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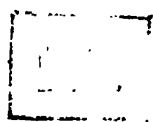
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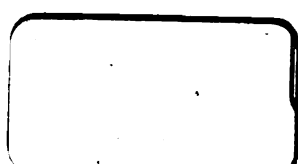
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THE

LAW REPORTER,

CONTAINING

All the Cases Argued and Determined

424

IN

THE HOUSE OF LORDS,
THE PRIVY COUNCIL,
THE COURT OF APPEAL IN CHANCERY,
THE ROLLS COURT,
V. C. KINDERSLEY'S COURT,
V. C. STUART'S COURT,
V. C. WOOD'S COURT,
THE COURT OF QUEEN'S BENCH,
THE COURT OF COMMON BENCH,
THE COURT OF EXCHEQUER,

THE BAIL COURT,
THE EXCHEQUER CHAMBER,
THE COURT OF CRIMINAL APPEAL,
THE PROBATE COURT,
THE COURT FOR DIVORCE AND MATRI-
MONIAL CAUSES,
THE ADMIRALTY COURT,
THE BANKRUPTCY COURTS,
AT NISI PRIUS,
MARITIME LAW CASES.

TOGETHER WITH A SELECTION OF CASES OF UNIVERSAL APPLICATION DECIDED IN
THE SUPERIOR COURTS IN IRELAND AND IN SCOTLAND.

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THE LAW REPORTER,

COMPRISING

All the Cases Argued and Decided

IN ALL THE

COURTS OF LAW AND EQUITY, IN BANKRUPTCY, INSOLVENCY, NISI PRIUS,
THE CRIMINAL COURTS, AND IN IRELAND.

FROM SEPTEMBER 1863 TO MARCH 1864.

PRIV. Co.]

THE FALKLAND. THE NAVIGATOR.

[PRIV. Co.]

Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Friday, July 31.

(Present—The Right Hon. Lords WENSLEYDALE,
CHELMSFORD, and KINGSDOWN.)

THE FALKLAND.

THE NAVIGATOR.

Ship—Collision—Changing tack—Wearing—
Negligence.

When a vessel is sailing upon a wind and passes from one tack to another, the usual and ordinary mode of effecting this change is by tacking, and not by wearing. As vessels which are navigating near to the one which is changing her tack naturally expect that the ordinary method of going about will be pursued, the unusual, and therefore unexpected, operation of wearing ought not to be resorted to, unless for some good reason, nor without sufficient sea room for the purpose. Hence, if in wearing a vessel negligently injure another, the former is liable for the damage done.

This was an appeal from a decree of the High Court of Admiralty in two suits for damage by collision between the ship *Falkland* and the barque *Navigator*, off Dungeness. At the time the *Navigator* had commenced wearing, and in doing so saw the *Falkland* ahead about half a mile off, when the *Navigator's* helm was put hard aport, and was brought to the wind on the starboard tack. The *Falkland*, instead of porting her helm, starboarded her helm and ran into the *Navigator*. The judge of the Admiralty Court held the *Falkland* was to blame.

Brett, Q.C. and Potter for the app. the *Falkland*.

Dr. Twiss, Q.C. and Clarkson for the resp. the *Navigator*.

Cur. adv. vult.

Lord CHELMSFORD.—The questions upon these appeals from decrees or sentences of the learned judge

of the Court of Admiralty do not involve any dispute upon facts, but require the application of nautical skill and experience to determine to which of the two vessels the blame of the collision is attributable. The facts may be shortly stated. The *Navigator*, an American barque, and the *Falkland*, a British ship, about five o'clock in the morning of the 6th Feb. 1863, were off Dungeness. The wind was west, and the morning thick and hazy. Both vessels carried the usual lights. The *Navigator* was proceeding down Channel on the port tack, close hauled under two double-reefed topsails and foretopmast staysail. The *Falkland* was following the *Navigator* at the distance of about three-quarters of a mile on her starboard quarter, also close hauled on the port tack, under topsails, jib, foretopmast staysail and spanker. The *Navigator*, intending to change from the port to the starboard tack, instead of going about in the usual way by tacking, put her helm aport, and commenced wearing round. While in the act of wearing, the *Falkland* was, for the first time, seen from on board the *Navigator*, her red light appearing about two points on the *Navigator's* starboard bow, the green light of the *Navigator* becoming visible to those on board of the *Falkland*. The *Navigator*, in order to complete the operation of wearing, continued her port helm. The *Falkland*, still upon the port tack, kept her wind until shortly before the collision, when her helm was put down for the purpose of diminishing the force of the expected blow. The *Navigator*, as she approached the *Falkland*, put her helm hard aport, and ran stem on into the *Falkland's* starboard bow, leaving there her billet-head and part of her cutwater. Cross-suits were instituted in the Court of Admiralty by the owners of the respective vessels for the injuries they had both sustained by the collision. On the part of the *Navigator* it was insisted that the *Falkland* was alone to blame for not having ported her helm, by which, it was said, the collision might have been avoided. It was contended, on behalf of the *Falkland*, that the *Navigator*, before she attempted to go about, ought to

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TATHAM v. ANDREE.

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have ascertained that there was room for her to wear ahead of the *Falkland*, and that when she found that this could not be done she was bound to go astern, and that she could not force the *Falkland* to port her helm, and in effect to wear round also. The learned judge of the Court of Admiralty, with the assistance of the elder brethren of the Trinity-house, held that the *Falkland* was solely to blame; that those on board of her were well aware that the *Navigator* was wearing, and ought to have ported in time and not starboarded, and that no blame attached to the *Navigator*, and he dismissed the suit of the *Falkland* against the *Navigator* with costs; and in the suit by the *Navigator* against the *Falkland*, he pronounced for the damage proceeded for, and condemned the debts. in costs. From both these decrees the owners of the *Falkland* appealed. On the hearing of the appeals their Lordships had the usual advice and assistance which they require in all cases where nautical knowledge is necessary to enable them to arrive at a satisfactory determination. It would have been great satisfaction to them if their nautical assessors had agreed with the Trinity Masters, by whose skill and judgment the learned judge of the Court of Admiralty was guided; but unfortunately there is a complete difference of opinion between them. The difficulty which this conflict of opinion throws upon the committee in cases like the present, which require technical knowledge for their correct decision, has been often felt, and was acknowledged in the case of the *Julia*, 14 Moo. 235, to which reference has been made more than once during the present sitting. Undoubtedly their Lordships did not mean by their observations in that case to express a determination never to disturb a judgment in the Admiralty Court which was founded on a question of seamanship, but merely (as was stated in the case of the *Minnehaha*) that they would always feel extreme reluctance in reversing a decision, the propriety of which depended upon the correctness of the judgment formed by persons of nautical skill and experience. But if, aided by technical knowledge and experience of equal authority, their Lordships are satisfied that the view taken in the court below is erroneous, they cannot shrink from the duty of acting upon their judgment thus informed and enlightened, without abandoning their functions as an appellate tribunal in all cases of this description. In the observations which follow, their Lordships must be understood as expressing their own conclusions, derived from the advice of their nautical assessors, and the reasons which have induced them to adopt their opinions in preference to those of the Trinity Masters in the court below. The first matter to be considered is the manoeuvre of the *Navigator* in wearing round. When a vessel is sailing upon a wind and passes from one tack to another, the usual and ordinary mode of effecting this change is by tacking, and not by wearing. As vessels which are navigating near to the one which is changing her tack naturally expect that the ordinary method of going about will be pursued, the unusual and therefore unexpected operation of wearing ought not to be resorted to unless for some good reason, nor without sufficient sea room for the purpose. The learned judge of the Court of Admiralty put it to the Trinity Masters to determine why the *Navigator* wore instead of tacking, to which it does not appear that they gave any answer. In the printed case of the *Navigator* it is stated that "the weather having cleared up, vessels at anchor in Dungeness roads could be seen, and it was deemed prudent to wear the barque from the port on the starboard tack." The approach of the *Navigator* near to the vessels in the Dungeness roads may have been a good reason for her going about, but affords no explanation of the preference of wearing to tacking. But it is evident that the sails which the *Navigator*

was carrying were not sufficient to keep her under command, and there can be no doubt that she wore because she was unable to stay for want of a proper amount of canvas. She was certainly at liberty to wear, or to stay, if there was no impediment to either course; but before she decided upon wearing, she ought to have been sure that there was room to perform that evolution. Now, before she wore, it is quite certain that the *Navigator* had never seen the *Falkland* at all, although the *Falkland* had seen the *Navigator*. The course of wearing was therefore adopted without reasonable and proper precaution. But, assuming that wearing, instead of tacking, was a justifiable course for the *Navigator* to pursue, there could be no good reason for her perseverance in it, and her determination to complete the circuit to the other tack, when she found the *Falkland* in her way. Having in the act of wearing observed the light of the *Falkland* about two points on her starboard bow, it was the duty of the *Navigator* to pass to leeward, and not to attempt to cross the *Falkland's* bows. At the time when the *Navigator* first saw the *Falkland* on her starboard bow, her head was about south-east, and the wind being west she was going free, and was bound to give way to a vessel close hauled as the *Falkland* was. With respect to the *Falkland*, although she saw the *Navigator* in the act of wearing, there was nothing to indicate to her that the *Navigator* was merely changing her tack, but the act of wearing itself might reasonably lead to the belief that she was intending to bear away up channel. At all events, when the *Falkland* saw a vessel with the wind free coming towards her, she was perfectly right in acting upon the well-known rule and keeping her tack, instead of giving way by porting her helm. And when a collision appeared inevitable, she was quite right in starboarding her helm at the last moment in order to diminish the force of the coming blow. For these reasons their Lordships cannot concur in the judgment of the learned judge of the Court of Admiralty, but they must recommend to Her Majesty to reverse the decrees in both suits, and in the suit of the *Falkland* against the *Navigator* to pronounce for the damage proceeded for, but in both suits without costs of the appeal on either side.

Decrees reversed.

Apprs. proctors, Pritchard and Sims.

Resps. proctors, Clarkson, Son and Cooper.

Monday, Aug. 3.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L.J., and TURNER, L.J.)

TATHAM v. ANDREE.

Lien—Bankruptcy—Order and disposition of bankrupt—Possession of goods as regards lien—Civil law.

At a meeting of L.'s creditors, A. claimed certain property pledged to him, and it was agreed to place the same in the hands of third persons to be sold, and such persons took possession accordingly. Afterwards a petition for adjudication of bankruptcy was presented against L., and he was made a bankrupt:

Held, that the goods were no longer in the order and disposition of L. at the time of the bankruptcy.

The general rule of the civil law was, that possession of moveables was not necessary to the validity of a lien, whether created by contract or act of law, and that such lien would attach upon moveable property even in the hands of a bona fide purchaser without notice. By the Roman Dutch law this rule was modified, and if goods left in the possession of the mortgagor were sold or mortgaged to a third person, they could not be followed into the hands of such

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transfers for value; but the contract was binding on the debtor, and the goods themselves might be taken if they remained in his hands.

This was an appeal from two orders of the Supreme Court of Ceylon.

Charles Hargraves Ledward, of Colombo, in Ceylon, carried on business as an auctioneer, chapman, and dealer, and on the 22nd Dec. 1857 issued a circular stating his inability to pay his debts, and convening a meeting of his creditors for the following day. The creditors met on the 23rd Dec., and appointed Arthur Wellington Heale and Thomas Spofforth to represent their interests, and to take possession and charge of all the insolvent's property. They did so, the property consisting solely of stock-in-trade, household furniture and book-debts. They remained in possession, realising portions thereof, until 8th Feb. 1858, when the said C. H. Ledward was duly declared an insolvent by the District Court of Colombo, in respect of the said act of insolvency committed by him on the 23rd Dec. 1857; and the appa. Christopher Tatham and Robert Dawson Macmillan were appointed the assignees in substitution for Messrs. Heale and Spofforth.

The said Arthur Wellington Heale and Thomas Spofforth were, on the said 8th Feb., appointed provisional assignees, and afterwards, on the 19th Feb. 1858, were appointed assignees of the estate of the insolvent. Amongst the persons who claimed to be creditors of the said insolvent, and who were present at the meetings of the creditors of the insolvent, and voted in the choice of assignees, were the resps.

The resp. Christoffelz claimed to be a creditor of the insolvent in the sum of 650*l.* and interest on a common money bond dated the 24th March 1857. This bond contained a general hypothecatory clause, in the following words: "And I, the said Charles Hargraves Ledward, further declare to bind myself, my heirs, executors and administrators, and all my property, moveable and immovable, wheresoever situated, which I am now possessed of, and whatever I shall hereafter become possessed of, as security for the due payment of the said sum of 650*l.* together with interest thereon." None of the property of the insolvent, which he possessed or which belonged to him at the time of the execution of the said bond, or which he afterwards acquired, was at any time delivered to the resp. Christoffelz, or to any one on his behalf, but the same (with the exception of such articles as were sold or otherwise disposed of by the insolvent) always remained, with the consent and permission of the said Luke Philip Christoffelz, in the possession, order and disposition of the insolvent, down to the time when they were taken possession of by the said Arthur Wellington Heale and Thomas Spofforth, as aforesaid.

The resp. Andree claimed to be a creditor of the insolvent in a sum of 450*l.*, on a bond, dated 21st Dec. 1857, payable two months after demand. This bond contained an hypothecatory clause in the following words:—"For which payment of principal and interest to be well and truly made I have bound, and by these presents do bind myself, my heirs, executors and administrators, and all my property whatsoever, and especially mortgage and hypothecate the household furniture, plate, glass, pictures, horses, mules, crockery and other articles belonging to me, the said Charles Hargraves Ledward, and described in the annexed catalogue marked A, and possession of which said furniture, plate, glass, pictures, horses, mules, crockery and other articles, I have, with these presents, delivered to the said Archibald Stephen Andree." None of the property of the insolvent which he possessed, or which belonged to him at the time of the execution of the said bond, or which is described in the catalogue marked A, referred to in the said bond and annexed thereto, nor any other property which he afterwards acquired, was at any time delivered to the

resp. Andree, or to any one on his behalf; but the articles mentioned in the said catalogue, and all other the property of the said insolvent which belonged to him at the time of the execution of the said bond, or afterwards (with the exception of such as were sold or otherwise disposed of by him), always remained, with the consent and permission of the said resp. Andree, in the possession, order and disposition of the insolvent, down to the time when they were taken possession of by the said Arthur Wellington Heale and Thomas Spofforth, as aforesaid.

On proof of debts against the estate of the insolvent, the resp. Christoffelz claimed a preference over the other creditors of the estate, and to have a charge on the property of the said insolvent, in respect of the hypothecatory clause contained in his bond. The resp. Andree also claimed a preference over the other creditors, and to have a charge on the property of the insolvent, and particularly a charge on the articles described in the said catalogue annexed to his bond, in respect of the hypothecatory clause contained in his bond.

After hearing evidence, these claims to preference were, on the 12th March 1858, disallowed by the District Court of Colombo. The resps. thereupon appealed from the decision of the District Court of Colombo to the Supreme Court of Ceylon, and the appeal was heard on the 15th July 1858. On such appeal the counsel for the assignees contended, amongst other things, in support of the decision of the District Court of Colombo, that the general hypothecatory clause in the bond of the resp. Christoffelz was inoperative, and gave him no preference as against creditors. That, to entitle him to such preference, a delivery of the things pledged was necessary by the Roman Dutch law. That even if the hypothecatory clause was originally operative, still, that as by an ordinance (No. 7 of 1853) the law in Ceylon is assimilated to that of the English Bankrupt Act, 12 & 13 Vict. c. 106, and as all the property of the insolvent, to which the hypothecatory clause could relate, remained with the consent of the resps. in the insolvent's possession at the time of the committal of the act of insolvency, and down to the time of their being taken possession of by the assignees, they must be deemed to have been in the reputed ownership of the insolvent with the consent of the true owners, and to have passed to his assignees. That the general hypothecatory clause in the bond of Andree was inoperative as against creditors for the same reasons as were urged against the validity of the corresponding clause of the bond of the resp. Christoffelz. That the specification of certain property in the catalogue referred to in Andree's bond gave it no greater force or effect than the bond of Christoffelz, because there was no delivery of the articles specified in the catalogue. That further, the giving of the bond to Andree was not for a present consideration, but was voluntary and in contemplation of bankruptcy, and therefore void as a fraudulent preference. Upon the hearing of the said appeal, the Supreme Court, on the 15th July, made an order reversing the decision of the district court, so far as it related to the claim of the resp. Christoffelz, and declaring that he was entitled to a preference over the other creditors on his bond, but the claim of the resp. Andree was sent back to the district court for reconsideration. The claim of the resp. Andree was again investigated by the district court, which on the 1st Nov. 1858 declared his claim preferent as to the property specially described in the catalogue, and as to the other property declared him entitled to a preference over all the other creditors except the resp. Christoffelz. On appeal from this decision the Supreme Court, on the 7th June 1859, made an order affirming the same.

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The judgment of the Supreme Court of Ceylon in the principal point was delivered by Sir W. C. Rowe, as follows:—

"The proceedings in this case having been read, it is considered and adjudged that the interlocutory order of the District Court of Colombo, of the 12th March 1858, be set aside. In this case Luke Philip Christoffelsz and Archibald Stephen Andree, each of them holding a notarial instrument by which certain property of Charles Hargraves Ledward, an insolvent, was hypothecated with them for their respective debts, claimed in the District Court of Colombo, by virtue of those instruments, to have those debts paid out of the proceeds of the estate, in preference to the other creditors. This claim the district judge in each case disallowed, against which decision these creditors have now appealed. There being some difference both as to the form of the instruments and the facts of the transaction as they affect these parties severally, we shall deal with the case of Christoffelsz first. At the time of the act of insolvency Ledward had nothing but moveable property, and all that property, although hypothecated to Christoffelsz, was indisputably in the possession of the insolvent as the reputed owner, and that being so it was contended in this court, as it had been before contended in the court below, that the district judge had, under the 49th section of Ordinance No. 7 of 1853, power to order the same to be sold for the benefit of the general creditors; and the case of *Ryan v. Rowle*, 1 Atk., was pressed upon us as a leading authority upon this point. That any man should be suffered to obtain for himself a fictitious credit, by remaining in possession and holding himself out to the world as the ostensible owner of valuable property up to the period of insolvency, and that upon such insolvency some individual creditor should by virtue of some special security step in and sweep all that property, to the prejudice of the general creditors, is a state of things so contrary to the first principles of sound credit and common justice that it has been expressly provided against by the law of England in the Act of Parliament from which this 49th section of Ordinance No. 7 of 1853 is clearly borrowed. But it does not seem to have occurred to those who framed this Ordinance that it was to come into operation and must be construed in connection with the Roman Dutch law which prevails in this colony, and which sanctions a form of hypothecation such as was adopted in this instance by Ledward. That form is neither that of a mortgage nor of a bill of sale; it simply pledges the property, without purporting in any manner to pass that property itself, or to give the dominion over it to Christoffelsz. The district judge was therefore of opinion that the case provided against in the 49th section of Ordinance No. 7 of 1853, namely, of a reputed owner continuing in possession by permission of the true owner, had not arisen in this instance, Christoffelsz not being in any legal sense the true owner of this property. In this view of the case we concur, and that being so, have carefully consulted the Roman Dutch authorities to ascertain whether the general creditors have any remedy by that law, independently of the ordinance. Those authorities differ considerably on this point; a difference indeed which we may sometimes expect to find in works which for the most part profess only to record the individual opinion of text writers, or the law as it was understood by them to prevail in the different provinces or municipalities of Holland. In this very instance Matthæus, de Auctionibus, 253, and Vanderlinden, 176, have been cited on one side, and Grotius, book 2, c. 48, s. 38, on the other, as giving versions of the law on this point which are perfectly conflicting, whilst the note to the latter states that the law as laid down in the text of Grotius, although the law of Holland, was not the law of Amsterdam. We find also Burge, vol. 3, p. 572, citing Voet, lib. 20,

tit. 1, n. 13, as an authority for the proposition that even in a concursus of creditors the contract of hypotheca alone would not give the creditor any preference, unless the mortgage had been followed by delivery—a proposition which, on reference to the original text of Voet, we think that that text does not bear out; a result which shows the importance of consulting the original instead of adopting as a matter of course other versions of authors whose confessedly unclassical and sometimes ungrammatical latinity makes them difficult of interpretation. Taking the original text of Voet, therefore, as the most trustworthy authority, we arrive at the conclusion that according to the Roman Dutch law, as he lays it down, the creditor who holds an instrument of hypothecation, such as that of Christoffelsz, although he could not follow and take the property if it had passed into the hands of a third party for valuable consideration, is entitled to priority over all unsecured creditors when that property still remains in the hands of the grantor of that instrument. The district judge seems to have arrived at the same conclusion as far as this principle is concerned, but in his anxiety doubtless to relieve the general creditors in the present instance, if possible, he has we think fallen into an error in its application, for we find him going on to hold that the passing of the property of Ledward to his assignees was such a transfer as would defeat the priority of Christoffelsz. Now, according to the evidence, Christoffelsz put in his claim not only before any such transfer took place, but before any proved act of insolvency on the part of Ledward. In point of time, therefore, there was no transfer to the assignees, actually or by relation, prior to the vindication of his right by Christoffelsz. Further, assuming, for the sake of argument only, that the assignment and delivery to the assignees amounted to such a transfer to a third party for valuable consideration as would according to the Roman Dutch law defeat the priority of Christoffelsz (which we by no means hold), still those assignees could only take subject to the 76th and 111th sections of Ordinance No. 7 of 1853, under one or the other, if not under both of which, the rights of such a specialty creditor as this would in our judgment be saved. We are most reluctantly, therefore, compelled to the conclusion, that the law of this colony, as it now stands, not only enables a man, by retaining possession of his own hypothecated goods, to delude the world by appearances of solvency, but also permits any one creditor, lying behind and furnished with such an instrument as is now produced by Christoffelsz, to come in at the last moment, and deprive the general creditors, if his specialty debt be large enough, of all hope of dividend. That such a state of things can be allowed by the Legislature to be perpetrated amongst English and native traders, by virtue of a capitulation entered into so far back as 1799, with the Dutch, whose descendants and whose capital, with few exceptions, have been so long withdrawn from this island, we cannot well believe, more especially as the Roman Dutch law, which we are thus bound to administer, is, in the terms of that proclamation, the law as it subsisted under the ancient government of the United Provinces, such law being, as is well known, no longer the law of Holland itself, and being, save where modified by our ordinances, entirely wanting in those amendments which have within the last half century been adopted in other countries to meet the exigencies of society and commerce. In the meantime we must bear in mind that it is our duty, as judges, not to make the law; but, simply administering it faithfully as we find it, to state publicly the grounds of our judgment, which judgment, as far as Christoffelsz is concerned, is that the decision of the court below be set aside, and that his debt be paid out of the proceeds of Ledward's estate, in priority and in preference to the other creditors."

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The assignees appealed against the above order.

Bovill, Q. C. and Hannen, for the apps., contended that by the English bankrupt law which prevailed in *Crym*, the goods in question being in the disposition of the insolvent, were liable to be sold as assets. There could be no lien without possession :

Haggard v. Mackenzie, 25 Beav. 493;

North v. Gurney, 1 J. & H. 509 ;

Ex parte Boulton, re Sketchley, 1 De G. & J. 163.

The old rule of the civil law, that possession was not necessary to give a lien, has been modified by the law of all modern countries.

2 Burge Com. 571 ;

Vander Linden, B. I. s. 3 ;

Voetius ad Pand. B. xx. tit. 1, n. 13 ;

Matth. de Auctionibus, B. 1, c. xix. s. 74 ;

Grotius Law of Holland, 264 (*Herbert's transl.*) ;

Story on Bailments, s. 297 ;

Van der Leeuwen, B. iv. c. xiii. s. 19.

Esprit, for the resps., contended that the resps. had done all in their power to take possession from the bankrupt, and this took the case out of the rule that the goods were in the disposition of the bankrupt :

Heat v. Mortimer, 10 B. & C. 44 ;

Hutton v. Crutwell, 1 E. & B. 15 ;

Harris v. Rickett, 4 H. & N. 1 ;

Ody v. Cooleney, 1 Tyr. & Gr. 536 ;

Ex parte Boyle, 3 De G. M. & G. 515 ;

Ex parte Littledale, 6 De G. M. & G. 714 ;

Belcher v. Bellamy, 2 Exch. 308.

By the Roman Dutch law a formal deed will certainly preserve the lien.

Cur. ado. vult.

LORD KINGSDOWN.—Two objections are made to the securities in this case. First, that they must be considered void on the ground that the property mentioned in them was left in the order and disposition of the insolvent at the time of the insolvency with the assent of the true owner. Secondly, that the instruments of pledge being unaccompanied with possession, are void against the general creditors under the Insolvent Act. It appears to us that neither objection can be maintained. As to the first, we think the insolvency must be held to have taken place when the petition for an adjudication of insolvency was presented and the adjudication was made. But, at a meeting some weeks before, the resps. had claimed the property pledged to them, and it had been agreed that it should be placed in the hands of third persons and sold. This was done, and the property, therefore, before the insolvency had ceased to be in the order and disposition of the insolvent. This appears to us to have been settled by the case referred to in the argument : (*Ex parte Littledale, re Pearse*, 6 De G. M. & G. 714.) In that case the petitioner had lent money to the bankrupt in order to enable him to purchase stock in a public company. The stock was purchased and transferred into the name of the bankrupt, in order to qualify him to be a director of the company. It remained standing in his name at the time when he became bankrupt ; but he had made an assignment of the stock to the petitioner at the time when it was purchased, and five days before the bankruptcy the petitioner had given notice of his assignment to the directors, and this was held sufficient to take the case out of the operation of the statute. This is a case of great authority, for it was decided by the Lord Chancellor and the Lords Justices ; and though upon another transaction of a similar character in the same case some doubt was expressed by one of the Lords Justices, such doubt did not extend to the transaction of which we have stated the particulars. In the present case the petitioning creditor's debt was not due till 5th Jan. 1856, and the act of bankruptcy was on the 8th Feb. 1856. The meeting of the creditors and notice of the claims of the mortgagees were on the 23rd and 24th

Dec. 1857. A further point was raised as to one of these securities, that of the resp. Andree, that it was void on the ground of fraudulent preference ; but we are satisfied, upon the evidence, that this security cannot be impeached upon that ground. Then, as to the necessity of possession under the Roman Dutch law, in order to support the securities : the general rule of the civil law is, that possession of moveables is not necessary to the validity of a lien, whether created by contract or act of law, and that such lien will attach upon moveable property, even in the hands of a *bonâ fide* purchaser without notice. Upon this principle it has been decided by the Judicial Committee that, if a ship which has been in fault in a collision be afterwards sold, she is liable to be attached in the hands of a *bonâ fide* purchaser for value without notice, in a suit instituted after the sale to recover damages for the loss occasioned by the collision : (*Harmer v. Bell—The Bold Buccleugh*, 7 Moo. P. C. 267.) This rule has been modified by the Roman Dutch law to this extent, that if the goods left in the possession of the mortgagee are sold or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value, but the contract is binding on the debtor, and the goods themselves may be taken if they remain in his hands. This is the law as collected by Mr. Burge from the authorities to which he refers, and which those authorities seem fully to warrant. Mr. Burge proceeds : " Even in a concursus of creditors the contract alone would not give the creditors any preference or lien on the goods, unless the mortgage had been followed by the delivery of them." The passage is said by the learned judge in the court below not to be supported by the text of Voet to which reference is made, and certainly we cannot find there sufficient warrant for it in the sense put upon it by the apps.' counsel. The law upon this subject appears to have differed in different provinces in Holland, and both the district judge who decided in favour of the apps., and the Supreme Court which decided in favour of the resps., agree in this, that according to the Roman Dutch law as prevailing in Ceylon, a mortgage of moveables by writing before a notary, though unattended with possession, is valid not only against the debtor himself, but against his general creditors. The assignee under the Insolvent Act stands in the place of the general creditors, and takes the property of the insolvent, subject to the charges to which it was subject in the hands of the debtor, unless in cases where either on the doctrine of fraudulent preference, or of the statutable provision with respect to goods left in the order and disposition of the insolvent, a right is given to them which in other cases they would not possess. But in this case there cannot be properly said to have been any concursus. The property had been taken out of the hands of the mortgagor before the general creditors had any claim upon it. Their Lordships are of opinion that the securities in the present case are not open to objection on either of these points, and that the judgment of the court below is right, and they have humbly advised Her Majesty to affirm it with costs.

Affirmed with costs

App.'s solicitors, *Lawford and Waterhouse*.

Resps.' solicitor, *T. Clark*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

May 27 and 28.

(Before the LORD CHANCELLOR (Westbury.)

CHAPMAN v. BROWN.

*Will—Construction—Clause of forfeiture—
Assignment—Estate tail—Income.*

A testator, after creating certain annuities and giving a life-estate in the property to his wife, to be cut down to an annuity of 500l. a-year in the event of her second marriage, gave one moiety to his son Henry for life, with remainder to his four daughters, and the other moiety subject to accumulation, and after the death or second marriage of his wife, and the decease of his child Henry and his four daughters, to his son George in tail, with remainder to Arthur in tail, with remainder to Henry in tail. The accumulation he declared should continue until after the decease or second marriage of the wife, and the decease of the five children above referred to, or "during so much of such time as the law will allow for accumulation," and after the expiration of that period the trustees were to retain so much as should be required for repairs, &c., and subject thereto, the estate and interest of the tenant in tail under the antecedent limitations were to come at once into possession.

The will contained the following clause of forfeiture:

"That if any person for whom any rents and profits, annuity, or other income is provided by this my will (being persons now living), shall become bankrupt or become insolvent, or shall, either alone, or, being a female, either alone or in conjunction with any husband, present or future, make any assignment, appointment, or other disposition of or charge upon the rents and profits, or share of rents and profits, annuity or income, to the repayment of which such person shall be immediately or otherwise entitled under this my will, before the same shall actually accrue due, or shall attempt so to do by any writing, then, and in such case, not only shall the rents and profits, or shares of rents and profits, annuity or income, to which such person so becoming bankrupt or insolvent, or doing or attempting to do such act as aforesaid, is entitled, be forfeited and be no longer payable to him or her, but the right which each such person might have had, upon any future event, to any other rents and profits, or share of rents and profits, annuity or income, shall be forfeited and never accrue," and go to the person or persons to whom the testator had made the same payable by his will after the death of such person who shall so forfeit the same as aforesaid. Arthur, by deed, after reciting the will, assigned all the real and personal estate to which he was entitled in possession, remainder, or contingency, under the will, in consideration of and subject to two annuities thereafter covenanted to be paid:

Held, that the clause of forfeiture did not apply either to the estate tail or to the rents and profits arising therefrom, or to the corpus or interest of the accumulated fund, firstly because the attempt to attach a clause prohibiting alienation to the estate tail or the corpus of the fund would be repugnant and void; and secondly, because the clause of forfeiture did not apply to the income of the estate tail or the accumulated fund, as the right to the income was consequential upon the right to the corpus.

This was an appeal from a decision of Kindersley,

V.C., upon the question whether, by virtue of certain provisions in the will of George Raggett, the testator in the cause, a certain act which had been done by the deft. Arthur Raggett was an act which had occasioned a forfeiture of any and which of the benefits intended for him by the will. The bill was filed by the executors and trustees under the will, for the purpose of having the direction of the court as to the administration of the property. The testator was the owner of some freehold premises in St. James's-street, and those premises were used by the club known as White's Club, the members of which did not themselves buy premises or even take a lease, but they arranged that the owner or lessee of the premises should keep them for the use of the club.

The testator having these freehold premises in St. James's-street, employed them for the purposes of the club, deriving a profit from the subscriptions paid by the members. Besides that freehold property the testator was the lessee of some other property, a portion of which, if not the whole, was contiguous to the club, and was used as a kitchen or other office connected with the club. The other portion situate in Jermyn-street was used as a counting-house by the testator. He was also the owner of other freehold and leasehold property upon which no question arose. The testator by his will, dated the 14th April 1840, devised to the two trustees the plt., and his son Henry Raggett, his freehold house called White's Club, with the fixtures and plate, &c., upon certain trusts, that they should grant a lease of the premises to the members of the club for a term of years, or that they should be willing, as he himself had been, to keep them for the club. The leasehold premises in Jermyn-street were to be dealt with very much in the same way, and then the testator gave this direction: "I direct the trustees or trustee for the time being acting under this my will to pay out of the rents and profits of the message or club-house, and kitchen to be let either with or without such chattels as aforesaid, and also out of the rents and profits of the leasehold message, counting-house, yard, cellar and premises" (that is the freehold and leasehold in Jermyn-street), "to pay out of the net rents and profits of the message or club-house and kitchen, and the message, counting-house, yard, cellars and premises in Jermyn-street, with the appurtenances, the annual sums hereinafter mentioned, without preference or priority." Then the testator proceeded to direct payment out of those rents and profits of certain annual sums to various persons. It is not necessary to mention them all, but among the rest there was to be paid an annual sum of 50l. for the maintenance and benefit of the testator's grandsons G. and A. Raggett and granddaughter Eliza Raggett, who were the children of testator's eldest son Charles W. Raggett, to whom another of those annual sums was given. The clause above referred to was only for their benefit until they attained twenty-one. George and Arthur attained the age of twenty-one years, "and likewise the annual sum of 50l. for the maintenance, &c. of the eldest of such grandsons for the time being during his minority;" that is, in addition to the benefit he derived from a portion of the 50l. common to the three eldest of them, he was to have for his maintenance during his minority another 50l. The testator then proceeded: "And further, after my grandchildren respectively shall attain the age of twenty-one years, to pay to my grandchildren respectively the following annual sums, viz. 50l. to G. Raggett during his life, or, in case his wife should die or marry again in his lifetime, and also in case of the death in his lifetime of Henry Raggett, and of all his daughters, Mary, Charlotte, Ann and Emily, the annual sum of 50l. to be paid unto G. Raggett only until the death of the survivor of his wife, son and daughters, or the marriage of his wife, which should last happen, the further annual sum of 25l.

to each of them, A. Raggett and E. Raggett (the other two of those grandchildren) during the joint lives of himself and herself, or of both or either of them C. W. Raggett and his wife (the parents of those children), and after the death of either C. W. Raggett or his wife, an annual sum of 50*l.* to each of them A. Raggett and E. Raggett during his and her respective life." The testator then proceeded: "And further my will is, that the trustees do during the life of my wife, if she so long continue my widow, pay unto her for her absolute use the residue of the rents and profits of the club-house and kitchen, to be let either with or without such chattels as aforesaid, and of the rents and profits of the messuage, &c. in Jermyn-street, after payment of outgoings and of the annual sums payable as aforesaid." He then provided that the minimum income which the wife was to derive from this source was to be 500*l.* a-year, and if there should not be enough to produce the sums plus the 500*l.* to the wife, then the annual sums were to be paid *pro rata*. And in case of the marriage of his wife, she was to have annually 500*l.* And after her decease or second marriage, but subject in the latter event to the payment of 500*l.* per annum during the life of his son Henry, to pay to him one moiety of the surplus rents and profits of the club-house and kitchen, and of the messuage, &c. in Jermyn-street, after payments as above directed; that was, as to half of the surplus rents. Then there was a proviso that, in the event of any daughter dying, leaving issue, they were to stand in *loci parentis*. But when all the daughters died there was to be a cesser of the benefit in the moiety. And as to the other moiety, and of the income arising from the accumulation, to be a fund reserved for repairing the club-house, and replacing or adding to such furniture when requisite, and for rebuilding the same when of sufficient amount. The trustees were directed to invest the last-mentioned moiety in good securities, to accumulate the same by way of compound interest until wanted for the purposes declared, or the decease or second marriage of his wife, and decease of all his children, with power to the trustees to apply any part of it to the purposes aforesaid; and subject to all these interests, as to the real estate, to his grandson G. Raggett, and the heirs of his body (that is, to the sons of his eldest son C. W. Raggett), and for default of issue to his grandson A. Raggett and the heirs of his body, and for default of issue to his son H. Raggett and the heirs of his body, and in default to his own right heirs. Therefore, subject to those prior gifts, which were of a limited character, the testator directed that the estate was to go, so far as it was in the nature of real estate, to his son George, in tail, remainder to his son Arthur in tail, remainder to his son Henry in tail, remainder to his own right heirs; and as to such as was of the nature of personal estate, together with such surplus of the accumulated fund, upon such trusts as would best and nearest correspond with the trusts so declared concerning that part of the property which is of the nature of real estate, and it was provided that no grandson should take a vested interest in the personally under twenty-one, and that neither of his grandsons should acquire an absolute vested interest in any part of the property, whether real or personal, unless living at the time of the decease or second marriage of his wife, and also at the time of the death of the survivor of his children, or unless such grandson dying in the lifetime or during the widowhood of his wife, or in the lifetime of the others, should leave a child or children who should live to be twenty-one, or die leaving issue. And that neither grandson should have a vested interest in the personal estate, unless he live to be twenty-one, or die leaving issue. And it was provided that if the accumulation intended should exceed the limit allowed by law, from the time beyond which it could not be allowed, it should be

applicable in each year by the trustees for repairing and furnishing the club-house, &c., until the death or marriage of his wife, and the decease of all his children, and that so much of the income as should not be so applied should go to the persons who would be entitled to the property producing such income, if the possession were not postponed. After some immaterial provisions, the will provided for forfeitures in case of bankruptcy or insolvency.

The testator died in March 1843, and his will and a codicil were proved by the plts., and by H. Raggett, the executors. H. Raggett carried on the business of the club for some time afterwards, but had since died.

An indenture, dated the 19th Nov. 1860, was made between George Raggett of the first part (that is, the eldest of the grandchildren of the testator, the first tenant in tail in remainder under the will); Arthur Raggett of the second part (the second of the grandsons); and James Grant and Henry Topham, of the third part; it recited very fully the will of the testator, that George Raggett and Arthur Raggett had agreed and contracted with James Grant and Henry Topham for the sale to them of the messuage and hereditaments known as White's Club-house, and all other, if any, the real estate comprised in the will of George Raggett deceased, of or to which they or either of them then was, or at any time thereafter should or might be respectively entitled in possession, remainder, or contingency under the recited will, and the fee-simple thereof in remainder in contingency respectively expectant as as aforesaid, free from all incumbrances, but subject to the annuities, &c., in the will recited.

The question upon this indenture was, whether one clause of forfeiture contained in the will of the testator applied to the estate tail given to George and Arthur under the will, or to the accumulated fund and the annuities, or whether it applied only to the income of the property.

The V. C. held that it did not affect the estate tail or the *corpus* of the property, but only income.

Arthur Raggett now appealed from that decision.

Osborne, Q. C. and *Bathurst* for app.

Railly, Q. C. and *Renshaw* for residuary legatees.

Glassey, Q. C. and *Martindale* for plts.

Shapter, Q. C., *Fischer* and *Everett* for other parties.

Osborne in reply.

Cases cited:

Rooke v. Lord Kensington, 4 K. & Jo.;

Hully's Trust, 4 De G. M. & G. 404.

THE LORD CHANCELLOR.—I have had an opportunity of considering this case, and I have felt no difficulty in arriving at a clear conclusion upon it. The first question is, the construction of the clause of forfeiture. I am of opinion that this clause does not apply either to the estate tail, or to the rents and profits as belonging to the present petitioner. Nor do I think it has any application to the *corpus* of the accumulated fund, or to the interest thereof. And that for two reasons: first, because an attempt to attach a clause prohibiting alienation to the estate tail, or the *corpus* of the fund, would be repugnant and void; in the next place, because I think the construction of the clause of forfeiture does not enable me to apply it to the income of the estate tail, or the accumulated fund, for I cannot distinguish the right to the income from the right to the *corpus*. The right to the income is consequential upon the right to the *corpus*. Arthur takes an estate tail in the realty, and in respect of that estate tail is entitled to the rents; he takes an absolute interest in the accumulated fund, and in respect of that absolute interest would be entitled to the income. There is no warrant or authority in the will for distin-

[CHAN.]

CHAPMAN v. BROWN.

[CHAN.]

guishing the right to the rents or the right to the income from the right to the *corpus* or the principal. And again, upon the language of the clause of forfeiture, it is clear that it was intended to apply to a variety of those limited interests in the nature of annuities and life-estates either for the life of the donee, or estates *pur autre vie*, which are given in the will. The language of the clause of forfeiture speaks of rents and profits, shares of rents and profits, annuities or income. I am therefore of opinion that the clause of forfeiture was not intended to apply to, nor does it include, the interests taken by the present app. in the estate tail, or in the accumulated fund. I am quite of opinion with the V.C. as to the construction of the deed of Nov. 1860, and I concur with him in thinking that it does not include the annuities which are given by the will to the app. It follows, therefore, in my judgment, that there is no ground for declaring any forfeiture as the consequence of the execution of that deed by the present app., unless I can find in the will that which it is contended is to be found there, namely, an interest in rents and profits not being an annuity, and not being a right in respect of the estate tail, or in respect of the *quasi* estate tail in the accumulated fund. Now, the scheme of the will I take to be this: that, after certain annuities, the first life-estate is given to the testator's widow during her widowhood; that estate is to be cut down to an annuity of 500*l.* a-year in the event of her second marriage; then, subject to certain annuities, one moiety is given to the testator's son Henry for life, remainder to his four daughters; and with regard to the other moiety, that, after directing an accumulation, is given in a manner which I will presently more particularly advert to; and after the decease or second marriage of his wife, and the decease of his children Henry and his four daughters, it is given to George in tail, with remainder to Arthur in tail, with remainder to Henry in tail. Now, a trust for the accumulation of the rents and profits of this moiety is directed, and the first declaration of that trust would seem to be intended to enure during the lives of the four daughters. But the words declaring this accumulation conclude by these expressions, "that it shall continue until after the decease or second marriage of the wife, and the decease of the five children Henry and the four daughters, or during so much of such time as the law will allow for accumulation." The real effect of that declaration, therefore, is that the rents shall be accumulated during the legal period, that is during twenty-one years. The stress of Mr. Bailly's argument was put upon this, that the estates tail are not to commence until after the decease or second marriage of the wife and the death of the five children. But that form of expression is sufficiently accounted for by the fact that the accumulation is directed to enure during that period of time, subject, however, to the words which I have already adverted to, and which do in effect limit that trust for accumulation, and the language "after the decease" and the other words that I have mentioned, is further controlled by a subsequent clause. That clause contemplates the result of the accumulation being limited to the legal period of twenty-one years, takes up the disposition of the rents from and after the expiration of that period; and it first of all subjects them to a charge for the purpose of repairing the messuage or club-house, and supplying additional furniture, and then it directs the surplus of the rents to go to the person who would for the time being be entitled to the property producing such income, the same as if the possession and enjoyment of the said property were not postponed. It was agreed before me by the counsel for the resps., that this was a new gift; but it will be observed, upon an examination of the language, that it is no new gift, but is a direction to the trustees to recognise, imme-

diately upon that event occurring, the right and title of the person who may be tenant in tail. The words, therefore, do not amount to a separate and independent gift of a distinct and substantial interest; but they are nothing in the world more than a declaration that the title and right of enjoyment of the individual to whom the *corpus* is expressed to be given in tail if the accumulation could enure during the lives of the five children, shall be recognised; and that, in respect of that right and title, the individual shall receive the surplus income the same as if it had not been postponed. The true effect of the whole of the directions, therefore, taken together, is precisely that which I intimated in the outset of the argument, and for which Mr. Osborne has contended. The limitations of this moiety are in reality these; the rents are directed to be accumulated for a period of twenty-one years; from and after the expiration of that period the trustees have a right to retain so much as shall be required for the purpose of keeping the club-house in repair and supplying additional furniture, and subject thereto, the estate and interest of the tenant in tail, under the antecedent limitations, come at once into possession. There is no possibility of distinguishing between the right in respect of which he will take the surplus rents, and the right in respect of which he will take the rents of the property after the expiration of the lives of the five persons during which in the first instance the trust for accumulation is attempted to be created. There is no room, therefore, for the conclusion that there has been any forfeiture. The only ground upon which it has been attempted to rest forfeiture has been the attempt to distinguish between the right to the income and the right to the principal, which I hold to be one and the same right, and the attempt to distinguish between the right to the surplus rents during what I will denominate the ineffectual direction for accumulation, and the right to the rents after the expiration of the lives of the five persons. I hold the estate tail to commence at once in enjoyment upon the determination of the legal authorised term for accumulation, subject only to the contingent charge for insuring the repairs of the club-house, and I hold that that interest in the fund and in the real estate is not an interest that is at all within the meaning of the clause of forfeiture, and that, therefore, the alienation of the *corpus* and the alienation of the estate tail do not create a case of forfeiture within the true meaning of the clause. My attention has been very properly called this morning to those words in the will by which the absolute vesting the absolute ownership is postponed in each tenant in tail, and made contingent upon his surviving the four daughters and the son Henry. But I think the answer to that is, that the operation of that clause does not prevent the operation of the other limitations which vest the estate immediately, but this proviso might have the effect of divesting that vested estate in the event (and it would operate then in the nature of an executory limitation) of the tenant in tail predeceasing the survivor of the five children of the testator named in the clause. I must therefore reverse the declaration of the V.C., and substitute for it a declaration that no forfeiture has been created by the deed.

Solicitor for the pls., *William Day*; for the defts., *Digby and Son*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Friday, May 22.

YOUNG v. NEILL.

Chartering ships—Sale of cargo—Lien on proceeds—Costs.

If the consignee of a cargo charters a vessel for the shipment of it, and properly incurs expenses in relation thereto, he is entitled to a lien on the cargo, and the proceeds arising from a sale of it. If a person other than the consignee has advanced money for the shipment of the cargo, with the consent of the principal, he is entitled to a lien on the proceeds, if he can stop them before they come to the hands of the shipper.

A., living in St. John's, employed B., in London, as his agent for the sale, in England, of certain deals then in New Brunswick, and authorised him to arrange by sale, on contract or charter, for the removal of all the deals. B. duly chartered several vessels for the removal of the deals, and some of the cargoes reached England and were sold here. A., however, consigned one of the cargoes to C., by whom it was sold, and realised 615*l*. B. had incurred some expenses in chartering the vessels, which had not been paid by A. B. therefore filed a bill against A. and C., praying specific performance of the agreement with him; a declaration that he was entitled to a lien on the proceeds of all the cargoes for his expenses, and for his commission, for damages for the breach of contract by A.; and to be allowed to add those damages to his lien:

Held, that B. was not entitled to specific performance of the agreement; but that he had a lien for his expenses and for his pecuniary losses (but not for unearned profits) on the proceeds of all the cargoes, and that he was entitled to arrest the 615*l*. on account thereof, before it came to the hands of A. C. supported the case made by A., instead of acting merely as a stakeholder:

Held, that he was not entitled to costs.

The Messrs. Young and Lewin, the plts. in this suit, were merchants in London, and they filed their bill against the defts. Neill, Gilbert, and Messrs. Boyson and Tagart, praying a declaration that the plts. were entitled to a decree, for either the specific performance of an agreement by Neill for the consignment to them of the cargoes of certain vessels, or that they were entitled to a lien on the proceeds of the sales of such cargoes, for expenses and liabilities incurred by them under the agreement, and for commission; and in particular to a lien for such charges as aforesaid on a sum of 615*l*, part of the proceeds now in the hands of the defts. Messrs. Boyson and Tagart; and that the plts. were entitled to damages from Neill for a breach of the agreement, and to add such damages to their lien.

The facts of the case were these:—

In Jan. 1860, William Gilbert, a lumberer at Shediac, in New Brunswick, was indebted to Samuel Neill, of St. John's, and it was arranged between them that some deals belonging to Gilbert should be shipped to England, and consigned to an agent for sale there, and that the produce of the sale should be received by Neill in liquidation of his debt. Neill accordingly wrote and sent to a Mr. Crane, of St. John's, a letter, dated the 13th Jan. 1860, and which, so far as it is material to this report, was as follows:—"Dear Sir,—You are hereby authorised, while in England, to sell on contract, on my account, through a good responsible agent, three million superficial feet of spruce and pine deals, to average second quality, delivered at the port of Shediac, the coming spring, in the customary manner. The produce the agent will place to my credit; my drafts at

ninety days to be accepted by him, for the several amounts of each cargo on handing bill of lading. For all not sold on contract you are authorised to charter vessels to remove them."

Crane came to England, and applied to the plt. Young to act as agent for carrying out the agreement. On the 14th Feb. 1860 Crane delivered to Young, Neill's letter of Jan. 13, together with the following one, written by Crane to him:—

"Dear Sir,—In conformity with the above instructions, I hereby authorise you to arrange by sale, on contract or charter, for the removal of the deals named."

Then followed a list of the deals, and at the same time Crane informed Young that the average value of the deals was 40*s*. per 1000 superficial feet. It was then also agreed that Neill should be at liberty to draw bills upon Young to the extent of 30*s*. per 1000 feet, to be accepted by the plt., and paid out of the produce of the sales, and that the surplus produce (if any) should be held in trust for Gilbert. It was afterwards found to be too late in the season to sell deals on contract in England, and Crane therefore authorised Young to charter and send out vessels to Shediac for the removal of the deals, which were to be consigned to Young for sale. Nine vessels were accordingly chartered and sent out by the plt., but one of them was lost, and only eight (of which the *Katinku* was one, duly arrived at the place of their destination.)

Gilbert forwarded the bills of lading of all the ships (except the *Katinku*), to Neill, upon the understanding that he would in turn forward them, and consign the cargoes to the plt. according to the agreement; Neill, however, did not do so; but sent the bills and consigned the cargoes (except those of the *Katinku*) to Messrs. Barnes and Son, of Bristol.

The plts. incurred considerable expenses in chartering the vessels, for the removal of the deals and for insurances, and entered into arrangements for the disposal of the cargoes on their arrival in England. They also accepted bills drawn by Gilbert under the agreement of the 13th Jan. 1860, and supplied him with goods on the understanding that they were to be paid for out of the proceeds of the cargoes. The Messrs. Barnes and Son sold the cargoes consigned to and received by them, and accounted therefor to Neill; but none of the proceeds of such sale were applied in repaying to the plts. the expenses and liabilities so incurred by them as aforesaid.

In the month of Aug. 1860 a suit was instituted in the Supreme Court of New Brunswick (but to which suit the plts. here were not parties), and by an order made in it, the bill of lading of the *Katinku* was directed to be delivered to Messrs. Wiggins and Co., of New Brunswick, and they were ordered to consign the ship and cargo to their agents in England for sale; and Mr. Joseph Wiggins, of the last named firm, was appointed a receiver in the suit. The *Katinku* and her cargo were accordingly consigned with the bill of lading to the defts. Boyson and Tagart; and they sold the cargo, which produced after payment of expenses the sum of 615*l*.

It appeared that the Messrs. Boyson and Tagart had furnished accounts of the sale of the cargo of the *Katinku* to Mr. Joseph Wiggins, and that in those accounts they had either entered the 615*l*. as paid to him, or had carried it over to his credit. The bill in this suit was filed in 1861, and on the 15th April in that year an injunction was granted to restrain the Messrs. Boyson and Tagart from parting with the funds in their hands arising from the sale of the cargo of the *Katinku*.

Neill, by his answer, stated that the agreement of the 13th Jan. 1860, between himself and Gilbert, was, that the proceeds of all the shipments should be re-

mitted to Neill, and that he never authorised, or sanctioned, or acquiesced in the alleged arrangement between Crane and Young, by which part of such proceeds were to be received by Gilbert, and that the proceedings of Crane and the *plts.* were at variance with the authority actually given by him. It was further contended, on his part, and on that of Boyson and Tagart, that, as the proceeds of the cargo of the *Katinka* were either paid or credited in account, by the last-named deft. to Mr. Wiggins, such proceeds were now to be considered as held by him subject to any order of the court of New Brunswick, and that this court had, therefore, no jurisdiction in the matter.

Baggallay, Q.C. and *Welford* appeared for the *plts.*, and contended that there was a clear contract made between Crane and Messrs. Young and Lewin that all the cargoes should be consigned to them; that they should receive the proceeds and pay themselves their expenses and commission, and that that gave them the right to stop any of the proceeds of the cargoes which had been sold, before they reached the hands of Neill. They argued that there was no difference between the intercepting of a bill of lading before it reached a wrong destination (in which case this court would clearly interfere) and the intercepting of the proceeds of the cargo before they were actually paid away.

Selwyn, Q.C. and *Robinson* appeared for the deft. Neill, and insisted that the *plts.*' claim to a remedy was to be prosecuted in a court of law, not of equity. They had no right to the decree for specific performance, as such a relief was, in fact, now impossible. They had no such lien as they claimed, either generally or in particular. A general lien could arise only from custom, and to support it there must be possession of the subject-matter of the lien; but here there was no custom; and as to proceeds of the cargo of the *Katinka*, the bill of lading had never come to the hands of the *plts.* A particular lien could arise only from contract, and to support it there must be something amounting to at least an equitable assignment of the subject-matter of the lien; but here there was no evidence of any assignment. But under no circumstances were the *plts.* entitled to more than the expenses incurred as aforesaid in respect of the *Katinka*.

J. H. Palmer, Q.C. and *G. Long*, for the defts. Messrs. Boyson and Tagart, supported the arguments of Mr. Neill's counsel, and cited

Burn v. Carvalho, 4 My. & Cr. 690;

Nicholson v. Knowles, 5 Madd. 47.

Baggallay, Q. C. in reply.

The MASTER of the ROLLS.—I have no doubt, from the evidence in this suit, that the proceeds of the *Katinka's* cargo were in the hands of Messrs. Boyson and Tagart when the injunction was granted in April 1861. Assuming, therefore, that the *plts.* are right on that point, I think it is clear that I must order payment into court of the fund, and restrain the defts. Neill and Gilbert from taking any steps for obtaining payment of it into the New Brunswick court. I am also of opinion that, upon the evidence, the agreement entered into by Crane with the *plts.*, whether originally authorised by Neill or not, was afterwards made known to and acquiesced in by him, and that he is therefore bound by it. With respect to the other part of the case, it was contended by the defts. in their arguments that the *plts.* had rested their case on one of three grounds, viz., upon either their right to a decree for the specific performance of the agreement of 13th Jan. 1860; or for a declaration that they are entitled to a lien; or to damages for the breach by Neill of his contract with them. It was then argued that they had failed in all those three contentions. I certainly think that the case cannot be put as one for the specific performance of the

agreement, as it is plain the contract cannot now be specifically performed. I also think that if the bill had simply prayed for damages for a breach of the contract, it could not have been sustained, for then a court of law would have been the proper tribunal. But, independently of those considerations, if the *plts.* have a lien, they may be entitled to add to that lien any damages which they may obtain at law for the breach of contract. Unless therefore they have some charge on the fund the bill must fail. I think, however, that they have a charge upon it. Even if the *Katinka* had been the only vessel chartered by them, they were authorised to incur expenses in chartering her; in consideration of which they were to have the vessel consigned to them. Neill knew of and sanctioned that arrangement. I assume that in such a case as this some expenses must be properly incurred by some one, and if by the consignee himself, he is clearly entitled to a lien; if by some person other than the consignee, and who has advanced money for the purpose with the consent of the principal, he is entitled to a lien if he can arrest the proceeds of the cargo before they come to the hands of the shipper. I am of opinion that Neill cannot take the proceeds of the *Katinka's* cargo without paying the expenses incurred with respect to it. In all that I have said, I have assumed that the *Katinka's* cargo was the property of Neill. If, however, it belonged to Gilbert, no question really arises. The same principles will apply to the proceeds of the other cargoes; for the contract was one entire contract as to all of them, and the court will not apportion it, or marshal the cargoes. If therefore one cargo is insufficient to pay the expenses incurred with respect to it, while the others are more than sufficient, the whole will be liable. The *plts.* have therefore a lien upon, and are entitled to stay the proceeds of all the cargoes for the amount of all the advances and disbursements made by them under the agreement with Crane, and to tack to that lien all loss and damage sustained by reason of the breach of contract. By all loss and damage I mean pecuniary loss and damage; but I do not therein mean to include the profits which might have been obtained if the contract had been performed. That would be giving the *plts.* damages for which they should have sued at law. They cannot add to their lien unearned profits, until they have been obtained by a judgment at law. The *plts.* must have their costs against Neill, and it must be declared that they have also a lien for them upon the fund. As to Boyson and Tagart, I should have given them their costs if they had acted merely as stakeholders; but, as they have thought proper to support the case of Neill against the *plts.*, instead of standing neutral, the decree will be made without costs as to them.

Solicitor for the *plts.*, *W. Smith*.

Solicitors for the defts., *Torr, Janeway and Tagart*.

Thursday, June 25.

DRAKEFORD v. DRAKEFORD.

Bequest to "a class and A."—Survivorship among the class—Time for ascertaining—Lapse.

The period for ascertaining the survivorship among a class of legatees is the time for the distribution of their legacy, unless the testator has himself otherwise directed.

Where a testator left all his unfunded property in cash, bills, jewels, plate, furniture, &c., &c., to his widow; and bequeathed the interest on his funded property to his widow for life, and then to H. for his life, at whose death the principal was to be equally divided amongst H's surviving legitimate children and the testator's niece and goddaughter R.; H. died in the lifetime of the testator's widow; R. died

in the lifetime of the testator; and two of the surviving children of H. died in the lifetime of the testator's widow: it was

Held, that the class of the surviving children of H. was to be ascertained at his death; and that the share of R. lapsed for the benefit of the next of kin of the testator.

This was an administration suit, to carry out the trusts of the will of a Mr. William Lewis. The testator, by his will, dated the 4th Sept. 1816, and duly executed, appointed trustees thereof, and (*inter alia*) made the following bequest:—

"In case my dearest wife Rosamond Lewis should survive me, I give (with the following deduction) to her sole use and disposal during her natural life, the half-yearly interest arising on my property, funded in the Bengal Six per Cent. Loans, the principal of which amounts to sicca rupees, 202,500; and I also leave to my wife all my unfunded property in cash, bills, jewels, plate, furniture, &c., &c. The deduction above alluded to is of 300*l.* sterling a-year, to be paid by half-yearly instalments to my brother Henry Lewis, or, in case of his decease, to my nephew Henry Lewis, the son of the former. At the death of my wife Rosamond, I direct that annuities of 100*l.* sterling a-year each shall be purchased (should they be surviving) out of the principal of my property for the separate lives of my sisters-in-law, Barbara Willows and Jane Willows, and for that of my niece and goddaughter Rosamond Willows. After the above shall have been effected, I bequeath the half-yearly interest arising on my funded property to my brother Henry Lewis, for his natural life, at whose death the principal is to be equally divided amongst his surviving legitimate children, and my niece and goddaughter Rosamond Willows."

The testator's niece and goddaughter Rosamond Willows, and his nephew Henry Lewis, predeceased the testator, and he died shortly after the date of his will.

The testator's brother Henry Lewis died in 1828, leaving four children.

Two of those children died in the lifetime of the testator's widow, and she died in 1861.

Upon that state of facts three questions arose: The first, at what period the "surviving legitimate" children of Henry Lewis were to be ascertained? The second, whether the share given to Rosamond Willows lapsed by her death in the testator's lifetime? and the third, if not, whether it belonged to the children of Henry Lewis, as being the survivors of the class to whom it was given, or to the widow of the testator?

Selwyn, Q. C. and Hetherington, for the trustees of the will, contended that the class of Henry Lewis's surviving children was to be ascertained at the period of the distribution of the funds, viz., at the death of the testator's widow. They cited

Daniell v. Daniell, 6 Ves. jun. 296;

Stevenson v. Gulean, 18 Beav. 590.

Chitty and Langley, for one of the surviving children of Henry Lewis, cited

Cripps v. Wolcott, 4 Mad. 11;

Taylor v. Beverley, 1 Coll. 108.

Beggally, Q. C. and *Lake*, for the other surviving children of Henry Lewis, cited

Spurrell v. Spurrell, 11 Hare, 54.

Cole, Q. C., *Southgate*, Q. C., *Speed*, *Busk*, *Morris*, *Turner* and *Anstie* appeared for other parties.

Upon the second question, viz., whether Rosamond Willows's share had lapsed, the following authorities were cited:

Porter v. Fox, 6 Sim. 485;

Clark v. Phillips, 17 Jur. 886;

Stanhope's Trust, 27 Beav. 201.

The MASTER of the ROLLS.—The words of this will are clearly expressed. The rule of construction in

these cases undoubtedly is, that the period for ascertaining the survivorship among a class of legatees is the time for the distribution of their bequest, unless the testator has himself otherwise directed. He may, of course, appoint an earlier period for the purpose. Now, in this case I cannot strike out from the will the words "at whose (*i.e.* Henry Lewis's) death," used by the testator. But retaining them is not to require that the fund should be then divided and paid to the prejudice of the widow's life-interest, but only that the shares of the persons to take are then to be ascertained. The children of Henry Lewis who survived him, form the class who are to take, and they take equally between them vested interests, to be paid after the death of the widow. I approve of the decision in *Cripps v. Wolcott* and the subsequent authorities, which have settled that, in cases like this, the time of distribution is that for ascertaining the class to take, unless the testator has expressly appointed another period for the purpose; and here another period is clearly pointed out. With respect to the question of the lapse of the share of Rosamond Willows, I am of opinion that the share of Rosamond Willows lapsed for the benefit of the next of kin of the testator. It is clear that the class to take must be ascertained at one and the same period. I do not mean to say that every member of the class is to be ascertained at the same time; but that, as to the division of the property, it is to be taken at one and the same period. Thus, if a testator gives property to A. for life, with remainder to the children of B. and the children of C., and C. was dead at the testator's death, the number of the children of C. is to be ascertained then, but the number of B.'s children is not to be ascertained until the death of the tenant for life; they all, however, take vested interests, liable to be divested *pro tanto*, by the birth of other children of B., before the death of the tenant for life. It is true that in the case just suggested I have not used the word "surviving," as in the case now before the court; but a class cannot be ascertained, *quâ* class, unless the property vests in all at the same time. No doubt, if the gift in this case had been "to the children of A. and to my niece Rosamond," it might have been considered as, in the first instance, a gift to a class; but in order to make Rosamond a member of the class, the testator should have said, "I give my property to Henry Lewis for life, and at his death the principal is to go among his legitimate children, and my niece, or such of them as shall survive Henry Lewis." Had he so said, the class would have had to have been ascertained at that period; and if a member of it had died in the interval, there would have been no lapse. Here, however, Rosamond Willows was intended to take, at all events; and the only "class" to be ascertained is that of the children of Henry Lewis, and they are to be ascertained at his death. If Rosamond Willows had survived the testator, she would have taken an ascertained vested interest in the trust-fund, subject to increase or decrease, according as the number of the children of Henry Lewis, who survived him, might be more or less, and on her death her legal personal representative would have taken her share. I have considered the cases of *Stanhope's Trust*, and *Clarke v. Phillips*. In my opinion, Rosamond Willows did not take as one of a class; and the share to which she would be entitled if she were now alive has therefore lapsed, and belongs to the testator's next of kin.

Solicitors: G. F. Hudson; Vizard and Anstie; Tilleard and Co.

ROLLS.]

Re ROBINSON'S WILL—THOMPSON v. BOWYER.

[ROLLS.]

Saturday, July 18.

Re ROBINSON'S WILL.

Trustee Act 1857, s. 32, and Trustee Extension Act 1852, s. 9—Appointment of new trustees—Vesting order—Leaseholds.

Quære, whether, where there is no existing trustee, the court has jurisdiction, under the above Acts, to appoint new trustees, and at the same time to make a vesting order as to leasehold property?

Jaue Robinson, the testatrix in this matter, died in March 1862, seised and possessed of freehold and leasehold estates. By her will she had duly appointed three trustees thereof; but it appeared that two of them had died in her lifetime. The surviving trustee never acted in the trusts of the will. He died in Sept. 1862, and no representation had been taken out to his estate. A petition was now presented by the *cestuis que trust* under the will, praying the appointment of new trustees thereof, and a vesting order. The question was, whether under the circumstances the court had jurisdiction to make any vesting order as to the leasehold property?

Speed appeared for the petitioners, and cited

The Trustee Act 1850, s. 22;

The Trustee Extension Act 1852, s. 9;

Re Matthews' Settlement, 22 L. T. Rep. 211.

C. T. Simpson mentioned

Re Ellis's Settlement, 24 Beav. 426.

Graham Hastings and *Lawrence* appeared for the *resps.*

THE MASTER of the ROLLS.—The precise point now before me does not appear to have been raised in *Re Matthews' Settlement*, and my impression is that I have no jurisdiction to make the vesting order as to leasehold property. The petitioners may however, if they choose, take it at their own risk.

Solicitors for the petitioners, *Taylor, Hoare* and *Taylor*.

For *resps.*, *J. Bowen May*.

Tuesday, July 21.

THOMPSON v. BOWYER.

Redemption suit—The Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 28—Letter of mortgages—Denial of plt.'s right to redeem—Bill dismissed with costs.

In 1814 A. mortgaged an estate to B. in fee, and subsequently, but in the same year, granted an annuity out of the estate to C. By a deed of even date with the grant of the annuity, A. conveyed the estate to a trustee to secure (*inter alia*) the payment of the annuity. Only the first two quarterly payments of the annuity were duly made. In 1839 B. transferred his mortgage to D., who then entered into, and ever since continued in possession of the estate. In 1856 C.'s representative claimed to be paid his annuity out of the estate, and asked D. for an account of the rents of it. D., in reply, wrote as follows:—

"I deny . . . the claims of your client. I need only add that if he were entitled to the account, it would be of no use, as the rents and profits of the estate have never been sufficient to pay the interest on the first charge referred to in your letter."

On a bill filed in 1858 by C. against D., praying the usual decree for the redemption of the estate, it was

Held, that although the deed of even date with the grant of the annuity would prevent A., and any one claiming through him, from setting up the Statute of Limitations, still, as D. claimed under the original mortgagee, and as the letter written by D. was no acknowledgment within the statute of C.'s right to redeem, the bill must be dismissed, and with costs.

This was a redemption suit.

The plt. was the legal personal representative of the grantee of an annuity, and the deft. was the transferee of the estates on which the annuity was charged.

The facts of the case were these:—In Feb. 1814 Sir George Bowyer was seised in fee of an estate called the Kennington estate, and tenant for life of an estate called the Radley estate. By an indenture of mortgage, executed in 1814, Sir George Bowyer mortgaged the Kennington estate in fee to the Messrs. Hoare, the bankers, to secure to them the sum of 13,000*l.* and interest.

By an indenture, dated the 9th Nov. 1814, Sir G. Bowyer granted an annuity of 712*l.* 10*s.*, payable out of the Kennington and the Radley estates, to William Thompson, for ninety-nine years, if the grantor should so long live. By an indenture of even date with the last-mentioned deed, the two estates were conveyed to Mr. Rowe upon trust for sale, in case of default being made in payment of the annuity, and then upon trust, out of the proceeds of the Kennington estate, to pay off Messrs. Hoare's mortgage; and out of the surplus of such proceeds, and the proceeds of the Radley estate, to pay the arrears (if any) of the annuity then due, and to provide a capital sum to meet the growing payments of the annuity, and subject thereto upon trust for Sir George Bowyer, his executors, administrators and assigns.

In 1815 Sir George Bowyer went abroad, and lived out of the jurisdiction until his death. In Jan. 1816 the Messrs. Hoare entered into possession, and received the rents of the Kennington estate, and continued to receive the same until they transferred their security to the present Sir G. Bowyer. In 1827 William Thompson died, leaving the plt. his legal personal representative. By an indenture dated the 9th Feb. 1839, the Messrs. Hoare transferred the Kennington estate to the present Sir G. Bowyer, who thereupon entered into possession and receipt of the rents of that property, and had continued in such possession and receipt ever since. The first two quarterly payments of William Thompson's annuity had alone been duly made.

Some correspondence took place between the parties, and in the year 1856 the solicitors of the plt. wrote to the present Sir George Bowyer a letter, which, so far as it is material to this report, was as follows:

"Jan. 14, 1856.—Dear Sir,—We have made a variety of inquiries on the subject; and we find that some sixteen years since you paid off a first charge on the Kennington property which was then vested in Messrs. Hoare as mortgagees, and entered into possession of the rents; and as our client claims to be entitled, subject to that charge, to have his annuity and arrears satisfied out of that estate, it is our duty to ask you for an account of the rents and profits since you entered into the possession."

To that letter the present Sir George Bowyer, a few days afterwards, sent the following reply:—

"Gentlemen,—In answer to your letter of the 14th inst., I beg to say that I deny, though with all due courtesy, the claim of your client. I need only add that if he were entitled to the account, it would be of no use, as the rents and profits of the estate have never been sufficient to pay the interest of the first charge, referred to in your letter.—I have the honour to remain, &c.

"GEO. BOWYER."

No further proceedings were taken in the matter until 1858, when the plt. filed his original bill in this suit against Sir George Bowyer, the grantor of the annuity, and the present Sir George Bowyer and his mortgagees, praying the usual redemption decree as to the Kennington estate. Sir George Bowyer, the grantor of the annuity, died in 1861.

The present Sir George Bowyer relied upon the Statute of Limitations, the 3 & 4 Will. 4, c. 27, s. 28, as a bar to the plt.'s claim. By that statute and

[ROLLS.]

RICHARDS v. MILLETT.

[ROLLS.]

section it is enacted that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him, and in such case no such suit shall be brought but within twenty years next after such acknowledgment, or the last of such acknowledgments, if more than one, was given, &c.

The principal question was, whether, under the circumstances above stated, the letter of the present Sir George Bowyer was an acknowledgment of the plt.'s title, or of his right to redeem within the meaning of the statute?

Bonkgate, Q.C. and *Stock* appeared for the plt., and contended that by the deed of even date with that which was the grant of the annuity, Rowe was an express trustee of the Kennington estate for William Thompson, and therefore the plt., as his representative, was clearly entitled to the decree he sought; but if not, the letter of the present Sir George Bowyer was virtually a recognition of his title as mortgagee, and therefore of the plt.'s right to redeem. They cited

The Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 25;

Yeung v. Lord Waterpark, 13 Sim. 199-204, a. c. on app. 10 Jur. 1;

Lewis v. Duncombe, 29 Beav. 175; s. c. 3 L. T. Rep. N. S. 867;

Round v. Bell, 30 Beav. 221, a. c. 5 L. T. Rep. N. S. 15;

Trulock v. Robey, 12 Sun. 406;

Stansfield v. Hobson, 16 Beav. 236; a. c. on appeal, 3 De G. M. & G. 620.

The *Solicitor-General* and *Wickens* appeared for the present Sir George Bowyer.

Schwartz, Q.C. and *Ware* for other parties.

The MASTER of the ROLLS.—I am clear that, unless the ordinary meaning of words is violated, the letter of the present Sir George Bowyer cannot be treated as an acknowledgment of the plt.'s right to redeem within the meaning of the statute. There was an annuity granted by the late Sir George Bowyer in Nov. 1814, and the estate charged with that annuity was conveyed to Rowe upon trust to pay the arrears of the annuity, and subject thereto in trust for the grantor. I am of opinion that, in accordance with my decision in *Lewis v. Duncombe*, that deed was sufficient to have prevented the late Sir G. Bowyer, and is now sufficient to prevent any person claiming through him, from setting up the Statute of Limitations against the plt. But it so happened that, previously to the execution of the annuity deed, the late Sir G. Bowyer had mortgaged the very same property in fee to the Messrs. Hoare, the bankers, to secure to them 13,000*l.* and interest. The question now is, whether, in the absence of any acknowledgment, the plt. has a right to redeem the debts, who claim, not under the late Sir George Bowyer, but under the Messrs. Hoare? It is clear that the present Sir George Bowyer, who was the transferee of the Messrs. Hoare's mortgage, does not claim under the trust-deed of 1814. He claims under the original mortgage to Messrs. Hoare. The only question therefore is, whether the second of the two letters which have been referred to constitutes an acknowledgment of the plt.'s right to redeem, within the meaning of the 3 & 4 Will. 4, c. 27, s. 28? That letter contains this expression: "I deny, though

with all due courtesy, the claim of your client." That may, perhaps, at first sight, look like a denial of the plt.'s annuity, and not of his general right to redemption; but, on referring to the letter of the solicitors of the plt. to Sir George Bowyer, to which the letter of the latter was a reply, the word "claim" occurs several times, and on the last occasion in the following context: [His Honour then read the portion of the letter first above stated, and continued:] In answer to that Sir G. Bowyer writes: "I deny the claim of your client;" or, in other words, what he says amounts to this: "I deny his right to have the annuity and arrears satisfied out of this estate." He then proceeded, "I need only add," &c. [His Honour read the letter secondly above stated, and continued:] I think that the plt.'s counsel were under a misapprehension when they argued that all the statute requires is an acknowledgment that the debt holds under a mortgage title. A person might say, "I entered and originally held as a mortgagee; but I now hold the property as absolute owner." The admission required by the statute is an admission that "some one" has a right to redeem the plt. In *Stansfield v. Hobson*, where the words of the mortgagee's letter were, "I do not see the use of meeting unless some one is ready with the money to pay me off," I held that there was a sufficient acknowledgment, because the letter amounted to a qualified admission on the part of the mortgagee, that if any person was ready with the money to pay him off, he would have the right to do so; and that he (the mortgagee) would be bound to receive the money. Here there is a general denial of the plt.'s claim, with an additional statement that even if the debt did not so deny it, the plt. would derive no benefit from the account. That letter, beginning, as it does, with an express denial of the plt.'s claim, cannot therefore be treated as an acknowledgment of his right to redeem. If that were not so, no one could safely answer a solicitor's letter, except by saying that he refused to give any reply. Under those circumstances the plt.'s case fails; and the bill must be dismissed with costs.

Solicitors: *Weston, Laurence and Markby*; and *Ware and Westall*.

Saturday, July 25.

RICHARDS v. MILLETT.

Pleading—Husband and wife—Wife's separate estate.

Where a married woman sues by her next friend, in respect of her separate estate in property in which her husband takes no interest, he ought not to be a co-plt. with her, but a deft. in the suit.

The testator in this suit, by his will, duly executed, devised the residue of his property, including an estate of which he was mortgagee, to trustees upon trust, as to one moiety thereof, for the plt. Warwick Owen Gurney Richards, and as to the other moiety, for the plt. Agnes Ann Powys (wife of the Hon. Chas. Powys), for her life for her separate use, and after her death for her children, as she should appoint, and in default of appointment then upon trust for her children equally. Mr. Powys took no interest in the trust property under the will. The present bill was filed by Mrs. Powys (by Mr. Warwick Owen Gurney Richards her next friend), by the infant children of Mr. and Mrs. Powys (by Mr. Powys their next friend), and by Mr. Powys, as co-plts. against Messrs. Millett and Davy, the trustees of the will. The estate, of which the testator was mortgagee, consisted of mineral property which had become absolutely vested in the debts, by virtue of a foreclosure decree. It was alleged that the nature of the property rendered it desirable for the plts., the *cestuis que trust* of it, to have it sold and converted into personal estate; and the bill in this suit was accordingly

filed praying a decree (for which minutes had been prepared) to carry out that object.

Bevir appeared for the plts.

E. Charles, for the defts., objected, that the suit was improperly framed. *Mrs. Powys* sued by her next friend; but *Mr. Powys*, who took no interest in the property devised to his wife for her life for her separate use, was a co-plt. with her. That was wrong, as he ought to be made a co-deft.

Bevir in reply.

The MASTER of the ROLLS.—I think *Mr. Charles's* objection is a valid one, and must prevail. In some cases a husband is joined as co-plt. with his wife, when she is suing by her next friend; but those are cases where he also takes an interest in the property sought to be affected by the decree. I have some doubts whether that practice is quite correct; but I am clear that the husband ought not to be made a co-plt. with his wife where he takes no interest. The effect of joining the husband as co-plt. with his wife would be to make the suit his suit, which would not bind her. The bill must therefore be amended by striking out the husband as co-plt., and adding him as a co-deft.; and when that is done the decree may be drawn up according to the proposed minutes.

Solicitors: *Coodo; Kingdom and Cotton.*

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn, Barrister-at-Law.

Thursday, July 16.

RUSSELL v. THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY.

Practice—Motion by deft. against a co-deft.

Before a decree in a suit, one of the defts. moved to restrain a co-deft. from prosecuting an action, on the ground that the object sought by the action was identical with the relief sought by the bill. In the alternative it was asked, that all proceedings in the suit might be stayed:

Motion refused with costs.

This was a motion on behalf of the defts., the London, Chatham and Dover Railway Company, to restrain two of their co-defts., who were trustees under a settlement, from prosecuting an action at law which had been commenced by them against the company.

By an indenture of settlement, dated the 18th May 1854, and made between the deft. John Scott Russell of the first part, the deft. Harriette Scott Russell of the second part, and the defts. George Wynne and Francis Fuller of the third part, it was declared that a sum of 3000*l.* should be held by G. Wynne and F. Fuller upon certain trusts for the benefit of *Mr. John Scott Russell* and *Harriette his wife*, during their joint lives, and after the decease of the survivor upon such trusts for the child or children of the marriage as they should jointly appoint, and in default of appointment in trust for all the children in equal shares.

Under a power in the settlement the 3000*l.* was laid out upon the security of a second mortgage of a piece of land in the parishes of Beckenham and Lewisham, with a dwelling-house and buildings thereon, and by another settlement dated the 3rd Feb. 1855, and made between the same parties, the same land, dwelling-house and buildings were settled by *Mr. John Scott Russell* upon trusts similar to those declared by the indenture of 1854 concerning the sum of 3000*l.* The settlement contained a power for the trustees with the consent of *Mrs. Russell* during her life, notwithstanding coverture, and after her decease with the consent of *Mr. Russell* during his life, and after the death of the survivor at the discretion of the trustees or trustee, to sell the premises.

The defts.' railway passed through a tunnel under this property. Previous to the construction of the line an agreement was come to between the first mortgagor, the trustees, *Mr. and Mrs. Russell*, and the company, whereby it was agreed that the company should pay 3700*l.* for the purchase of the several rights of way, privileges, easements, land, hereditaments and premises required by them, of which 2500*l.* was to be paid to the first mortgagor, and the residue, 1200*l.*, was to be handed over to the trustees; and it was further agreed that the company should pay 300*l.* to *Mr. Russell* in respect of the permanent loss and inconvenience he would suffer from the works. The deed of conveyance was dated on the 20th Dec. 1861.

When the tunnel came to be constructed, greater damage than was expected was done to the walls of the house and outbuildings, and to other parts of the property, and this bill was filed by the four children of *Mr. and Mrs. Russell*, two of whom were infants, against the company, *Mr. and Mrs. Russell* and the trustees, alleging that the compensation of 3700*l.* was altogether inadequate for the damage that had been done; and praying, first, that proper directions might be given for having the amount of the purchase and compensation money ascertained; secondly, that the trustees and the company might, notwithstanding the agreement of the 10th May 1861, and the conveyance of the 20th Dec. 1861, be decreed to take such steps as might be necessary for having the said purchase and compensation money ascertained; thirdly, that the company might be decreed to pay such sum when ascertained; and, fourthly, that in the meantime the company might be restrained from continuing in possession of the said hereditaments, and from continuing the tunnel or any of the works of the undertaking.

After the bill was filed the trustees of the settlement brought an action against the company for the damage done to the property; and this was a motion in the suit (no decree having been yet obtained) by the railway company against their co-defts., the trustees, to restrain the action, on the ground that the object sought by the action was identical with that of the suit, and that ample relief to all parties could be had under the proceedings in equity. There was another branch of the motion in the alternative to stay all proceedings in the cause.

Malins, Q.C., Cotton and Meadows White (of the common law bar) supported the motion.

The VICE-CHANCELLOR.—One deft. cannot move against a co-deft. I cannot hear you upon anything except the question of staying all proceedings in the cause.

Malins referred to

Edgecumbe v. Carpenter, 1 Beav. 171.

The VICE-CHANCELLOR.—That is no authority. No injunction can issue without an express prayer for the purpose.

Malins further cited

Wedderburn v. Wedderburn, 2 Beav. 213; 4 M. & Cr. 596,

and referred to *Booth v. Leicester*, 1 Keen, 579.

Bacon, Q.C. and Martindale, for the plts. and the trustees, were not called upon.

The VICE-CHANCELLOR.—There are objections to this motion which, in any view of it, are insurmountable. The first part of the motion asks for an injunction by one deft. against another deft., to restrain that co-deft. from proceeding in an action at law. That application is made before decree. After a decree, all parties are actors, and the court proceeds on a different view as to the rights of the parties; but before decree, and upon an interlocutory application, I have never heard of the writ of injunction being issued by the court. I have turned to a book of the highest authority (*Mitford on Pleading*, 5th edit. p. 55), and

there I see it is stated, in a note referring to the case of *Sesory v. Dyer*, Amb. 70 : "It is a general rule, that the writ of injunction will not be granted unless prayed for by a bill which is already filed." But the note states this qualification, "or under special circumstances, which the party applying undertakes to file forthwith." That exception is founded on the decision in *M'Namara v. Arthur*, 2 Ball & B. 349. But, in the case of *M'Namara v. Arthur*, the injunction was applied for to restrain the plt. It seems to me impossible to grant a writ of injunction on the application of one deft. against another, by an interlocutory proceeding before the cause is brought to a hearing and the decrees is made. Lord Eldon, in the case of *Wright v. Atkyns*, 1 V. & B. 314, says: "Generally, if the bill does not pray an injunction, the plt. cannot move for an injunction under the prayer for general relief; but if, after a decree for an account under a bill for foreclosure, the mortgagor attempted to cut timber, the court would enjoin him, though there was no prayer for that." Of course there could be no prayer where one deft. was applying against another under the circumstances referred to by Lord Eldon. I should not have thought it necessary to quote these authorities, but for the arguments which have been urged at the bar. I have noticed that this is an application by one deft. against a co-deft. But who are the plts. in this suit? The plts. are persons, some of them infants, filing a bill in this court against their own trustees who have entered into an agreement for the sale of their land to the defts., a railway company. The plts. complain that that agreement was wholly *ultra vires*, and was improperly made; and they ask the court to direct that, if the land is to be sold, it may be sold in a proper way, and that if compensation is to be made it may be made in a proper way. The bill further complains of another injury, namely, that after this agreement by the defts. the trustees to sell the plt.'s land, their co-defts. the railway company, against whom the plts. also complain, have under that agreement been so proceeding as to inflict certain special injury on the property in which the plts. are interested, by the misconstruction of works, so as to do damage of a very serious kind. It is plain that, whatever remedy the plts. may be entitled to in respect of an injury of that kind, it is a separate consideration, and apart from the general question raised by the bill, in which they complain that the trustees have made an improper agreement for the sale of their land. The first thing which the motion asks is an injunction to prevent the action at law from going on. But the alternative which has been urged at the bar is, that this action should go on, and that the suit should stop. Looking at the nature of the action, I find that it is certainly one in which damages may be recovered for the special injury done by the misconstruction of the works which are mentioned in the plts.' bill, and I can see no reason why an action of this kind may not, with perfect convenience, proceed; for the plts. are complaining against both parties, the trustees and the railway company. Upon an accurate view of the case, the argument on behalf of the railway company, that all proceedings in the suit ought to be stayed, because the plts. are complaining against them that they have made an improper agreement with the plts.' trustees, cannot be sustained. I cannot make any order; but I wish it to be understood that this is without prejudice to any case that may be made by a bill for an injunction.

Decree asked for the costs.

The VICE-CHANCELLOR said, that the motion must be refused, and with costs, if the trustees pressed for it.

Ordered accordingly.

Solicitors for the plts., *George Capes*, agent for *Drummonds, Robinson and Till*, Croydon; for the company, *Freshfields and Newman*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, ESQs.,
Barristers-at-Law.

Saturday, May 2.

OAKFORD v. EUROPEAN AND AMERICAN STEAM SHIPPING COMPANY (LIMITED).

Contract—Partnership—Liability of retiring partner of a firm, parties to a contract—Principal and surety.

A contract was entered into by a mercantile firm with a joint-stock company, to manage the general shipping affairs of that company. Shortly afterwards one of the firm retired from the partnership and it was agreed that he should be indemnified by the continuing partners, who carried out the objects of the contract with the joint-stock company. Disputes, however, arose between the company and the continuing partners, which were subsequently referred to arbitration, as provided for by the original contract. The result was, that the mercantile firm were largely indebted to the company. The partner who retired was no party to the reference to arbitration. The original contract had not been put an end to at the time of those transactions:

Held, that the partner who retired had not been absolved from his liabilities under the original contract with the company;

That the continuing partners were his agents; and that what they had properly done under the contract was binding upon him:

Held, also, that the reference to arbitration did not require the retiring partner's concurrence.

This was a bill filed by the plt. Mr. J. S. Oakford, a shipbroker, who with the defts. J. R. Croskey and J. H. Wolff, had been in partnership as merchants and general ship and insurance brokers. The other defts. were a joint-stock company under the style of the European and American Steam Shipping Company (Limited).

The bill prayed that the company might be restrained from prosecuting an action at law commenced by them against the three partners who had entered into the contract under the following circumstances:—

On the 8th April 1857 an agreement was entered into between the defts. and the plt., and the two defts. Croskey and Wolff, who carried on business as partners. It recited that the company had purchased eight steamships of the General Screw Steam Shipping Company, to be employed in trade between ports on the continent of Europe or Great Britain, and ports in North and South America, and other parts, making Southampton the head-quarters of the company; and that the company had agreed with the Messrs. Croskey and Co. to undertake the general management of said vessels, and of the business connected with their employment, upon the terms thereafter stipulated and set forth.

The clauses upon which the question in the cause turned were the following:—

Art. 1. "That such sum or sums as the directors may think fit shall be laid out and expended on the said ships so as to make the same fit for the purposes of the undertaking, after which an account shall be made up, including the first cost of the vessels, and the costs of their first repair and equipment, and the costs of taking them to the port of their first outward destination, which shall be considered as the capital account."

Art. 12. "The said company shall allow to said Messrs. Croskey and Co., at the end of each year, commencing from the 1st June, for their services as hereinbefore set forth, a remuneration out of the profits of the said ships, to be ascertained and calculated upon the following principle, viz.: There shall first be deducted out of the earnings of the ships all expenses connected with the working of the said ships (after the same shall have been, at the cost of the com-

pany, fully repaired, altered, inventoried and found and rendered complete for the services for which they are destined to be employed), and all wages, victualling stores, port charges, pilotages, agents' commissions, brokerages, fuel and other supplies, and current and incidental expenditure. There shall next be deducted all costs and expenses of the repairs and reinstatements to hull, rigging, machinery, stores and appurtenances, necessary to maintain and keep the ships in good working order, together with the further sum of 1000*l.* per annum for each ship, for providing a boiler fund for each ship, and the premiums of insurances, after deducting discounts and returns, together with the sum of 5 per cent. on the capital, to be ascertained as aforesaid, less the boiler fund, to be set aside as a depreciation fund; and in case the balance of the said earnings shall be insufficient to pay the said company, a dividend after the rate of 6 per cent. on the amount of capital embarked, to be ascertained as aforesaid, then the said Messrs. Croskey and Co. shall not be entitled to receive any payment for their services out of such earnings (except the allowance of 500*l.* for officers and clerks, and the brokerage on the insurances); but if the balance of such earnings, after such deductions as aforesaid, shall be more than sufficient to pay the said company a dividend after the rate of 6 per cent. on the said capital, then the said company shall pay or allow to the said Messrs. Croskey and Co. one moiety of the excess in each year, provided that in such calculation no deduction shall be made from the earnings of the said ships on account of the said annual sum of 500*l.* to be allowed to the said Messrs. Croskey and Co. for their office expenses, nor for or on account of any expenses to be incurred by the said company for rent of offices for the said company, nor for the salary or expenses of the directors, or of any superintendent, clerks, or officers to be appointed by them, nor for expenses of directorial management, all which shall be borne and paid by the said company; provided also, that nothing in this agreement shall be construed to interfere with the right of the said Messrs. Croskey and Co. to charge to the owners or shippers of goods, and to retain, for their own benefit, the usual forwarding and other commissions on goods shipped by the said ships, or disembarked therefrom, whether charged to such owners or shippers direct, or in the aggregate charge of a through rate."

Art. 14. "That this agreement shall continue in force for three years from the date hereof, and for such further periods as the net profits of the undertaking admit of a dividend of 6 per cent., calculated as aforesaid, being paid to the shareholders. Provided always, that if from any cause either party shall wish to terminate it after the expiration of twelve months from the 1st June next, and of such their intention shall give to the other six calendar months' notice, then it shall be terminated on the expiration of such notice, and the company shall hold harmless and indemnify the said Messrs. Croskey and Co., or their agents, on behalf the said company, so far as the same shall have been in accordance with the terms of this agreement; but in the event of such notice having been given by the said company, and while the dividend of 6 per cent. as aforesaid shall be divisible, then the said Messrs. Croskey and Co. shall be entitled to be paid, and the said company shall be bound to pay to the said Messrs. Croskey and Co., a commission of 6 per cent., to be calculated on the gross earnings of the undertaking for the twelve months next preceding the termination of such notice. Provided, that in the event of the said agreement being terminated when the company is paying a dividend exceeding 6 per cent., the commission to be paid as aforesaid shall be rateably increased by 1 per cent. of commission for 1 per cent. of dividend."

By the concluding article it was provided, "that in

case any dispute or difference between the said company, their successors and assigns, and the said Messrs. Croskey and Co., their, executors, administrators, or assigns, touching the matters therein mentioned, the dispute should be referred to arbitration in the usual terms, with a power of appointing an umpire by the two referees."

On the 11th July 1857 the plt. retired from the copartnership, and by an indenture, dated the same day, the plt. ceded all his interest in the agreement of the 8th April 1857 to the defts. J. R. Croskey and J. H. Wolff, who thereupon released and covenanted to indemnify him from and against all liabilities in respect thereof.

It was alleged, and not denied, that the company were informed of the retirement of the plt. from the copartnership, and were aware that he had ceded all his interest in the agreement to Croskey and Wolff.

These gentlemen continued to carry on business under the same designation, and had the management of the vessels under the agreement.

Disputes having arisen with respect to Croskey and Co.'s accounts with the company up to 1st June 1858, a memorandum dated the 7th Sept. 1858 was signed by Croskey and Wolff of the one part, and the chairman of the company of the other, as follows:—

"On Tuesday, the 7th Sept., the committee again met the directors, after further communication with Messrs. Croskey, and made further suggestions for an arrangement of the difference with Messrs. Croskey, which, after discussion, were reduced to the following form:—

"1. That Messrs. Croskey and Co. should consent to the bonus being added to the capital on which 6 per cent. preferential dividend is to be ascertained.

"2. That the principle of the accounts, as rendered by Messrs. Croskey, and as prepared by Mr. Jay up to the 1st June last, is to be taken as admitted, subject to the following conditions: [Certain conditions, such as production of vouchers, &c., were here set out.]

"8. The agreement between the company and Messrs. Croskey and Co. to be reconsidered with a view to prevent the occurrence of differences."

A more formal agreement was subsequently prepared and signed by the same parties, embodying the memorandum, and appointing two arbitrators. The submission was made a rule of the Court of C. P. The arbitrators purported to appoint an umpire; but, in consequence of an irregularity in this appointment, leave was subsequently given, by an order of the Court of C. P., to Croskey and Wolff, to revoke their submission, which they accordingly did.

By an order of the Court of Bankruptcy, dated the 5th April 1859, it was ordered that the said company should be wound-up, and E. W. Edwards, Esq., was appointed the official liquidator.

On the 10th Feb. 1860 the company commenced an action in the Exchequer of Pleas against the plt. and the defts. J. R. Croskey and J. H. Wolff, to recover the sum of 615,256*l.* 15*s.* 4*d.* for money had and received to and for the use of the said company, between the 8th April 1857 and the 17th Dec. 1859 inclusive, together with interest on the several items composing such sum.

As before stated, it was to restrain this action that the bill was filed.

It appeared in evidence that the first clause of the memorandum of 7th Sept. 1858 had reference to a dispute as to the construction of the first article of the original agreement of 1857, as to what was to be considered as the amount of the capital of the company. The ships having been originally purchased from another company at a price to pay the old shareholders 6*l.* 12*s.* 6*d.* per share, it was provided that any of the old shareholders might exchange their shares for fully paid-up 9*l.* shares of the new company. The question therefore had been whether the difference

between the 6*l.* 12*s.* 6*d.* and the 9*l.* was properly carried to capital account or not.

Sir H. Cairns, Q.C., E. F. Smith and Swanston, for the plt., contended that the plt., on his retirement from his partnership with the company's knowledge, and being indemnified by the continuing partners, ceased to be liable to the company under the contract of the 24*th* April 1857, and became a surety only; and that as such surety he was released from all liability by reason of the variation of the original contract by the memorandum of the 7*th* Sept. 1858, to which he had been no party, and particularly by the appointment of arbitrators by Croskey and Wolff alone. As to the first point they cited

Oakley v. Pasheller, 4 Cl. & Fin. 207;

Evans v. Drummond, 4 Esp. 89;

Hart v. Alexander, 7 Car. & P. 746; s. c. 2 M. & W. 484.

As to the second,

Bonar v. Macdonald, 3 H. of L. Cas. 225;

Small v. Currie, 4 De G. M. & G. 678;

Davies v. Stainback, 6 De G. M. & G. 680.

Daniel, Q.C. and Cotton for the defts.—The company contended that no arrangement between the partners could abrogate the company's rights under the original contract.

Bedford v. Deakin, 2 Bar. & Ald. 210.

E. F. Smith for Croskey and Wolff.

Cairns in reply.

THE VICE-CHANCELLOR.—It seems to me that it would be carrying the doctrine of *Oakley v. Pasheller* to an enormous extent, if I were to adopt the contention of the plt. That case determined that, where a man has two debtors, both of them liable to him, he might sue either the one or the other, if he found it convenient so to do—to press one for his debt, because he was a person competent to pay, and to give to the other time; and then it is said an agreement between those two debtors themselves would so affect him that he would be deprived of that advantage. That no doubt was a strong decision, and it was on this consideration, that where you have notice of an equity between two persons with whom you are concerned, you must not deal with those persons in such manner as to affect their rights. That case, however, does not seem to me to bear the slightest comparison with this one, which is simply this: Three persons, members of a firm, enter into a contract to do certain acts, resulting in heavy accounts between them and the European and American Steam Shipping Company. A year, or hardly a year, elapses, when one of the three partners of the firm who entered into the contract with the company retires and takes a covenant of indemnity from the other partners. So far, to a certain extent, he puts himself in the position of the retiring partner in *Oakley v. Pasheller*. But what is the consequence of his so doing, he being bound by his contract for three years? It is quite clear that his continuing partners were bound to go on with the contract, and all the liabilities of the contract were to be taken as subsisting; that is to say, as between him and the company, he could not retire from the obligations of the contract, and it is not contended by the plt.'s counsel that he could do so. What is the consequence of his retiring? He must release his copartners; and I adopt the views of counsel on the other side in that respect, that he must treat his partners *ex necessitate* as his agents for all legitimate purposes of the contract, but not beyond it; for he is bound by every act of theirs, provided it is done in conformity with the contract. The question of a new contract is a separate matter. If there is an adoption of a new debtor, you thereby release your co-contractor from his contract. The only question I have to consider is, what has been done by the company, they having entered into a new contract? First, there

having been disputes with the company and their contractors, we find a memorandum signed to settle them, by which it is expressly recited that there might be an arrangement of the differences with Messrs. Croskey; there is no idea of any new agreement being entered into. It is this: "That Messrs. Croskey and Co. should consent to the bonus being added to the capital on which 6 per cent. preferential dividend is to be ascertained." At first I was struck, on the opening of the case, with what appeared to me to be the fact, that there must have been a new contract. But I found, in substance, it was simply this, that the company having put one meaning upon it, and the Croskeys another, instead of going to litigation about it, they agreed to refer matters to arbitration. I think it would be carrying the doctrine of the case of *Oakley v. Pasheller* very far to say, even if the court could come to the conclusion, when the whole matter was before it, that the one party who made the error was in the right, and the other party was in the wrong, and that therefore the relation of principal and surety was constituted between the parties. In other words, that everything must be litigated, and you cannot make a concession to avoid litigation if it turns out that the thing is wrong. For instance, suppose the most trifling concession upon a contract of this character—that, instead of being a question of 80,000*l.*, it were one of 10,000*l.*, and the one side says, "I am entitled to this," and the other side says, "you are not;" and they agree, in order to avoid litigation, that it is to be taken as if the one were right and the other wrong, would the party who owed 5000*l.* or 6000*l.* be discharged because he gave up a point which might have been litigated, which the court might find to be in his favour? Looking at it thus, my opinion is, that Mr. Crawford was right, and that the company made no concession at all, and that was the meaning of the agreement. Mr. Crawford has sworn to what took place, and has put forward his report, which is dated the 9*th* April, the very day after the agreement in question was made, as helping his memory to show the intent and purpose of himself in the agreement. He says that Croskey was present and knew all about this report being made, and he never raised a dispute about it afterwards. The question is, what is the real meaning of the agreement? The first clause is, "that such sum or sums as the directors may think fit shall be laid out and expended on the said ships, so as to make the same fit for the purposes of the undertaking, after which an account shall be made up, including the first cost of the vessels." How had the vessels been bought? By an agreement with the old Screw Steam Shipping Company; that was the first cost of the vessels, and the report of the directors as to what their meaning was is this, "to which must be added the sum of 81,614*l.* 10*s.*, represented by the bonus of 2*l.* 7*s.* 6*d.* on the 34,364 ascertained shares, making the capital amount to 484,994*l.* 7*s.* 7*d.*, to the whole of which, under the agreement with the Messrs. Croskey and Co., the preferential dividend of 6 per cent. applies." That was the intention of the company. The whole of the facts should be looked into, and the court has a right to know the price paid for the ships, and how they were dealt with, partly by giving 9 per cent. dividend, and partly by paying down in cash. Therefore I come to the conclusion, that even if *Oakley v. Pasheller* is stretched to its utmost limits, it would be going too far to say that the continuing partners could not agree to waive their own opinion on a disputed point of law without thereby releasing the co-contractors to the original contract from all engagements. However, it does not appear to me that they have waived anything which they could successfully have maintained. The only remaining point is as to the arbitration. That is quite clear. The original agreement expressly pro-

vides that all matters in dispute shall be referred to arbitration, and that the award shall be made a rule of court. Without saying that they were obliged to refer to arbitration, it is certain they were discharging a duty in doing so under the agreement. But I am asked to hold, on the authority of *Oakley v. Pasheller*, that where three parties have contracted that they shall refer all matters in dispute to arbitration, and two have been left to the full management and control of the business under the contract, and refer a disputed question to arbitration, the whole is to be void because the one who retired has not joined in that arbitration. He handed over to them all the partnership affairs in which he was concerned, and they indemnified him, and this contract, from which he could not retire, and having done so, he must be taken to have passed to them the appointment of the arbitrator, if it was necessary to have one to settle disputes and differences arising out of the agreement. I think it would be monstrous to carry out the doctrine of the case of *Oakley v. Pasheller* so far as to say that such a transaction as the present would release the plt. from his contract; therefore, all that I can do is to dismiss the bill with costs. *Bill dismissed with costs.*

Solicitors: *Linklaters and Hackwood; Daves and Sons.*

May 6, 7 and 27, and June 3.

HODGSON v. EARL BECTIVE AND OTHERS.

Will—Construction—Devise of residuary real estate—Bequest of residuary personal estate—Contingent interests—Interim rents and profits of the realty—Interim profits of the personality.

A testator devised certain specific parts of his real estate to trustees for the benefit of his widow for life, at her death to his daughter for life, with divers limitations over, her eldest son being the only one in esse taking an interest thereunder, with a devise of all his residuary real estate to trustees upon the same uses, trusts, &c., as his specific real estates before devised:

Held, that such a residuary devise of realty did not carry with it the rents and profits not disposed of, but resulted to the benefit of testator's heir-at-law.

He also bequeathed two-thirds of his residuary personal estate upon trusts to invest in real estates to be settled to uses which were the same as those of his residuary real estate:

Held, that, as to such share of his residuary personal estate, there was no intestacy, and consequently the income should be accumulated and added to the corpus to be laid out in land as directed by the will. Recapitulation of the several cases bearing upon the two classes of residuary gifts.

This was a bill filed by the trustees of the will of the late Alderman Thompson, of London, against the Earl and Countess of Bective (the latter being the only child of the testator), and against her eldest son and heir-at-law of the testator; and it prayed generally that the rights and interests of the several persons claiming to be interested under the will in the trusts of the residuary real and personal estates of the testator, and the accumulations of the annual income thereof respectively, might be ascertained and declared.

William Thompson by his will, dated the 2nd March 1853, devised to trustees in fee his Kirkby Lonsdale and Mansergh estates, in Westmorland, to the use of his wife for life, with remainder to the use of the trustees during the life of his daughter the Countess of Bective, upon trust to pay the rents to the countess for her separate use without power of anticipation, with a proviso for the cesser of such estate for the countess's life, in the event of the Earl of Bective becoming Marquis of Headford, or of the countess, or the

earl, or any future husband of hers letting the mansion-house, with remainder to the use of the countess's sons born in the testator's lifetime (except the deft. Lord Kenlis, or the eldest son for the time being of the countess being heir or heir apparent of the earl) successively for life, with remainder to their first and other sons successively in tail male, with remainder to each of the countess's sons born after the testator's death (except an eldest son for the time being of the countess being heir or heir apparent of the earl) successively in tail male, with remainder to Lord Kenlis for life, with remainder to his first and other sons successively in tail male, with remainder to Lord Kenlis in tail male, with further remainders and with an ultimate remainder to the testator's right heirs. And the testator directed, that if any person or persons who would, if the now stating direction had not been inserted, have been entitled to the possession or the receipt of the rents and profits of the said real estates respectively as tenant for life or tenant in tail by purchase, should be under the age of twenty-one years, his trustees should during the minority or respective minorities of such person or persons receive the rents and profits and manage the estates, and after satisfying annual charges and paying such sum or sums as the trustees should think proper for the maintenance and education of such minor or minors, accumulate the residue by investing them, and stand possessed of the accumulations upon such trusts, &c., as the same would be held if the same were moneys arising from sales under the power of sale and exchange contained in the will. "And as to, for, and concerning all the real and residue of the testator's real estates and all his chattels real, whatsoever and wheresoever, not thereinbefore devised or bequeathed, he gave, devised and bequeathed the same unto the plt. and the other trustees (who had renounced or died), their heirs, executors and administrators, nevertheless to, for, and upon the uses, trusts, intents and purposes, and with, under and subject to the powers, provisos and declarations thereinbefore limited, expressed, directed and declared to take effect from and after the decease of the testator's said wife and his said daughter the deft. Amelia, Countess of Bective, or the sooner determination of the said estate so limited in use to his said trustees during the life of the countess as aforesaid of and concerning the said hereditaments and estates thereinbefore devised situate in the said township of Kirkby Lonsdale and Mansergh. But so nevertheless as not to increase or multiply charges under the powers of jointuring or charging with portions. Provided always, that no person who should take an estate tail by purchase in any chattels real respectively thereinbefore devised or bequeathed in and by the now stating will should be entitled to the absolute property therein respectively, unless and until he or she should attain the age of twenty-one years, or dying under that age, unless he or she should leave issue of his or her body inheritable to such entail living at his or her decease, or born in due time afterwards."

The testator bequeathed the residue of his personal estate and effects to his trustees in trust to convert, and the proceeds to be invested in the purchase of real estates, and to invest and pay the income in such manner as the rents of the real estates to be purchased would be payable. And he directed his trustees to invest two equal third parts of the residuary personal estate in the purchase of freehold or copyhold hereditaments in England or Wales (the counties of Westmoreland and North Lancashire and the West Riding of the county of York to be preferred, but without fettering or controlling the discretion of said trustees), and to settle the same to, for and upon the same uses, trusts, intents and purposes, and with, under and subject to the same powers, provisos, directions and declarations as were thereinbefore limited, ex-

pressed, directed and declared to take effect from and after the death of the testator's wife and the countess, or the sooner determination of the estate limited to the trustees during her life of the Kirkby Lonsdale and Mansergh estates. And the testator directed the remaining third part to be laid out in real estate to be settled upon Lord Kenlis for life, and his first and other sons in tail male, with remainder to uses declared in the same words as those of the real estate to be purchased with the other two-thirds.

By a codicil, dated the 18th Jan. 1854, the testator devised the Barnacre and Bond estate, in the county of Lancaster (for the purchase of which he had entered into a contract since completed), unto the trustees, their heirs and assigns, to, for and upon the uses, trusts, intents and purposes, and with and subject to the powers, provisos, directions and declarations in his said will limited, expressed, directed and declared to take effect from and after the decease of his said wife and his daughter the said Countess of Bective, or the sooner determination of the estate in his said will limited in use to his said trustees during the life of his daughter, of and concerning the said Kirkby Lonsdale and Mansergh estates.

The testator died on the 10th March 1854.

The deft. the Countess of Bective was the only child and sole heiress-at-law of the testator at the time of his death. The testator's widow, and the deft. the countess, or her husband in her right, were the only persons entitled to share any personal estate of the testator undisposed of by his will or codicil.

The widow died on the 7th Sept. 1861, having by her will, dated the 24th July 1856, appointed the defts. the Earl and Countess of Bective executor and executrix, who duly proved the will.

The countess had one son only at the date of the testator's will, and at the time of his death, viz. the deft. Lord Kenlis, also only son and heir apparent of Lord Bective, born in Feb. 1844, and who had never been married. The countess had not had any son born since the testator's death. She had five daughters all under age, and unmarried.

The testator was, at the time of his death, entitled to real estates of great value, besides those specifically devised by the will and codicil.

The fund was a clear fund. The residue of the testator's personal estate, after payment of debts, &c., was of great value. The trustees and executors had from time to time converted part of such residuary personal estate and invested the proceeds in the purchase of real estates, the legal estate in which was vested in the surviving trustees, but of which no settlement had been made. The greater part, however, of the personal estate remained unconverted. Maintenance money had been applied out of the interest of part of the personal estate, and the surplus of considerable value had been accumulated.

The cause now came on for a hearing.

Robt. Q. C. and Wickens, for the trustees, submitted the questions to the court.

The *Solicitor-General* (Palmer), *Hobhouse, Q. C.*, and *Vaughan Hawkins*, for the Earl and Countess of Bective, contended that until the birth of a younger son of the countess, or if there should be no such son during her life, or at any rate until the sooner determination (which had not yet taken place) of the estate by the testator's will limited in trust for her of and in the testator's estates in Kirkby Lonsdale and Mansergh, the annual income of the testator's residuary real estates and the estate devised by his codicil, and of two equal third parts of his residuary personal estate, was undisposed of by the will, and that the deft. the earl, in right of his wife, was entitled during such period to the accumulated income of the residuary real estate, and the estate devised by the codicil, and the accumulations thereof respectively since the testator's

death; and that also in right of his wife, and as personal representative of the widow, he was interested in the annual income of two equal third parts of the residuary personal estate, and also of such of the purchased real estates as represented purchases out of or on account of such two-thirds and the accumulations thereof respectively. As to the real estates they relied on:

Hopkins v. Hopkins, Cas. tem. Talbot, 44; a. c. 1 Atk. 581; 1 Ves. sen. 268;

more fully set out in Mr. Hargrave's note in Coke Lit. 271 b. A copy of the decree in this cause was obtained from the registrar's book.

Driffild v. Driffild, 1 Dow. & Cl. 268;

Wills v. Wills, 1 Dru. & War. 439.

As to the residuary personal estate:

Ackroyd v. Smithson, 1 Bro. C. C. 503.

The VICE-CHANCELLOR referred to

Phipps v. Akers, 3 Cl. & Fin. 702.

They also referred to

Skrimsher v. Northcote, 1 Swana. 566;

Humble v. Shore, 7 Hare, 248;

Wyndham v. Wyndham, 3 Bro. C. C. 58;

Fullerton v. Martin, 1 Drew. & Sm. 31; 1 L. T.

Rep. N. S. 531;

Shaw v. Cuntiffe, 4 Bro. C. C. 144;

Bullock v. Stones, 2 Ves. 521;

Re Drakeley's Estate, 19 Beav. 395.

Sir H. Cairns, Q.C., Gifford, Q.C. and Erskine, for Lord Kenlis, contended that a gift of personality carried with it all the intermediate produce. That rule was enunciated in *Green v. Ekins*, 2 Atk. 473, and was not shaken by *Hopkins v. Hopkins*. As to the realty, the point was governed by *Genery v. Fitzgerald*, Jac. 468. It could make no difference whether the personality were given in its entirety, or divided into parts, if the limitations were the same. They also referred to

Gibson v. Lord Montford, 1 Ves. 485;

Akers v. Phipps, 3 Cl. & F. 665;

Phipps v. Akers, 3 Cl. & F. 702;

Turton v. Lambard, 1 De G. F. & Jo. 495;

2 L. T. Rep. N. S. 38.

The VICE-CHANCELLOR required the *Solicitor-General's* reply only as to the question of personality.

The *Solicitor-General* replied on that point.

The VICE-CHANCELLOR said:—A question of very considerable importance as regarded the amount of the property involved has been raised in the discussion in this case, arising as it does with regard to two portions of the property, the residuary real estate of the testator, the late Mr. Alderman Thompson, and the residuary personal estate, or rather two-thirds of the residuary personal estate, given by the same will. The case has been argued with great ability, but the opinion which I had formed during the argument has not been changed by a further consideration of the facts of the case. On both points raised the authorities are in my opinion decisive. The first question which arises is this: there is a devise by the will of the testator of certain estates called his Kirkby Lonsdale and Mansergh estates to the trustees of his will on certain trusts conveying clearly, as far as they are concerned, the legal estate to those trustees during the life of his daughter the Countess of Bective, his only child, and upon certain trusts for her, with a certain possibility of that estate becoming determined, subject, I should mention, to the intermediate life-estate given to the testator's widow, but afterwards to the Countess of Bective, the widow being now dead; and after that there are a series of limitations of this description, namely, to the second and other sons of his daughter, exclusive of the deft., her eldest son, Lord Kenlis, and Lord Kenlis being alive, and no other son, those limitations which followed after the limitations of the life-interest would, if they stood alone, and in effect,

as regards the residuary bequest, which afterwards I shall have to consider, be taken as being the first gifts after that residuary devise. The first gifts under that residuary devise, would, of course, be executory devises. The residuary devise then is made in this form—he gives it thus: “As to, for, and concerning all the rest and residue of my real estates and all my chattels real, whatsoever and wheresoever, not hereinbefore devised or bequeathed, I give, devise and bequeath the same unto the plts. and the trustees, their heirs, executors and administrators, nevertheless, to, for, and upon the uses, trusts, intents and purposes, and with, under and subject to the powers, provisoes, directions and declarations hereinbefore limited, expressed, directed and declared to take effect from and after the decease of my said wife and my said daughter Amelia, Countess of Bective, or the sooner determination of the said estate so limited in use to my said trustees during the life of my said daughter as aforesaid, of and concerning my said hereditaments and estates hereinbefore devised situate in the said township of Kirkby Lonsdale and Mansergh. But, so, nevertheless, as not to increase or multiply charges under the powers of jointuring or charging with portions.” Therefore, in effect, you have, as to all this residuary real estate, a clear executory devise to the second and other sons, none of whom have yet come into *esse*, and any estate which Lord Kenlis may take must be expectant upon the time when that contingency will determine, and when it shall be ascertained what is the effect of this executory devise, there being in the interim no absolute disposition in words. Whether there is any disposition in point of construction, is the point I have to consider, there being none in words, of the intermediate rents and profits pending the suspense of that executory devise. Now, as regards this point, it appears to be quite settled by authority ever since the time of *Hopkins v. Hopkins*, in the simple case of an executory devise, where nothing is said of rents and profits, the devise of the estate will not carry the intermediate rents and profits; but they are undisposed of, and go to the heir-at-law of the testator, who in this case is the Countess of Bective, she being the testator's only child. The case of *Hopkins v. Hopkins* went even to the full extent, I may say, of this case, because there the devise was not merely of certain specified estates, but, as appears from the note taken from the registrar's book, *all other his estates and effects*, being an entire and complete devise as much as if there had been a gift of all his residuary real estates. In such a state of circumstances of course it is now too late (recognised as that case has been from that time down to the case of *Driffield v. Driffield*, in the H. of L., and *Wills v. Wills*, before Lord St. Leonards, in Ireland, and standing, as it does, as a case of the highest authority) to contend that unless there be something clearly leading to what the court considers judicially to imply a gift of the intermediate rents and profits, any such gift can take effect or can be supposed to be contained in the testator's will in favour of any persons, either the persons waiting until the executory devise shall take effect, or for the person who shall first come into *esse* when the executory devise has taken effect, or for all the persons who may be interested under the series of devises following that executory devise by way of accumulation of the rents and investment of the rents for the benefit of the persons who may so take in succession. All those persons are clearly excluded unless you can find that there is enough on the face of the will to lead to the inference that such a disposition of rents and profits was intended by the testator. As regards the devise of the estates, if this had been a simple devise of Blackacre, and not a residuary devise, I have every ingredient here that there was in *Hopkins v. Hopkins*. There is the fact of the

accumulation being directed in certain instances, and not being directed during the period that the executory devise should be in suspense; and there is in truth no distinction, as it appeared to me throughout, that can be drawn between *Hopkins v. Hopkins* and this case, unless it be in the circumstance that this is a devise of all the residue of the testator's real estate. Now, as regards the question of intermediate rents and profits not directly dealt with by the will, there have been two classes of cases. The leading case in one class (in fact it involved both, but it is the leading authority as regards the first branch of the case which I am about to allude to) was the case of *Stevens v. Stevens*, where it was held that if you first have a series of executory devises, which, according to *Hopkins v. Hopkins*, do not pass the intermediate rents but leave the intermediate rents undisposed of, and then that series of limitations is followed by a general residuary devise of all the testator's real estate—in cases of that description it has been held that the undisposed of rents and profits mentioned in the first part of the will pass to those who take beneficially the interest under the general residuary devise of all the testator's real estates. *Stevens v. Stevens* is a case of that kind. There is another class of cases of which *Stevens v. Stevens* is an instance, and *Driffield v. Driffield* another, and *Genery v. Fitzgerald*, a case more frequently referred to as settling that second class of cases, namely, where you find a general devise of all a testator's real and personal estate as one fund, intended to go obviously as one fund, and limited as such to pass over to a series of limitations which may be commenced by an executory devise, there it has been held that by a mixing of the two funds together, and it having been settled that the gift of the personal estate does carry, in all cases, the intermediate profits arising up to the time of the bequest operating in possession, the court has held itself at liberty to infer from that circumstance that which it would not against the heir infer from the mere gift of the estate—an intention that the whole should go in one course of devolution, and going in one course of devolution that the intermediate rents of the real estate should be held to pass in the same manner as the interest, dividends and produce of the personal estate passes for the purpose of the executory devise. The whole doctrine is so clearly laid down in *Genery v. Fitzgerald* in half-a-dozen sentences by Lord Eldon than one can scarcely do better than simply to refer to it. Mr. Shadwell, who was counsel in support of the appeal on behalf of the heir-at-law from the decision which had taken place at the Rolls, put the case thus, alluding to the first class of cases I have mentioned. He says this: “Where there is an executory devise of real estate and the intermediate rents and profits are not disposed of, they descend to the heir-at-law, the rule being different as to personality.” He then quotes the authorities. “On the other hand, if after an executory devise of a particular estate there is a general residuary clause, it will carry the intermediate rents and profits of the land first devised.” That is the class of cases to which I have referred. What Lord Eldon says is this: “The general principles are these: when personal estate is given to A. at twenty-one, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits; but when he mixes up real and personal estate in the same clause, the question must be whether he does not show an intention that one rule shall operate on both. Here the property was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together; there is not the weight of authority in favour of the proposition, that

real and personal estate are given in this case. That I apprehend is the rule which has been clearly settled." Now there are some dicta of Lord St. Leonards in the case of *Wills v. Wills*, which at first would seem to lead to the conclusion that the simple gift of the residuary real estate would carry intermediate rents and profits; but when we look at it a little more closely, I think that is not the meaning to be attributed to that learned judge. Speaking of *Gibson v. Lord Montford*, in which was also what I have described as a gift of a mixed fund, and where there was a great deal of discussion and consideration before Lord Hardwicke came finally to the conclusion that that would pass the intermediate rents and profits, Lord St. Leonards says: "Notwithstanding this, the decision was still considered not to be quite conclusive, for I find that in 1793 the heir-at-law received a sum of 1500*l.* for relinquishing all his right to the property and executing a deed in confirmation of the will. The point, however, now admits of no doubt; it is clearly settled by *Genery v. Fitzgerald* (that is the class of authorities he refers to), and *Glanville v. Glanville*, a case in 2 Meriv., a case exactly the same character, that a gift of 'the real and residue of my estate' does by force of the words include the intermediate rents, the rest and residue of my estate being there the estates real and personal, the two mixed. At first it might seem as if it was the residue of the estate, simply referring to real estate; but when you look to the authority, you find it is relating to a mixed fund, and a mixed fund only." I have looked in vain for any authority which has held that after the bequest of particular estates on a series of limitations, and finding a devise of the residue of the real estate given on the same uses and trusts, a different rule can be inferred to the disadvantage of the heir-at-law, and that it can be supposed that the intermediate rents and profits were intended to be applied in the manner that it is necessary for those who oppose the claim of the heiress-at-law in this case to contend. I apprehend, if you look at the nature of a residuary devise of real estate in itself, the answer is obvious, that the mere effect of its being a residuary devise of real estate could not operate in the manner described, because, up to the time of the Wills Act, the residuary devise of real estate was no more than a devise of *Blackacre*—it was the same thing, there was no difference between the two. A residuary devise of real estate was always held to be specific, because a person could only devise all the estates he had, that is, the actual property he possessed at the date of his will; and when, therefore, he seems to say, "I may have forgotten some particular estates which I have, and which I can dispose of, and those estates I intended to dispose of"—looking, therefore, to the reason of the thing, there would seem to be no reason why a simple residuary devise of real estate should have the operation contended for. The Wills Act could not, on this point of construction, make any difference, because the intended operation of it was to sweep in everything which the testator might have at the time of his decease, but not to alter that rule of construction which has been adopted in favour of the heir-at-law, namely, that you must find express words, or I should rather say, manifest intention—necessary implication it has been sometimes called—on the face of the whole will to exclude the heir from that benefit which the rule of law has conferred on him. The simple fact of a devise of residuary real estate seems to me clearly not to fall within any such rule, nor can I find any authority which would authorise me to say so. But in this case there remains to be considered the point of the personal estate. I may shortly state it thus—for the purpose of being laid out as to two-thirds of it in land, to be settled in effect to the same uses as are

prescribed with regard to the real estate. Now, it said—and the observation deserves attention—that would seem singular that, if you find it held that a gift of "all my real and personal estate, to certain intent uses and purposes," is to have the effect of manifesting the intention that the rents and profits are to pass exactly in the same manner as the income of the personal estate passes, and thereby deprive the heir-at-law of the benefit of the rule laid down in the case. I have referred to, it would seem singular to say that the circumstance of the testator dividing his will into two parts, and disposing of the real estate in one way and the personal estate in another, should lead to a different conclusion; but upon that I do not think the reasoning is sound. The whole of the doctrine which favours heirs-at-law is, to a considerable extent, artificial with respect to our peculiar doctrines in this country in favour of the heir's position; and the courts having considered that where a testator has distinctly and clearly in his will mixed up the whole and carried it over in one part he has thereby indicated an intention that they should go in the same way, does not apply to a case where he has carefully and deliberately isolated the two properties giving precise limitations as to the one in one portion of his will, and precise limitations as to the other in the other portion of his will. In this case the testator did not contemplate any such complete mixture at all, because the first operation was to divide the personal estate into three several parts, and give two-thirds to the one part and the one-third to the other, and there is nothing on the face of the will in the least which can justify me in saying that the testator has mixed up the whole into one mass. I think, therefore, it is impossible to exempt this case from the authority of the case of *Hopkins v. Hopkins*, and that I am bound to declare that as regards the interim rents and profits of the real estate they are undisposed of. Now as regards the personal estate, I consider the case to be equally concluded by the authorities. It seems to me that from the time of *Green v. Ekins*, followed as that case has been by numerous authorities, since the rule as to personal estate is exactly the opposite to the rule as to real estate, that when you give personal estate—I think Lord Hardwicke in one of the cases expresses it—you have given all its produce as long as the law allows it to be accumulated or to remain in suspense; such personal estate, and the whole of its produce, goes to the purpose indicated in the will; and that the gift of the personal estate, *ex vi termini*, carries with it all the intermediate profits which may arise in respect of the estate; and I see no difficulty whatever on the face of this will in applying that rule. The testator gives a his personal estate, and directs it to be laid out in the purchase of real estate to be settled to the same use. If *Hopkins v. Hopkins* had been good law as to the second branch of the case, it would have been an authority on the point in favour of the heir-at-law, the two happened to be different persons. But on this branch of the case it is clear that the latter part of the decision as to the personal estate directed in the will to be invested in the purchase of real estate was wrong. The decision there affected the will of the testator to a certain extent, by converting his personal estate into real estate, and then the confusion arose, which to me now seems singular, by which the will was held to operate for the purpose of converting the personal estate, not for the objects of the will, but for the object of a person not in the least in the contemplation of the testator, namely, the heir-at-law. The proposition now seems to us to be a truism. The heir-at-law claiming by default of disposition cannot claim anything under the disposition; that is now a truism, and the only mode in which the heir could possibly claim personal estate would be by a gift contained in his

favour in the will. If it is given by the will, he would of course be entitled; but the notion of the heir-at-law taking by intestacy any portion of the personal estate is of course a solecism when the proposition is reduced to its clear terms. That part of the case of *Hopkins v. Hopkins* can therefore present no authority with reference to the decision of the present case. In this case all I have is a direction that you are to take the whole personal estate, and, taking the whole personal estate, you are of course to take all its income; but your first process will be that you will divide it into one-third and two-thirds, and when you have done that, the two-thirds are just as much given, with all their produce, as the whole residue if it had been given in its entirety. That two-thirds, with all its produce, will have to be invested in the manner described, and the circumstance that you may have invested a part of it long before the executory limitations take effect, has nothing to do with it—it is still personal estate until the will has had the effect in operating upon it to hand it over in some other shape to some other persons interested, and being personal estate, the rents and profits of it are the produce of personal estate just as much as before the money become invested, and those words which I have referred to, which say that in the interim the produce shall be disposed of in the same manner as the rents and profits, carry the case no further. Those rents and profits are part of the produce of the personal estate as much after it was invested as it was part of the personal estate before it was invested, and will go in the same manner. *Scrimshire v. Northcote* was referred to as raising some difficulty, but in my opinion that case has not the slightest bearing on the present question. *Scrimshire v. Northcote* was one of the simplest cases that one can possibly conceive. A portion of residuary personal estate was given to the extent of 500*l.*, which, like the case of *Page v. Leapingwell* and that class of cases, was held to be a portion of the residuary estate. The gift of a portion of the residuary estate failing, of course it went to the next of kin. Is there anything here analogous to that? The shape of the argument seemed to me this, although I could scarcely follow it, viz.: you will invest these two-thirds in the purchase of real estate, and then when the rents of that real estate are found to be not applicable, because there is no person *esse* capable of taking an interest, there is a want of disposition, and there being a want of disposition it will go back in thirds; that is, one-third must go over to the person entitled to the third, and two-thirds are to be disposed of for the purposes of the will, and that would be altogether an absurd and inconsistent construction. That is not the mode in which the matter will operate in the least upon authority. If I give the whole of my personal estate to be invested on trusts similar to those, all the interim income will have to be applied as capital in doing that which the will directs the personal estate to be applied to, namely, being real estate, both the principal and interest will be so applied to the purchase of real estate. What difference can it make, if, instead of giving the whole, I say I give two-thirds of it? All you do is, you cut the whole fund into three parts, you take two-thirds and put it aside, and you deal with that two-thirds in the manner I have described. The circumstance of its being divided into two-thirds and one-third can have no effect in leading me to a contrary conclusion to that to which the authorities lead me if the whole property were given as one. The Solicitor-General also threw out an observation as to whether or not one could not infer from the nature and mode of the gift a sort of converse rule to *Genery v. Fitzgerald*. The answer is simply this: the rule in *Genery v. Fitzgerald* is applied in order to effectuate the supposed intention of the testator, which according to the general rule of *Hopkins v. Hopkins* is

not held to extend to the rents and profits. You have therefore ascertained the intention by inference, what is considered to be the necessary implication, in order to oust the right of the heir. What the Solicitor-General suggested was, that when there are what on the authorities are plain words of gift, I am to infer something to destroy that gift. I hold that there is a plain gift to be applied in a particular manner, and I can raise no inference against that plain gift from anything contained in the former limitations in the will, there being in truth nothing to lead to that inference which ought to destroy that gift so made as to chattels real. I do not know whether there are any chattels real, and therefore I have made no declaration as to any such.

June 3.—The question again came before the court as to the question of the chattels real, there having in fact been some, part of the testator's estate, and the V. C. directed the decree to be drawn up conformable to the above judgment, with a declaration that the interim income of the chattels real fell into the general residue of the personal estate.

Solicitors: *Lakes, Kendall and Lake; Farrer, Overy and Farrer.*

Common Law Courts.

COURT OF PROBATE.

Reported by DR. SWABEY, of Doctors'-commons.

Tuesday, May 12.

In the Goods of THE MARQUIS OF LANSDOWNE,
deceased.

Embodying in probate documents referred to in will—Practice.

A., by his will, bequeathed certain leaseholds to trustees upon the same trusts as declared in a certain indenture of settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The Court granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed describing and giving the date of the settlement.

The Marquis of Lansdowne died on the 31st Jan. 1863, leaving a will, dated the 10th June 1862, and two codicils. The will, among other things, bequeathed certain leasehold property to trustees, upon the same trusts as were declared in and by an indenture of settlement dated the 18th March 1834.

This indenture had been enrolled in the Court of Ch., and was of great length, the trusts alone taking up about 150 folios.

The only part of the leasehold property not included in the said indenture was part of the site of Lansdowne-house.

Dr. Spinks moved for probate of the will and codicils, without embodying in the probate the indenture of settlement. The ordinary practice of the registry might require the settlement to be engrossed, but the court may, according to circumstances, exercise a discretion in such matters.

Sir C. CRESSWELL.—I will grant this application. The whole subject of embodying in a probate documents referred to in the will is difficult and embarrassing. It was discussed in *Sheldon v. Sheldon*, 1 Rob. 81, by Dr. Lushington, who there says that he, when at the bar, communicated privately on the subject with Sir J. Nicholl, who stated his opinion that the embodying documents in a probate should not be required when the expense would be great. Dr. Lushington also, in that case, points out the distinction between cases in which documents may, on the application of the parties, and those in which they must, be set out in the probate. That distinction seems to me to apply to the present

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case. If the Marquis of Lansdowne had merely directed that the leaseholds should be disposed of according to the trusts declared in the indenture, the executors might have required a knowledge of those trusts in order to perform their duty, and it might, on that account, have been necessary that the trust-deed should be embodied in the probate; but he gives the leaseholds to trustees, and they must see the trusts duly executed. On an affidavit being filed giving a description and the date of the enrolled deed, probate may go as prayed.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABEY, of Doctors'-commons.

Tuesday, Feb. 24.

LAWRENCE v. LAWRENCE.

Dissolution of marriage—Order as to settled property—Notice of application.

After a decree nisi for dissolution of marriage the petitioner filed a petition praying for an order to vary a marriage-settlement. Before the decree was made absolute, the resp. was served abroad with a copy of the petition, and with a notice that after the decree was made absolute the court would be moved to make the order as to the settled property. The resp. had not appeared at any stage of the proceedings:

Held, that the court had power to vary the marriage-settlement in the absence of the resp.

This was the wife's petition for dissolution of marriage, on the ground of the husband's adultery and desertion. The resp. did not appear. On the 11th June 1862 the Judge Ordinary made a decree nisi, which was made absolute on the 27th Jan. 1863. After the decree nisi had been made, the petitioner filed a petition praying for an order as to settled property. A copy of this petition, before the decree was made absolute, was served upon the resp. in New Zealand, notice being at the same time given to him that after the decree had been made absolute the present application would be made.

Dr. Wambey (Dr. Deane, Q. C. and Browning with him) now moved, under the 5th section of 22 & 23 Vict. c. 61, to make such order.

CRESSWELL, J. O.—It appears that not only notice of the intended application was given to the resp., but that a copy of the petition praying for an order as to the settled property was also served on him. I think that is sufficient to enable me to entertain the application in the absence of the resp. If a petition had not been filed, I think that notice of the petitioner's intention to apply to the court would hardly have been sufficient. His Lordship then made an order as to the application of the settled property.

Tuesday, March 24.

DART v. DART.

Judicial separation by reason of wife's cruelty—Provision for wife.

The court has no jurisdiction to order that a husband who obtains a decree of judicial separation by reason of his wife's cruelty, should make any provision for her maintenance.

This was the husband's petition for judicial separation on the ground of cruelty. The resp. denied the cruelty, pleaded provocation, and counter charge of cruelty. The issues joined on these pleas were tried by a common jury, who found a verdict for the petitioner. The case had been adjourned for formal proof of the marriage.

Dr. Wambey now tendered the requisite proof and asked for decree of judicial separation.

G. C. Clarkson, for the resp., asked the court not to pronounce the decree except on condition that the petitioner should make some provision for the resp. In *White v. White*, 1 L. T. Rep. N. S. 197, the court held that where a judicial separation is decreed on the ground of the cruelty of the wife, she is not entitled to permanent alimony. I do not ask for alimony, but submit that the court has a discretionary power to grant the decree of judicial separation, and that under the circumstances it would be reasonable to make it only on condition of some provision being made for the wife. The wording of the 16th section of the Divorce Act does not make it imperative on the court to make a decree: "a sentence of judicial separation may be obtained either by husband or wife." I must admit that there is no precedent to show that the Ecclesiastical Court ever granted alimony in such a case; but there is nothing to show that they would have refused. If the court has the power, it is a reasonable case for its exercise. The wife brought her husband some property, and if no provision is made for her she will be thrown on the parish.

CRESSWELL, J. O.—I think I have no jurisdiction to grant alimony to a wife who is separated from her husband on the ground of her cruelty. I should not have been sorry to have found that I had jurisdiction, but I have not, and I do not agree with the maxim, *boni judicis est ampliari jurisdictionem*. I therefore decree a judicial separation, and make no order as to alimony.

SUTHERLAND (falsely called CROMIE) v. CROMIE.

Entitling affidavits—Practice.

Affidavits in a cause must be entitled strictly as the cause itself is entitled.

This was the woman's petition for a decree of nullity of marriage. The resp. was served with the citation and copy petition in North America; but the affidavit of service was entitled *Sutherland v. Cromie*.

Dr. Swabey, on moving for directions as to mode of trial, contended that the variance between the title of the affidavit and that of the cause, in consequence of the omission in the former of the words "falsely called Cromie," was immaterial, as being only a descriptive addition.

CRESSWELL, J. O. held the variance to be material, and rejected the affidavit.

Solicitor, Edwards.

SPILSBURY v. SPILSBURY.

Pleading—Amendment—Re-service—Practice.

Adultery as the ground of a petition should be distinctly alleged. It is not sufficient that the petition alleges information and belief of the petitioner that the resp. has committed adultery.

When leave to amend such a petition is granted, where there has been no appearance, it must be reserved.

This was the husband's petition for dissolution of marriage by reason of the wife's adultery. The petition contained no direct averment of adultery, but alleged that the petitioner was informed and believed that the resp. had committed adultery. The resp. had not appeared.

Dr. Spinks, for the petitioner, moved to amend the petition by charging adultery in distinct terms.

CRESSWELL, J. O.—The petition may be amended, but it must be re-served as amended.

Tuesday, April 21.

SPERING v. SPERING.

Suit for restitution—Agreement to live separate.

An agreement between husband and wife to live separate is no bar to a suit for restitution of conjugal rights.

This was the wife's petition for a decree of restitution of conjugal rights. The husband's answer alleged, among other matters, that he and his wife had agreed to live separate, and that he should make the wife an allowance; that in accordance with such agreement they had for several years lived separate, and that the allowance had been duly paid.

Demurrer.

Dr. Spinks.—An agreement to live separate is no answer to a suit for restitution of conjugal rights. [CRESWELL, J.O.—Has not a great authority held that it is?] *Hunt v. Hunt*, 5 L. T. Rep. N. S. 778, in which the present L. C. restrained by injunction the petitioner in a suit for restitution from proceeding here, differs from the present case, which is a bare agreement between husband and wife to live separate. In *Hunt v. Hunt* there was a formal separation deed, and the husband covenanted with trustees that he should not compel his wife to live with him.

Dr. Swabey, for the resp., said that, as he understood the L. C.'s judgment, the present answer could not be sustained. In *Hunt v. Hunt*, though he restrained the individual, the L. C. admitted that even a formal separation deed was in the Matrimonial Court no answer to a suit for restitution.

CRESWELL, J.O.—Then there will be judgment for the petitioner on the demurrer.

STONE v. STONE AND APPLETON.

Practice—Notice of application for new trial—Decree nisi.

When the petitioner in a suit for dissolution has obtained the verdict of a jury, it is no ground for refusing to make a decree nisi that notice of intended application for a new trial has been given.

This was the husband's petition for dissolution of marriage, on the ground of the wife's adultery, and for damages. The resp. denied the charge. The co-resp. did not appear.

The issue was tried before the Judge Ordinary by a special jury, who on the 28th March 1863 found that the resp. had committed adultery with the co-resp., and assessed the damages at 2000*l*.

The Queen's Advocate (*H. Lopes* with him) now moved for a decree nisi.

R. Searle for the resp.—Notice has been given that the resp. intends to apply for a new trial. Until that application has been disposed of, the decree nisi should not be pronounced. In *Lewis v. Lewis*, 4 L. T. Rep. N. S. 774, the court said that it doubted whether, after a decree nisi had been pronounced, it had power to dismiss the petition upon the application of the parties. If in this case a new trial should be granted, and the resp. should obtain a verdict, the decree nisi on the present verdict would still remain, and might cause embarrassment.

CRESWELL, J. O.—I think that in such a case the decree nisi would occasion no difficulty, as it would be done away with altogether. I pronounce a decree nisi, and condemn the co-resp. in costs.

Tuesday, April 28.

TAYLOR v. TAYLOR.

Mode of trial—Special jury.

Although in a suit for judicial separation the court has a discretion, under sects. 28 and 36 of the Divorce Act, to refuse a trial by jury, it will generally, at the request of either of the parties, direct a trial by jury, and an issue of cruelty is no ground for refusing a trial by jury; but if the wife asks for a special jury it does not follow as a matter of course that the costs of the special jury will be allowed as against the husband.

This was the wife's petition for judicial separation on the ground of cruelty. The resp. denied the cruelty.

Dr. Spinks, for the petitioner, moved for an order that the issue should be tried by a special jury.

Dr. Swabey, for the resp., asked the court to try the issue itself. It is not obligatory, except in cases for dissolution, that issues of fact should be tried by a jury. A jury is not always the best tribunal in cases of cruelty.

CRESWELL, J.O.—If one of the parties asks that questions of fact should be tried by a jury, I think, as a general rule, I ought to grant the application. Let the cause be tried by a special jury. It does not follow that the wife will be allowed the costs of the special jury.

DIGEST OF MARITIME LAW CASES (EXCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from vol. 8, p. 803.)

[N.B.—The LAW TIMES REPORTS, N.S., will give all the Maritime Law Cases decided from Michaelmas Term 1859. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1859. A Digest of the Salvage Cases during the same period is appearing in the LAW TIMES.]

SEIZURE.

(See "Capture," "Blockade," "Restitution," &c.)

2044. General right of British subjects to take possession of enemy's property coming into this country. Form of proceedings in case of such seizure or capture by non-commissioned captors. Question as to seizure of munitions of war or other property on land under special authority of the Crown. Domicil, as affecting national character of individual. Spoilation of papers. Observations by the court upon the cases of *The Hunter*, 1 Doda. 480; *The Two Brothers*, 1 C. Rob. 131; *The Rising Sun*, 2 C. Rob. 104; *The Polly*, 3 C. Rob. 351; *The Margate*, 1 C. Rob. 31; *The Adrina*, 1 C. Rob. 318; (*The Johanna Emilie*, or *The Johanna Emilia*, A.C., June 30, 1854, 1 E. & A. R. 319 to 330, and note to page 330.)

2045. Construction of order in council of March 29, 1854, exempting from capture or seizure Russian vessels sailing from a foreign to a British port before that date: (*The Argo*, A. C., Aug. 4 and 15, 1854, 1 E. & A. R. 375.)

2046. "Property claimed by British merchants cannot be restored if at the time of seizure the trade was contrary to British statute law." Cases cited: *The Waltham Packet*, 2 Rob. *The Erasmus Packet*, 4 Rob. 262; (*The Ocean Bride*, A. C., Oct. 18, 1854, *Shipping Gazette*.)

2047. In a claim for restitution of the cargo of a ship, seized for breach of blockade, the exclusive jurisdiction belongs to the Admiralty Prize Court. Costs and damages given, not from date of seizure, but from the date when the claim for restitution was made to the time when simple restitution was offered but declined. Restitution ought to have been accepted under reservation of the question as to damages and costs: (*The Elise Wilhelmine*, A. C., Nov. 25, 1854, 2 E. & A. R. 40.)

2048. Custom-house officer condemned in costs and damages to date when simple restitution was offered but declined, for wrongful seizure of a neutral vessel on the ground of alleged breach of blockade. There is a wide distinction between commissioned and non-commissioned captors. Cases quoted and founded on, and explained by the court: *The Adraen*, 3 Doda. 48. Absence of Danish seapass in question as to ship's neutrality: (*The Elise Wilhelmine*, A. C., Nov. 25, 1854, 2 E. & A. R. 31, approved of by the J. C. P. C. in *The Ossee*, March 29, 1855, 2 E. & A. R. 180.)

2049. Costs and damages given against captors where a ship was seized without reasonable ground for suspicion that she had committed a breach of the blockade of

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Re JAMES MOORE.

[BANK.]

Cumstodit; reversing the judgment of the Admiralty Court. *Minist* in Pratt's edition of *Story*, p. 25, where the word *possible* cause of capture is substituted for *probable* cause. General principles applicable to this point extracted from report made to King George III. in 1753 by the Judge of the Admiralty Court and the law officers of the Crown.

Cases cited, founded or commented upon, or explained by the court:

- The Pigeon* (not *Pigeon* as in No. 1533 heretofore), before the French Conseil des Prises in 1799 (*Traité des Prises Maritimes*, published in 1854).
- The Sédire* (an American case), 2 Cranch, 93;
- The George* (an American case), 1 Mason, 26.
- And the following English cases:
- The Maria Schroeder*, 3 Rob. 152;
- The Wilton*, 4 Rob. 79;
- The Wilton*, 6 Rob. 316;
- The Elizabeth*, 1 Acton, 18; opinion of Sir William Grant, as authority upon such subjects second only, if second, to Lord Stowell;
- The Acton*, 2 Doda, 81, ship and cargo destroyed by capture. Restitution, with costs and damages, decreed by Sir Wm. Scott, in April 1815, to an American claimant.
- The Rufen*, decided by Sir William Scott (Lord Stowell) in 1815.
- The Cape Nicola Mole* case. Restitution decreed where captured ships had been condemned by the Court of Admiralty at St. Domingo, to which, by mistake, no warrant had been issued to give it a prize jurisdiction; captors indemnified at the public expense:
- The Huldak*, 3 Rob. 236; *The Driver*, 5 Rob. 145.
- The Denny*, 1 Rob. 52. What justifies a condemnation for breach of blockade.
- The Elise Wilhelmine*, 2 E. & A. Rep. 31. See No. 2048 heretofore.
- The Acton*, 1 Rob. 93, above cited, a case where it was a question of some nicety whether a blockade was or was not in existence.
- The Lema*, Edw. 190, where a capture was made from a neutral under a mistaken construction of a British Order in Council.
- The John*, 3 Doda, 336, where the prize was lost by unavoidable accident. Restitution of an American vessel, captured by a British cruiser, in ignorance that war between Great Britain and America had ceased.
- The Keston*, 1 Rob. 153. Act of mischief done by the King's officers through ignorance. They must look to their own Government for reimbursement.
- The Zookemane*, 3 Rob. 153, a case relative to contraband goods, and delay of the Crown to exercise right of seizure.
- The St. Juan Nepomuceno*, 1 Hagg. Adm. 265. Value of slaves liberated by the Crown, sought to be recovered.
- Linde v. Rodney*, 2 Doug. 614; and *The Haabet*, 6 Rob. 54. Also the American cases:
- The Elsworth*, 2 Wheaton, 357, as to distinction between a subordinate officer and the admiral; and
- The Livsey*, 1 Gullison, 247, as to the comparative application of the rule regarding costs and damages to public and private ships.
- Rules as to carrying sea-passes and other ship's papers (3 E. & A. R. 180). Observations as to the great interest which captors have in increasing the number of prizes, and the wholesome restraint to be put upon them: (3 E. & A. R. 185.)
- (*The Octave*, J. C. P. C., Feb. 23 and March 26, 1855, 2 E. & A. R. 179 to 184.)
2050. Role of Admiralty Court as to arrest of the cargo, when a ship is seized: (*The Caroline*, A. C., June 20, 1855. *Shipping Gazette*.)
2051. Liability of United States Government for act of military officer in command at Puebla seizing as enemy's property a quantity of tobacco, restitution of which was afterwards decreed to the proprietor. "It would be unreasonable to require of military officers the experience or legal skill necessary to be applied to the ascertainment of legal rights." Principles regulating rights of seizure: (American case: *J. Alzira Port v. The United States*, U. S. Court of Claims, 9 M. L. R., May 12, 1856.)
- 2061 a. Insurance was effected on money expended for provisions for the use of 350 Chinese emigrants or coolies and advances of freight, from Mexico to Havana, "warranted free from capture and seizure." On the high seas the coolies assaulted the captain and crew and took possession of the ship, which was thereby totally lost. Held, that the underwriters were by the above warranty exempted from liability for the loss. Cases and authorities cited in argument by Wilde for plaintiff and Blackburn for defendant: *Poult v. Hyde*, 5 E. & B. 607; *Arnould on Insurance*, 832; *Emerigon on Insurance*, c. 12, s. 18; *Goss v. Withers*, 2 Burr. 680, 686; *Dean v. Hornby*, 2 E. & B. 180; and *Naylor v. Palmer* (Kilmorrey v. Sheppard, 28 L. J. 147, Q. B., 32 L. T. Rep. 312; 5 Jur. M.S. 963; the Law Digest to June 1859, 261, to Dec. 1859, 836.)
- 2061 b. A ship was chartered for a voyage from the west coast of Africa, and a cargo was shipped on the charterers'

account on the outward voyage to Ambriz and Loanda and insured. The ship was seized at Ambriz by a British cruiser on 21st Sept. 1854, for being, as alleged, engaged in the slave trade, and taken to St. Helena, where sentence of forfeiture and condemnation was pronounced by the Vice-Admiralty Court on 20th Nov. 1854. Notice of abandonment was given without delay to the underwriters in London on 13th Dec. 1854, before intelligence of the condemnation had been received. An appeal was made to the Judicial Committee of the Privy Council, and on 3rd Feb. 1855 the judgment of the Vice-Admiralty Court was reversed, and the cargo ordered to be restored to the charterer. He could not have obtained possession of any of his goods until Dec. 1855, and then only by giving security for the invoice cost of the goods, having reference to their depreciated value. A small part of the goods being perishable had been sold, and the residue had remained as a security for the heavy penalties awarded by the Vice-Admiralty Court: Held, that the seizure of the ship being a wrongful act which could not be regarded as sanctioned by Government, the underwriters were liable. "If it had been a lawful taking by a British cruiser the underwriters would not have been liable." *Sundry cases cited by the court, and by Wilde for the plt. and Bovill for def.* Decree for a total loss: (*Zuazo v. Janson*, Q. B., June 16, 1859; 33 L. T. Rep. 270; 28 L. J. 337.)

(To be continued.)

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Sept. 5 and 6.

(Before Mr. Commissioner FANE.)

Re JAMES MOORE, an arranging Debtor.

Deed of composition—Protection to debtor after notice of filing, &c., of deed—Application for leave to issue execution—Sect. 198 of the Bankruptcy Act 1861.

A., an arranging debtor, executed a deed of composition under sect. 192 of the Bankruptcy Act 1861, with a declaration that it was intended to be within the provisions of the Act, and for the benefit of all the creditors:

Held, a valid deed.

This was an application on behalf of an execution-creditor under sect. 198 of the Bankruptcy Act 1861, for leave to issue execution, notwithstanding the filing and registration of a deed of composition. After the execution of such a deed the Act provides: "After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy."

Dalton appeared for the execution-creditor, and *Dowse* for the arranging debtor.

The debtor was an upholsterer, at Portsmouth, and Mr. Phair, the execution-creditor, who had commenced his action before the execution of the deed, proceeded to judgment notwithstanding notice of the registration; but the judge of the County Court, on giving judgment for the plt., stayed execution, which was not to issue without leave of the Court of Bankruptcy. From the statement made to the court, it appeared that in July last Phair, the execution-creditor, issued process in the Hampshire County Court, at Portsmouth, against Moore, and on the 26th Aug. obtained judgment for the amount of his debt and costs. In the meantime, however, on the 18th Aug., the debtor registered a deed under the 192nd section of the Bankruptcy Act 1861, and obtained protection. The deed was as follows:—

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"This indenture, made the seventh day of August one thousand eight hundred and sixty-three between James Moore of Southsea, in the parish of Portsea, in the county of Southampton, auctioneer, cabinet-maker and upholsterer, hereinafter called the said debtor of the first part, Jane Moore of Southsea aforesaid, widow, hereinafter called the said surety of the second part, and the several persons hereinafter called the said creditors of the third part, whereas the said debtor being indebted to the several persons, creditors of the said debtor, parties hereto of the third part, and being unable to discharge in full the several debts owing by him to them respectively, has proposed and agreed to pay his said creditors a composition of ten shillings in the pound, in full satisfaction and discharge of their several and respective debts, the same to be secured by the covenant of the said surety, and by the assignment hereinafter contained, and to be payable in manner following, that is to say, the sum of five shillings in the pound on or before the seventh day of November next, and a further and final sum of five shillings in the pound at the expiration of six calendar months from the date hereof; and whereas the several persons creditors of the said debtor, parties hereto of the third part, have agreed to accept such composition so secured as aforesaid in full satisfaction and discharge of their several and respective debts; and whereas the said debtor has requested the said Jane Moore to become security for the due payment of the herebefore mentioned composition on the said several debts which she, the said surety, has agreed to do, on having the assignment of the stock-in-trade, goods, chattels and effects of the said debtor upon the trusts hereinafter declared, expressed and contained. Now this indenture witnesseth that, in consideration of the premises and of the covenant hereinafter contained on the part of the said surety, he, the said debtor, doth hereby bargain, sell, assign, transfer and set over unto the said surety, her executors, administrators and assigns, all and singular his stock-in-trade, goods, chattels and effects whatsoever and wheresoever, to have and to hold the same unto the said surety, her executors, administrators and assigns absolutely. And this indenture further witnesseth, that in consideration of the assignment herebefore made and contained, and in consideration of the covenants on the part of the several persons parties hereto, creditors of the said debtor of the third part hereinafter contained, she, the said surety, at the request of the said debtor, testified by his execution thereof, doth hereby for herself, her heirs, executors and administrators, covenant with the said several persons parties hereto, creditors of the said debtor of the third part, and with each of them, their and each of their executors, administrators and assigns, that she, the said surety, shall and will pay, or cause to be paid to them, their executors or administrators, the said composition of 10s. in the pound, on the amount of their several and respective debts, in manner and by the instalments herebefore mentioned, or accept their several bills of exchange for the several amounts of such instalments payable in manner herebefore mentioned. Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that if a majority in number representing three-fourths in value of the creditors of the said debtor, whose debts shall amount to 10l. and upwards, shall not by themselves or their respective attorneys or agents duly authorised and appointed for that purpose, execute, assent to, or approve of these presents within the space of twenty-eight days to be computed from the date hereof, or such further time as a commissioner of the Court of Bankruptcy shall order or direct, or if the said debtor shall be adjudicated a bankrupt within that time, then and in either of the said cases this present indenture, and every covenant, clause and agreement herein contained, shall

cease, determine and be utterly void. And this indenture witnesseth, that in consideration of the assignment and of the covenant hereinafter contained, made and entered into by the said surety for payment of the composition on the said several debts in the manner herebefore provided, they the said several creditors, parties hereto of the third part, do and each and every of them doth, by these presents, absolutely release, acquit and discharge the said debtor, his heirs, executors and administrators, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sum and sums of money, accounts, reckonings, judgments, executions, claims and demands whatsoever, at law and in equity, which they and each and every of them now have or hath, or which each and every of them, their heirs, executors, or administrators, respectively hereafter may, can, or ought to have, claim or demand against him the said debtor, his heirs, executors, administrators, or assigns. And it is hereby declared that these presents are intended to be, and are a deed within the meaning of the Bankruptcy Act 1861, and made expressly for and to be applied for and towards the benefit of the whole of the creditors of the said debtor. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

"JAMES MOORE [L.S.]
"JANE MOORE [L.S.]

"Signed, sealed and delivered by the within-named James Moore and Jane Moore, in the presence of

"J. H. PAFFARD, Solicitor, Portsea.

"Signed, sealed and delivered by the within-named Jane Moore, in the presence of

"J. H. PAFFARD, Solicitor, Portsea."

Dalton, who applied under the 198th section for leave to issue execution, said, the deed was simply between the debtor and his surety, and the several creditors who were parties to and executed that deed, and that it did not provide for the payment of the debts of such of the creditors as did not come in. He read and commented upon the covenant between the surety and the several persons parties to the deed and creditors of the debtor. There was no covenant on the part of the surety that she would pay such a composition as was proposed at the end of six months to the creditors who did not come in, but there was a general declaration at the end of the deed that it was intended to be a deed within the meaning of the Bankruptcy Act 1861, and made expressly for and to be applied towards the benefit of the whole of the creditors of such debtor.

Dowse submitted that the deed was really within the provisions of the Act of Parliament, and was for the benefit of all the creditors of the debtor. There could not be stronger words used to show that that was the case than the concluding declaration in the deed. The learned counsel referred to and commented upon that portion of the deed.

His Honour intimated that he would carefully peruse the deed, and give his judgment on a future day.

Sept. 8.—Mr. Commissioner FANE said:—I have carefully read over the deed dated the 7th Aug. 1863, made between Mr. James Moore of the first part, Jane Moore of the second part, and the creditors of James Moore of the third part, the object of which is to carry out a proposed arrangement between James Moore and his creditors. The deed has been deposited at the office of the chief registrar of the Court of Bankruptcy, and has been duly registered, and is, in my opinion, a proper deed to carry out its object, which is to effect a convenient arrangement between the debtor and his creditors. A creditor who has obtained a judgment in some County Court against the debtor James Moore, desires to enforce that judgment, and thus obtain 20s.

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in the pound on his debt, to the prejudice of the other creditors. I will not give him the smallest assistance in his object. He must come in with the other creditors.

The application was accordingly refused.

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COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

May 2, 4 and 5.

REG. at the prosecution of ANDREW COWAN v. JAMES RYND.

Mandamus—Compensation—Lands not taken, but injuriously affected—Accommodation works.

The arbitrator appointed by the Board of Works having declined to give compensation to a party whose lands, though not taken, were injuriously affected by the works of a railway company, and having also refused to provide accommodation works, the court granted a mandamus to him to compel him to entertain the questions.

This was a motion on behalf of Mr. Rynd to discharge a conditional order obtained by Mr. Cowan, that a mandamus should issue directed to John Rynd, Esq., the arbitrator duly appointed in that behalf by the Commissioners of Public Works in Ireland, in the matter of the Belfast, Holywood and Bangor Railway, commanding him, as such arbitrator, to inquire into and adjudicate upon the value of a certain piece or parcel of land, situate in the parish of Holywood, barony of Castlereagh, and county of Down, of the said Andrew Cowan, required for the purposes of the said railway, and specified in the maps and plans deposited with the Commissioners of Public Works by the said company, and included within the limits of derivation appearing on said map or plans, and the interest of the said Andrew Cowan in said land, and to assess the purchase-money to be paid for said land, and also inquire into and adjudicate upon, and assess the compensation to be paid to the said Andrew Cowan, by reason of any lands of the said Andrew Cowan being injuriously affected by the works of the said company, and to inquire and determine what works should be made and maintained by the said company for the accommodation of the lands of the said Andrew Cowan adjoining the said railway, and duly to make his award in relation to the premises pursuant to the statutes in that behalf. It becomes unnecessary to report the facts relating to the first branch of the *mandamus*, as the company disclaimed all intention of taking any portion of Mr. Cowan's lands, and that disclaimer was taken down upon the order made by the court. As to the other points, the affidavit of Mr. Cowan stated that the Holywood and Bangor Railway Company were incorporated by an Act passed in the 23 & 24 Vict., entitled the Belfast, Holywood and Bangor Railway Act 1860, by which Act the said company were empowered to make a railway from the Holywood branch of the Belfast and County Down Railway in the county of Down, to Bangor, in the same county; that deponent was then and still is the owner, under a lease for lives renewable for ever, of a piece of ground at Holywood, described in the original lease thereof as bounded by the sea on the north, by the road leading to the shore on the south, by a wall surrounding a disused meeting-house after mentioned on the east, and by a field called William McCormick's field on the west; that by the maps and plans deposited by the company with the Commissioners of Public

Works, the centre line of railway intended to be made by the company was shown to extend opposite deponent's said piece of land through Belfast Lough, or the slob-land thereof, and within ten feet of deponent's boundary; that it was also shown on the maps and plans that the said railway was intended to be constructed at this place upon an embankment of the height of twenty-three feet, and breadth of 110 feet, and which was of the height of twenty-five feet at the place where it was represented as passing said piece of land; that shortly after his appointment, the arbitrator published the usual notice in pursuance of the Railways (Ireland) Act 1851, requiring all persons claiming to have any right to or interest in the lands required for the purpose of the railway, or to have compensation for any lands injuriously affected by the execution of the works of the company, or to have any works made by the company for the accommodation of lands adjoining the railway, to deliver to him, on or before a day named, a statement in writing of the nature of such claim; that deponent's solicitor furnished such a statement to the arbitrator; that the arbitrator held his first meeting to hear the claims of parties interested in the lands required by the company at Belfast on the 7th July last; that the portion of land of which deponent was owner was most valuable building ground, as it was situated in close proximity to the town of Holywood in the county of Down, which is a rising marine watering-place situate four miles from Belfast, on the shore of Belfast Lough; that said portion of land, before the railway was projected, and before it was contemplated to form said embankment, and to construct said railway across, and past, and touching same, was one of the most eligible building sites in or near Holywood, and was worth, as building land, at least 5s. per foot frontage to the sea, having a free access to the sea, on which it abutted with an uninterrupted sea-view, and with most valuable easements appurtenant or connected therewith, inasmuch as deponent and his predecessors in estate were in the habit of bringing coals and lime, or other cargo, and did bring same over the strand up to said portion of land, and had the benefit both of a free and uninterrupted sea-view from said portion of land to and across Belfast Lough, and also of a free access thereto and egress therefrom by boats, inasmuch as the sea at high tide flowed up to the edge thereof; that deponent's name did not appear on the maps, plans, schedules, or estimates deposited by the company; that the solicitor attended before the arbitrator on the 7th July, prepared to prove the value of the ground, and the injury deponent would sustain in respect of the said portion of land, which would be injuriously affected by the execution of the company's works, as well in respect of the destruction which the said intended embankment would cause to said portion of land by cutting off same, as it would do, from the uninterrupted sea-view it then enjoyed, as also by depriving the said piece of land, and the occupiers thereof, or any one building thereon, from the right of free and uninterrupted access and approach to and from the sea by boats, and other conveyances, and on foot, appurtenant to and enjoyed with said portion of land, and also by completely destroying the said portion of land as building ground, inasmuch as the said intended embankment would fence in and overlook same, and render same almost totally valueless for building purposes, for which alone it was valuable. The affidavit then stated that, at the meeting, the arbitrator referred to the company's engineer, who stated that it was not intended by the company, nor was it necessary, to touch on or to take the deponent's small portion of land, whereupon the arbitrator refused to insert deponent's name. The affidavit also stated, as one of the injuries done to deponent, the darkening

(a) From the *Irish Jurist*, by permission.

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by the proposed embankment of the ancient and accustomed light, and obstructing the approach of the ancient and accustomed light to the said portion of land. It appeared from another affidavit that the only building upon the said portion of land was the old meeting-house already mentioned, which was altogether out of repair, and was now only used as a store, and was distant about 96 feet from the centre of the line of railway. The upper windows of this building would overlook the proposed embankment; the view from the lower windows was already shut out by the wall of the meeting-house itself. Another injury which it was suggested would be done by the proposed embankment, was the interference with the now-existing facilities for bathing off the land. The final award of the arbitrator had not been published when the conditional order for the *mandamus* had been obtained, but it had been published before the present motion.

Brewster, Q.C. (with him *Dames*) for the deft. Mr. Rynd.—With respect to the question whether a *mandamus* should issue to the arbitrator to assess compensation to be paid for lands of the prosecutor injuriously affected by the works of the company, although not taken or touched by the works, Mr. Cowan, in his affidavit, relies on five grounds—first, on the deprivation of light and air; secondly, on the loss of the prospect which his houses would have when built; thirdly, that his premises will be overlooked by the railway; fourthly, that at present he enjoys an opportunity of bathing off the brink of his land, and that in that respect his rights will be affected; fifthly, that his right of access to the shore and the water for purposes of boating and navigation, as for bringing lime and coal to the land, will be interfered with. His claim is made under two general Railway Acts, the 8 & 9 Vict. c. 18, s. 68, and the 8 & 9 Vict. c. 20, s. 6. To what extent would an action have lain at common law, if there had been no statute? To what extent could Mr. Cowan have claimed against the party making the railway not on his land, in reference to injuries done to his land? First, as to the deprivation of light, air, and prospect, it is a fixed principle of common law that the only right a man has as annexed to his land in respect of light, is a right to light at the highest level; he has no right to lateral light—in fact, he has no right to light as annexed to land merely as distinguished from light annexed to a house:

Martin v. Goble, 1 Campb. 322;

Harbidge v. Warwick, 3 Ex. 352;

Roberts v. Macord, 1 M. & Rob. 230;

Attorney-General at the relation of Gray's Inn Society v. Doughty, 2 Ves. 453;

Morris v. Lessees of Lord Berkeley, 2 Ves. sen. 452;

Fishmongers' Company v. East India Company, 1 Dick. 163;

Attorney-General v. Nichols, 16 Ves. 338.

The law will not regard a diminution of the value of property by reason of a building on adjacent land overlooking land, or intercepting the prospect. If so, it is not matter for compensation under the Act of Parliament:

Squire v. Campbell, 1 M. & Cr. 459;

Re W. C. Penny and the South-Eastern Railway Company, 7 E. & Bl. 660;

Chandler v. Thompson, 3 Campb. 80.

Then with respect to the deprivation of the right of bathing, that is not the subject of an action at all. In reference to compensation under these statutes, that is open to a different objection; it is not a right incident to or connected with the land—the injury is merely a personal one, and no personal injuries gives a right to compensation under these statutes. Every subject of the Queen has a right to bathe in that place, although not to go on Mr. Cowan's land for the purpose. With

respect to the facilities of access to the sea for the purpose of boating, bringing lime and coal, and such matters, Mr. Cowan has no more right in the sea than any other of the Queen's subjects, and there being, therefore, no individual right, there is no such individual injury to him as would entitle him to bring an action:

Hubert v. Groves, 1 Esp. 148;

King v. The Directors of the London Dock Company, 12 East, 429;

Reg. v. The London Dock Company, 5 Ad. & Ell. 163;

Wilkes v. Hungerford Market, 2 Bing. N. C. 281;

Reg. v. The Eastern Counties Railway Company, 2 Q. B. 347;

James Glover v. North Staffordshire Railway Company, 16 Q. B. 212;

Caledonian Railway Company v. Ogilvie, 2 Mac. H. of L. 229;

The New River Company (apps.) Johnson (resp.), 6 Jur. N. S. 374; a. c. 29 L. J., N. S., 93, M. C.;

Moore v. Great Southern and Western Railway Company, 10 Ir. C. L. R. 46;

Tuohey v. Great Southern and Western Railway Company, 10 Ir. C. L. R. 98;

Chamberlain v. The West End of London and Crystal Palace Railway Company, 2 B. & Sm. 605; 8 L. T. Rep. N. S. 149.

Harrison, Q.C. for the prosecutor.—The 68th section of stat. 8 & 9 Vict. c. 18, and the 6th section of stat. 8 & 9 Vict. c. 20, apply in this case. The lands of the prosecutor, though not taken, are injuriously affected, and he is entitled to compensation. It is not necessary that the lands should be taken. *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 B. & Sm. 605, shows that a liberal construction is to be given to the statutes. At first the courts thought that a party was not entitled to any remedy, although his land was injuriously affected, if it was not taken:

The London and North-Western Railway Company v. Smith, 1 MacN. & G. 216.

But this was corrected in

The East and West India Docks and Birmingham Junction Railway Company v. Gadke, 3 MacN. & G. 155;

The London and North-Western Railway Company v. Bradley, 3 MacN. & G. 336;

The Caledonian Railway Company v. Ogilvie, 3 Macq. H. of L. 229.

In those cases it is laid down that it is immaterial whether any portion of the land is taken or not. None of the cases cited on the other side are precisely analogous to the present. Then as to the loss of light, air, and prospect, there is a great difference between a man buying a plot of ground with houses about it, where he buys knowing the risk he runs of being built out, and the case of a man buying a strip of ground by the sea-shore, where he cannot expect that his view will ever be interfered with. Although we admit that there is no authority to show that a party has a right, so far as land is concerned, to have lateral air coming in to him, still this is not a case of a neighbouring owner at all, but the case of a building under an Act of Parliament, and it is for the court to say whether the Act of Parliament was not intended to include cases of the kind within the words "injuriously affected." In principle, the erection of this embankment has set up a nuisance, and the cases showing that a man cannot on his own land set up a nuisance to his neighbour will apply here. The existence of the embankment makes the place less healthful:

Gale on Easements, 290;

Breadst v. The Imperial Gas Company, 7 De G. M. & G. 436; s. c. on appeal, 7 H. of L. 600.

[LEFROY, C. J.—To ground an action for the taking away of light and air, must it not appear that there has been an appropriation of the light and air? It is not sufficient merely to lay a claim by reason of the light and air of heaven having been intercepted.] As to the loss of prospect, it must be admitted that, in an ordinary case, the loss of a view is not a subject of compensation; but the observation made as to the loss of light and air will also apply here. This is a nuisance, legalised to some extent, but which ought to be paid for. With respect to bathing, Mr. Cowan is peculiarly injured as the owner of this land; he alone, and his licensees, could come here to bathe; the public have no general right to come on his land for that purpose: (*Blundell v. Catterall*, 5 B. & Ald. 268.) In one sense, the right of bathing is only a personal right; but it is a right which can only be exercised by the owner of the land. The bathing is an easement attached to his estate, which no one can exercise without his permission. Then, as to the facilities afforded by the sea for bringing lime and coal to the prosecutor's land, the fact of a road being made less convenient, or the access to land being interfered with, has been held to be a fit subject for compensation:

Moore v. The Great Southern and Western Railway Company (*ubi supra*);

Wilks v. The Hungerford Market Company, 2 Bing. N. C. 281;

Ross v. Groves, 5 M. & G. 613.

Dames in reply.—The case of *Chamberlain v. The West End of London and Crystal Palace Railway Company* is opposed to the reasoning in the cases of *The Caledonian Railway Company v. Ogilvie*, and of *Rez v. The London Dock Company*. Sect. 17 of the statute 8 & 9 Vict. c. 20, sufficiently protects the rights of the public to access to the sea.

Iverson v. Moore, 1 Ld. Raym. 486;

Webb v. Bird, 10 C. B., N. S., 268;

Jones v. Tapping, 11 C. B., N. S., 283.

are important on the question as to the right to light and air. [FITZGERALD, J.—The last cited case has been questioned in a case which has gone to the H. of L.] With respect to accommodation works, the prosecutor has lapsed his time; but if the *mandamus* goes for compensation, the arbitrator can provide accommodation works, and we will raise no objection to any traverse.

LEFROY, C. J.—In this case we are all of opinion to grant the order, making absolute the conditional order, that a *mandamus* should issue. It will be accompanied by an order that the parties will draw up to their mutual satisfaction in the way which was suggested originally by the court, and to which the parties have acceded with respect to the difficulty as to title. We are of opinion to grant the *mandamus*, upon the ground generally that the lands of the party have been injuriously affected. We do not think it necessary to confine this right to cases where their lands are taken, but we say that it belongs to a party in virtue of any injury to his own particular lands where those lands have been injuriously affected. Several grounds have been stated here on which the party insists as showing that his land has been injuriously affected; but we do not think it necessary to decide upon any of those grounds, but rather more proper to leave them generally to be considered more solemnly and particularly, except as to the two instances in which it appears to us that the party's lands have been injuriously affected in respect to his own particular right of enjoying those lands. Any other grounds will be open to him to insist upon before the arbitrator; and also as to the question of accommodation, what accommodation will be required, will be also

open for the arbitrator. I have purposely expressed these views in this short manner; if I have omitted any point that is important my brethren will show it.

O'BRIEN, J.—I concur in the views expressed by my Lord Chief Justice. I do not decide as to some of those topics which were urged. It will be time enough to raise them if the party be not satisfied with the award of the arbitrator. One important matter is this: It appears that the arbitrator acted under a misconception, namely, that because this gentleman's lands were not taken he was not to get compensation. That is a misconception.

HAYES, J.—I concur; and certainly this discussion will not be without its good effect. It will establish this principle—that in this country, according to our act, though the lands of an individual be not taken, yet injuries done to them may be investigated, for which compensation may be granted to him. It was a cardinal error below to consider that this was not so; and, perhaps, our expression of our views will go far to enable the arbitrator to make reparation. Then as to what this compensation should be given for, it appears to me and to the rest of the court, that so far as this gentleman is affected by the building up of the rampart, excluding him from access to the sea, he is entitled to compensation whether that access is for the purpose of bathing or of navigation. There are two or three other questions as to light, air, and prospect. Well, now, there has been some suggestion in the course of this discussion on principles which have not yet been very well considered, and which it will be better not to discuss at present, leaving them to be settled in the future. It appears to me that in some of the cases as to prospect, it has been laid down that an individual is not entitled to compensation for loss of prospect. I apprehend that the cases go on this, not that where a person has been injured in his most valuable property he is not to be compensated, but upon another principle, namely, that the person who has injured him did it in the lawful exercise of his territorial rights, and therefore, it being so done for that reason, the party affected shall not be compensated. But a question arises to be considered, whether that principle can be held to apply in cases of this kind, for here the company has put itself in the position of the Crown, which held the shore, along which the embankment runs, only as a royal trustee; and it is not competent for the Crown to build a wall round a person's property; and that being so, it may be a question whether the grantees of the Crown could do it, or whether it was not an implied condition attached to that grant, that compensation should be given if such an act was done.

FITZGERALD, J.—I would desire to advert to the extent to which I concur in the decision of the court. The question as to compensation for land taken is now out of the case, and we leave it to the counsel to settle the order in that respect. The court allows the *mandamus*, leaving it to Mr. Harrison and Mr. Dames to settle the precise terms of the order; and the question now is, whether a party is not entitled to compensation if his lands are injuriously affected, although the lands are not taken, and the railway does not touch his lands; and we are all of opinion that the party is entitled to compensation for that injury, and that leads me to the last question—what is an injuriously affecting of lands. I am willing, for the purpose of this motion, but only for that, to adopt the argument that the test is, whether an action would have lain for the injury irrespective of the statute. Adopting that test for the purpose of this motion it appears to me that in respect of the injuries Nos. 4 and 5, that Mr. Brewster stated an action would lie for those injuries, not in respect of the deprivation of a public right, but for the interference with the party's private right to get over his own land to the sea for

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those lawful purposes which were stated. It appears to me that an action would have lain for those injuries, and, therefore, that the party would be entitled to compensation for them. There are many injuries in respect of which a party cannot obtain redress; and I offer no opinion as to the questions with respect to the loss of light, air, and prospect; and as to the being overlooked; in fact, I offer no opinion save as to Nos. 4 and 5. Then the order being made absolute for the *mandamus*, and it appearing that the arbitrator below declined to entertain the case on the part of the prosecutor because the lands were not taken, it follows that the *mandamus* must go to direct the arbitrator to settle the accommodation works as well as to assess compensation, both because the arbitrator declined to give accommodation works on this same ground of the party's land not being taken; and also because those works may go to reduce almost to nothing the damages to which the prosecutor may be entitled.

Order absolute.

COURT OF COMMON BENCH.

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

Saturday, Jan. 17.

COYNE v. BRADY.

Cruelty to animals—Construction of the 12 & 13 Vict. c. 92—Judicial respect for English decisions.

The penalties imposed by the 3rd section of the 12 & 13 Vict. c. 92, on persons assisting at a cockfight, are restricted to combats of that character conducted in a place particularly kept for this purpose.

This was a case stated by the justices of the peace for the county of Dublin, assembled at Tallaght, for the opinion of the court, pursuant to 20 & 21 Vict. c. 43, s. 2. A summons in writing having been preferred by Thomas F. Brady, secretary to the Society for the Prevention of Cruelty to Animals, and John Harvey, a head constable, under sects. 2 and 3 of 12 & 13 Vict. c. 92, John Coyne was on the 3rd June 1861 convicted by the said justices assembled at Tallaght, of having been unlawfully engaged in cockfighting on the morning of the 15th May 1861, upon the lands of Glassamucky and Kiltipper, contrary to the provisions of the 12 & 13 Vict. c. 92. The fact of the cockfight was proved to the satisfaction of the magistrates, and it was further proved that John Coyne was seen to win and lose money in betting, but there was no evidence of his having handled the birds. Within three days John Coyne applied in writing under 20 & 21 Vict. c. 43, s. 2, requiring the justices to state a case for the opinion of the Superior Court.

J. A. Curran, jun. for the app. — This conviction is bad. There are two several grounds on which it will be sought to sustain it, and I shall deal with them in order. To encourage, aid, or assist at the fighting of cocks is not an offence within the intent or meaning of the 12 & 13 Vict. c. 92, s. 3. There must be more than this. It must be done in a place so kept or used for the purpose of fighting cocks as to subject the keeper of it to the penalty imposed in the foregoing clause of the same section. That section enacts, "That every person who shall keep, or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid; provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed

to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence." The words "as aforesaid" mean in the way or manner aforesaid, i. e. in a place kept for fighting or baiting animals. This construction will make the section intelligible. It will be unintelligible otherwise. We cannot suppose the Legislature to have intended that the principals should be exempted from the penalty they were imposing on those who should encourage, aid, or assist. It is accessories they mean—accessories to the offence specified in the previous part of the same section. But the magistrates conceived that a fresh offence was created in this latter clause, and they convicted the app., who was only proved to have won and lost money by betting. This view of the meaning of the section will be confirmed by referring to the 5 & 6 Will. 4, c. 59, s. 3, for which the present enactment was substituted. The latter statute clearly affected those only who frequented such places as I have mentioned. Indeed, there is an express decision on the point. In *Clarke v. Hague*, 2 L. T. Rep. N. S. 85; 8 Cox Crim. Cas. 324, the full Court of Q. B. in England held that, to constitute an offence within the meaning of the 12 & 13 Vict. c. 92, s. 3, the assisting at the fighting or baiting must occur at a place kept for the purposes of fighting or baiting; and Blackburn, J., in giving the judgment of the court, reasons upon the statute as I have done. But, secondly, supposing this point decided in the app.'s favour, the magistrates will seek to shelter themselves under the more comprehensive verbiage of the 2nd section. In their case they rely on this section, and profess to have convicted Coyne under and by virtue of it. It will be argued for them, that this appeal differs from *Clarke v. Hague*, because express notice was taken of the 2nd section, and the magistrates availed themselves of it. That section enacts, "That if any person shall, from and after the passing of this Act, cruelly beat, ill-treat, over-drive, abuse, or torture, or cause, or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l.*" I submit that it is impossible for them thus to unite the two sections in order to support their own Act. But that section meant no such thing as to include a case of this kind; it applies only to cruelties caused by the immediate act of man, it does not contemplate cases where the animals themselves are the agents. If the fighting of cocks was meant to have been included in the 2nd section, then the concluding clause of the 3rd section becomes utterly useless; and this, whether it bear my construction or the construction which will be contended for upon the other side. Read the words "as aforesaid" to mean, "whether of domestic or wild nature," and they will only have repeated an offence previously created; or read them to mean in the precise manner in this section specified, and the Legislature will be punishing in a particular instance that to which, under the more general words of the 2nd section, they had already attached a penalty, and that penalty the same penalty.

Barry, Q.C. (with him Purcell) for the resps. — The words "as aforesaid" mean animals "whether of domestic or wild nature," &c. The distinction taken by the English Court of Q. B., in *Clark v. Hague*, between principals and accessories is fanciful. If this distinction be insisted on, then the cock is the principal in a cockfight, and all the people present, whether they handle the birds or encourage them by shouting, or bet upon them, are accessories. [MONAHAN, C. J.—Did you ever hear of a cock being indicted?] I insist upon

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it that there is no difference between a man handling the birds, and a man encouraging them to fight, such as that which exists between principals and accessories; the latter is no more an accessory than the former. If the app.'s construction of this section be supported, it follows that I may carry a bear with me about the country for the purposes of baiting or fighting with impunity, provided I keep him moving from spot to spot, and never repeat the offence in the same place. In *Clarke v. Hague* the resps. were unrepresented: the app. argued the case, and there was no appearance on the other side. But further, supposing this section be construed in the app.'s favour, the 2nd section will sustain this conviction. [Reads 2nd section.] *Clarke v. Hague* is also reported in 29 L. J., N. S., 105, and there the following observations with which Blackburn, J. closed his judgment, are given: "We do not wish to be understood as confirming the opinion that no penalty can be incurred unless the animals are baited in a place (to use the phrase in the case) regularly kept for that purpose; on this we pronounce no decision, as the justices have not found the fact to raise this point, nor asked us any questions upon it, the only question submitted to us being whether it is an offence to assist at cockfighting elsewhere than in such place; we think it is not, and therefore our judgment must be for the app."

MONAHAN, C. J.—The public are little able to appreciate the grounds of doubt in the breasts of different judges; and it naturally tends to bring the administration of the law into contempt, when they see before them conflicting interpretations of the same statute. This is a thing to be avoided where it can be. Every opinion of every judge is fallible; and this is a principle to be recognised in the expression of a decision. Did this 3rd section of the 12 & 13 Vict. c. 92, come before us for the first time, we must have taken a different view of it; we must have acquiesced in the resp.'s reading and supported this conviction. But it has not so come; and this express decision of an English court we do not feel ourselves at liberty to overrule. Accordingly, this conviction must be quashed, but without costs. *Conviction quashed.*

EXCHEQUER CHAMBER.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

Wednesday, April 29.

(Before LEFROY, C.J., MONAHAN, C.J., and BALL, CHRISTIAN, O'BRIEN, HAYES and FITZGERALD, JJ.)

SPAIGHT v. BEYERLIEB.

Charter-party—Authority of shipbroker to bind shipowner—General and particular agency.

A shipbroker, employed by a shipowner, has no such general authority as will enable him to charter the ship for a voyage in a manner contrary to instructions expressly given to him by the owner, although such instructions have not been communicated to the parties dealing with him.

This was an appeal, on the part of the plt., against an order of the Court of Ex., bearing date the 13th May 1863, whereby that court disallowed the cases shown against a conditional order dated the 22nd Jan. 1862, granting a new trial. The action was brought upon a charter-party, and the summons and plaint complained that the deft. was indebted to the plt. in the sum of 200*l.* for that, whereas by a certain memorandum of charter-party or contract of affreightment made by and between the said plt. of the one part and the said deft. of the other part, and bearing date the 12th Feb. 1861, it was mutually agreed that the ship or vessel of the

deft. called the *Eos*, therein described as of the measurement of 295 tons, or thereabouts, and then in London, being light, staunch and strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Miramichi; that is to say, the port of Miramichi, in North America, or as near thereto as she might safely get, and should there load, from the factors of the plt., a full and complete cargo of dry deal, with deal ends, or sawn laths or lathwood, for broken stowage, not exceeding what she could reasonably stow and carry over and above tackle, apparel, provisions and furniture, and, being so loaded, should therewith proceed to Limerick, or as near thereto as she might safely get, and should deliver the same, being paid the freight in said memorandum of agreement specified (that is to say), for timbers, per load of 50 customs calliper measure, deals and battens, per Petersburg standard hundred, 4*l.* 15*s.*; deal ends per the same measure, 3*l.* 3*s.* 4*d.*; lathwood, per fathom of four feet, 1*l.* 11*s.* 8*d.*; the cargo to be brought and taken from alongside, according to the custom of the port of loading and discharging, ship to proceed with deck load at full freight, if allowed to take it (the act of God, the Queen's enemies, fire, and every other damage or accident of the sea, rivers and navigation, of whatever nature and kind soever, during the said voyage always excepted), one-third of the freight to be paid in cash on the arrival at the port of discharge, and the remainder on the right delivery of the cargo by good and approved bills, payable in London at four months following; thirty running days are to be allowed the merchant (if the ship should not be sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lying days at 5*l.* per day; and it was thereby further agreed that the penalty for nonperformance of the said agreement should be 600*l.*, the said vessel to be reported by Mullock, or their agents, at the port of discharge; and it was further agreed that sufficient cash for ship's use should be advanced at the port of loading on customary terms of interest, insurance and commission; and the plt. said that they were always ready, and tendered and offered to perform their part of the said agreement in all respects, and that they called upon and requested the said deft. to perform the same, but although the said ship or vessel of the said deft. was not prevented from proceeding on said voyage with convenient speed, or from sailing from the port of London to Miramichi, and then performing said voyage, by the act of God, the Queen's enemies, or damage or accidents of the sea, river, or navigation of any sort, he, the said deft., though thereunto requested as aforesaid, did not cause his said ship or vessel to proceed with convenient speed upon the said voyage to Miramichi, or as near thereto as the said ship or vessel could safely get, and to carry out said agreement with convenient speed as aforesaid, but on the contrary thereof the deft., instead of proceeding on said voyage from London to Miramichi with convenient speed, proceeded on another and different intermediate voyage, to wit, on a voyage from London to Newcastle-on-Tyne in England, and from thence to Lisbon, and was thereby guilty of great and unnecessary delay; and the plt. averred in fact that if the said ship or vessel had so proceeded according to the said charter-party, she would have arrived in Miramichi in sufficient time to load her cargo, and to arrive with the same in Limerick aforesaid in the month of June 1861, whereas, in truth and in fact, and by reason of the said deviation from the said direct voyage to Miramichi, because of the said intermediate voyage, and the delay arising therefrom, the said ship or vessel did not arrive at Limerick aforesaid until the 18th Aug. in the year aforesaid, and by reason of the said delay, and of the lateness of the arrival of the said ship or vessel at

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Limerick aforesaid, and which delay and lateness of arrival were not caused by the act of God, the Queen's enemies, or fire, or any damage of seas, rivers, or navigation, the said *plts.* were deprived of certain gains and profits which would have accrued to them from the same voyage, had same been duly carried out according to the said agreement, and in conformity with the said agreement and contract of affreightment; and the *plts.* in fact said that, by the said delay, they were deprived of the benefit of a market of the said deals, which they otherwise would have had, if the said voyage was carried out by deft. in performance of, and in conformity with, the said memorandum of agreement or contract; and the *plts.* said that, by reason of the breach of the said agreement, they had sustained damage to the extent of 200*l.* To this deft. pleaded—first, that he did not contract or agree with the *plts.* in manner and form as in plaint alleged; secondly, that he, in all respects, kept, performed, and fulfilled said contract and agreement, and did cause his said ship to proceed with all convenient speed from said port of London to said port of Miramichi, and did carry out said agreement with convenient speed according to the terms of the charter-party, or contract of affreightment made by and between *plts.* and defts.; thirdly, that the contract or charter-party of affreightment made by and between the *plts.* and defts., in reference to the said ship or vessel, and in reference to the sailing thereof, and the bringing home a cargo for *plts.* by the said vessel from Miramichi aforesaid, and which bore date the 13th Feb. 1861, and not the 12th Feb. 1861, as in said plaint erroneously stated, contained and was subject to certain terms and provisions not set forth in plaint, and, among others, to the term or provision following, that is to say, "That deft. should be at liberty to take a cargo out or on the way for owner's benefit;" and deft. said that under and by virtue of said term or provision, and, in pursuance thereof, he did, as he lawfully might, take and carry out cargo from Newcastle to Lisbon, as in plaint stated, and deft. averred that same, and no other, was the alleged breach of contract in plaint complained of, and that deft., in all respects, kept, performed and fulfilled said contract and agreement according to the true intent and meaning thereof, and the terms and provisions thereof, as in his defence above set forth. The issues were, first, whether the deft. contracted and agreed with the *plts.* in manner and form as in the plaint alleged; secondly, whether the deft. kept, performed and fulfilled his contract and agreement with *plts.* in all respects; thirdly, whether the deft. caused the ship in said plaint mentioned to proceed with all convenient speed from the port of London to the port of Miramichi, and whether he carried out his agreement with *plts.* with convenient speed according to the terms of the charter-party and contract of affreightment made by and between *plts.* and defts.; fourthly, whether the third defence was true in substance and in fact. On the trial before Deasy, B., on the 17th Jan. 1862, it was proved that a Mr. Mullock, a shipbroker in Limerick, acting for the Messrs. Spaight, on the 12th Feb. 1861, forwarded to the Messrs. Pilkington, shipbrokers in London, a charter-party, in the terms set out in the summons and plaint for signature by the deft. This charter-party was received back by Mr. Mullock on the 14th Feb., signed as follows:—"By authority of Captain Beyerlieb, p. p. Pilkington Brothers. J. A. Taleen." J. A. Taleen was a clerk in the employment of Pilkington Brothers, the brokers employed by Captain Beyerlieb, to hire out the ship *Eos*. The charter-party was subsequently signed by one of the *plts.* The case stated by counsel on behalf of the deft. was, that the Messrs. Pilkington, or Taleen on their behalf, had exceeded their authority by executing the charter-party of the

12th Feb.; that a document lodged with them, but not shown to the *plts.*, had stipulated for leave to take an outward cargo; that the Messrs. Pilkington had delivered to deft. a charter-party dated the 13th Feb., containing such stipulation, but which was not signed by the *plts.*, and that deft. was ignorant, until he arrived at the port of Limerick, of the charter-party of the 12th Feb., having always acted on the supposition that the stipulation as to taking out cargo was contained in the charter under which he was sailing. The deft. was examined in support of the case thus stated. He proved that he had employed Messrs. Pilkington, the shipbrokers, as his agents, and had placed his ship in their hands, and he produced the documents referred to in the statement of his counsel, but these documents were objected to and rejected by the learned judge as not having been communicated to the *plts.*; and a verdict was found for the *plts.* for 110*l.* damages, but liberty was reserved to the deft. to move to change this into a verdict for deft., or to enter a nonsuit in case he ought to have received the evidence showing Pilkington's or Taleen's authority to have been limited, or to have ruled that the contract alleged by the *plts.* had not been proved, or that the third defence had been sustained. On the 22nd Jan. 1862 a conditional order was made by the Court of Ex. that the verdict had for the *plts.* should be set aside, and a nonsuit or verdict for the *plt.* entered instead thereof, or that the verdict for the *plts.* should be set aside, and a new trial had, on the ground of the misdirection of the learned judge, and of the reception of the evidence that ought to have been rejected at the trial. In the ensuing Easter Term the Court of Ex. made absolute this conditional order, so far as it directed that the verdict had for the *plt.* should be set aside, and that a new trial should be had. Against this order the present appeal was brought, on the grounds, first, that the charter-party of the 12th Feb. was duly executed by Messrs. Pilkington and Co., through their clerk, Mr. Taleen, and that the said Pilkingtons, as agents and shipbrokers for the deft., had full power and authority to sign the said charter-party, and thereby to enter into a contract with the *plts.* binding on deft.; secondly, that the authority so vested in the said Messrs. Pilkington could not be controlled by any second letter of instructions given by the deft. to the said Messrs. Pilkington, or their clerk, Mr. Taleen, and not in any way communicated to the *plts.*, or to their agent.

Armstrong, Serjt. and *Jellet* for the *plts.*—The only question in the case is whether the Messrs. Pilkington had authority to bind the deft. by the charter-party of the 12th Feb. We say they had implied and full authority to do so. A merchant is not bound to inquire into a broker's authority. The position of the broker is sufficient to entitle the merchant to act upon it. We contend that a man may be made a general agent in two ways, either by being employed to do business of a particular kind for a person, or by his being employed in a particular instance within the scope of his known trade and business. We say then that it being clearly within the business of shipbrokers to charter, and that being the business by which they live, and that being the only business which they had with the ship, that very fact constitutes the shipbroker a general agent, and that as between the person who employs him and the world no private instructions can affect the broker's general authority. When the employment is within the scope of his known business he becomes a general agent, though employed only in one single transaction:

Russell on Factors, 75;

Nickson v. Broken, 10 Mod. 110;

Chitty on Contracts, 199, 5th ed., referring to *Smethurst v. Taylor*, 12 M. & W. 545;

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Pothier on Obligations, translated by Evans, ss. 79 to 83;

Story on Agency, ss. 58, 59.

The authority to charter the ship having been in the first instance given by the deft. to the Messrs. Pilkington, everything necessary to the chartering flowed from that; then the question is, were they general or special agents? We say they were general agents:

Smith v. Maguire, 3 H. & N. 554;

Alexander v. Gibson, 2 Campb. 555;

Rinquist v. Ditchell, 3 Esp. 64.

[FITZGERALD, J.—According to your view, a broker getting a ship to charter to Miramichi might send her to the East Indies.] So we say.

Pickering v. Bask, 15 East, 38; and

Whitehead v. Tuckett, 15 East, 400,

also bear out our view. [HAYES, J.—Your contention is that an authority of the kind cannot be qualified, although it may be revoked. MONAHAN, C. J.—And does a man who employs a broker to hire out a ship, authorise him also to sign the charter-party on his behalf, or must it not be signed by the captain?] *David v. Adams*, Amb. 495. According to the best text-writers a broker in respect of contracts entered into within the scope of his usual business is a general agent:

Smith, Merc. Law, p. 184;

Chitty on Contracts, p. 199;

Russell on Factors, *ubi sup.*

[CHRISTIAN, J.—But is it the ordinary employment of a shipbroker to charter a ship to any part of the globe that he may think proper, or only to charter her to the place which he is instructed to charter her for? LEVMOY, C. J.—One can understand that brokers should have authority as incident to their employment to direct that ships should stop at particular places or deviate in a particular way, but not that they should have power to act in the very teeth of instructions and directions given to them.]

John E. Walske, Q.C. and *James Murphy* for the deft.—The difficulty on the other side is to show that a shipbroker is a general agent. We deny that he is so. The very definition of a shipbroker negatives the existence of any such authority in him as has been contended for:

Story on Agency, s. 31;

Pitts v. Beckett, 13 M. & W. 743, 747; and *Parke*, B.'s observation at p. 750.

If a house agent is employed to let a house for the summer, and he lets it for forty years, can it be said that the owner is bound by the contract? *The East India Company v. Hensley*, 1 Esp. 111, shows what the authority of a broker really is. The authority of a ship's master is an *à fortiori* case, and yet even that authority is limited:

Sickens v. Irving, 7 C. B., N. S., 165;

Grant v. Norway, 10 C. B. 665.

The broker's authority is to make the contract which his employer directs him to make, and no other. [CHRISTIAN, J.—Your proposition is, that the authority of the agent is only to bring the parties together, and that for everything else the party dealing with him must look to his authority.] Yes. *Brady v. Todd*, 9 C. B., N. S., 592, on the doctrine of warranty, is important here. The present contract is not even one signed by the captain. Wherever a contract is on the face of it signed by procuration, that is notice to the person taking it that it is signed under a specific authority which he is bound to look to.

Attwood v. Mannings, 7 B. & Cr. 278;

Alexander v. Mackenzie, 6 C. B. 766;

Sney v. Elliott, 12 C. B., N. S., 273;

Dunn's Civil Law, book 1, tit. 17, gives the nature of a broker's authority.

Armstrong, Serjt. in reply.—The other side forget that the Messrs. Pilkington were agents for the

deft. alone, and not for both parties; and Story and Domat both speak of a broker who is an agent for both parties. *Pitts v. Beckett* has no reference to the present case. [MONAHAN, C. J.—Is there any case to show that a person employing a shipbroker authorises him to enter into a contract, and does not rather employ him for the purpose of looking out for another person who will enter into a contract?] *Rinquist v. Ditchell* is a settled authority in our favour. There is no case showing that the words "by authority of" have the same meaning and the same technical force as the words "per pro." The words "by authority" are rather a declaration on the face of the document that the party using them has a general authority.

LEFROY, C.J.—We are all of opinion that the judgment of the Court of Ex. ought to be affirmed, and we were all of opinion from the beginning that the notion that a broker has such a general authority as to enable him to act contrary to special directions, that a broker employed to charter a ship has such a general authority as that, is quite unfounded.

MONAHAN, C.J.—And I may add that I am of opinion that, even if he had in ordinary cases such a general authority, yet when he enters into a contract in terms "by procuration"—and I consider that the words "by authority" amount to the same thing—then if it should turn out that, though he might have had the general authority in ordinary cases, in this particular case he had a specific authority only, the party dealing with him ought to have looked to the specific authority. *Appeal dismissed with costs.*

Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Saturday, June 13.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L. J., TURNER, L. J., SIR J. T. COLERIDGE, SIR L. PEEL and Sir J. W. COLVILLE.)

ABRAHAM v. ABRAHAM.

Indian law—Hindoo law—Rights of members of an undivided family—Status of convert to Christianity in India.

Upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion; or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion. At his death the heirs, according to the Hindoo law, take all the property he had at the time of his conversion; and the law of his new religion governs the devolution of his subsequent acquisitions.

Under the regulations of the law of India, which direct the decision in such a case to be according to equity and good conscience, the courts have adopted the practice of referring that decision to the usages of the class to which the convert has attached himself, and of the family to which he may have belonged.

This was an appeal from the Sudder Dewanny Adawlut at Madras.

The appa. were Charlotte Abraham, the widow, and Daniel Vincent Abraham, the only surviving child of Matthew Abraham, deceased. The resp. was Francis Abraham, the only brother of the late Matthew Abraham. Matthew Abraham and Francis Abraham were by birth Hindoos of pure native blood, their ancestors for several generations having embraced Christianity, and being known as native Christians. In

1820 Matthew, the elder brother, married Charlotte Abraham, who was also a Christian, and belonging to the class of East Indians. Matthew, in 1823, established a shop at Bellary. In 1827 he contracted to supply Government with liquor for the troops, and established a distillery for the purpose. He entered into partnership with his brother and Mr. Richardson in the shop business, and after dissolution of that partnership in 1837, he continued in partnership with his brother, on the same terms, until his death. Francis Abraham, the brother, also married an East Indian, some time before Matthew's death. In 1842 Matthew died, leaving a widow and children. Francis, after Matthew's death, carried on the shop business, and also obtained a renewal of the Abkarry contract.

In 1854 the widow and children of Matthew instituted a suit against Francis, the brother, for an account of their property, estimated at 300,000 rupees. They alleged that all the capital was supplied by Matthew, and that Francis was a manager or clerk, at a salary. The resp. Francis answered that both he and his brothers were brothers of an undivided native Hindoo family, jointly labouring together for their common welfare, borrowing money on their joint bonds and security, and therefore that he had an equal right to all the capital, and was now head of the family, and that the fact of their having been Christians did not make them subject to the English law; but they were still subject to the Hindoo law and no other.

The plts., by their replication, submitted that the fact of the family having been Christian for several generations put an end to the Hindoo law as affecting them; but even if it did apply, then, according to that law, the usages of the family were the rule of guidance, and in that case the defd. had no right to any portion of the property of the late Matthew Abraham.

The Civil Court of Bellary nonsuited the plts. on a technical point, but the Court of Sudder Adawlut, on appeal, set aside the nonsuit, and held that the usages of the family were the guide, and evidence ought to be received on that point; and after evidence received, the court consulted the pundits as to the rule of the Hindoo law, and ultimately held the Hindoo law applicable, and that the property fell to be divided into two equal shares, and dismissed the suit with costs against the plts., who now appealed.

The *Solicitor-General* (Palmer) and *Melville* for the apps.

Sir H. Cairns, Q.C. and Mackeson for the resps.

Cur. adv. vult.

LORD KINGSDOWN.—The first and most important question raised by this appeal is, by what law the rights of these parties ought to be determined. In considering the question it is material in the first place to observe what was the real point in issue in the cause. Laying out of consideration the objection raised by the answer, that the plt. Charlotte Abraham, as widow, could not sue jointly with the other plts. her sons, an objection of misjoinder of parties which in their Lordships' opinion was properly answered by the replication, and properly disposed of by the Sudder Court, when the case was first brought before it by appeal, the true question at issue in this case is, not who was the heir of the late Matthew Abraham, but, whether he and the resp. formed an undivided family, in the sense which those words bear in the Hindoo law with reference to the acquisition, improvement, enjoyment, disposition and devolution of property. It is a question of parcenership, and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligation growing out of the *status* of an undivided family, is the creature of, and must be governed by, the Hindoo law. Considering the case, then, with

reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by a severance which the Hindoo law recognises and creates. Their Lordships, therefore, are of opinion that, upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he had renounced his old religion; or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion. It appears indeed, both from the pleadings and from the points before referred to, that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The custom and usages of families are alone appealed to, with a reference also to the usages of this particular family, a reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity. The conclusion at which their Lordships have arrived on this point appears also to be supported by authority, for the opinion expressed as to the Hindoo law by the judge of the civil court at Bellary seems to coincide entirely with the opinions of pundits reported in the second volume, pages 131 and 132, of Macnaghten's "Hindoo Law." It is there stated that, on the death of an apostate from the Hindoo faith, his heirs according to Hindoo law will take all the property which he had at the time of his conversion, and the marginal note states that his subsequently acquired property would be governed as to its devolution by the law of his new religion. The religion embraced in that case was the Mahomedan, which regulates the devolution of property. The pundits therefore, in their reply, naturally connected religion with the rules of descent of property as an adjunct, but the important point which they declare is the separation of the convert from the binding force of Hindoo law as to his subsequent acquisitions. Such then being the state of the case so far as the Hindoo law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindoo becoming a convert to Christianity. The *lex loci* Act clearly does not apply, the parties having ceased to be Hindoos in religion; and, looking to the regulations, their Lordships think that, so far as they prescribe that the Hindoo law shall be applied to Hindoos and the Mahomedan law to Mahomedans, they must be understood to refer to Hindoos and Mahomedans, not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindoo law; but it does not of necessity involve any change of the rights and interests in, and his powers over, property. The convert, though not bound as to such matters either by the Hindoo law or by any

other positive law, may, by his course of conduct after his conversion, have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which, as to these matters, has adopted and acted upon some particular law, or, by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed. Their Lordships have thought it right thus to state their opinion on this point, as this is the first case in which the question has been brought under their consideration. They consider the decision referred to in the judgment of the Sudder Dewanny Adawlut in the case of a succession to one of the class of East Indians to be an instance of a just and proper exercise of the discretion entrusted to these courts. The English law, as such, is not the law of those courts. They have, properly speaking, no obligatory law of the forum, as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English: they conformed to them in religion, manners and customs, and the English law as to the succession of moveables was applied by the courts in the Mofussil to the succession of the property of this class. Such then being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence. Their Lordships collect from the evidence that the class known in India as native Christians, using that term in its wide and extended sense, as embracing all natives converted to Christianity, has subordinate divisions forming again distinct classes, of which some adhere to the Hindoo customs and usages in a modified form, and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property. Of this latter class are the East Indians, a class well defined in India, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law which the British subjects in the limited sense of the terms of the jurisdiction of the charters of the Supreme Courts enjoy in other respects, in the common bond of union in religion, customs and manners, approach the class of British subjects. Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late Matthew Abraham and the resp. descended was of that class of native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property, they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom; but their Lordships are perfectly satisfied upon the evidence that the late Matthew Abraham and the resp. had no ancestral property, and that the property which the late Matthew Abraham had, was acquired by him by his own sole unaided exertions, and without any use whatever of any common stock. They fully concur in the finding of both the courts in India upon this point. They are also quite satisfied upon the evidence that from the time of the late Matthew Abraham's marriage he and the app. Charlotte his wife, and their children, adhered in all respects to the religion, manners and habits of the East Indians, the class to which the app. Charlotte Abraham belonged. Previously to the marriage some doubt appears to have been entertained whether the East Indians, the class to which the lady belonged, would receive Matthew Abraham into their society and treat him as one of themselves.

The evidence on this point of the app. Charlotte Abraham, the first plt., is corroborated by that of a very respectable witness on whose veracity no doubt can rest. Before this time Mr. Matthew Abraham had assumed the English dress and had outwardly conformed to all the habits of the English. Assurances were given that the East Indians of Bellary would recognise her husband as one of their body, and the marriage took place. On an important public occasion, when a jury was summoned of East Indians, Matthew sat as one of them and acted as their foreman. The evidence on this part of the case appears to their Lordships to be clear beyond all doubt. They proceed then to consider its effect. That it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, their Lordships entertain no doubt; but that is not the question on which this case depends. The question is, whether, when there are different laws as to property, applying to different classes, parties ought not to be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in other respects, of the class to which they belong. In this particular case the question is whether the property was bound by the Hindoo law of parcenership. Now Matthew Abraham acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment which the ancestors may voluntarily have imposed on themselves could be of compulsory obligation on a descendant of theirs acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, & *fortiori* a Christian may do the same. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed or lost by desuetude. It was well observed by Mr. Melvill that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictione juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or interest? Surely, in things indifferent in themselves, the tribunals which have a discretion, and have no positive *lex fori* imposed on them, should rather proceed on what actually exists than on what has existed, and, in forming their own presumptions, have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not. The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class, is no greater than that which often results from a change of domicile. The *argumentum ab inconvenienti* cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as existing in law? Their Lordships are of opinion that it was competent to Matthew Abraham, though himself, both by origin and actually in his youth, a "native Christian," following the Hindoo laws and customs on matters relating to property, to change his

class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderate step taken up on a whim, and to be as lightly laid aside. We find in the evidence that there was, on one side, an exhibition of preliminary caution. The change was deliberate; it was publicly acted upon, and endured through his life for twenty years, or more. His family was managed, and lived in all respects, like an East Indian family. In such a family the undivided family union in the sense before mentioned is unknown. How, then, can it be imposed on that family of which Matthew Abraham formed the head as father? Not by consent, for there was none; nor by force of obligatory law, for there is none; not by adoption, for they had not adopted any Hindoo customs, but, on the contrary, had rejected them all. It could only be imposed, as it seems to their Lordships, by passing over the actual family springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members; by passing over all actual usages, customs and ways of living, and by supposing, contrary to the fact, the prevalence of Hindoo customs which had been deliberately abandoned. Their Lordships, therefore, are of opinion that the undivided family on which the deft. relies in his answer did not exist in any sense which is material to or assists the decision of the case. There being then, in their Lordships' opinion, no such undivided family, and the case not being in their judgment governed by the Hindoo law, it is unnecessary to discuss the opinion given by the pundits upon the operation of that law, or to enter into the question, so much discussed at the bar, whether the late Matthew Abraham's acquisitions ought or ought not, according to that law, to have been deemed to be his separate estate. It is sufficient, with reference to the opinion of the pundits, to say that the case stated for their opinion proceeds upon an assumption which, in their Lordships' judgment, was not warranted by the facts. Their Lordships, however, think it right to add, for the guidance of the courts in India in future cases, that whenever the opinion of pundits is required, and there are any special circumstances which may bear upon the question to be submitted for their opinion, those special circumstances ought to be set forth in the case submitted to them. Their Lordships make this observation with reference to the broad and general statements contained in the case which in this instance was laid before the pundits, "that the brothers lived together, and that the eldest acquired some property," unaccompanied as those statements were by any specification of the mode in which, and the circumstances under which, the brothers so lived, and the property was so acquired—circumstances which, to say the least, were important to be considered in forming an opinion upon the point submitted for consideration. Having thus considered the case so far as respects the law to be applied in determining it, their Lordships will now proceed to consider how the case stands upon the evidence with reference to the point whether the deft. was entitled to share in the property in question by agreement, or consent amounting to agreement, between him and the late Matthew Abraham; a point which, though not distinctly pleaded on the part of the resp., must, as their Lordships think, upon a fair view of all the pleadings in the case, be considered to be open. In considering the weight of the evidence upon this point, the first thing to be determined is, upon whom does the burden of proof rest? Their Lordships are of opinion that it lies on the deft. It must be so, even under the Hindoo law, as the nucleus of acquired property was in this case separate, unaided acquisition, unaided either by funds or labour of the claimant. Their Lordships do not propose to enter into a minute examination and consideration in detail of every part

of the evidence relied upon, nor of every observation made and argument urged upon it by either side; that course would extend their observations to an unnecessary and unprofitable length. They propose to deal with the presumptions insisted on on either side as arising from the conduct of the parties, and to contrast and weigh those presumptions. The case was rightly stated by Mr. Mackeson to be not a one-sided one; on the contrary, it presents evidence embarrassing to deal with, both in the conflict of positive testimony and of opposing presumptions. Their Lordships will consider the evidence on the points, and the presumptions to be drawn from it with reference to the Hindoo law. In this point of view, much, if not the whole, of what is urged on the part of the resp., as to the nature of the original family to which he and Matthew belonged, and as to the dealings of such families, is sufficiently answered by what has been already said as to the right of Matthew Abraham to change, and as to the fact of his having changed, the class of Christians to which he was attached. As to the absence of proof that the resp. received any salary or emolument as agent or clerk independently of the absence and destruction of books and accounts, which cannot but weigh heavily against the resp., it is to be observed that there is an equal absence of proof that resp. ever received any share of profits as partner. The arguments, from the dealings of the brothers, so forcibly urged by Sir H. Cairns, are certainly as forcible to prove an ordinary partnership as to prove that kind of parcenary which obtains under the Hindoo law. These brothers, when they established a partnership in the shop, established and maintained it on the ordinary commercial basis, in shares, as well when they were the only partners as when Richardson was associated with them. On what ground, then, should a court conclude, if it thought that a conjoint interest existed in the Abkarry contracts, that it was founded on Hindoo family union, rather than on the model of the shop business? This presumption could only be made by assuming the Hindoo law to govern the case. As to the bonds and conveyances, it is to be observed that these instruments are wholly unexplained by the evidence, and that the fact of the app. Charlotte Abraham having been made a party to some or one of them renders it very difficult to deduce from any of them the inference for which the resp. has contended; but what is, perhaps, of still greater importance is this, that there is no proof of the application of any of the moneys raised by these instruments to any other purposes than the purposes of the shop, and that the resp. by his answer refers to these moneys having been raised for the purposes of the shop business. With respect to the correspondence, their Lordships feel no doubt as to the conclusion to be drawn from it. After carefully perusing it, they have been unable to find anything at variance with the statement contained in the letter of the 19th Aug. 1842, to which they have above referred. They find much both in the correspondence and in the other documents in proof in the cause which tends to confirm what is stated in that letter. The resp. by that letter insists on no right. He merely suggests a similar remuneration to that which he had hoped to receive by way of testamentary gift from his deceased brother. Their Lordships are totally unable to reconcile this letter with the existence of the right since insisted on. After giving due weight to the arguments on both sides on its construction and meaning, they are unable to adopt that reading of it on which the counsel for the resp. have insisted. That construction is not, in their opinion, consistent with either the spirit of the composition, viewed as a whole, or with its language. Then as to the admission contended to have been made by the app. Daniel Vincent Abraham, neither the app. Charlotte Abraham nor the plt. Charles Henry Abraham is in any way proved

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to have been privy to or cognisant of this admission; the late plt. Charles Henry Abraham was absent in England at the time, and he never in any way adopted it. It is no doubt evidence against all the plts., but in their Lordships' opinion undue weight has been ascribed to it in the judgment of the Sudder Court. Whence had this young man of nineteen his knowledge that the family was undivided? It is a mixed and complex proposition of fact and law, and it supposes a *status* concerning which the resp. himself seems to have been long uncertain. Had he so understood his position at the time when he wrote the letter of the 19th Aug. 1842; had he then considered that he was a half sharer in the whole property, he could scarcely have expressed himself as he did in that letter. Yet to this admission of this youth, ignorant alike of law and business, a binding effect is given against all the plts. on the record. Their Lordships are not prepared to follow the Sudder Court in the weight which they have given to this admission. Looking at the whole case with reference to the Hindoo law, they are of opinion that the claim of the said resp. to a share of the property in dispute by virtue of that law cannot be supported, and they are not less satisfied that, if the case be looked at with reference to the English law—a point of view however which, so far as the resp. is concerned, seems to them to be excluded by the pleadings in the cause—the evidence on the part of the resp. is insufficient, when weighed against the evidence on the other side, to establish a partnership according to that law. Their Lordships, therefore, have come to the conclusion that the decree of the Sudder Court cannot be maintained; but, on the other hand, they are not prepared to go to the full length to which the judge of the Civil Court of Bellary has gone by his decree. The resp. no doubt stood in a fiduciary position; though he may have been unconscious of the duty arising from his acts, he had in effect attorned to the app. Charlotte Abraham by accepting a power of attorney from her. That character and the acquisitions under it should have been renounced before the resp. asserted an interest adverse to that of his constituent; such an assertion in one acting as agent is not prohibited on grounds of policy alone. It is in itself an unconscientious breach of duty to a principal. The letters of administration were indeed taken out for a special object only; they were not strictly necessary, a certificate would have sufficed. But they were not of a limited character; there were assets in the local jurisdiction, and all parties concerned in interest were either consenting to or subsequently ratified the authority delegated by the letters of administration. The administration related back to the death of Matthew; the possession of the whole property therefore from the time of his death must be ascribed to the first plt., as the deft. acting under his power could not claim adversely. Their Lordships are by no means disposed to infringe upon the wise and salutary rules which have been laid down as to the conduct of persons standing in confidential positions; but, on the other hand, they entirely agree with the Sudder Dewanny Adawlut in their estimate of the value of the resp.'s services. The property in the Abkarry contract may, by reason of its special character, be said to have been in a great degree preserved to the family by him. The evidence shows that none of the plts. were competent to the management of the concern. In all probability, but for the resp. the contract would have been lost to the family. It is represented to have been the chief source of their income. It differs materially from an ordinary trading partnership. The selection of the contractor is influenced by considerations which might probably have caused the resp. to be named as the successor to his brother in the contract. The relationship of the resp. to the family, the devotion of his

time and labour to the augmentation of its wealth, the creation, as it were, of the profits of the Abkarry business, establish a great difference between this and the case of any ordinary agency. In ordinary cases and under ordinary circumstances these services on the part of the resp. would, no doubt, be sufficiently compensated by the provision in that behalf contained in the decree of the civil court; but in this case their Lordships find it proved by the plts.' first witness that the resp., on Matthew's death, declared to him that he had worked like a slave in the Abkarry business, and was merely paid for his labour, but that for the future he would not do so unless he received an equal share with the others, meaning his brother's widow and two sons; and the witness says that he soon afterwards mentioned this conversation to the widow. If the widow dissented from this view, she ought, as their Lordships think, to have communicated such dissent to the resp., but she never did so. After her having so long availed herself of the resp.'s services, which she knew to be rendered on the faith of his receiving one-half the profits as a remuneration for those services, she, and the other parties interested in the estate, could not, in their Lordships' opinion, be justly entitled to dispute the right of the resp. to be remunerated to that extent. Their Lordships, therefore, think that it ought to have been declared by the decree that the resp. was entitled to an equal share of the profits of the Abkarry contract, accrued after the death of Matthew, as a remuneration for his services in the execution of that contract. Their Lordships think, also, that, having regard to the evidence to which they have last alluded, and to the resp. having been permitted for so many years to carry on the Abkarry contracts without any dissent having been expressed to the terms stipulated for by him, the decree of the civil court has not dealt properly with the question of costs. They are of opinion that, under the circumstances of the case, the costs, up to the hearing, ought not to have been given against the resp. by the decree, but ought to have been reserved until the accounts were taken. The benefit which may result to the estate may form a material ingredient in considering what ought ultimately to be done as to the costs, and the mode in which the resp. may account under the decree may also influence that question. The decree of the civil court having thus, in their Lordships' opinion, gone too far, their Lordships think that there should be no costs of the appeal to the Sudder Court, or of this appeal. Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Sudder Court, and to restore the decree of the Civil Court of Bellary modified as above pointed out.

Decree varied.

Apps.' solicitors, *Minet and Smith.*Resps.' solicitors, *Jones and Blazland.*

Wednesday, Aug. 5.

(Present—The Right Hon. Lord KINGSDOWN, Dr. LUSHINGTON and Sir E. RYAN.)

THE LACONIA.

THE COLCHIDE.

Ship—Collision—Jurisdiction of Consular Courts—Origin of such courts—6 & 7 Vict. c. 94.

The Ottoman Government has long acquiesced in allowing the British Government a jurisdiction, whatever be its peculiar kind, between British subjects and the subjects of other Christian states, which jurisdiction is exercised by means of Consular Courts. There is, however, no compulsory power in an English Consular Court in Turkey over any but English subjects; but a Russian or other foreigner may, if he please, with the consent of his

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Sovereign, voluntarily resort to it and submit to its jurisdiction.

Such a court has jurisdiction in cases of collision between British and foreign ships, and a British subject has no right to protest against such jurisdiction being made available against him.

This was an appeal from two judgments of Her Majesty's Supreme Consular Court at Constantinople.

The *respa*. the Russian Steam Navigation and Trading Company obtained the consent of the Russian Consul-General at Constantinople to submit to the jurisdiction of Her Majesty's Supreme Consular Court at Constantinople, and abide by the decision of that court in regard to a dispute arising out of a case of collision between one of their steamships called the *Colchide* and another steamship called the *Laconia* belonging to the *appa*. Messrs. Papayanni and others, British merchants. The suit was commenced by a petition of the *respa*. against the *appa*., praying the court to pronounce against the *Laconia* for 43,000*l*., the damage done to the *Colchide*, which was alleged to have been destroyed by the collision in question on 20th March 1862 in the Sea of Marmora.

The *appa*. protested against the jurisdiction of the Consular Court, but the judge overruled the protest. The *appa*. then obtained leave to bring, and brought, a cross-action against the *respa*., the owners of the *Colchide*, alleging that the *Laconia* was run into by the *Colchide* by the fault of the latter vessel.

At the hearing on the merits the judge pronounced both parties to have been to blame. The judgment on the point of jurisdiction was as follows:—

"The court affirms its jurisdiction, not on the ground that it is a Court of Admiralty, or that it has jurisdiction in all cases taken cognisance of by Courts of Admiralty, but simply on the ground that it has jurisdiction in cases of collision within Turkish waters, and that it can exercise that jurisdiction *in rem* as well as *in personam*. The court further observes that, although it is true no mention of a jurisdiction in actions *in rem* is specially made in the order in council of the 27th Aug. 1860, yet, under the 26th section of that order, 'all jurisdiction, power and authority, legal, equitable, or other, which any consul of Her Majesty, by custom, has or may exercise in the dominions of the Sublime Ottoman Porte,' is specially reserved to Consular Courts, and there is no doubt that consuls in the Levant have customarily exercised, and still continue to exercise, jurisdiction over ships in the sense of ordering their detention and sale. In actions on bottomry bonds, vessels are constantly stopped, sequestered and sold. Claims are marshalled and satisfied by sale of the *res*, and indeed the rules of the civil law in the apportionment of damages in cases of collision have been followed. The court calls also attention to the 4th, 5th and 13th sections of the order in council. It is not to be doubted but that Her Majesty has in the Levant jurisdiction *in rem*, as well as *in personam*; in other words, that she has a jurisdiction in Admiralty in the same way as she has a common law and equity jurisdiction, for such jurisdiction would naturally follow any cession or conquest of territory. By the 4th section all the jurisdiction, whatever it may be, is to be exercised under and according to the provisions of the order in council. By the 5th section 'such jurisdiction is to be exercised, so far as circumstances will admit, in conformity with the common law, the rules of equity, the statute law, and other law for the time being enforced in England.' This section therefore contemplates the exercise of jurisdiction in conformity with some other law than the common or statute law, and it is fair to presume that by this term 'other law' was meant, if occasion should arise for its application, the civil law, and when reference is made to the reservation contained in the 26th clause, it is clear that Her Majesty intended to delegate to

Consular Courts, established under the order in question, the power to exercise *all* her jurisdiction in the Levant, other than the common law, rules of equity, and statute law which the consuls had, by custom, exercised in the dominions of the Sublime Ottoman Porte. The court also draws attention to the fact that practically as between the different foreign Consular Courts in the Levant, much proceeds from and depends on a principle of reciprocity. To a great extent custom has created a certain uniformity and consensus of action with reference to the exercise of different jurisdictions possessed by the different Consulates, and for the Supreme Court to declare now that it will no longer recognise a custom so long observed, generally known and acted on, of stopping ships, to answer claims upon them, would be productive not only of great inconvenience but of great injustice, as in a great many cases individuals who had suffered grievous wrong and injury would be practically without remedy. To take the present case as an instance, the result of leaving the remedy which the *pits*. in this action claim to have for the undoubted loss they have sustained, to be enforced against the captain of the *Laconia*, would be practically, in all probability, to deprive them altogether of the compensation to which, if they are justified in the claim they make, they would be entitled, because it is absurd to suppose that the captain is worth 40,000*l*. The owners are not within the jurisdiction of this court, and, in all probability, it would be impossible to carry on this action with any chance of success in England, in consequence of the difficulties attending the utter absence of jurisdiction over witnesses in this country, from the variety of independent nationalities, and, so far as the ship itself is concerned, she might be sold here, or otherwise disposed of, and never be placed within the jurisdiction of the English Court of Admiralty."

The owners of the *Laconia* appealed to Her Majesty in Council.

Brett, Q. C. and V. Lushington for the *appa*..

C. P. Butt and Pritchard for the *appa*..

Curr. adv. vult.

LORD KINGSDOWN.—In considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian state, and the intercourse between two Christian nations. This is an undoubted fact. Many of the reasons are obvious; but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact. It is true beyond all doubt that, as a matter of right, no state can claim jurisdiction of any kind within the territorial limits of another independent state. It is also true that between two Christian states all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on treaty or engagements of similar validity. Such, indeed, were factory establishments for the benefit of trade. But though, according to the laws and usages of European nations, a cession of jurisdiction to the subjects of one state within the territory of another would require, generally at least, the sanction of a treaty, it may by no means follow that the same strict forms, the same precision of treaty obligation, would be required or found in intercourse with the Ottoman Porte. It is true, as we have said, that if you inquire as to the existence of any particular privileges conceded to one state in the dominions of another, you would amongst European nations look to the subsisting treaties; but this mode of incurring obligations, or of investigating what has been conceded, is matter of custom and not of natural justice. Any mode of proof by which it is shown that a privilege is conceded, is according to the principles

of natural justice sufficient for the purpose. The formality of a treaty is the best proof of the consent and acquiescence of parties; but it is not the only proof, nor does it exclude other proof, and more especially in transactions with Oriental states. Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the state, active assent or silent acquiescence where there must be full knowledge. We, having considered the materials before us, entertain no doubt that, so far as relates to the Ottoman Government, no objection is tenable against the exercise of jurisdiction between British and Russian subjects. Indeed, the objection, if any such could properly be urged, should come from the Ottoman Government rather than a British suitor, who in this case is bound by the law established by his own country. The case may in some degree be assimilated to the violation of neutral territory by a belligerent; the neutral state alone can complain. We think, looking at the whole of this case, that so far as the Ottoman Government is concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a jurisdiction, whatsoever be its peculiar kind, between British subjects and the subjects of other Christian states. It appears to us that the course was this, that at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native courts; then in the progress of time, commerce increasing and various nations having the same interest in abstaining from resort to the tribunals of Mussulmans, &c., recourse was had to consular courts, and by degrees the system became general. Of all this the Government of the Ottoman Porte must have been cognizant, and their long acquiescence proves consent. The principles are fully explained in the celebrated judgment of Lord Stowell in the case of *The Indian Chief*, 4 Rob., to which we have very recently referred. Though the Ottoman Porte could give and has given to the Christian powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give, nor could give to one such power any jurisdiction over the subjects of another power. But it has left those powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose tribunals they resort. There is no compulsory power in an English court in Turkey over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his Sovereign, and thereby submit himself to its jurisdiction. This case is provided for by the 6 & 7 Vict. c. 94. The 1st section of that Act recites that "by treaty, capitulation, grant, usage, suzerainty and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions, and that doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent upon the laws of the realm," and enacts that Her Majesty may exercise any power or jurisdiction which her Majesty now hath or may at any time hereafter have within any country out of Her Majesty's dominions in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." The effect of this section is, that the jurisdiction of the British Consul in the Ottoman Empire became within the limits within which it existed by usage or suzerainty to be regulated by order in council. Now the order in council dated the 27th Aug. 1860 recites, among other matters, that "Her Majesty has had and law has power and jurisdiction in the Ottoman

dominions, and that it is expedient to revise and consolidate the provisions of the former orders, and to make further provision for the due exercise of Her Majesty's power and jurisdiction aforesaid, and for the more regular and efficient administration of justice, and the better maintenance of order among all classes of Her Majesty's subjects, and of persons enjoying Her Majesty's protection resident in or resorting to the dominions of the Sublime Ottoman Porte." The 64th section of the order provides "that the Supreme or other Consular Court, according to its respective jurisdiction, original or appellate (as the case may require), and in conformity with the rules relating to suits between British subjects, and appeals therein, may hear and determine any suit, proceeding, or question of a civil nature instituted, taken, or raised by a British subject against a subject of the Sublime Ottoman Porte, or a subject or citizen of any other state in amity with Her Majesty, against a British subject, provided that the subject of the Sublime Ottoman Porte, or the subject or citizen of such other state as aforesaid, obtains and files in such court the consent in writing of the competent local authority on behalf of the Sublime Ottoman Porte or of the consul of such other state (as the case may be), to his submitting and does submit to the jurisdiction of the supreme or other consular court, and if required, gives security to the satisfaction of the court, by deposit or otherwise, to pay fees, damages, costs and expenses, and abide by and perform any such decision as may be given by the supreme or other consular court originally or on appeal (as the case may require). The plt. in this case has complied with these conditions, and has thereby submitted himself in the suit to the jurisdiction of this court. The court has no jurisdiction over him except by his consent. It could not have entertained the cross-action unless by his submission to its authority, and it has compelled him to give that consent by refusing to proceed in the action which he has instituted against the original deft., unless he consented to do justice by appearing to the cross-action which they desired to institute against him. He has thought fit to comply with these terms, and he does not now complain of them, and it would be singular if the party who himself is by law (subject to the tribunal could raise an objection. But the court had no right to exercise the jurisdiction which at his instance it has enforced against his adversary. The general right of the court to entertain the suit under these circumstances is perfectly clear, and to throw any doubt upon it would be to subvert all the principles upon which justice is administered among the subjects of Christian powers in this and other countries of the East. Hitherto we have spoken of jurisdiction in its general sense, and have stated our conclusion that for a case of collision in the Sea of Marmora, some legal proceeding would belong to the Consular Court. Now we must inquire further whether it was competent to the court to proceed as if it were invested with the authority of a vice-admiralty. We think that question must be solved by reference to the usage which has prevailed—the usage respecting the arrest of vessels—the proceeding *in rem*. So far as we can ascertain from the information furnished to us, there appears to have been one case of collision—possibly more—but there is proof of one only. The consular judge, however, states that proceedings *in rem* have been customary, and especially in cases of bottomry. Now causes of bottomry, where the ship is arrested, are clearly proceedings *in rem*, usually of Admiralty jurisdiction. We think that by the very extensive and comprehensive terms used, such a jurisdiction, whether to be called by that name, has been conferred upon the Consular Court, and if in bottomry we can discover no reason why it should not exist in cases of collision,

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the same considerations of convenience, the same necessity for obtaining justice, subsist in both cases. It is not necessary to declare that the court possessed full Admiralty jurisdiction; it is sufficient to express our concurrence with the consular judge, that with respect to proceedings *in rem*, the causes of action occurring within given limits, and the usage of so treating cognate causes such as bottomry causes, justify him in the course he has pursued on the present occasion, and therefore we must uphold the jurisdiction. There is, however, another question which required our serious attention. There was a cross-action in addition to the original action. The judge found both parties to blame, and he ordered that the damage sustained by each should be added together, and each party pay one-half. The effect on the present occasion would be a loss to the *Laconia* of about 20,000*l.*; but it is not to the effect we must look. We must direct our attention to other considerations. Had the rule prevailing at common law been adopted, each party would have had to bear his own loss. Opinions may differ, and indeed do differ, as to what course is most consonant to justice. This question we are not called upon to decide, but what we have to decide is, when the proceeding is *in rem* what ought to be the rule? What was the intention of the authority which sanctioned and made legal the exercise of the jurisdiction *in rem*? Could it be intended to constitute a jurisdiction *in rem* with a common law remedy? We think that no such anomaly could be intended, and therefore concur in the view of the Consular Court. We regard the recent order in council by which a certain Admiralty jurisdiction is expressly given, not as creating such jurisdiction, but only as expressing more distinctly and with greater detail the authority which had been already conferred by former orders. It now becomes their Lordships' duty to state the determination at which they have arrived upon the merits of the case. After the most careful and anxious consideration of every part of the evidence, and of every point in the argument, their Lordships concur in the intimation given by the learned judge in the court below, that "under the circumstances it would seem a simple, and perhaps it would be the right, course to say neither party has proved his case. That is the decision which their Lordships have adopted, and they will, therefore, humbly recommend to Her Majesty that the judgment of the Supreme Consular Court be reversed, and that both actions be dismissed, each party paying their own costs throughout, and that the moneys deposited be given up, and the securities vacated.

Judgment reversed.

App's solicitors, *Pritchard and Sons*.

Resp's solicitors, *Walker and Twyford*.

Equity Courts.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

June 9 and 20.

PHILLIPSON v. KERRY.

Voluntary deed—Death of donor and donee—Deed set aside after.

Where the donor and donee of a voluntary deed were both dead, and the evidence showed that the donor never properly understood the nature and effect of the deed, the Court ordered it to be delivered up to be cancelled.

A voluntary deed is either wholly good or wholly bad, and the court will not modify its terms.

This was a suit to set aside a voluntary deed, under

circumstances of a somewhat peculiar character. The facts were these:—

Isabella Albert duly executed her will, and thereby bequeathed a sum of 4275*l.* 4*s.* Indian Consols, to a Miss Sophia Courtail, for her life, and after her death for her children, and in case there should be no child, then after Miss Courtail's death upon trust for her appointees by deed or will. The testatrix died. Miss Courtail had boarded and lodged in the house of a Mrs. Mary Burton Phillipson during that lady's lifetime, and after her death in the house of Mr. Charles Burton Phillipson, her son. In Jan. 1857 Miss Courtail executed two deeds, by the first of which she appointed the above-mentioned stock to herself for life; and by the second she appointed the same absolutely to Charles Burton Phillipson. She however received the dividends on the stock during the life of Charles Burton Phillipson, and he died in July 1861. After his death she was informed that she could not then alter the disposition made by her of the stock, but that the same and the dividends thereof were irrevocably appointed and belonged to the representatives of Mr. Phillipson.

On the 17th Nov. 1862 a bill was filed on behalf of and by Miss Courtail in this suit, stating that when she executed the two deeds she understood and believed that the effect of them would be the same as that of a will; that if Mr. Phillipson died in her lifetime, the stock would be at her own disposal, and that she would at all events, and notwithstanding such second deed, be entitled to the income of the stock during her life. The bill then prayed that the second deed of appointment might be delivered up to be cancelled. While the bill was being prepared Miss Courtail was taken ill, and she sank so rapidly, that although her solicitor called on her with a medical man and a commissioner on the afternoon of the day on which the bill was filed, she was too ill to understand them, or to make the requisite affidavit in support of her bill. She died on the evening of the same day. The suit was, however, duly continued by her representatives, and it now came on for hearing.

Mr. Kerry, the solicitor who prepared the deeds of appointment, was one of the two executors of Mr. Charles Burton Phillipson, and as such, a deft. to the suit. The effect of the evidence, which was voluminous, and of the arguments, will appear from his Honour's judgment *infra*.

Selwyn, Q.C. and *Kay* appeared for the plts., the representatives of Miss Courtail.

Baggalley, Q.C. and *Bevir* for Mr. Kerry.

G. L. Russell for Mr. Griffith, the co-executor of Mr. Charles Burton Phillipson.

Selwyn, Q.C. in reply.

Toker v. Toker, 8 L. T. Rep. N.S. 777, was cited in the arguments.

The MASTER of the ROLLS.—This case is a singular one in this respect, that both the donor and the donee under the disputed deed are dead, and therefore the court is unable to obtain from either of them an account of the transaction. The death of the donor, however, does not in my opinion affect the matter. It appears from the evidence that in October last she complained of the second deed. She then gave instructions for steps to be taken to set it aside, but died before she could complete her evidence as to it. The questions are, whether the deed was fully explained to her, and whether, if it was, it correctly expressed what her real intentions were? That all now depends on the evidence of Mr. Kerry, who was the solicitor employed in the matter, and who, as one of the executors of the donee, is a party to this suit. I have examined his evidence, but I cannot say that I think it proves the donor to have been fully aware of the effect of the deed. She does not appear to have seen that by it she was depriving herself of the present enjoyment of

her property, and putting herself completely in the hands of the donee, or any person who, as his general or particular assignee or representative, might be obliged to disregard the moral obligation under which the original donee was, to allow the donor to receive the dividends during her life. It was said that the second deed was executed to avoid the legacy duty; but even if that was proved to be the case, it is no excuse for the omission to inform her of the most important element in the case. It was also contended that the deed might be reformed so as to carry out the true intention of the parties, and to give the donee the property after her death. I think, however, that that cannot now be done. A voluntary instrument of this kind is either wholly good or wholly bad, and the court cannot modify it terms. One thing appears to me clear from the evidence; no intention ever existed on the part of the donor to leave herself destitute. I must therefore assume it to have been the actual intention on both sides that more should have been done than was done; and the result is, that the second deed cannot stand. It must therefore be delivered up to be cancelled. The case however is not, in my opinion, one for giving costs on either side.

Solicitors for the plt., *Lovell and Co.*

Solicitors for the defts., *R. H. Peacock; R. H. Girard.*

Friday, July 10.

EDWARDS v. BROUGHTON.

Settlement—Construction—Property held not to be within the settlement.

A testator bequeathed the income of his property to his wife for her life, and the corpus of it, after her death or second marriage, between his sons and daughters equally; empowering his wife to settle a daughter's share on her marriage; and directing that if any of his children died under twenty-three years of age without leaving issue, the survivor should take such child's share. One of the sons attained twenty-three, and died intestate without leaving any issue, but leaving a sister one of his next of kin. The sister afterwards married, when the mother and sister settled all her share, "by survivorship or otherwise," in the testator's property, upon her and her children. The brother then died:

Held, that the share of the testator's property, which the daughter took as next of kin of her brother, was not included in the settlement.

Edward Cormack, by his will, dated the 23rd Jan. 1826, bequeathed the income of the residue of his estate to his wife Eleanor Cormack during her widowhood; and directed that after her death or second marriage, such residue should be divided equally between his three sons and two daughters. The testator empowered his wife, in case either of the two daughters should attain twenty-three years of age, to settle the portion of such daughter upon her and her children; and he also directed that if either of his five children should die under twenty-three years of age without leaving issue, the surviving children should take the portion of such deceased child.

The testator died in 1827.

Edward Cormack, one of the sons, attained twenty-three years of age, and died in 1835, intestate, leaving no issue, but leaving a sister Rebecca one of his next of kin.

In 1845 all the testator's then surviving children had also attained their respective ages of twenty-three years, and in that year Rebecca married Mr. Edwards. By her marriage-settlement, dated 5th Feb. 1845, after omitting that the property of the testator, subject to the trusts of his will, then consisted of three specified sums of bank annuities, and that Eleanor Cormack (the widow) was desirous, in pursuance of the power

given to her by such will, of settling Rebecca's share in the bank annuities and personal estate in manner thereafter expressed; it was witnessed that Eleanor Cormack and Rebecca Cormack (with the concurrence of Wm. Edwards) assigned to the trustees of the settlement "all that one-fifth part, share, or proportion in the three specified sums of bank annuities, and all and every other parts, shares and portions of Rebecca Cormack, by survivorship or otherwise, of and in the same, and of and in the securities for the same for the time being, and of and in the dividends, interests and annual proceeds of the same respectively, and all the estate, right, title, contingent, reversionary, or other interest, claim and demand of them the said Eleanor Cormack and Rebecca Edwards and each of them, of, in, or concerning the same, or any part thereof, subject only to the payment of one-fifth part of the annuity of 100*l.* bequeathed by the testator to Eleanor Cormack."

Eleanor Cormack, the widow, died in 1860, and the bank annuities and other personal estates thereupon became divisible.

The question was, whether the share in the bank annuities which Mrs. Edwards took as one of the next of kin of her brother, was bound by the trusts of her marriage-settlement?

Graham Hastings appeared for the plt. Mrs. Edwards, and contended that her interest in her brother's share, which she did not take by survivorship, but as his next of kin, was not settled. He relied upon

Parkinson v. Dashwood, 4 L. T. Rep. N. S. 41; a. c. 30 Beav. 49.

Dauney, for the trustees of the settlement, insisted that the case cited differed from the present one; in that the former contained the words "under the will," in the settlement therein referred to, which limited the property then in question. Here, as all the surviving children had attained twenty-three in 1845, there could not, strictly, be any "survivorship," and the words "or otherwise" must, therefore, be construed broadly, to include every interest of Mrs. Edwards in the funds bequeathed.

The MASTER of the ROLLS.—I think the case of *Parkinson v. Dashwood* governs this one. I consider that Mrs. Edwards' share in her brother's portion of the funds came from him to her in the same manner as the property of the lady's father in *Parkinson v. Dashwood* came to her. There must, accordingly, be a declaration that Mrs. Edwards' interest in the testator's funds, as next of kin of her brother, is not included in the settlement.

Thursday, July 16.

HENNESSY v. BRAY.

Devise—Estate for life—Forfeiture of—Estate tail—The word "heirs" read "heirs of the body"—Mortgage—Account.

Where a testator devised an estate to trustees upon trust for A. for life, and upon his death "for the first and other sons of A. successively according to the priority of their respective births, and their respective heirs for ever, to the intent that the elder of the said son and sons of A. should be preferred and taken before the younger of the same sons and his heirs, and for default of such son or sons as last aforesaid, upon trust for all and every the daughters of A., and their respective heirs and assigns for ever, equally to be divided between them, if more than one, share and share alike, as tenants in common and not as joint tenants; and if there should not be more than one such daughter of A., then upon trust for such one daughter, her heir and assigns for ever," it was

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Held, that the first and other sons of A. took estates tail general in succession, with remainder to the daughters of A., as tenants in common in fee.

The will of the testator contained a proviso, that if A. mortgaged the rents and profits of the estate, the trusts thereof for his benefit were to cease and be void, and the trustees were to hold the rents and profits during the remainder of A.'s life, for such persons and in the same manner, as if A. were then dead. The testator died in 1844. In 1851 A. and his then trustees mortgaged the estate to B.; but B. had not any notice of the clause of forfeiture. In 1852, the only child (a son) of B. died an infant and unmarried. In 1861 the parties entitled in remainder, on the forfeiture of A.'s life-estate, filed a bill praying a declaration that the mortgage executed by him in 1851 was such a forfeiture, and for an account against A., his trustee and his mortgagee, from the date of the mortgage:

Held, that the mortgage was a forfeiture of A.'s life-estate; but that the plt.'s title accrued on the death of the son of A., from which time he and his trustees were bound to account for the rents and profits to the plts.; and an inquiry was directed when B. first had notice of the clause of forfeiture in the will, from which time only he was bound to render an account.

The bill in this suit stated that the Rev. W. P. Bray, the testator in the suit, by his will, dated the 4th May 1844, devised an estate, called the "Bray Down estate," to trustees upon trust for his son Reginald Bray, for his life, and, from his death, upon trust as follows:—"For the first and other sons of my said son Reginald Bray successively, according to the priority of their respective births, and their respective heirs for ever, to the intent that the elder of the said son and sons of my son Reginald Bray and his heirs, shall be preferred and taken before the younger of the said sons and his heirs; and for default of such son or sons as last aforesaid, upon trust for all and every the daughters of the said Reginald Bray, and their respective heirs and assigns for ever, equally to be divided between them, if more than one, share and share alike, as tenants in common, and not as joint tenants; and if there should not be more than one such daughter of the said Reginald, then upon trust for such one daughter, her heirs and assigns for ever." The will contained a proviso that, if Reginald Bray should execute any mortgage of the rents and profits of the Bray Down estate, then and from thenceforth the trusts thereinbefore declared for his benefit should absolutely cease and be void; and the trustees were, immediately thereupon, during the remainder of the life of Reginald Bray, to hold the rents and profits upon trust for such persons, and in the same manner, in all respects, as if Reginald Bray were then dead. The will then contained a devise and bequest of the residue of the testator's real and personal estate amongst all his children equally. The testator died in 1844. In Oct. 1851 Reginald Bray and George Jennings (the then trustee of the will) joined in a mortgage of the Bray Down estate to Richard Kitton to secure a debt due to him from Reginald Bray. In 1852 the son and only child of Reginald Bray died an infant and unmarried. In 1861 the plts., who were some of the children of the testator, discovered the fact of the mortgage executed by Reginald Bray of the Bray Down estate to Mr. Kitton. The bill charged collusion between the trustee (Mr. Jennings) and the mortgagee in procuring the security, and prayed a declaration that on the execution of the mortgage to Mr. Kitton, Reginald Bray's interest in the Bray Down estate ceased in favour of the plts. (the residuary devisees), and for an account against Reginald Bray, George Jennings and

Mr. Kitton, of the rents and profits received by them since the date of the mortgage.

Mr. Kitton, in his evidence, denied that he knew of the clause of forfeiture in the will when the mortgage was executed to him, for he had not then seen the testator's will, and was unacquainted with its contents; and the evidence did not support the charge of collusion.

The cause now came on upon motion for decree.

Hobhouse, Q. C. and Kekewich appeared for the plts., and contended that, under the testator's will, Reginald Bray took an estate for life, with remainder to his sons successively in tail; that Reginald's life-estate was forfeited by the mortgage to Mr. Kitton; that Reginald Bray's son being dead, the Bray Down estate was now vested in the plts. as residuary devisees thereof, liable to be divested by the birth of another son or daughter of Reginald Bray; and that they had a right to an account of the rents and profits from the time of the mortgage. They cited

Tyrone v. The Marquis of Waterford, 1 De G. F. & J. 613; s. c. 2 L. T. Rep. N. S. 397.

Ashley v. Ashley, 6 Sim. 358;

Joel v. Miles, 3 K. & J. 458; s. c. 3 L. T. Rep. N. S. 882.

Turton v. Lambard, 1 De G. F. & J. 495; s. c. 2 L. T. Rep. N. S. 38.

Hicks v. Salkitt 18 Jur. 926; s. c. 3 De G. M. & G. 782;

Dormer v. General Fortescue, 3 Atk. 124;

Wright v. Chard, 1 De G. F. & J. 567; s. c. 1 L. T. Rep. N. S. 138, 182; 2 lb. 104.

Speed, for the deft. Mr. Jennings, contended that the infant son of Reginald Bray took, on his birth, an estate in fee-simple, which, on his death descended to his father as heir-at-law, and that Mr. Jennings had acted *bona fide*, and was not bound to account to the plts. as they insisted. He cited

Foster v. Lord Romney, 11 East, 594;

Rez v. Marquis of Stafford, 7 East, 521;

Lewis v. Waters, 6 East, 336;

Kershaw v. Kershaw, 3 Ell. & Bl. 845.

Southgate, Q. C. and E. Charles, for the deft. Mr. Kitton, argued that the account against him ought only to be from the filing of the bill. They cited

Maw v. Pearson, 28 Beav. 196.

Hobhouse, Q. C. in reply.

The MASTER of the ROLLS.—I am of opinion that, upon the construction of this will, estates tail in succession were given to the sons of the testator. It was argued that the eldest son of Reginald Bray took an estate in fee-simple on his birth; that that estate descended, on his death without issue, to his father; and that the same estate is now vested in Reginald Bray, in fee, as the heir-at-law of his son. I think, however, that it is impossible to place that construction on the will, because it would put an end to the other interests given to the other sons. The testator's intention evidently was, that the sons should take the estates of inheritance in succession; and the only way in which they can do that is, by taking estates tail in succession. The word "heirs" in this will must be read "heirs of the body," to give effect to the other words in the devise. That construction is assisted by the words of the gift over, which is made to take effect, not "in default of such issue," but, "in default of such son or sons." The result then is, that the limitations in this will must be read as giving an estate for life to Reginald Bray (subject to the proviso for ceasing), with remainder to his first and other sons in tail general in succession, with remainder to his daughters as tenants in common in fee. But the adoption of that construction of the will renders it necessary to consider the question which arises on the clause of forfeiture. With respect to that I am of opinion that the mortgage by

Reginald Bray operated as a forfeiture of his life-interest; and that on the death of his son in 1852, the pta. and the other residuary legatees became entitled to the rents and profits. Reginald Bray and Mr. Jennings are bound to account for the rents and profits received by them respectively, or by their respective order, or for their respective use, since the pta.' title accrued. As to Mr. Kitton, however, I think he is not liable to account for any rents and profits received by him before he had notice of the clause of forfeiture in the will, but after that time he must account for the rents and profits received by him. If Reginald Bray has received any rents since the time when Mr. Kitton had notice of the clause in the will, and has applied them towards payment of the interest on Mr. Kitton's mortgage, he will be liable to account for the rents so received, but Mr. Kitton will not. There must be an inquiry when Mr. Kitton first had notice of the clause of forfeiture contained in the will. The costs must be reserved, as I think that Mr. Jennings will, on duly accounting, be entitled to his costs; and that upon Reginald Bray so accounting, Mr. Kitton may receive the one set of costs to be allowed to Reginald Bray and his mortgagees.

Solicitors for the pta., *R. W. Childs*, for *Richard Parr*.

Solicitors for the deft. Mr. Jennings, *Jones and Blackland*, for *John Peter*, jun.

Solicitors for the deft. Mr. Kitton, *Coode, Kingdon and Cotton*, for *R. K. Frost*.

Tuesday, July 21.

BASHFORD v. CANN.

Mortgagor and mortgagee—Policy of assurance—Premiums.

A mortgagee of an annuity insured the life of his mortgagor, and wrote to him to say that, on the redemption of the annuity, the policy should be assigned to him. The mortgagee, or those claiming under him, paid all the premiums on the policy. The mortgagor died, but the annuity never was redeemed:

Held, that the representatives of the mortgagee were entitled to the full benefit of the policy.

The facts of this case were shortly these:—In the month of April 1829, a Mr. Joseph Pomphrey Austin was indebted to a Mr. George Walker in a sum of £1800l., and on the 15th April in that year Mr. Austin granted an annuity to Mr. Walker, by deed, by way of mortgage, to secure the debt. The mortgage-deed contained a covenant by the mortgagor that he would attend at the West of England Fire and Life Assurance office at any time, at the request of the mortgagee, for the purpose of the latter affecting an insurance on his life. On the 16th April 1829 the mortgagee wrote to the mortgagor a letter, which was as follows:—

"London, 16th April 1829.

"Sir,—In order that no misunderstanding may arise when the annuity which you granted to me yesterday comes to be paid off, I beg to record for your satisfaction that the policy of insurance on your life for 1200l. which I intend to effect in the West of England office, is to be assigned to you as soon as the annuity is redeemed and all arrears discharged, upon payment to me of the stamp duty on the policy, the proportion of the premium which shall have been paid for the current year, and all expenses attending the assignment. —I am, Sir, your obedient servant,

"J. P. Austin, Esq."

"GEO. WALKER.

In the month of May 1829 the mortgagee insured the mortgagor's life for two sums of 1200l. and 600l. in the West of England office. The mortgagee died, but all the premiums on both policies were paid by

him, or by those claiming under him, up to the time of his death, and the same were not paid by or charged to the mortgagor or any persons claiming under him.

The mortgagor died in June 1862, and the annuity had never been redeemed. After his death the plt. (the representative of the mortgagee) applied to the office for payment of the policy moneys, when they stated that they had received notice from a Mr. Norton, who claimed under the mortgagor, not to pay the 1200l. to the plt.

The plt. therefore filed his bill in this suit, praying a declaration that he was entitled to the moneys secured by the two policies.

The deft. Mr. Norton relied on the letter of the 16th April 1829 above stated; and contended that it showed the true contract between the parties, as to the 1200l. policy.

Selwyn, Q. C. and *Woodroffe* appeared for the plt., and insisted that under the circumstances of this case the representative of the mortgagor had no claim to any of the moneys. They cited

Gottlieb v. Cranch, 4 De G. M. & G. 440;

Drysdale v. Piggott, 22 Beav. 238; s. c. 27 L. T.

Rep. 193; and on appeal, 27 L. T. Rep. 310;

Courtenay v. Wright, 2 Giff. 337; s. c. 3 L. T.

Rep. N. S. 433.

Southgate, Q. C. and *L. Mackeson* appeared for the deft. Mr. Norton, and cited

Lea v. Hinton, 19 Beav. 324; s. c. on appeal, 5

De G. M. & G. 823.

Baggallay, Q. C. appeared for the insurance office.

The MASTER of the ROLLS.—No attempt has been made in this case to set up a case against the mortgagee or those claiming under him on the mortgage-deed itself, to have the policies delivered up upon payment of what is due; but it was insisted that there was a contract which controlled the annuity, or mortgage-deed. A letter from Mr. Walker to the mortgagor, written on the 16th April 1829, was relied upon, and was said to be such a contract. Now the mortgagor was clearly entitled to have come to this court before his death, and upon redeeming the annuity to have required the policies to be assigned to him. But he never did redeem the annuity; and it is not now, in fact, redeemed. How then can it possibly be said, that when the event has occurred on which the policies were expressly to be paid, those claiming under the mortgagor are entitled to the policy moneys, as if he had redeemed the annuity in his lifetime? I am of opinion that the plt. is entitled to the benefit of the policies, and to receive the principal money with interest as from the death of the mortgagor.

Solicitor for the plt., *C. Foulger*.

Solicitors for the deft. Mr. Norton, *Mackeson and Goldring*.

July 22 and 23.

BROAD v. SELFE.

Mortgagor and mortgagee—Foreclosure—Agreement for commission and expenses—Costs—17 & 18 Vict. c. 90; 25 & 26 Vict. c. 42.

Where there is a contract for a mortgage, the court will not permit a person, under the colour of the mortgage, to obtain a collateral advantage, which neither belongs nor is appurtenant to a contract of mortgage; and although that principle, probably, had reference, originally, to the usury laws, it goes beyond them and is not affected by their repeal.

The deft. in a foreclosure suit had entered into an agreement with the pta., authorising them to sell some property of his in order to repay themselves, with interest, a loan made by them to him, and also a commission, and their expenses. He afterwards revoked the authority to sell so given by him; but before the bill was filed, he tendered to the pta. their

principal and interest, together with a small sum for their expenses. It was held, that there must be the usual foreclosure decree, without any costs of the suit on either side; but with an account of what was due to the plts. for their principal, interest and costs (other than their costs of the suit), and for their expenses, and the services rendered by them to the property. The Court, however, refused to direct any inquiry as to the commission; because, as to that, the contract could not be enforced on the ground of want of mutuality.

This was a foreclosure suit; and it came on to be heard upon a motion for a decree. The facts were these:—

In the month of June 1861 the plts. lent to the deft. 200*l.* on his promissory note, which was payable in the month of September following; but the note was then dishonoured. On the 30th Sept. 1861 the deft. gave to the plts. a new promissory note for the same amount, and also signed a memorandum of agreement which was as follows:—

“Memorandum of agreement made this 30th day of Sept. 1861, between Peter Broad and Taylor Pritchard, of 28, Poultry, in the city of London, auctioneers, and John Selfe, of Surbiton-hill, in the county of Surrey. Whereas, in consideration of the said Peter Broad and Taylor Pritchard advancing to the said John Selfe the sum of 200*l.* upon the security of a piece or parcel of land known as “the Park,” Surbiton-hill, the said John Selfe hereby authorises and instructs the said Peter Broad and Taylor Pritchard to sell and dispose of the whole or any portion of the land, as above named, either by private or public sale, at and for the best price that can be obtained, and further to repay themselves out of the proceeds of such sale the said sum of 200*l.*, with interest at the rate of 5 per cent. per annum from the date hereof, with a commission of 5 per cent. on the amount realised, and the expenses attending the sale thereof; and in the event of John Selfe repaying the said Peter Broad and Taylor Pritchard the aforesaid sum of 200*l.* and interest, the said John Selfe shall pay to the said Peter Broad and Taylor Pritchard a commission of 5 per cent. upon the value of the said property, together with all the expenses incurred by them, whether the property or any portion thereof is sold by any other agency or retained by the said John Selfe. The said John Selfe further undertakes to execute a legal mortgage of the above-mentioned lands and buildings to the said Peter Broad and Taylor Pritchard, at his own expense, whenever called upon by them so to do, such mortgage to contain all the usual and customary covenants, and particularly a power for sale, either by private contract or public auction.”

The value of the property comprised in the agreement was about 8000*l.* The plts., in pursuance of the authority thereby given to them, made the necessary arrangements for proceeding to a sale of the premises, and, in so doing, incurred considerable expense. In Feb. 1862 the deft. gave the plt. notice that he revoked the authority so given as aforesaid, and the premises were not sold. The plts. then applied to the deft. for payment of the principal and interest of the debt; of 5 per cent. commission (amounting to 400*l.*); and of the expenses which they alleged to be due to them. The deft. refused to pay them the 5 per cent. commission, and in March 1862 he tendered to them the sum of 200*l.* and interest, and 15*l.* for any expenses which they might have incurred in the matter.

The plts. thereupon filed their bill in this suit praying a decree for an account of what was due to them for principal moneys, interest, commission and expenses under the aforesaid memorandum of agreement, and for payment by the defts. to them of the

amount so found due, or, in default, a foreclosure of his equity of redemption of the premises.

Cole, Q.C. and C. J. Shebbeare appeared for the plts. T. A. Roberts, for the defts., contended that, although this was called a foreclosure suit, it was, in fact, one for specific performance of the agreement. If so, there was no mutuality between the plts. and the defts. But it was also a mortgage transaction, and the plts. were seeking collateral advantages under the agreement to which, as mortgagees, they were not entitled. He cited

Chambers v. Goldwin, 9 Ves. 254;
Coote on Mortgages, 21, 391, 444;
Webb v. Rorke, 2 Sc. & Lef. 661;
Langstaffe v. Fenwick, 10 Ves. 405;
Leith v. Irvine, 1 M. & K. 277;
Jennings v. Ward, 2 Vern. 520;
Edmunds v. Povey, 1 Vern. 188;
Fisher on Mortgages, 500;
Matheson v. Clarke, 3 Dr. 3; 24 L. T. Rep. 105.

July 23.—The MASTER of the ROLLS.—I am of opinion that the contract in this case is only a contract for a mortgage, to the extent of 200*l.* principal, and the interest upon it. I also think that the cases referred to by Mr. Roberts and several others, which I have myself consulted, show that the court will not permit a person under the colour of a mortgage to obtain a collateral advantage which neither belongs nor is appurtenant to the contract of mortgage. Although that principle, in its origin, probably had reference to the usury laws, it goes, in my opinion, beyond them, and is not affected by their repeal. The remedies of foreclosure and redemption are co-extensive. It is clear that if the mortgagor here, had come to redeem the security, he would have been allowed to do so, on payment of the principal sum of 200*l.* and the interest and costs. Then I might have had to consider whether, under the recent Act, the court could direct an inquiry as to what was properly due to the mortgagees in respect of services rendered to the property under the agreement entered into between them and the mortgagor. The case would have been the same if he had come for a foreclosure decree. Now I propose to make in this case the usual foreclosure decree, and in so doing to direct a reference to chambers to inquire what (if anything) is due to the plts. in respect of expenses and services rendered by them under the agreement. With regard to the question of costs, generally speaking, in foreclosure suits, the mortgagee adds his costs to the security; but it is equally clear that where the mortgagor has tendered his mortgage-money and interest prior to the suit, if the mortgagee then comes here to foreclose, he must pay the costs of the suit. In this case, no doubt a tender was made of the 200*l.* principal and interest, and 15*l.* for expenses, but which latter sum the plts. did not consider enough, and refused to accept. It must, however, be remembered that the deft. had entered into the contract with the plts. to pay them a commission, with his eyes open; and although that is a contract which this court cannot enforce, for want of mutuality—for the court cannot compel the plts. to perform the services required by the agreement—yet, as the deft. has entered into this contract, he cannot now claim the same benefit from the tender as he might have claimed in the case of an ordinary mortgage. The court therefore cannot give him the costs of the suit. But the plts. are not entitled to any costs of the suit, because they do not come simply to enforce a mortgage security, but to enforce that to which the court considers they are not entitled. There will therefore be no costs on either side up to the hearing. An account must be directed of what is due to the plt. for the principal sum of 200*l.* and interest at 5 per cent and the mortgagee's costs other than the costs of the suit, with the usual foreclosure decree.

There must also be an inquiry what (if anything) is due to the plts. in respect of expenses incurred and services rendered by them in relation to the property mentioned in the memorandum of agreement, and further consideration on that part of the case and the future costs must be reserved.

Solicitors for the plts., *Watson and Sons*.
Solicitor for the deft., *Henry Jones*.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn,
Barrister-at-Law.

Wednesday, May 27.

KING v. CHAPLIN.

Annuities—Agreement for repurchase—Construction.

In 1838 the plt., then a widow, in consideration of 4990*l.*, agreed to grant to C. an annuity of 538*l.* during her life, and by the deed of grant, C. covenanted that if the plt. should at any time be desirous of repurchasing the annuity, C. would, on receiving all arrears on the said annuity of 538*l.*, accept 4990*l.* in full for such repurchase. The plt. afterwards married J. K., and in 1845 J. K., in consideration of 1000*l.*, granted to C. another annuity of 133*l.* 5*s.* during the joint lives of the plt. and himself; and at the same time it was agreed between J. K. and C. that C. would accept the reduced sum of 480*l.* instead of 538*l.* on the first annuity, provided J. K. would not redeem one of the annuities without redeeming both. The reduced sum of 480*l.* was paid and received up to J. K.'s death in 1861. The plt. then gave notice to C. of her desire to redeem the first annuity:

Held, upon the construction of the agreement, that upon the death of J. K. the right of C. to the full amount of 538*l.* revived; that upon each transaction, when the reduced sum was paid and received, all question of arrears was concluded; and hence that the plt. was entitled to repurchase the annuity on payment of 4990*l.* and arrears since the death of J. K. at the rate of 538*l.*; but without paying arrears in respect of the difference between 538*l.* and 480*l.* during the joint lives of herself and J. K.

This was a suit for establishing the right of the plt. to repurchase an annuity, and for determining the terms on which the repurchase should be made, under an agreement. The circumstances were as follows:—

In the year 1838 the plt., then Caroline G. E. Minchin, widow, being entitled for her life to the dividends of a sum of 20,000*l.* Consols, agreed, in consideration of an advance of 4990*l.* by William Chaplin, to grant to him an annuity of 538*l.* during her life, and by a deed, dated the 12th April 1838, the plt., in consideration of the sum of 4990*l.*, granted to William Chaplin the said annuity of 538*l.* during the life of the plt., to be payable out of the dividends of the said sum of 20,000*l.* Consols. The deed contained a covenant by the plt. to pay the annuity, and the sum of 20,000*l.* Consols was further assigned and transferred to a trustee upon trust to secure the payment of the same. The deed further contained a covenant by William Chaplin, that in case the plt. should at any time thereafter be desirous of repurchasing the said annuity of 538*l.*, and of such intention should give William Chaplin, his executors, administrators, or assigns, notice by the space of three calendar months, the said William Chaplin would, on receiving all sums that should be due for the arrears of the said annuity of 538*l.*, together with a proportionate part thereof from the last day of payment preceding such purchase up to the day of repurchase, accept 4990*l.* in full for the repurchase of the said annuity.

William Chaplin also insured the plt.'s life for the sum of 4990*l.*, subject to the payment of annual premium of 226*l.* 4*s.* 3*d.* Bonuses to the amount of 2150*l.* had been declared on this policy.

In 1845 the plt. married John King. No settlement was made on the marriage; and in the same year John King contracted with William Chaplin for the sale to him of another annuity of 133*l.* 5*s.* during the joint lives of John King and the plt. his wife; and by a deed, dated the 14th May 1845, in consideration of 1000*l.* paid by Chaplin to John King, the latter granted to the former an annuity of 133*l.* 5*s.* during the joint lives of Mr. and Mrs. King, to be chargeable on the funds for which the said sum of 20,000*l.* Consols had been substituted. The deed contained provisions similar to those of the former, together with a covenant that in case John King should at any time thereafter be desirous of repurchasing the said annuity, and of such intention should give three months' notice, that the said William Chaplin would, on receiving all sums then due for arrears of the said annuity of 133*l.* 5*s.*, with a proportionable part thereof until the day of repurchase, accept 1000*l.* in full for the repurchase of the said annuity.

William Chaplin effected an insurance upon the life of John King for 1000*l.*

When the treaty for the purchase of the annuity of 133*l.* 5*s.* was entered into, it was agreed between John King and William Chaplin, that the annuity of 538*l.* should, during the joint lives of John King and the plt., be reduced to 480*l.*, and that such reduced annuity should, during the joint lives, be accepted in full satisfaction and discharge of the annuity of 538*l.*, and from the date of the deed of May 1845, down to the death of John King, which took place in Feb. 1861, the reduced annuity of 480*l.* was regularly paid. The last payment before John King's death was due on the 12th Jan. 1861, and was paid in the following March.

On the 2nd May 1861 the plt. caused a notice to be served on Wm. Chaplin of her intention at the end of three months to repurchase the annuity, and shortly after the 2nd Aug. following, the plt.'s solicitor went to Wm. Chaplin's house, where he saw the deft., then the wife, and since the widow of Wm. Chaplin (Wm. Chaplin himself being seriously ill), and thereupon tendered to her a sum for the purchase-money, 4990*l.* and the arrears. There was a dispute between the parties as to the amount which was tendered, the plt. alleging that the sum was 5340*l.*, the deft. that it was only 5140*l.* Whatever the amount was, the deft. refused to accept it.

In May 1862 the deft., as executrix of Wm. Chaplin, commenced an action against the plt. to recover 1571*l.* 10*s.*, being 294*l.* in respect of arrears of an annuity of 538*l.*, with interest since the death of John King, and a sum of 1277*l.* 10*s.* in respect of the arrears of the said annuity, being the difference between the amounts of the payments due on an annuity of 538*l.* from March 1845 up to the death of John King, and those due on the annuity of 480*l.* during the same period, which had been paid.

The plt. Mrs. King then filed this bill on the 12th July 1862, alleging that she was advised she had no defence at law, and praying for an account of what was due to the deft. as executor for arrears of the annuity of 538*l.* since the death of John King, and that, upon payment of such sum, together with 4990*l.*, the indenture of the 12th April 1838 might be ordered to be delivered up to be cancelled, &c., and that the deft. might be ordered to assign and deliver up the policy; also, that the action might be restrained.

The conflict between the parties was, as to what were the terms, or as to what was the construction of the agreement in 1845; the plt. alleging that the object of the reduction was, that William Chaplin

might have secured to him, after paying the premium of 226*l.* 4*s.* 3*d.*, interest on the 4990*l.* at the rate of 5 per cent. and no more, and that the agreement was, that one of the annuities should not be repurchased during the joint lives of Mr. and Mrs. King without the other being repurchased at the same time; the deft., on the other hand, by her answer, alleged that her husband agreed to allow the annuity to be reduced only on the condition that neither of the annuities should be repurchased except whilst both were subsisting, thus denying the right of the plt. to repurchase, except upon the terms of paying all the arrears of the full annuity of 538*l.*

The deft. attempted to support her contention by the evidence of Mr. Moberly, who acted, in 1845, as William Chaplin's solicitor; but his Honour ultimately decided in favour of the plt.'s view of what the terms of the agreement were, so far as the same were the subject of evidence.

On the 15th July 1862 an order was made by this court on the motion for an injunction, directing judgment to be given in the action, to be dealt with as the court should direct, and ordering the plt. to pay to the deft. 513*l.*, being the residue of the sum of 807*l.*, the amount of arrears of the annuity of 538*l.*, from the 12th Jan. 1861 to the 12th July 1862, after deducting therefrom the sum of 294*l.*, which had been paid by the plt. into the Court of Q. B., and restraining execution on the judgment till the hearing of the cause. This the plt. had done.

The cause now came on to be heard.

Malins, Q.C. and *Freeman* were for the plt.—They contended that the plt. was entitled to redeem on the terms of paying at the rate of 538*l.* from the 12th Jan. 1861, the last day of payment during the joint lives.

Bacon, Q.C. and *Dickinson*, for the deft., contended, first, that the plt. was not entitled to redeem at all; and, secondly, if that could not be maintained, that the only terms, if any, upon which she could be allowed to do so, must be the repayment of the arrears of the full annuity of 538*l.* since 1845, over the annuity of 480*l.* which had been paid. If the agreement of 1845 ceased to have operation at the expiration of the joint lives, the only agreement thereafter in force between the parties was the deed of 1838, under which redemption was only to be on the terms of repayment of all sums that should be due for the arrears of the annuity of 538*l.* It was also contended that the plt. having pleaded equitable pleas to the action at law, was not entitled to file a bill in equity.

The VICE-CHANCELLOR.—I think the agreement was a very sensible one, and beneficial to both parties, for it is so conceived and expressed as, in my opinion, to be an agreement which could only have effect and operation during the subsistence of both the annuities. When one or other of the annuities ceased, the event in which the annuity was to be redeemed, and the condition as to the redemption of both, became impossible. It is a very rational arrangement that the grantee of an annuity should say, "I will accept a smaller sum in satisfaction of the larger annuity, provided you will not redeem one without redeeming both." It is a beneficial arrangement for the grantee of the annuity, because it induces the grantor not to exercise that right to repurchase which the annuity deed contains with a view to his benefit. This agreement was made in the year 1845. According to the agreement, the annuity of 538*l.* was to be reduced to 480*l.* That is the benefit to the grantor of the annuity. On the other hand, the condition was, that if the annuities were to be paid off, they must be both paid off, that one could not be paid off without paying off both. Ever since the year 1845, in pursuance of this agreement, the grantee of the annuity receives what is called properly the reduced annuity, and gives receipts for every half-

yearly payment. There is his receipt for the half-year's annuity due on the 14th Jan. last. It seems to me that upon each transaction, when the half-yearly payment was made, no question of arrears could occur, that it was accepted in satisfaction of the annuity which was then due, that is to say, of the reduced annuity, and it was the reduced annuity, because neither of the annuities were repurchased, or sought to be repurchased. When the event of the falling in of one or other of the annuities occurred, this agreement could have no operation, because, when that event occurred, it would be impossible to have a simultaneous repurchase of both. The effect of that is, that the deed whereby the annuity which remains unextinguished, or which remains in existence as an annuity, is secured, must govern the amount payable in respect of it. Here the annuity of 538*l.* is that which continued to exist after the other had fallen in, and therefore could no longer be repurchased. As soon as that event occurred the right of the grantee of the annuity to the sum expressed, that is to the full amount, and not to the reduced amount, accrued. And now that the question occurs as the repurchase of that annuity, there being no arrears, it must be repurchased on the footing of the payment of the whole principal sum, and of an annuity at the rate of 538*l.* from the time of the last payment of the reduced annuity being accepted in satisfaction, and with that I think there can be no question as to the terms upon which the repurchase is to be effected. What is more difficult is to decide the question of the costs of this litigation. The parties disagreeing, the grantee of the annuity brings an action for the whole arrears from the year 1845 of the larger annuity, after having accepted the reduced annuity in consequence of a contract. It is said there is no defence to the action at law. I am very much surprised at that, and still more surprised when I see the defence which was made to the action at law. But the question of jurisdiction which Mr. Dickinson has argued no longer arises. Whilst the action at law was pending, what are called equitable pleas were pleaded, and I suppose the plt. in this suit was advised that those equitable pleas could not be maintained. It seems to me to be highly probable that this was so. But the bill having been filed, the course that was taken was this, that, either by the order of the court or by arrangement between the parties—and it is immaterial which—the jurisdiction is transferred to this court, and a judgment is given at law to be dealt with as this court shall direct. I can only satisfy my mind on the real question in the cause on which I think the plt. is entitled to succeed in this court, by saying, that on that question the plt., being right, certainly ought not to pay any costs; but on the other hand, considering the manner in which the matter has been dealt with between the parties, I can only satisfy myself as to the justice of the case by holding that there should be no costs on either side. This is not a case in which a person comes in to redeem a mortgage upon an equitable right to redeem, and where the terms of obtaining that equity are to pay the costs of redemption. This is not a redemption, it is a repurchase.

Malins contended for the plt.'s costs on the ground that she had succeeded in the litigation, but

The VICE-CHANCELLOR declined to give costs, on the ground of the plt.'s proceedings at law.

Bacon asked for the costs of the action at law, on the ground that a sum had been paid into court by the plt.

The VICE-CHANCELLOR said he could give no costs of the action at law. There would be a decree for a repurchase on payment by the plt. of 4990*l.*, together with the arrears of the annuity from the 14th July 1861; and upon payment of the amount found due,

that the defts. assign the policy of assurance to the plt.

Solicitors: for the plt., *Langley and Gibbon*, agents for *N. Were*, Plymouth; for the defts., *Shum and Crossman*, agents for *W. H. Moberly*, Southampton.

V. C. WOOD'S COURT.

Reported by *W. H. BENNETT* and *EDWARD LLOYD*, Esqrs.,
Barristers-at-Law.

July 21, 23, 24 and 27.

SIMPSON AND ANOTHER v. SOUTH YORKSHIRE
RAILWAY COMPANY AND ANOTHER.

*Agreement under seal—Extent of obligations under—
Partnership—Notice—Acquiescence.*

The obligations created by an agreement under seal cannot be extended as against persons who have succeeded to the business of a firm, who were originally parties to the agreement, unless evidence of express notice to and acquiescence by those persons as to the excess of liability alleged to be provided for by such agreement is distinctly given.

*Where, therefore, a railway company covenanted to do certain works the charge for which was not to exceed 2000*l.* and the extra charges for which, with the knowledge and consent of the other parties to the agreement, did in fact exceed 4000*l.*;*

The original parties having subsequently assigned all their interest in these works to persons who succeeded them in their business, and no notice proved that the new partnership had acquiesced in this extra outlay:

*Held, that such succeeding partners were not liable to the excess beyond the 2000*l.*, the extent of liability under the agreement.*

This was a bill filed by Messrs. Simpson and Stewart, a firm working a colliery called the Lund Hill Colliery, against the South Yorkshire Railway and River Dun Company, to restrain the company from preventing or impeding the use by the plt. of a certain tramway leading from the plt.'s colliery to the railway of the defts. company, and for an account.

In 1853 the defts. T. S. Galland, together with one Wm. Taylor the younger, worked as partners the Lund Hill Colliery, under a lease for a term of sixty years. This colliery is situate to the northward of and about 1000 yards from the Elsecar branch of the Dearne and Dove canal, on the western side of, at the distance of a few yards from which, runs the Elsecar branch of the railway of the defts. company. At the date of the agreement or deed upon the construction and effect of which the question in the cause arose, the canal and all the powers of the canal company were vested in the South Yorkshire Railway Company. Taylor and the defts. Galland were desirous of forming a tramway from their colliery to the company's branch railway, and an agreement under seal between them and the South Yorkshire Railway Company was entered into with that object.

It bore date the 20th June 1854, which, after reciting that the said company had agreed with the said Wm. Taylor and Thomas Spicer Galland to make and construct, immediately upon receiving notice in writing from them to that effect, a connecting branch from the sidings of the railway of the said company, at or near the point marked A. on the plan thereunto annexed, to the colliery pits then being sunk or constructed by the said Wm. Taylor and Thomas Spicer Galland, on land at Hemingfield, belonging to Samuel Swift, of Hemingfield aforesaid, gentleman, and also to make and construct by the side of the said Dearne and Dove canal, at or near the said branch, a basin, as shown on the said plan, for facilitating the loading and unloading of vessels, and a spur or short branch or tramroad from the said firstly mentioned connecting branch to the said

basin, and also such other works and conveniences as should be considered necessary by Charles Bartholomew, engineer of the said company, according to certain plans and specifications to be settled between the said William Taylor, Thomas Spicer Galland and Charles Bartholomew, and signed by them, and reciting that it had been agreed between the said parties thereto, that the said then intended works should be done by contract in the usual way, the said contracts to be approved of by the said William Taylor and Thomas Spicer Galland, such approval being testified by their signatures thereto; and that it had been further agreed that the sums to be expended in the said works and conveniences should not exceed the sum of 2000*l.*; and reciting that the said works would be constructed on and over lands belonging respectively to the said Samuel Swift and Remington Wilson of Broomhead Hall in the county of York, Esq., Sir George Wombwell, of Wombwell, in the county of York, Bart., and to the said company, and the said William Taylor and Thomas Spicer Galland, or the said company, or one of them (having procured the leave and authority of the said several landowners for the said construction on their said respective lands), the said William Taylor and Thomas Spicer Galland had agreed to secure to the defts. the company the repayment of the costs of the said works so to be expended as aforesaid by seven equal instalments at the times thereafter mentioned, until the full amount thereof should have been paid together with interest for the same, at the rate and times thereafter provided for payment thereof, upon completion of which said several instalments the same works (except the land where the same should have been constructed) should become the property of the said William Taylor and Thomas Spicer Galland: it was witnessed that for the considerations aforesaid, and in consideration of the said sum so at their request to be laid out and expended by the said company in the construction of the said works and conveniences at the time and in manner thereinbefore mentioned, and particularly described in the said plan and specification, they the said William Taylor and Thomas Spicer Galland, did thereby for themselves, their heirs, executors and administrators, covenant, promise, and agree to and with the said South Yorkshire Company, their successors and assigns, that they the said William Taylor and Thomas Spicer Galland, their heirs, executors, or administrators, should well and truly pay or cause to be paid unto the said South Yorkshire Railway Company, their successors and assigns, all and every the sum and sums of money, costs and charges, not exceeding in the whole the sum of 2000*l.*, which they the said South Yorkshire Company should pay or incur in constructing and completing the works thereinbefore mentioned, or in any manner arising out of the same, by seven equal payments on the 30th Dec. in every year after the expiration of three years from the date date thereof, the first instalment to be paid on the 30th Dec. which would be in the year 1857, and so on yearly, until the full amount of the said principal sum so to be laid out and paid as aforesaid in the construction of the said works and conveniences as aforesaid, should have been paid to the said South Yorkshire Company, together with interest in the meantime for the said sum of 2000*l.*, or on so much thereof as for the time being should remain unpaid, after the rate of 5*l.* for every 100*l.*, by the year, payable half-yearly, on the 30th July and the 30th Dec. in each year, the first payment thereof to begin and be made on such of the said half-yearly days of payment as should next happen after the construction and completion of the works to be done under the now stating agreement; provided, and it was thereby agreed between the said parties thereto, and the said company did thereby declare that, on payment of the

whole of the said principal sum, together with such interest as aforesaid, the said works and other conveniences to be erected as aforesaid (except the land whereon the same should have been constructed), should become the property of the said William Taylor and Thomas Spicer Galland, their executors, administrators and assigns, and that in the meanwhile, so long as the said William Taylor and Thomas Spicer Galland should regularly pay such instalments as aforesaid, together with the interest thereon, or on such of them as should, for the time being, remain unpaid on the days thereinbefore appointed, it should be lawful for the said William Taylor and Thomas Spicer Galland to use the said works for the passage thereon of the trucks, carriages and articles passing to and from their said colliery from and to the said canal and railway, and the sidings thereof respectively; provided also, and it was thereby further declared that, in case of default by the said William Taylor and Thomas Spicer Galland, their executors and administrators, in the payment of any or either of the said instalments, when and as the same should become due as aforesaid, it should be lawful for the said company to close the said works and conveniences against the said William Taylor and Thomas Spicer Galland, and against any traffic passing to or from their said colliery; and further, the said William Taylor and Thomas Spicer Galland did thereby grant and agree that it should be lawful for the said company, their agents and assigns, to seize and distrain any trucks, carriages, chattels, articles or effects of them the said William Taylor and Thomas Spicer Galland, their executors, administrators and assigns, being in or upon the said works or conveniences, and the same to sell and dispose of by appraisement, by private sale, or public auction, in such manner as the said company might think fit and proper, as fully and speedily to all intents and purposes as if the same were seized by the company by virtue of a writ of execution for sale of the same for payment of a debt without any right on the part of the said William Taylor and Thomas Spicer Galland, their executors, administrators, or assigns, to replevy the same; and further, by and out of the moneys produced by such sale as aforesaid, to pay to themselves, the said company, their agents or assigns, the sum or sums of money so due to them under the now stating indenture or agreement, or which might accrue during such seizure or sale as aforesaid; and moreover, in case any seizure should be made, by means thereof to pay and satisfy the arrears and debt so owing as aforesaid, that it should be lawful for the said company, in case they should think proper so to do, by themselves, their agents or assigns, to remove all or any part of the said works and property and materials thereof, notwithstanding any previous payment might have been made by the said William Taylor and Thomas Spicer Galland, their executors, administrators, or assigns, under the now stating indenture, and in case of the total removal of the said works by the said company, the covenant of the said William Taylor and Thomas Spicer Galland for the payment of any instalment or of the interest thereon not then due or payable, should become void and of none effect.

In accordance with the stipulations of said deed, the company made and completed the tramway branch works and conveniences now in the occupation of the plts.

In 1857 Taylor and Galland paid the company 887*l*. 1*l*s. in part satisfaction of the amount of their works.

Taylor and Galland had previously dissolved partnership as from 31st Dec. 1856, [and shortly afterwards Taylor and the plts. agreed to enter into partnership to work the colliery under the firm of the Lund Hill Company, for a term as yet unexpired, and the allegation in the bill was, that all the railways,

plant, implements, tenant-right, stock, chattels and effects belonging to or in anywise connected with the said partnership of W. Taylor the younger and T. S. Galland, save and except any moneys which might be due or owing to or from the said former partnership, up to the 31st Dec. 1856, were in equity assigned to and became vested in the plts., and Taylor and Galland as such partners as aforesaid.

It was also stipulated that all the liabilities of the old partnership up to Dec. 31, 1856, should be discharged by Taylor and Galland, and the plts. alleged that they had never in any manner taken upon themselves or become liable to the payment of any such liabilities.

In 1857 Taylor became bankrupt, and under a decree of this court in July 1861 all the share and interest of Taylor or of his assignees in the colliery property and effects, and in the assets as well of the old as the new partnership, became vested in the deft. Galland.

The plts. alleged that they had been always ready and willing and had offered to pay to the company on behalf of deft. Galland what was due and owing to them in respect of the principal sum of 2000*l*. and interest; but that defts. alleged (of which in fact there was no doubt) that they had expended a sum exceeding 4000*l*. in the construction of the said tramway and works, and they claimed to be repaid such expenditure and interest thereon, or in default of payment to enter upon the said tramway works, and distrain the trucks, carriages and effects thereon, and to take up and remove the rails or trams, and close the said tramway works and conveniences against the traffic from the plts.' colliery.

A demand of the amount was made, and a correspondence consequently ensued commencing the 18th Aug. 1858, which is stated and commented upon in the V. C.'s judgment.

The plts. contending that they were not liable for the excess beyond the 2000*l*., refused to pay, although they tendered a sum of 1783*l*. 3*s*. 1*d*., as the balance of principal and interest due under the agreement.

The company, however, refused this tender, and having proceeded to take up and remove the rails of the tramway and to stop the traffic thereon from plts.' collieries, and threatening to distrain and dispose of the plts.' trucks, waggons and other effects in and upon said tramway, works and conveniences, the plts. filed their bill praying for an injunction in the terms before stated, and for an account of what was due in respect of the principal and interest of said 2000*l*.

On the 10th Feb. the plts. moved for their injunction, but, on the undertaking given by the company that nothing further should be done by them until the hearing, the cause now came on for motion for decree.

The effect of the evidence is fully stated in the judgment.

Sir H. Cairns, Q.C., Amphlett, Q.C. and C. R. Freeing, for the plts., contended that the purchase of the rails, goods and other materials for the construction of the tramway, conveniences, &c., was not connected with that part of the works contemplated by the agreement, viz. the sidings from the colliery to the railway, and that they were mere chattels, the amount of which constituted a debt from the parties for whom they were used, viz. the old partnership; that, like any other debt from that partnership, the plts. were not liable for and had never assented to the excess of outlay; indeed, the works had been completed before the partnership of which they formed a constituent part was formed; that these extra works were not done by contract, according to the deed, and could not fall within it, as not being at all connected with that deed; that no case had been made by the defts. the company which warranted the court in altering or varying the terms of the deed; that no admission had been made by the plts. that they had ever become liable to the extra

demand. The effect of the deed had not been altered by anything done by Taylor or Galland before the completion of the works, or by the *plts.* since.

Relq. Q. C. and *Speed*, for the *defts.* the railway company, contended that the construction of the extra works done was part of the works authorised by the deed. They were sanctioned by Taylor and Galland, and they agreed that the price of them should be retacted by the deed. The *plts.* had taken to these works, and took no better title to them than Taylor and Galland could have. They had taken with complete notice of the company's rights; at all events, no efficient tender had been made, even supposing the amount of their liability limited to the 2000*l.*

Cairns in reply.

July 27.—The VICE-CHANCELLOR said:—The question in this case is, in fact, a short one, although much evidence has been entered into on the subject. It is simply this—what is the construction and effect of a certain agreement which was entered into under seal on the part of Taylor and Galland, who originally held the colliery which is now called the Lund Hill Colliery, and by which they arranged with the *defts.* the South Yorkshire Railway Company, that the railway company making for them a certain tramway and conveniences at an expenditure not to exceed 2000*l.*, they, Taylor and Galland, would pay that 2000*l.* by instalments in the manner mentioned in the deed; and that in the event of default being made in payment, there should be a right (I can hardly call it of entry, because the lands were not the lands of either party), but a power of seizing the property and a power of removing the tramway, and further, a power on the part of the railway company of impeding the traffic on the tramway, of removing it, and of closing it. This seems to have been the intention of the parties as stated in the indenture as originally agreed to, and the question is, whether by subsequent events the contract on the part of Taylor and Galland in the first instance, was a contract which would be binding on them, as is alleged by the *defts.*, and would be binding on those who succeeded and entered upon the colliery on the termination of the original partnership, namely, Messrs. Simpson and Stewart, and whether an additional sum, making a total expenditure of upwards of 5000*l.*, was intended to be secured in the same manner as was stipulated by the original terms of the indenture—namely, by a power of removing the chattels and a power of closing the railway. Now the agreement, which was one of a peculiar character, was an agreement by which leave was to be obtained by the parties holding the colliery from certain landowners, the company itself being partly landowners, and part of the land of course being also the property of the colliery company, but with a number of the intervening landowners—the agreement was, that with the consent of those intervening landowners the company should lay down the line and rails and perform the works which were to be designed and approved of by the engineer, and when that was done, and when the instalments should all have been paid up, and not before, the chattels thus deposited were to become the property of the colliery company, and of course they were to have the use of the line of railway which was to be so constructed. That being so, no difficulty apparently would have arisen except from the difficulties in which Mr. Taylor became involved, ending in his bankruptcy, and which seem to have occasioned in truth the dispute which has now arisen, because of course, while Taylor and Galland were solvent, the additional money which had been expended in respect of the construction of the tramway and works would be looked on as a debt due from them and to be settled in the same way as any other debt between them and the company. But, in consequence of the bankruptcy of Taylor, the ques-

tion arose whether or not Taylor had done such acts because I think there is nothing fixing Galland beyond the mere circumstance that he must have known what the works were which were going on, and had entered into a deliberate contract, he being a partner in the firm, that this additional expenditure should be included in the deed. The facts in that respect were these: the company set to work to perform their obligation. The works were not to be paid for as regards the first instalment until the 30th Dec. 1857, the date of the contract being in the month of June 1854. The first instalment was to be paid in 1857, and then the instalments were to be paid by seven equal payments in each year from the 30th Dec. 1857; and the strongest portion of the evidence, as far as the evidence is concerned, independently of questions of law that may arise as to the possibility of Taylor so binding his copartner, or the possibility of the *plt.* being affected by what had been previously done—the evidence that is given is that of Mr. Bartholomew, who states that he sent to Mr. Taylor (who seems to have been the active man in conducting the affairs of the colliery under the firm of Taylor and Galland), on the 19th Sept. 1856, certain accounts with this letter:—"I beg to inclose a statement of amounts due to you from the South Yorkshire Railway Company;" that, of course is a mistake. It is so in the original, but it means the converse. It means, "amounts due from you to the South Yorkshire Railway Company, and also to the Wombwell Main Coal Company. The amount in respect of Lund Hill colliery includes what was agreed to be executed by the Wombwell Main Company on the Wombwell estate, and also the further materials furnished for your sidings. I shall be glad to see you on Tuesday next on the subject, as I have promised to write Mr. Baxter thereon" (Mr. Baxter being the solicitor of the railway company), and must do so in the course of a few days." That is addressed to Messrs. Taylor and Company. All this time it may be observed there was not an instalment due, and would not be for a year and a quarter after the date of this letter, according to the terms of the deed. He says in the letter he has sent the following accounts:—"Account of the Lund Hill Colliery rails, chairs, sleepers, and fastenings from the sidings to the pits, 960 lineal yards and 187 lineal yards of branch to canal, being exclusive of all sidings, 1147 lineal yards at 18*s.* 5*d.*, 1056*s.* 3*d.* 11*d.* Works in excavation, masonry, ballasting and permanent way, not on the Wombwell estate, 790*l.*," he makes that 1846*l.* odd; then he makes out certain works amounting to 536*l.*, partly done for the Wombwell-road, partly for a branch to the canal, and then further works amounting to 373*l.* Then comes the larger item, "For rails, chairs, sleepers and fastenings supplied for 2000 lineal yards of siding (2000 yards at 18*s.* 5*d.*), 1841*l.* 13*s.* 4*d.*," and making a total in that respect of 2131*l.*, and by this large sum of 2131*l.*, and by another sum which he says (by way of explanation) was occasioned by a deviation rendered necessary in consequence of the non-consent of a certain owner or occupier in making a particular bridge which he puts at 500*l.*, the total is swelled to the amount of 4887*l.* instead of 5131*l.* 19*s.* 11*d.* Then Taylor receives that, and Mr. Bartholomew says he had an interview with Taylor on the subject, and that Taylor asked him, "on behalf of the company, not to press at that time for the payment of the interest" (he had charged, I should observe, 244*l.* 8*s.* for interest), "but to accept a cheque for 887*l.* 11*s.*" (that being the odd balance over the 4000*l.*), "leaving a net 4000*l.* due in respect of principal money, and he at the same time wrote and left with me the following letter together with the said cheque of 887*l.* 11*s.*:" Rotherham, 23rd Dec. 1856. My dear Sir,—Inclosed I hand you two cheques, one 691*l.* 17*s.*, and another 887*l.* 11*s.*, dated Jan. 12,

1857. I shall feel obliged by your retaining them till that date, and pass them to our credit in your accounts." I ought to observe, that Mr. Bartholomew does not at all distinctly in that affidavit allege or aver any agreement. He says something about an understanding between him and Mr. Taylor, that this was to be considered as included in the original works; but on the re-examination, after cross-examination, he enters into much more detail, and he then states somewhat positively, that throughout, while these works were being done, while the bridge was being deviated and the other works were being performed, Mr. Taylor from time to time agreed that they should be added by way of extra charge to the 2000*l.* which was included in the deed. As regards the bridge, he vouches some letters as evidence of that; but one must say that, looking at those letters, they contain no evidence of that kind. They simply contain a correspondence in which Taylor assents to the deviation which was necessary to be made from the original course in consequence of the dissentient occupier, but nothing is said about the costs of construction, &c., and nothing is said about any agreement of the kind. One cannot help observing, on the face of this letter and of the correspondence independently of the law of the case, that Mr. Bartholomew and Mr. Taylor seemed to have ignored the agreement and all its contents at the time this transaction took place, for in the first instance there was charged not only this large sum of 4887*l.*, but an amount of 244*l.* for interest, whereas and under the provisions of the deed there was not a farthing of interest due. Taylor appears to have expected that payment would be made in respect of this, whereas no payment was due for a year and a quarter, and both sides apparently, while these accounts were going forward, had not the agreement in their hands, or at all events it was not at all present to their minds. There is a further observation which occurs upon this: I do not find any trace in the subsequent proceedings of this having been dealt with on the footing of the agreement, that instalments were asked for—instalments, I mean, of the 2800*l.*—because, of course, if the whole were to be put on the footing of the agreement, it would be very important for Mr. Taylor and Mr. Galland to know that, because, if it was not on the footing of the agreement, they would be debtors to the extent of 2800*l.* and odd, which was not covered, and they would be liable to pay it, and would not be entitled to any indulgence or delay in respect of it, but would be debtors immediately. All that was material to be ascertained, but nothing of the kind seems to have been ascertained, and one cannot help making this further remark, that upon the company of course is thrown the burden of showing that a solemn agreement under seal has been departed from to a serious extent, making the charge more than double what was agreed on. It is the company's duty to show something distinct and positive, and something beyond all question and dispute on such a subject, and the only evidence which I have is the certainly very incomplete evidence of Mr. Bartholomew, and Mr. Taylor is not called. It was said that the *plts.* should have called Mr. Taylor. The *plts.*, however, simply stand on their deed. The onus of proof of departure from the deed is on the *defts.* Mr. Taylor, however, is not called, and I must assume it was considered that it was not worth their while to call him, that he had nothing to say which would corroborate Mr. Bartholomew with respect to the transaction which took place. It really seems me, as a matter of fact, that there is not evidence enough to warrant me in departing, to so serious an extent, from an instrument under seal, as to add this by way of an additional charge on the charge contained in the agreement. There is no evidence of this description in the absence of Taylor, who would now be a perfectly competent witness in every sense,

having no interest in the matter since his bankruptcy. As a matter of law I think it would be very difficult to fix the *plt.* with any consequences of what Taylor did, because, supposing Taylor did that which Bartholomew avers him to have done—did enter into a solemn engagement on behalf of Taylor and Galland, that what was under the hand and seal of Taylor and Galland should be converted into a charge on the works and a power to take up the works—I apprehend that that was not within the scope of a general partnership agency, and that there is nothing in this case to show me that Galland had made Taylor his agent to enter into any such contract as that, or to engage him more seriously than he had already done in respect of this original contract as to the remedies. I am not saying anything as to whether Galland is or is not chargeable (it does not arise in this suit) with any additional expenditure which may have been incurred at the request of Taylor, or especially in reference to those materials which had been furnished. But as regards the charge being a charge which was to be secured by this particular deed to which Galland had assented under his hand and seal in this particular mode, a mode which was very serious in its consequences, as affecting the dealings of the railway company, I do not find, in the first place, that Taylor had any such power whatever. Secondly, I find, as regards the materials comprised in the charge, namely, that large charge of 2000*l.* for materials furnished for sidings which can only be brought under the words of the general contract, "such other works and conveniences as are thought proper," there being nothing whatever which satisfies my mind that any such matter as that was brought to Galland's notice—that there was all these numerous charges for these additional works to be executed under the deed by which he is to be charged. Under such circumstances it is quite impossible, as it seems to me, to hold that Galland is affected through the agency of Taylor with any contract of this description. I quite leave untouched, in the observations I am here making, how far Taylor had or had not authority to bind him *quod* partner as to the additional materials furnished amounting to 2131*l.*, which may very well have been necessary and proper for the working of the colliery for Taylor to have engaged to pay on behalf of himself and partner; but it is quite a different matter as to adding that to the security which is comprised in this deed. One has only to observe, if the case had been the converse—if it had been a deed under the seal of the company by which the contract had been by them to pay to Taylor and Galland as contractors for works of this description—I should at once have heard that they could not be affected or bound by anything their agents might have done by way of supplementing this deed, or adding to the force of the contract therein contained. Again, I cannot help repeating the observation, because it has struck me as one having considerable weight on the matter, that I find nothing at all which indicates that there was a willingness to release Galland or Taylor from the obligation of immediate payment in respect of these overcharges. There is nothing of the kind. There is a great deal of correspondence and a great deal of negotiation, but nothing saying, "We are willing to take this by instalments from you; but on the contrary, as far as it appears to me on this transaction, this was a debt from Taylor, or Taylor and Galland, wholly *dehors* the deed and wholly irrespective of that sum of 2000*l.* which was secured by deed. Then, I need not pursue that question further, because, if Galland could not be bound by such an agency as this, still less, of course, could the *plts.* be bound who come into the partnership after all this had been done, after Taylor and Galland had had these matters laid down, and had these things delivered to them; and in order to bind the *plts.*, the

ny thing that was brought forward to bind them was this, that on purchasing the property there was an item appearing in the valuation of that which they were about to purchase of 5131*l.*, being the exact amount, it was said, of principal and interest arising from this alleged arrangement between Taylor and the company, and which was put down as works executed by the South Yorkshire Railway Company. It appears to me that that would not in any way affect these gentlemen with notice that these were works which were bound to be secured by the covenants and engagements contained in the deed of 1854, because they might well suppose that many works might be done by the railway company for the benefit of Taylor and Galland irrespective of these. They were purchasing via Taylor and Galland had upon the expenditure of a certain sum of money. They come and find the works in the hands of Taylor and Galland; they have had the use of them; they have been allowed to enter into their own contract without any notice from the company that the company claimed the right of removing those works, and they go on for a year or two, having the use of this tramway, and having paid Taylor and Galland for that asset among the several other assets which they acquired. I do not see, after that, how it is possible for the railway company to say, "We are entitled, after you have entered on the faith of having this tramway, after having purchased with the notion that you had a communication between your colliery and the railway to take off its produce, we now have a right to turn round upon you and say, although you have a deed by which, on payment of 2000*l.*, you are freed from any interference on behalf of the company, in truth, instead of the 2000*l.*, there is to be a sum of 5000*l.* and odd paid before that can be done." As to charging them personally with any debt, the company's counsel very properly said that that was a right which the company could not at any time insist on; and all that the company could insist on was the right (and no more was contended for) of extending the provisions of this deed to this additional sum. It was said, that the correspondence shows an acquiescence on the part of the p*l*ts. I do not go through it because, from the first moment when the p*l*ts.' attention was called to it, they rejected it. The correspondence of 1858 shows a distinct rejection, on the part of the p*l*ts., of any claim to be fixed beyond the 2000*l.* in respect of this arrangement. The whole of the correspondence itself is in evidence, and Mr. Rolt relied a good deal on parts of that correspondence as showing that the company had acquiesced in such a view. It appears to me that there is nothing, from the beginning to the end, to lead to the conclusion that the p*l*ts. (that is, Messrs. Simpson and Stewart) did in any way do anything to recognise the bargain. On the contrary, they positively declined to sign the draft sent to them, by which they would have been bound to recognise the agreement. Then the only remaining point in the case was, whether or not a sufficient sum had been tendered before the stoppage of this railway to prevent the company insisting on their strict rights under the deed, assuming it to be for 2000*l.* only. That point stands in this way: A sum of 800*l.* odd was paid by Mr. Taylor, I hold that sum to have been paid in respect of the 4000*l.* and odd, the amount of the bill sent in to him. It was sent to clear off and reduce it to an even sum of 4000*l.* principal, and I hold that the company are entitled to deduct that sum as not included in this 2000*l.*. The consequence of doing that no doubt will be that this tender will be somewhat insufficient, even if you speak of the one instalment not being due until the end of this year, I have a little doubt as to that, because, as I read the deed, it seems to me that when there is default in any instalment in being paid, the whole sum becomes payable. Therefore clearly I

must hold that the tender did not amount to the exact sum which was due. Then it was said by Mr. Rolt, in that state of things, this court could not interfere, the legal right having accrued, without the full and entire debt being paid which had been thus credited. But, assuming that the p*l*ts. are not bound otherwise than by any such circumstance as that, the p*l*ts. coming into this court for relief, it would be impossible, as it seems to me, to hold, under the circumstances of this case, that any such right had accrued, because it stands thus: There had been repeated demands on the part of these gentlemen to know what was due, and there never had been an account furnished from which they could know what was due. On the contrary, the only account furnished misled them, and it misled them as to this particular amount. I do not say that it in the least binds the company. Taylor clearly paid that for principal and not for interest; but the account represented it as paid for interest. That misled them, and the p*l*ts. cannot be blamed for being misled in that respect. Then what was done upon that was—they calculated the whole amount of that debt, taking that view, that the 887*l.* was paid in part discharge of the debt, and in that way made the tender; but they accompanied that with the statement, "If you will give us the full amount of the debt we will pay all that is due," and the only matter which could throw any doubt upon that would be one passage in Mr. Baxter's affidavit, in which he says: "I deny that the p*l*t. William Stewart, in any other manner than as above stated, made any offer to pay to the defts.' company any money, and I say that, on the said occasion, I explained to the said William Stewart, as the fact is, that no part, either of principal or of interest, of the moneys due to the company under the said deed of the 20th June 1854, had ever been paid, and that upon his (p*l*t. William Stewart's) view of the matter, the company were entitled to 2000*l.*, with interest from 1856, and had forfeited all their right by non-payment, but that, upon my view of the circumstances, they were entitled to," of course to more. That might be very well if it were not accompanied by what has misled in the account which was transmitted. The former account showed the 887*l.* as applied in deduction of interest; it dealt with it in the same manner as if it had been applied in discharge of interest accruing on the debt. I think, in that state of things, when they were so misled, it is not enough for Mr. Baxter to say here, "I told them that there was the whole amount of 2000*l.*," while the account was still subsisting, which shows an appropriation of the money, but which is inconsistent with that view of Mr. Baxter. I think, now that we know all the facts, there is more due than that, and that there is more advanced than that; but we must remember this was paid with that representation made which was sufficient to mislead, and there was also a distinct offer to pay anything to be found due and just up to and including the time of the filing of the bill. I think, therefore, I am bound to hold that the defts. have been wrong in this controversy. The whole transaction is somewhat in the nature of a mortgage, in which the mortgagee denies the right to redeem. I think, up to that point, the costs will have to be borne by the company.

Minute of decree.—Declare, that on payment to the defts. the South Yorkshire Railway and River Dun Company, by the p*l*ts. and the deft. Thomas Spicer Galland, or any of them, of the sum remaining due to the said defts. the company, for principal and interest in respect of the sum of 2000*l.* covenanted and agreed to be paid by the indenture of the 20th June 1854, after deducting the sum of 1783*l.* 3*s.* 1*d.*, paid to the defts.' company, the tramway and works and other conveniences erected and made by the said company in pursuance of the provision of the said indenture will become the property of the p*l*ts. and the deft. Tho*s.*

V.C. W.]

BASKETT v. SKEEL—*Ex parte* SAMUEL STARLING.

[BANK.]

Spicer Galland, and that the plts. and the last-named deft. will be entitled to use the same in manner in that behalf in the said indenture mentioned. Declare that the sum of 887*l.* 11*s.* paid to the defts. the company, on the 12th Jan. 1857, ought not to be applied in reducing any part of the said sum of 2000*l.* secured by the said indenture. Take an account of what is due to the defts. the company from the plt. Thos. Spicer Galland, in respect of the sum of 2000*l.* and interest, on the footing of the same indenture, subject to the above declaration. Usual directions as to costs. The defts. the company to be perpetually restrained from closing or impeding the tramway works and conveniences as against the plts.

Solicitors: *Torr, Janeway and Tagart; Baxter, Rose, Norton and Co.*

July 25 and 27.

BASKETT v. SKEEL.

Mortgage—Produce of Consols—Interest—Usury laws.

*A mortgage-deed stated the consideration money to be 400*l.*, whereas in truth it was the produce of consols, realising only 360*l.* It was arranged that 400*l.* should be inserted as the loan, and interest on that sum paid by the mortgagor. This was to indemnify the mortgagees against any loss by the depreciation in the price of the stock.*

This transaction was before the repeal of the Usury Acts:

Held, that this was a fair bargain, and the mortgagees entitled to an account and payment on that footing.

This was a petition presented by G. J. Corner and C. Drummond, as mortgagees of a leasehold property at Newington, Surrey, in a cause which had been instituted to administer the estate of William Baskett the mortgagor, and it prayed that the usual account might be taken of the mortgage-debt and interest, and payment out of a fund in court.

By the mortgage-deed, dated the 3rd Nov. 1840, after reciting the lease, and that Baskett the mortgagor had occasion for the loan of a sum of 400*l.*, the premises were assigned as security with a covenant for payment of that sum and interest, with the usual power of redemption on payment.

The mortgagor having died, a suit was instituted for the administration of his estate, and the usual decree and reference were made, amongst other things directing an inquiry as to incumbrances on the real or personal estate of the testator. The master reported that certain parts of the testator's leasehold estate were subject to the above mortgage, and stating specially that only 360*l.* was actually advanced to said testator, and interest only on that sum had been paid up to a certain day. That in May 1844, the executors had given notice of paying off this mortgage in six months; but, in consequence of the mortgagees being unable to produce the title-deeds or the mortgage by which said sum of 360*l.* was secured, it had not been paid off, and no interest paid since the day mentioned in the notice. The petitioners offered by their petition to release the mortgage property, and indemnify the estate against any loss from the non-production of the title and mortgage deeds.

The mortgaged property had been sold under the decree, and the amount of the produce, 535*l.*, paid into court by the executors and invested.

Interest on the mortgage money from the 3rd May 1844 was still due, and the petitioners submitted that they were entitled to the 360*l.* and six years' interest on that sum, and that payment should be made to them out of the fund in court.

The evidence as to the mortgage was satisfactory; but a question arose whether, under the circumstances

above stated, the mortgage itself was not void by the Usury Acts in existence at the date of the mortgage.

W. M. James, Q. C. and Jolliffe, for the petitioners. *Speed* for the purchaser.

Willcock, Q. C. and Martindale, Cole, Q. C. and Surridge, Osborne, Q. C. and H. Humphreys, Giffard, Q. C. and Bagshaw, for the several other parties. The cases as to the Usury Acts were

Moore v. Battis, 1 Eden, 274;

Parker v. Ramsbottom, 3 B. & Cr. 257.

The VICE-CHANCELLOR thought the mortgage-deed had been sufficiently established, and the only question was whether the transaction was a *bond fide* transaction, or only colourable and intended as a mode of evading the then usury laws. He thought it was a fair transaction, and not intended to evade the Acts against usury. If stock was sold out by a mortgagor when its value was low, and the covenant was to reinvest the sum of stock sold out, the lender had a right to be indemnified against any loss which might accrue if the stock should be depreciated in value, and this was what had been intended by the parties to this transaction. As it did not appear to him (the V. C.) that it was merely colourable, but that the evidence showed that it was an honest and fair transaction, the petitioner would be entitled to an order declaring the debt of 360*l.* and six years' interest thereon a valid debt against the testator's (mortgagor's) estate.

Order accordingly.

Solicitors, *Chapple; M'Phail.*

Common Law Courts.

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Thursday, Sept. 10.

(Before Mr. Commissioner FANE.)

Ex parte SAMUEL STARLING.

Award of damages by the commissioner by consent under the 153rd section of the Act of 1861.

This was a motion on behalf of James Hudson to prove for the amount of damages to be ascertained by the commissioner for an alleged breach of contract in not completing an agreement entered into on the 20th Dec. 1862, for the sale of certain premises in High Holborn to the claimant Hudson for 325*l.*, of which 50*l.* was paid by him as a deposit. The intended purchase went off in consequence of four quarters' rent being outstanding.

Scarth sought to recover damages for the breach of the agreement, consisting of several items amounting altogether to 181*l.* 15*s.*, and called the commissioner's attention to the 153rd section of the Bankrupt Act 1861, which enacts, that "If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be proveable as if a debt due at the time of the bankruptcy: provided that in case all necessary parties agree, the court shall have power to assess such damages without the intervention of a jury or a reference to a court of law.

Dowse, on behalf of the bankrupt, opposed the application. He said an action was brought by Hudson in April last, and was making no progress.

Scarth said that was owing to the bankruptcy.

Dowse drew attention to the concluding words of the section, "provided that in case all necessary parties

gues, the court shall have power to assess such damages without the intervention of a jury or a reference to a court of law." He was not a consenting party, but objected to the intervention of the court, and therefore it had no jurisdiction.

Scotch contended that the assent of the bankrupt was not required, inasmuch as he was not a necessary party to these proceedings. The assignees and the creditors, who alone were interested in the dividends, were the necessary parties within the meaning of the Act. If they were driven to go to a jury, it would only run up a large amount of costs; whereas the commissioner was quite as competent as a jury to assess the damages. The bankrupt had entered Hudson in his schedule as a creditor for 50L, and rather than go to a jury he would be content to take that 50L.

Mr. Commissioner FANE observed that, considering the complication of this affair, and the hazard of its going to a jury, he thought that offer had better be accepted. It would save expense to all parties.

Dowse said that he was willing to let the proof stand for 50L, and as there was no assignee, the bankrupt was the only person who could be brought there to contest the proof.

The Court then directed that the proof should be admitted for 50L.

The proof was accordingly admitted.

DIGEST OF MARITIME LAW CASES (EXCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from p. 28.)

[RE.—THE LAW TIMES REPORTER, N.B., will give all the Maritime Law Cases decided from Michaelmas Term 1856. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1856. A Digest of the Salvage Cases during the same period is appearing in the LAW TIMES.]

SET-OFF.

As "Freight," 1182, as to American law; but according to English law.

2021. A set-off on account of damage to goods cannot be pleaded in an action for freight. The damage must be the subject of a cross-action: (*Allen v. Wymark, City Sheriffs' Court, Mitchell's Maritime Register, Nov. 23, 1862.*)

2022. A. Where there was an adjustment of a partial loss as insured on the policy, held, that in an action by the assured for the partial loss the underwriter could not plead a set-off for insurance premiums equal to the amount adjusted: (*Luchie v. Beahby, C. P., June 10, 1853, 2017, 3212, 3222, 3401; 1 C. L. R. 691; Arnould 124.*)

2023. Question as to insurance broker's right to set off his against premiums due to underwriters: (*The Ann Rose; Inchuth and others v. Bullen and others, Q. B., Jan. 15, 1856, Shipping Gazette.*)

2024. A claim of set-off in a case relative to damage to cargo by collision. Action brought under 6th section of 24 Vict. c. 10. In suits for seamen's wages, the invariable practice has been to adjust the accounts, to make allowance for advances and alms furnished. The decision in the *Arminius's* case was for the sake of justice carried perhaps to a doubtful extent. Practice in courts of United States contrasted with that in the Court of Admiralty here, as to claims of set-off: (*The Don Francisco, A. C., Dec. 3, 1861; 5 I. T. Rep. N. S. 461.*)

SHARES OF A SHIP.

2024. Neutral holding shares in an enemy's ship, held, on the authority of Lord Stowell, not to be entitled to restitution in case of capture: (*The Primus, A. C., July 21, 1854; and The Graf A. Bernstorff, A. C., Oct. 20, 1854; 1 E. & A. R. 283.*)

SHIP.

(See also "Abandonment," "Bottomry," "Collision," "Salvage," &c.)

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South Sea Fishery, 2061.

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I. ASSISTING SHIP OFF THE GROUND AFTER DISCHARGE OF CARGO.

2055. Rule of law as to whether expenses getting ship off the ground after her cargo is discharged, are a subject of general or particular average: (*The Snowden; Job v. Langton, Q. B., June 11, Shipping Gazette, June 27, 1856; 26 L. J. 97, Q. B.; Arnould, 922, 932. See full report of Lord Campbell's judgment in Shipping Gazette, April 24, 1857, Moran v. Jones, Q. B., April 21 and 22, 1857; Harrison's Digest 103; 6 El. & Bl. 779; 3 Jur. N. S. 109; 26 L. J. 97, Q. B.; Arnould, 932, 933. See "General Average."*)

II. LOSS OF SHIP.

(See also "Constructive Total Loss," "Total Loss," and No. 2069.)

2056. A ship on the strand sold for 350L. The purchaser after three weeks succeeded in getting her off, and repaired and sold her at a profit of 50L. Verdict against underwriters for a total loss of consent: (*The Lightning; Orisp v. Taylor, C. E., July 1, 1837, Shipping Gazette.*)

2057. Ballast having been improperly thrown overboard in order to allow ship to enter Sunderland with a low tide, in consequence of which the ship was lost, underwriters held liable: (*Dixon v. Sadler, C. E., June 7, 1839; 8 M. & W. 859; Harrison's Digest, 2009; Hildyard's edition of Park, 483.*)

2058 to 2062. These Nos. will be supplied.

III. SALE OF SHIP.

(See also "Registry," "Restitution.")

2063. Bills granted under a special agreement for the purchase of a ship by one of two purchasers for balance of the price, not being paid by the grantor, he having become bankrupt, the other purchaser was held liable for payment of the unpaid purchase-money: (*Lynn v. Chaters, Rolls Court, May 24, 1837, Shipping Gazette.*)

2064. Ship sold as a wreck and resold by purchaser at a profit after repairing her. Verdict against underwriters for a total loss of consent: (*The Lightning; Orisp v. Taylor, E. C., July 1, 1837, Shipping Gazette.*)

2065. The master of a ship has power to sell her in cases of absolute necessity, to do the best for all concerned, and therefore to dispose of her for their benefit: (*Hunter v. Parker, E. C., Dec. 11, 1839, and Nov. 7, 1840; 7 M. & W. 322; Arnould, 238; Shee's Tenterden, 19.*)

2066. American ship sold under decree of Admiralty Court. Title perfect without the register. The court refused a motion to bring in the register, as it might lead to a sale by order of this court, being considered a defective title without the register, which the American consul refused to give up on the ground that it was his duty to send it to the Secretary of State in the United States. In case of a British ship it might be necessary to require delivery of the register at the Custom-house, and the court might, in such an instance, exercise a proper jurisdiction: (*The Fremont, A. C., Jan. 13, 1841; 1 W. Rob. 163; Fritchard's Digest, 418.*)

2066 a. An unregistered agreement with owner of ship could not be enforced against ship or proceeds under 2 & 4 Will. 4, c. 85, s. 31, and 5 & 9 Vict. c. 89, s. 34. (*McClendon v. Rankin, V. C. C., Feb. 7, 1850, 14 Jur. 475; 19 L. J. 216. Ch., founded upon The Liverpool Borough Bank v. Turner, V. Ch. C., July 24 and 25, 1850, where it was held that a mortgage not in the form prescribed by Merchant Shipping Act is invalid: (3 L. J., N. S., 84.)*)

2066 b. Sale of ship. False representation as to description of material: (*Wright v. Crookes, 2 Scott N. R. 685; Harrison's Digested Index, year 1841.*)

2067. A ship having sustained damage near Calcutta, the captain, who was owner, came to England, settled with the underwriters on ship for 50 per cent and then returned to Calcutta, where he sold the ship instead of repairing her. Underwriters on freight held not liable for a total loss: (*The Mary Anne; Gougher v. Pearce, Q. B., Feb. 22, 1851, Shipping Gazette.*)

2068. Effect of mortgage claims or liens for bottomry or seamen's wages where the ship is sold at a foreign port by the master in case of necessity. Concealment of the

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Re COANE.

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existence of a bottomry bond from the purchaser would be a fraud: (*The Catharina*, A. C., March 3, 1851, *Shipping Gazette*.)

2069. The loss consequent on the sale of ship under decree of the Admiralty Court to pay salvage, because of the owners refusing to give ball, is not recoverable from underwriters: (*The Hebe*; *Rosetto v. Gurney*, C. P., May 30, 1851, 11 C. B.)

2070. By the maritime law, as well as by the law of England, the sale of a ship by the master can be justified only by imperative necessity. Condemnation by a vice-admiralty court not conclusive. Sale of a British ship by naval officer who had charge of her after being recaptured from pirates held void, in the absence of necessity being shown: (*The Eliza Cornish*, A. C., June 2 and 18, 1853, 1 E. & A. R. 36. But see *MacLachlan on the Law of Merchant Shipping*, 162, as to the decision in *Cammell v. Sewell*, 3 H. & N. 617.)

2071. Liability of purchasers of a ship from the ship-builder to the holders of a previous assignment by bill of sale of the ship while building: (*Reid v. Fairbank*, C. P., July 1853, 1 C. L. R. 787.)

2072. Evidence and documents required to establish a claim for restitution of a captured ship, sold by an enemy to a neutral, just before the commencement of or during war: (*The Johann Christoph*, A. C., Oct. 13, 1854, *Spinks' Prize Cases*, 82; *The Christine*, A. C., Oct. 18, 1854; *The Ernest Merck*, A. C., Dec. 6, 1854, 2 E. & A. R. 90 and 101; and the *Soglasie*, A. C., Dec. 16 and 29, 1854, 1 E. & A. R. 424.)

(To be continued.)

Ireland. (a)

COURT OF APPEAL IN CHANCERY.

Reported by EDMUND T. BEWLEY, Esq., Barrister-at-law.

Monday, Nov. 24.

(Before the LORD CHANCELLOR and the LORD JUSTICE OF APPEAL.)

Re COANE.

Secondary evidence—Old copy of lost deed—Trust term—Statute of Limitations.

A document purporting to be an old copy of a lost deed, whereby certain charges on land were created, coming from the custody of the owner of one of these charges, is not admissible in evidence against the owner of the land without being proved.

*A term of 500 years was vested in trustees for the purpose of raising a charge of 3000*l.* No part of this charge was raised, but interest on 2000*l.* was paid to the parties entitled to the entire charge when raised. No interest had been paid on the remaining 1000*l.* for upwards of forty years:*

*Quere, was a claim on foot of this 1000*l.* barred by the Statute of Limitations?*

This case came before the court on an appeal from an order of Dobbs, J. Under a settlement executed on the marriage of Anthony Coane, in 1780, a term of 500 years was vested in trustees for the purpose of raising a sum of 3000*l.* for the younger children of the marriage (as alleged by the appa.) to be distributed amongst them in such proportions as Anthony Coane should by deed or will appoint; and in default of appointment equally; and subject thereto the estate was limited to the first and other sons in tail. This indenture of settlement was duly registered on the 10th May 1782, but the original deed had been lost long prior to the commencement of the present suit. Anthony Coane died in Jan. 1821, and of his marriage there were issue, Henry, the eldest son, and three younger children, Ralph, Mary and Martha. Henry, Mary and Martha survived their father. Ralph died unmarried and intestate, and some doubt and controversy existed as to whether he had survived Anthony Coane or not. Mary married Mr. Dennis, and Martha Mr. Allingham. On the death of his father, Henry Coane entered into possession of the estate, and Mr. Coane, the present owner, claimed under the will of Henry.

(a) From the *Irish Jurist*, by permission.

The 3000*l.* had never been raised, nor had any appointment of it been made by Anthony Coane; but interest on two several sums of 1000*l.* had been paid regularly to Mrs. Dennis and to Mr. Johnstone, the assignee of Mrs. Allingham's share. The owner of the estate having presented a petition for sale in the Landed Estates Court, at the hearing before Dobbs, J., on settling the schedule of incumbrances, a claim was advanced on behalf of Mrs. Dennis to a charge of 1333*l.* 6*s.* 8*d.* on the following grounds:—In the first place it was alleged that the 3000*l.* had been settled by the indenture of 1780 on the younger children of Anthony Coane. The original deed, as has been already mentioned, had been lost, and the memorial of registration, which did not disclose the trusts very fully, represented this sum as being a provision for "the issue" of the marriage. Two documents, however, were produced, purporting to be ancient copies of the settlement of 1780, and in these the trusts of the 3000*l.* were stated to be for the younger children. These old copies had been found by Mr. Johnstone in a portmanteau which Mr. Allingham, the son of Martha Coane, otherwise Allingham, had left behind in the house of Mr. Johnstone. Mr. Johnstone was the brother-in-law to Mr. Allingham, and had purchased and obtained an assignment of the share of Mrs. Allingham in this sum of 3000*l.* The copies when found were along with other documents of the Coane family and deeds of both a later and earlier date. They corresponded with the memorial of registration as far as it went, and one of them had indorsed on it a correct certificate of registration. It was further alleged, that it had always been the reputation and belief in the family that this charge was for the younger children alone. It was then asserted that Ralph Coane had survived his father, and that upon Ralph's death the sum of 1000*l.*, to which he was entitled as one of the younger children, had accordingly become distributable amongst his next of kin, viz. Henry Coane, Mary Dennis the claimant, and Martha Allingham. The two principal questions involved in the present case were the following: first, whether the old copy of the settlement of 1780 was admissible in evidence without proof; and in the next place whether, granting its admissibility, the claimant's right to recover the proportion of Ralph's share was barred by the Statute of Limitations. Dobbs, J. admitted the copy of the deed in evidence, but disallowed so much of the claim as was equivalent to the proportion of Ralph's share, on the ground that it was barred by the Statute of Limitations. From this order Mr. and Mrs. Dennis now appealed.

The *Solicitor-General* (with him *Lowry*) for the appa.—When the owner presented his petition in the Landed Estates Court, in order to effect a sale of this property, the petition represented the estate as being subject to the incumbrances comprised in the third schedule annexed. Amongst these incumbrances is found the following: "Charge of 1000*l.*, part of a charge of 3000*l.* late Irish currency, created by Anthony Coane for his younger children." In the statutable declaration of the owner, and again in the schedule of incumbrances, as set down for final settlement, this sum of 3000*l.* is stated to be charged by the marriage articles of 1780 as a provision for the younger children of the marriage. Thus by the resp.'s own admission, independent of any further evidence, it is established that this charge was for the younger children of Anthony Coane, and *Re Power's Estate*, 11 Ir. Ch. 295, is an authority that the owner is estopped from objecting to incumbrances that have been admitted by his own affidavit. In the absence of the original the copy of the deed of 1780 is admissible as secondary evidence. It was found by Johnstone, who is one of the family, and the owner of a charge on the estate, in the portmanteau of Allingham, Martha

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Coane's son. In Buller's *Nisi Prius*, p. 254, it is laid down that "where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or extract may be given in evidence without being proved to be true, because in such case it may be impossible to give better evidence." As to the point in reference to the Statute of Limitations there is a subsisting trust term of 500 years, under which the trustee (who is a trustee for the entire sum of 3000*l.*) might take possession at any time, supposing that there was no payment of interest on a portion of the charge:

Caz v. Dolman, 2 De G. M. & G. 592; 17 Jur. 97; 22 L. J. 427, Ch.;

Young v. Lord Waterpark, 13 Sim. 204; a.c. on appeal, 15 L. J., N.S., 63, Ch.;

Hunt v. Bateman, 10 Ir. Eq. 360.

When there is a subsisting term under which the trustee can enter, the case is within the saving of the 25th section of the 3 & 4 Will. 4, c. 27.

Sullivan, Serjt. (with him *Warren, Q.C.*) in support of the order of the court below.—This alleged copy of the settlement of 1780 is not admissible. *Kerin v. Dawson*, 12 Ir. Ch. 358, is a far stronger case. There the copy tendered in evidence came out of the proper custody, and had a certificate on it by the family solicitor that he had compared it with the original, and yet it was rejected: (*Doe v. Willcomb*, 6 Ex. 601.) Here there is no proof of its being a copy, nor of the existence at any time of the original, and the custody is not such as can be considered the proper one. It must be treated then as if it were not evidence. The 3000*l.* being divisible amongst all the children of Anthony Coane, it does not affect the resp.'s case whether Ralph survived his father or not. If he died before him, on Anthony Coane's death, Henry, Mary and Martha became entitled to 1000*l.* each. If, on the other hand, Ralph survived his father, each child would have a share amounting to 750*l.*, and when Ralph subsequently died unmarried and intestate, as his portion became distributable amongst Henry, Mary and Martha, as his next of kin, they would each have a total share in this event also of 1000*l.* From the time they became so entitled, interest was paid on 2000*l.*, but for the last forty years no interest was ever paid on the remaining 1000*l.*, nor would the present case have ever been put forward, but for the statement which had been made in the petition for sale by the mistake or inadvertence of the owner. It would be a startling doctrine, indeed, if an owner is to be met by this *quasi estoppel*, if he make a statement in reference to the rights of other persons contrary to the fact, whereby the rights of these parties are not affected, and by which they are not in any way influenced:

Piggott v. Stratton, 1 De G. F. & J. 51;

Jorden v. Money, 5 H. of L. Cas. 185.

Independently of the Statute of Limitations, the court will not listen to stale demands:

Harcourt v. White, 28 Beav. 303;

Roberts v. Tunstall, 4 Hare, 257.

Warren, Q.C., for the same party, cited

Taylor v. Horde, 2 Sm. L. Cas. 613;

Bright v. Lagerton, 2 De G. F. & J. 606.

Loary replied.

The LORD CHANCELLOR.—In support of the app.'s case, there is nothing before us but this memorial of the marriage-settlement of 1780. I am clearly of opinion that this copy is not admissible in evidence. When copies are found with persons who are owners of the land, the case may be different; but here this document comes from the custody of parties putting forward claims adverse to the rights of the owner. The passage in Buller's *Nisi Prius* is very questionable as an authority, and even if it were good

law, it is not applicable to the present case. The copies being rejected, then, nothing remains but the representations of the resp. It would be very hard indeed that a party should be bound by allegations which have in no respect altered or affected the rights of others. Whether the term would be barred or not by the Statute of Limitations, I do not take upon myself now to decide. My impression is this—it would not be barred; but I do not mean to be bound by this expression of my opinion, as the question is one of much difficulty, and one requiring some consideration to determine.

The LORD JUSTICE concurred.

Order below affirmed.

COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

Tuesday, Feb. 3.

(Before O'BRIEN, HAYES and FITZGERALD, JJ.)

ALLEN v. CARVER.

Timber—Covenant to keep in repair—Exception—Damages.

Where a lease contained a covenant on the tenant's part to keep the demised premises, and all improvements thereon, in repair, and also an exception by the landlord of all timber trees growing on the premises, and a reservation of a right of ingress on the premises, and the tenant suffered the timber to be cut down:

Held, that the landlord could not recover damages against the tenant for the cutting down of the timber, in an action on the covenant to keep the premises in repair.

This was a motion to show cause against a conditional order obtained by the deft., that the verdict had for the plt. at the Kerry Summer Assizes for 1862, before Keogh, J., should be reduced from the sum of 70*l.* to the sum of 10*l.*, pursuant to leave reserved. The action was brought to recover damages for breach of covenants to repair contained in two leases. As the covenants in both leases were precisely similar, it is necessary only to state the pleadings and facts with respect to one of them. The summons and plaint complained that William Allen, the grandfather of the plt., being seised in fee of part of the lands of Liscongill, containing sixty acres, let the same by deed to the deft., to hold for twenty-one years from the 25th March 1855, and deft. entered, and deft. by said deed covenanted with the said William Allen and his heirs, that he, the said deft., should and would, during the continuance of the said demise, preserve, uphold, support, maintain, and keep the demised premises, and every part thereof, and all improvements made and to be made thereon, in good and sufficient order, repair and condition, and at the end of the said term, or other sooner determination of said demise, should and would so leave and yield up the same unto the said William Allen, his heirs, executors, administrators, or assigns, and afterwards, during the said term, the said William Allen died, and thereupon the reversion in fee of the said demised lands became vested in William Allen, the father of plt., as heir of the plt.'s grandfather, and afterwards the said William Allen, the plt.'s father, died, and the reversion descended to and became vested in the plt., and afterwards, during the said term, while the deft. was in possession under said deed, the deft. did not preserve, uphold, support, maintain, and keep the said demised premises and every part thereof, and all improvements made thereon, in good or sufficient order, repair, or condition, but, on the contrary, did suffer and permit said premises, and the fences thereon, and the houses thereon, to be out of repair, and in a ruinous

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condition, and did cause many of said fences to be thrown down and levelled, and did cut down, and allow to be cut down, and did take and carry away, and allow to be taken and carried away, from off said premises a great number of large and valuable trees growing thereon, and which, while growing thereon, greatly added to the value and appearance of said premises, and did also cut down, take, and carry away, and did permit others to cut down, take, and carry away from off said premises a great quantity of valuable and ornamental shrubs and holly-trees that were growing and standing thereon, and did cut away, and take away, and materially injure, a great quantity of oak and other trees growing thereon, and did injury to, and allow injury to be done to same, by taking and cutting off the bark from off same, to the damage and injury of plt., and of plt.'s estate and reversion in said premises, to the amount of 200*l*. The deft. pleaded that he, during all the time in said paragraph mentioned, did preserve, uphold, support, maintain, and keep the said demised premises, and every part thereof, in good and sufficient order, repair, and condition, and did not commit any of the breaches in said paragraph stated, and did not suffer or permit said premises, or the fences or houses thereon, to be out of repair or in a ruinous condition, or did not cause any of said fences to be thrown down or levelled, or did not cut down, or allow to be cut down, or take or carry away, or allow to be taken or carried away, from off said premises any large or valuable trees growing thereon, or did not cut down, take or carry away, or permit others to cut, take, or carry away, from said premises any valuable or ornamental shrubs or holly-trees that were growing thereon, or did not cut or take away, or materially injure, any oaken or other trees growing thereon, or do injury to, or allow injury to be done to same by taking or cutting off the bark of same. Issue was taken on this defence, and on the trial the lease of the premises was produced, which contained a clause, "saving and excepting, and always reserving out of this demise unto the said William Allen, his heirs, executors, administrators and assigns, all timber and timber-like trees now standing or growing on the said demised premises, or at any time hereafter to be found standing or growing thereon, with full liberty of ingress and egress for the said William Allen, his heirs, executors, administrators and assigns, or any other person or persons authorised by him or them to enter into and upon said demised premises, and the same to cut, fell, and carry away, with horses, men and carriages, at his and their will and pleasure, without the hindrance or interruption of the said Timothy Carver, his heirs or assigns." The jury found for the plt., assessing the damages at 70*l*., of which 10*l*. were for the injury to the plt.'s reversion, by not keeping the demised premises in repair, 50*l*. were the value of the timber which had been growing on the said premises at the time deft. became tenant to them, and which was cut during his tenancy, and 10*l*. were the value of the timber on the premises demised by the other lease, which contained an exception similar to that given above. The judge reserved liberty for the deft. to move to reduce the damages to 10*l*. if the court above should be of opinion that, in consequence of the exceptions contained in the leases, evidence of the cutting down, &c. of the timber trees ought not to have been admitted, and that the value of such timber could not have been recovered in this action. The deft. having obtained a conditional order accordingly, cause was now shown against it by

Barry, Q.C. (with him *James Murphy*) for the plt.—We contend, first, that the nature of the exception is such as to leave the destruction of the trees to be still a breach of the covenant; and, secondly, that, supposing we were not entitled to recover for them as upon a breach of the covenant, the objection

was not taken upon the pleadings, and we are now entitled to recover. *Furlong's Landlord and Tenant*, 400, shows the effect of excepting trees out of a lease :

Whistler v. Paslow, Cro. Jac. 487;

Liford's case, 11 Co. Rep. 50;

Legh v. Heald, 1 B. & Ad. 622.

We contend that all the soil passes by the lease, with the qualification that the tenant is bound to afford nutriment to the trees, and that, under the covenant in this case, the cutting down of the trees is a breach of the covenant. The cutting down of the timber is an injury to the premises, though there is a reservation of a property to the lessor which would entitle the lessor to go in and cut them down himself: (*Hine v. Whistler*, Poph. 146.) We submit, then, first, that, there being no exception of the soil, the trees were improvements on the premises; that the tenant was bound to take care of them; that the covenant has been broken, and the value of the trees is recoverable. Secondly, it was open to the deft. to have demurred to so much of the summons and plaint as related to the trees: it would be open to him even now to move in arrest of judgment; but, having gone to trial, he could not ask the judge to withdraw the question from the jury.

Clarke, Q.C. and *James Green* for the deft.—By the mere exception of the trees, without any reservation of the right of ingress, the landlord can go in and cut the trees. The effect of the exception is, that the trees form no part of the subject-matter of the demise, and no breach of covenant can be committed by any injury being done to them, and therefore the value of the trees could not be taken into consideration in estimating the damages. A thing expressly excepted from the demise cannot be considered as an improvement on the demised premises. An ejectment cannot be brought for waste committed upon demised premises by cutting down trees where trees are excepted out of the demise :

Goodright v. Vivian, 8 East, 190.

The action of covenant is a substitute for the old action of waste.

Doe dem. Douglas v. Lock, 4 Nev. & M. 807;

Furlong's Landlord and Tenant, 663 :

Evans v. Evans, 2 Campb. 491;

Jemney v. Brook, 6 Q. B. 323.

James Murphy in reply.—We do not say that the trees formed part of the demised premises, but that they were growing thereon. The old action of waste could only be for the destruction of the thing demised. If a tenant covenants not to cut down trees on the premises demised, he will be liable in an action of covenant, although the lease contains an exception of trees :

Doe dem. Rogers v. Price, 8 C. B. 894.

O'Brien, J.—We are all of opinion that the damages should be reduced, in the manner sought for, to 10*l*.. It is manifest that 60*l*. of the damages were given as the value of the timber growing on the premises. Now the case so much relied on of *Legh v. Heald* certainly appeared to establish that the exception in the lease did not except the soil, but excepted the trees only; and, adopting the ruling in the case in 11 Coke, that all that was excepted out of the soil was a right of nutriment, but still here the trees themselves were excepted; and then we come to construe the covenant, and see whether it, being a covenant to keep the premises in repair, includes within it a covenant against cutting, or allowing to be cut, trees standing on the demised premises at the time of the demise. Now the trees being excepted, we do not think that it was a breach of that covenant to cut trees or allow them to be cut. The point we think is fairly open to the deft. on the pleadings, and it would be attended with inconsistency to hold that, the landlord having chosen to make his lease in the form of excepting the

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tree, and to reserve a right to go in on the premises and examine the trees, the tenant on this covenant is liable to the same degree as he otherwise would be. There would be a great many liabilities cast on him if the trees were not excepted that are not cast on him where they are excepted. As to the last case which was cited, of *Rogers v. Price*, it is enough to look at the lease there to see that it does not apply, because that lease did not merely except all timber trees, but went on to give a covenant on the part of the tenant himself, not to commit any waste by cutting down timber trees; therefore the obligation of the tenant in that case arose from a positive covenant on his part not to cut down any timber trees.

HAYES, J.—I concur; I go with the pl't's counsel in thinking that, according to the true construction of this lease, the trees were the property of the landlord, and that all the particles of earth on which they grew were the property of the tenant, and that things being so there was reserved a right to the landlord of taking nutriment from the soil for the trees. All that being so, and the trees being the landlord's, and the soil the property of the tenant, I do not find on the reading of this covenant that it was intended to cast on the tenant the duty of nursing the landlord's trees. The landlord seems to have reserved that to himself, and I do think, therefore, that the trees, being excepted, cannot be considered as part of the demised premises. Nor do I think that growing trees come within the meaning of the word improvements, and therefore, on the fair construction of the lease, I think that the value of the timber trees ought not to be visited on the deft.

FITZGERALD, J.—I also am of opinion that the tenant has not covenanted to keep in repair the landlord's trees, which are expressly excepted out of the demise, and as to which the landlord has reserved a right to himself to visit them.

Rule absolute to reduce the verdict to a sum of 10l.

Wednesday, April 22.

JACKSON v. BARTON.

Summary Procedure on Bills of Exchange Act—Security for costs.

A deft. in an action brought under the Summary Procedure on Bills of Exchange Act must have obtained liberty to appear and defend before applying for security for costs.

Martin v. Wilson, 7 Ir. Jur. N. S. 335, followed.

Procell, for the pl't., moved by way of appeal from an order made by Keogh, J., on the 24th March, directing the pl't. to give security for costs. The action was one under the Summary Bills of Exchange Act. The deft. had, before obtaining liberty to appear and defend, applied to have the pl't., who resided out of the jurisdiction, compelled to give security for costs, and Keogh, J. had made the order. The case below is reported 8 Ir. Jur. N. S., 94. Counsel cited

Martin v. Wilson, 7 Ir. Jur. N. S. 335.

There was no appearance for the deft.

The COURT allowed the appeal, setting aside the order made below.

COURT OF PROBATE.

Reported by W. R. MILLER, Esq., LL.D., Barrister-at-Law.

Friday, April 24.

In the Goods of ALEXANDER OAG.

Probate—Scotch confirmation.

Where a confirmation was made in Scotland of testamentary papers executed by a person who was domiciled there, but died before the 21 & 22 Vict. c. 56 (the Probate Confirmation Act) came into

operation, there being assets in this country, the court will allow such documents to be proved here, the clause about resealing the confirmation not applying to the case.

Dr. Gibbon, for Alexander Stuart, moved for liberty to take probate of several documents executed in Scotland as the will of the deceased. A deed of settlement, bearing date the 24th Dec. 1850, had been executed by the deceased, assigning all his property and all his moveable estate to trustees, and also appointing executors, one of them being Alexander Stuart. And on the same day a deed of instruction or declaration of trust was also executed. A holograph codicil was made and signed by the deceased, and dated the 13th Oct. 1854; no attestation by witnesses was to it, but in Scotland that was not essential. The deceased died in the year 1854, and on 29th Sept. 1856 a probate or confirmation was had, and a *testament testamentar* was granted to Alexander Stuart, the executor of those documents, in the Scotch court. The inventory filed there did not include the property in Ireland. The oath was the same as is used here. The Act 21 & 22 Vict. c. 56, s. 9, provided for resealing Scotch grants, but did not apply to cases where parties died before that Act, and the registrars had declined to reseat the Scotch grant: (*Goods of Gordon, 29 L. J. 67, Prob.*) The deceased, as was sworn by affidavit, had been domiciled in Scotland. The original papers were here, having been registered in Scotland.

KEATINGE, J.—I think that you are entitled to probate of the several documents referred to as together containing the last will of the deceased. I therefore give you leave to apply in the registry for and obtain such a grant. *Order accordingly.*

Monday, May 4.

TERNAN v. TERNAN.

Habeas corpus ad testificandum—Prisoner.

Parties referred to a law court for a writ of habeas corpus to bring up a prisoner to give evidence in the Probate Court.

Dr. Townsend, for the pl't., moved for a *habeas corpus* to bring up a person who was in custody under law process to give evidence. He referred to the 30th section of the Probate Act of 1857, which gives the court all the powers possessed by the Court of Ch. to enforce the attendance of witnesses.

KEATINGE, J.—I am not aware that the Court of Ch. can issue such a writ. You had better apply to one of the judges of the law courts, as the sheriff might be involved in some difficulty if I ordered such a writ.

[*Note.*—But it appears from the case of *Buckeridge v. Whalley, 6 W. R. 180*, that the Court of Ch. does possess the power of issuing such a writ, as *Kindersley, V.C.* in that case ordered it to issue to bring up a person in custody under legal process to attend in chambers *de die in diem*; and several other cases are there referred to where the matter was considered and the writ ordered.]

Friday, May 8.

MOLONEY v. CASEY; MANSERGH intervenient.

Conditional order for new trial—Undue influence—Will in favour of attorney—Entire will tainted thereby—Necessary proof.

The Court refused a conditional order for a new trial, where the verdict had been found against an alleged will, the evidence being conclusive of undue influence practised on the testator by the person principally benefited, and who was most active in giving the directions for, and in the preparation of the will, and

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Held that no part of the will in favour of other persons could stand, nor the appointment of executor. The degree of proof necessary when the case is suspicious—the drawer, an attorney, taking great benefit under it.

Whiteside, Q. C. (with him *Dr. Ball, Q. C.*) moved for a conditional order to set aside, as against the weight of evidence, the verdict had for the deft. at the sittings after last term, or so far as it affected any legacies but those to Mr. Mansergh and the residuary bequest. The verdict had been found against the will, and in favour of the deft., who was the widow of the testator, on the ground of undue influence practised on the deceased by Mr. Moloney, the attorney who drew the will, and Mr. Mansergh, the principal devisee in the will. A bequest was in the will of 300*l.* for the poor of the parish in which the testator lived, to be distributed according to Mr. Moloney's discretion, and 300*l.* to the Protestant Orphan Society. A farm of land was left to Moloney in trust to sell, and the proceeds to be applied as he might think fit in charity, and Mr. Moloney was appointed executor, and also residuary legatee. We contend that the appointment of executor and the charitable legacies are all valid, and should stand as part of the will, though we may find it hard to sustain the residuary clause, as Moloney was the attorney who drew the will. The only parts of the will which should be touched are those in favour of Mansergh, who used the undue influence, and the residuary clause in favour of the drawer of the will:

Barton v. Robins, 3 Phil. 455;

Fawcett v. Jones, 1*b.*;

Piercy v. Westropp, Milw. 495;

Trimlestown v. Dalton, 1 Dow. & Cl. 85;

Boyce v. Rousboro', 6 H. of L. Cas. 45;

Carroll v. Carroll, Milw. 434.

Cwr. adv. vult.

May 22.—*KEATINGE, J.*—The motion now before the court is substantially one, only questioning the verdict as it related to the charitable legacies, and to two small pecuniary legacies of 10*l.* and 5*l.*, on the ground that it was against the weight of evidence. The will in dispute left to Mr. Mansergh, the intervenient, the lands of Shandrum, a freehold property for his life, with remainder to his son Henry in fee-simple. There was a legacy of 300*l.* to the treasurers of the Clare Protestant Orphan Society, and to his executor, Mr. Moloney, 300*l.*, to be expended by him at his discretion among the poor of the parish of Miltown. A bequest next followed of his lands at Spanish Point, with his furniture, plate, books, and pictures, to the plt. in trust, to sell them, the proceeds to be distributed in charity among such persons as he should think fit and proper objects. There was then a sweeping residuary clause in favour of the plt. The case made against the will by the deft., the widow of the said deceased, was, that he was greatly addicted to drink, and that, never having had a very vigorous mind, as death approached, his mind was not even as strong as before. In 1855 he married Miss Locke the deft., but before that he was on intimate terms with Mr. Ralph Mansergh, the intervenient. But for some reason, not necessary to mention, it occurred to Mr. Francis Casey (the father of the deceased Mr. Alexander Casey) that it would be better that after the marriage Mr. Mansergh should not be admitted to the house; and both sides admitted that a letter to that effect was written by Francis Casey to, and received by Mansergh, three or four days after the marriage. That was a cardinal fact in the case—but, notwithstanding that letter, Mr. Mansergh continued from time to time to meet Mr. Casey, the deceased, about the offices of his house, and in the neighbourhood. Some days after the marriage, Mr. Mansergh wrote an angry letter to the

deceased, telling him that he should not allow any woman to separate him from his old friend, and he followed up that by sending several others, some in his own hand, and signed by him, others in a feigned hand, and anonymous, but which the deceased told his wife came from Mr. Mansergh, and containing serious charges against her—amongst others, they charged her with infidelity, than which no heavier charge could be brought against any respectable lady. Some misunderstanding appears, some time after, to have occurred between the deceased and his wife, which seemed traceable to only one cause—Mansergh's letters to the unfortunate man. The evidence plainly showed that Mansergh was the instigator of the outrage committed during the last visit of the deft. to the deceased, when she tried to effect a reconciliation with him. She then was obliged to have recourse to the Consistorial Court in Dublin for protection, and in June 1861 she got a decree for permanent alimony at the rate of 150*l.* a-year. In those proceedings, Mansergh, on the part of the deceased, took an active part, by writing letters and otherwise. After the death of Francis Casey, Mansergh was, in all the concerns of the deceased, the master of the house. Casey was continually drunk, and even Mansergh himself admitted that he always expected that the deceased would do something for him and his son. There is evidence that the deceased was anxious to be reconciled to his wife, and that Mansergh interposed. It appeared that, in the Consistorial Court, an attempt was made to prove that Mrs. Casey had been unfaithful as a wife, and she was cross-examined as to it. But her character had been triumphantly vindicated by the letters of the deceased himself, which proved the utter groundlessness of the charge. It appears, then, that when the deceased was anxious for a reconciliation, Mansergh prevents it by telling the deceased that she was more another person's wife than his, when the deceased said, "My God! I never knew that before," to which the other replied, "Then know it now!" This course of conduct continued for some time, until the making of the will. The deceased had a copy of the proceedings in the Consistorial Court, and it was continually referred to by the deceased and Mansergh. Can any one doubt why this was done, or why Mansergh and his son took up their residence in the house? In Sept. 1860, Mr. Moloney, a solicitor, was introduced to the deceased. He was consulted by Mansergh about the propriety of appealing from the decree of the Consistorial Court, and from time to time he transacted business also through Mansergh. Now, it is quite true that the plea of incapacity has failed; the deceased was not incapable to make a will, but, in all business transactions, Mr. Mansergh was his right-hand man. Dr. O'Brien, an eminent physician in Ennis, was called in to see the deceased on the 15th Jan. 1862. The will is dated the 24th Jan. 1862. Moloney did some little sessions business at Ennis for the deceased, but in every case Mansergh attended for the deceased—he never was absent from his side. Dr. O'Brien had on his visit on the 15th Jan., a bad opinion of the deceased, and then Mansergh wrote on the 16th to Moloney the letter as to some accounts of the steward, which Moloney was to audit; but the important part is the postscript:—"P.S. Private.—Will a deed or a will be more secure as to leaving property? He wishes to know." On the 17th Moloney answered that a deed would be better, if registered. Now, this showed that Mansergh was then busy about the arrangement of the affairs of deceased, and his using the word "private" meant, it is not necessary to say anything about it to the deceased. Several other letters of a similar kind were referred to by the court, showing an arrangement going on between Moloney

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and Mansergh as to the disposition of the property. Dr. Flanagan proves that the deceased's state was then alarming, and he thought it right to have a consultation with Dr. O'Brien, and on the 21st Jan. the latter was written for, and told to attend on the 22nd. Then Mansergh writes on the 21st to Moloney, while he was settling the accounts, to come up at once, and bring up a will with all necessary materials for execution. Moloney did come that night; the deceased was in the parlour at a late dinner; but on the next day when he came deceased was in bed, but got up, and appeared at table. The company present were, Dr. Flanagan, a Mr. Lucas, a magistrate on confidential terms with Mansergh, and who lived seven miles off, and who was written to also on the 21st to attend as a witness on the 22nd, which he did. Moloney and Mansergh were there too; but Dr. O'Brien did not come, and nothing was done; but Mr. Moloney says that the deceased arranged that he was to come up the next morning to arrange about his will. As to this, or the instructions for the will, he is the solitary witness. What occurred between the 22nd and 23rd is all important. Dr. O'Brien appeared on the 23rd, and it is plain that it was not considered right or safe to approach Mr. Casey about a will till Dr. O'Brien could be prevailed on to mention the subject to him. But the doctor was expected on the 22nd; the attorney and the witness Lucas were there, but the doctor did not come, and nothing was done, but Mr. Lucas held his ground, and waited until the will was executed. However, on the 23rd the doctor arrived, and was requested by Mansergh to speak to the deceased about settling his affairs, which he did; and Mr. Moloney goes into the deceased's bedroom at about half-past ten, and remains there until about half-past two or three in the morning, and he represents that he was all that time taking the instructions for the will from the deceased, and prepared a draft and two copies, as the deceased desired that the will should be in duplicate. Now this important part of the case rests on the sole unsupported testimony of Mr. Moloney. No one else was there during the preparation or the reading over to the deceased of the will, except Moloney. A more suspicious case never came under my notice. This will leaves the freehold lands of Shandrum to Mansergh and his son for ever, and it gives to Moloney 300*l.* to be applied among the poor of Miltown, and to be applied at his discretion—he an attorney residing seventeen or eighteen miles away at Ennis. Then comes after a legacy of 10*l.*, and another of 5*l.*, a bequest of his house, with furniture, plate, pictures, books, linen, and stock of every kind, to the said Moloney, his heirs, executors, administrators and assigns, in trust to sell, and the proceeds to form a fund to be distributed in charity, as he may think fit and proper. A testator had a right to make a will as capricious as he pleased, if not sounding in folly, but that such a bequest should be found here is most astounding. He has the selection of the charity, and of the objects of such charity, vested as a personal trust in him. Then comes the sweeping residuary clause to him. The propriety of the verdict is not questioned, so far as relates to the devise to Mansergh, and the residuary clause in favour of Moloney. But I am called upon to set it aside, so far as regards the charitable legacies and small pecuniary legacies, and, above all, as to the appointment of the executor, and on the ground that, although undue influence or fraud may be relied on in impeachment of the will, yet that it will only affect the parties who are benefited by the will, who practised them, and not any others. I deny that proposition altogether. Each case must depend on its own circumstances. A case may come before the court in which influence, fraud, or contrivance is plainly applicable to a part, and not to the whole of the will.

Others may arise in which it was extended as to all, and it is the duty of the judge to bring under the notice of the jury the several parts of the instrument to which the defence applies. I am not aware that I failed in this case to do so, and no motion is made to set aside the verdict on the ground of misdirection. The *Trimblestown* case was referred to in support of this application, but I do not think it establishes any such proposition. That case is better reported in 1 Bli. N. S. 427, and it depended on its own circumstances. His Lordship referred to pp. 275, 453, 457, in support of his view. Three things are necessary to support a will—1. Adequate capacity. 2. Testamentary intention. 3. Due execution: (*Jones v. Goderich*, 5 Moo. P. C. C. 21.) I am now considering this case as if the legacies were not affected by fraud, though I think they were. Were there not eminently suspicious circumstances? and though fraud cannot be presumed, yet the authorities say that circumstances may render fraud so probable or highly suspicious, that stronger proof is required than in cases where the natural presumptions and free will were in favour of the dispositions of the testator. In ordinary cases what is required by law, if the capacity is unquestioned, is established by the mere fact of execution; but that is not so where there are suspicious circumstances; further proof is then required that the will is according to the intentions. Here there is a most suspicious circumstance; the will is not read in presence of any third person—no one present but Moloney, the drawer, and who takes so much interest under it. I can imagine a case where a man wrote a will largely benefiting himself, and the jury might, under the circumstances, find in his favour. But how could the public be safe, if wills of this kind were to stand, and if property were to be left to an executor who was almost a stranger to the testator. It was quite competent for the parties to have given evidence as to those legacies, but there was none save Moloney's, and the Attorney-General does not move to set aside the verdict on that ground. As to the additional proof required in such cases, see *Von Stenis v. Comyn*, 12 I. E. R. 631, where all the cases on the subject are cited. In my judgment, the jury exercised a wise discretion in not acting on such evidence as was offered here, and under all the circumstances of the case, I make no rule on the motion. *No rule.*

Friday, May 6.

BRADLEY v. REILLY.

Practice—Several wills not pleaded.

Unless by consent, several earlier wills of the deceased, not propounded by any party, cannot be put in issue in a suit by an executor to establish a later will, nor can the next of kin, by a citation on the persons interested, oblige them to litigate them in that suit.

Martin moved to fix the mode of trial in this case.

Dr. Ball, Q.C., for the deft., mentioned that this suit was by an executor, in a will of the deceased, to prove the same as against the next of kin. There were besides the will now in dispute, several former wills of the same deceased, to which the same plea of want of capacity filed in this suit would equally apply; and it would be desirable and a great saving of expense to have their validity tried in the same suit with that of the one before the court. In *Custiss v. Dun*, 4 Ir. Jur. N. S. 248, a similar course was adopted, but it was by consent; and in *O'Connor v. Herbert*, 7 Ir. Jur. N. S. 125, two wills were put in issue by different parties in the suit. It occurred to me that a citation might be issued by the next of kin on the several parties interested under the prior wills requiring them to propound or see proceedings in this suit; but on looking at the cases of

Tully v. Dalton, Milw. 462; and *Little v. Comyn*, lb. 467, it would appear that such a course would be impossible, and that there must be separate suits as to each will.

KEATINGE, J.—Unless some distinct party propounds each will separately, or unless every one interested consents, I do not see how you can put those earlier wills in issue in this suit.

In the Goods of URE.

Felo de se, will of—Practice.

Administration of the goods, &c. of a felo de se granted to the nominee of the Crown, though there was a will appointing executors.

G. Waters, on behalf of T. Mostyn (the Solicitor for the Treasury), moved for letters of administration of the goods and chattels of the deceased. It appeared from the affidavit on which he moved, that a coroner's inquisition of the 3rd March last, held at Armagh on the deceased's body, had found a verdict that he had died a *felo de se*; and an inventory had been made of his personal chattels; amongst these there was a deposit receipt for 1600*l.* lodged in a branch bank. The Attorney-General had consented to the grant to the Solicitor for the Treasury, as the nominee and for the use of the Crown. The deceased had made a will, dated the 3rd Feb. 1863, duly attested, giving his property amongst his relatives, who were now in America. The title of the Crown to the goods of the deceased is ascertained by the inquisition, and that is in law a revocation of the will: (1 Wms. Ex. 56.) The grant must, however, be subject to the debts, according to *Megit v. Johnson*, 2 Doug. 539, but the Solicitor of the Treasury is exempt from giving security: (20 & 21 Vict. c. 79, s. 86.)

KEATINGE, J.—If your title is under the inquisition you don't require the administration; but if you take it, you must take it *cum onere*. I therefore decree letters of administration to you without being required to give security.

[Note.—See, however, *The Goods of Eliza Bailey*, 2 S. & T. 156, where the distinction was made and acted on by Sir C. Cresswell between the title of a will of a *felo de se* to probate and its operative effect; and in that case the executor in the will of a *felo de se* was held entitled to probate of it irrespective of the Queen's warrant, which he had. Indeed, whatever before the 1 Vict. c. 26, may have been considered the law on this subject, it is clear that since that Act no will can be revoked except in one of the modes there pointed out, one of which is marriage, but none of them is suicide; but by the inquisition all the goods of the *felo de se* do undoubtedly vest in the Crown.]

House of Lords.

Reported by JAMES PATERSON, Esq., of the Middle Temple, Barrister-at-Law.

Tuesday, July 28.

REG. v. SADDLERS' COMPANY.

Corporation—Bye-law—Admission by fraud—Removal—Reasonableness of bye-law—Insolvency of member.

A bye-law of a corporation, dated 1799, enacted that no person who has been a bankrupt or becomes otherwise insolvent shall be admitted a member, unless he shall have afterwards paid all his debts or established an honourable character for seven years subsequently. D. was formally elected a member of the corporation by resolution, but before it was communicated to him, he, in answer to a question put by the clerk, but without authority, said he was solvent, which

was untrue in the sense of his being able to pay his creditors in full. D. was then admitted and acted as a member, but a month afterwards was removed without an opportunity of being heard.

Held (reversing the judgment of the Ex. Ch.), 1, that the word "insolvent" in the bye-law meant a public or notorious insolvency, such as stopping payment or calling creditors together and obtaining time, and therefore the bye-law was valid; 2, that D. was not removable by the corporation after being once admitted; 3, that if removable D. ought to have been heard previously to such removal; 4, that a peremptory mandamus ought to issue to the company to restore D. to the office.

This was a suggestion of error on a judgment of the Ex. Ch.

The object of the proceedings was to try the right of Kay Dinsdale to be an assistant of the Saddlers' Company, he having been in form elected by the Court of Wardens and Assistants of the said company, whilst he was in insolvent circumstances and unable to pay his creditors 20*s.* in the pound, and he having procured himself to be treated as such assistant by alleged false and fraudulent representations that he the said Kay Dinsdale was quite as solvent as any man of the said court and able to pay his creditors 20*s.* in the pound, although, as the defts. contended, he was not qualified to be such assistant by reason of the following bye-law of the company, made on the 23rd April 1799:—

"Resolved that no person who has been a bankrupt or become otherwise insolvent shall hereafter be admitted a member of the court of assistants of this company unless it be proved to the satisfaction of the court that such person after his bankruptcy or insolvency has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency to the satisfaction of the court or the majority of them."

A writ of mandamus had issued calling on the Saddlers' Company to restore Mr. Dinsdale to the office of assistant of the said company. The writ, after stating the charter of Car. 2, and that a vacancy had occurred in 1849 in the number of assistants when Mr. Dinsdale was on 20th Oct. 1849 duly elected, nominated and constituted an assistant, but that on 20th Dec. 1849 he was without reasonable cause removed, called on the company to restore him.

The return was made and pleaded to and issue joined, after which, on trial, a special verdict was returned as follows:—After stating that Mr. Dinsdale was duly elected by resolution on 25th July 1849, but the resolution was not communicated to him till after certain representations had been made as to his insolvency when he was summoned to attend a court as assistant on 16th Oct. 1849; that at the time of the passing of the said resolution he was in insolvent circumstances; that he attended two courts and acted as an assistant, but that he was removed from the said office on 20th Dec. 1849; that the bye-law was then in full force, and a person holding the office of assistant might be elected to the office of renter warden, which was an office of trust, and the person holding it might receive large sums of money belonging to the company;

"That the said Kay Dinsdale did, after the making and passing of the resolution of the 23rd April 1849, but before the same was communicated to him, or he was so summoned and admitted to the said office on the 24th Sept. 1849, in answer to an inquiry which the said Giles Clarke, then being the clerk and agent in that behalf of the said wardens or keepers and assistants, made of him as to his the said Kay Dinsdale's solvency, represent and state to the said Giles Clarke that he the said Kay Dinsdale then was quite as solvent as any man of the said court and able to pay his creditors 20*s.* in the pound; whereas in truth the

said Kay Dinsdale then was, and he thence hitherto has been insolvent, and he was then largely indebted to divers persons in large sums of money and was wholly unable to pay his creditors 20s. in the pound, as the said Kay Dinsdale then well knew, and the said creditors never were paid their said debts, or any part thereof, except a small dividend of 2s. 8d. in the pound, which, and no more, after great delay, was paid to the said creditors under the bankruptcy of the said Kay Dinsdale in the said return referred to, and by means of the said false and fraudulent representations the said Kay Dinsdale induced and procured the said then wardens or keepers and assistants to admit him to the said office as aforesaid; that the said Giles Clarke, as such clerk and agent, after the making of the said representations, and in consequence thereof, caused the said Kay Dinsdale to be summoned as aforesaid to attend the said meetings, which it is alleged the said Kay Dinsdale attended as aforesaid, and caused the fact of the said election to be communicated to him the said Kay Dinsdale. That the said representations were not communicated by the said Giles Clarke to any court of the wardens and assistants until the 20th Oct. 1849, which was the first court of the wardens and assistants held after the said representations were so made. That afterwards, on the 30th Nov. 1849, the said Kay Dinsdale did become and was declared bankrupt as in the said return alleged. That he was entitled to be summoned to the meeting of the 20th Dec. 1849, and to attend the same. That he had no notice of the said meeting or assembly until after the same had been held. That he did not attend the same, and had no opportunity of attending the same. But whether or not the said objections were valid and ought to prevent the jurors from finding as they found, they prayed the advice of the court."

The Court of Q. B. gave judgment for the prosecutor. This judgment was reversed by the Court of Ex. Ch., whereupon the present suggestion of error was made, and the learned judges attended the argument.

Gibbons, Laurie and Sewell, for the plt. in error, contended that the plt. was duly elected; that the misrepresentation alleged was not a fraud, but whether it was or not, it did not avoid the election or admission; that the bye-law was not valid, because it limited the number of those who by the charter were eligible to election. Even if valid, the bye-law did not disqualify the plt. for he was not insolvent within the meaning of the bye-law. Besides, he was not summoned to show cause against the said removal.

R. v. Lyme Regis, 1 Doug. 85;

Clarke v. Dickson, 1 E. B. & E. 148;

Ferret v. Hill, 15 C. B. 85;

Phillipson v. Earl of Egremont, 6 Q. B. 587;

Earl of Brandon v. Beecher, 3 C. & F. 479;

Fernor's case, 3 Rep. 77 a;

Doe v. Rees, 4 Bing. N. C. 384;

Biddlecombe v. Bond, 4 A. & E. 332;

Bayley v. Schofield, 1 M. & S. 338;

Shaw v. Lucas, 3 D. & R. 218;

Poulterers' Company v. Phillips, 6 Bing. N. C. 314;

City of London v. Vanacre, 1 Ld. Raym. 497;

R. v. Griffiths, 2 B. & Ald. 731;

R. v. Mayor of London, 2 T. R. 177.

Knoles, Q. C. and R. Clarke, for the deft. in error, contended that the bye-law was good and reasonable, that the plt. was properly removed, that he had procured his election by fraud, and that even if restored he would be instantly removed again.

At the conclusion of the argument the following questions were put by the House to the learned judges:—

1. Is the bye-law good in law?

2. Regard being had to the facts stated in the

verdict, was the plt. removable under the bye-law, assuming it to be good in law?

3. Ought the plt. to have been heard previously to removal?

4. Having regard to the facts stated in the verdict, ought the court below to have granted a peremptory *mandamus*?

After time taken to consider, the Judges answered as follows:—

1. Blackburn, Crompton and Williams, JJ., and Cockburn, C. J. held the bye-law was bad; while Willes, J., Martin, B. and Pollock, C. B. held it good.

2. The first-named judges (except Williams, J.) held that the plt. was not removable; while the other four judges held that he was removable.

3. Blackburn, and Crompton, JJ. and Cockburn, C. J. held that the plt. ought to have been heard before his removal, while the other four judges held he was not entitled to be heard.

4. Blackburn, Crompton and Williams, JJ. and Cockburn, C. J. held that a peremptory *mandamus* ought to have been granted; while the other judges held that it ought not.

The following are the opinions of Crompton, J. and Cockburn, C. J.

CROMPTON, J.—My Lords, in answer to your Lordships' first question, I say that, in my opinion, the bye-law is not good. I think that the making of bye-laws, by which the governing part of a corporation restricts or puts a qualification upon the persons who are to be elected beyond what the charter has pointed out, ought to be looked at narrowly. The present bye-law disqualifies, subject to certain exceptions, every one who has ever been unable, at any time, to pay his creditors 20s. in the pound; and although he has got his certificate in the most honourable way, or his creditors have given him the most complete and creditable discharge, he is still within the operation of the bye-law, unless he is proved to have paid his creditors subsequently in full. The disqualification does not depend on any act of bankruptcy, or on any fiat, petition, or definite legal proceeding in bankruptcy or insolvency, but might have to be ascertained from a laborious and painful inquiry into the state of the candidate's circumstances at any particular anterior time, and after the lapse of many years. The bye-law must be taken to extend to the not being able to pay the creditors in full at any time, or else its operation would not extend to the present case, in which the prosecutor has not committed any act of bankruptcy or insolvency previous to his admission. The exception of having established a fair and honourable character for seven years subsequently to the insolvency, to the satisfaction of the court or a majority of them, seems to me very loose, uncertain and unsatisfactory, and to give far too wide a discretion to the court of electors, or the subsequent court. A bye-law of this nature ought to be certain, and it seems to me extremely loose and uncertain to leave it to the judgment of the elective body to say whether there has been an honourable character satisfactory to them. If the insolvency is intended as a disqualification against being elected, the bye-law would seem very objectionable, as it would appear to imply that the electors before they record their votes are to come to a decision whether there has been a subsequent honourable character to their satisfaction. If the true construction of the bye-law were that the disqualification is a disqualification against being elected, great difficulties might arise as to whether a notice of the disqualification to the voters before voting might not cause their votes to be thrown away, and the adverse candidates to be elected. I do not, however, think that this is the real meaning of the bye-law, as it would seem impossible to be acted upon, especially in an election for several vacancies, where there are several

candidates. I think that the bye-law has the meaning put upon it in the Court of Q. B., and that its true construction is not that the body of electors at the time of election are to see to the qualification, but that it is to be a disqualification against the admission as distinguished from the election. The charter obviously points to a distinct period for admission and election; it requires some things to be done before election, and some after election, and before admission; and it might happen, as it seems to have done in the present case, that the party might not know of his election, and might not have had an opportunity of being prepared with proof of his payment of his debts, or his good character to satisfy the electors. The charter, as before pointed out, requires several things to be done before admission and after election, and in corporation law the distinction was perfectly well known, and I do not see why the word "admission" in the bye-law should not be read in its plain ordinary sense, especially where it is several times used in the same document, as contradistinguished from election. On this, which is, I think, the true construction of the bye-law, it seems to me very objectionable that a subsequent court, perhaps not consisting of the same members, should have the power of confirming or vacating the prior election on an investigation, for instance, whether the party has established what the court should think an honourable character. This is very loose and uncertain, and practically would leave far too much in the discretion of the body. A candidate might succeed at the election by one vote, and it might be voted afterwards at the subsequent court by a majority of one that at some distant period the party had not been able to pay the whole of his creditors 20s. in the pound, and that he did not appear to the satisfaction of the court to have established an honourable character for seven years subsequently. It is obvious what a different view might be taken by different members of the court, as to "an honourable character," and I cannot but think that so loose a provision might lead to unfairness and mischief. There is another point of view in which also the provision seems to me very objectionable; such a disqualification against admission as is pointed out in the charter, *exempli gratia*, for not taking the oath of supremacy, &c. depends on a fact which is capable of proof, when the question of title comes before the proper legal tribunal, as upon a *mandamus* the party so refused admission might allege and prove, that he had taken the oath; but this could not be so on such a discretion as is vested in the body by this bye-law. They are to have the decision whether the party has established such "honourable character," for it is to their satisfaction that the bye-laws refers; and it seems to me very objectionable that the bye-law should make a disqualification, and afterwards give a discretion of dispensing with it if the court of assistants are satisfied with the honourable character. I speak of this power as discretionary, because I think that if there were a return to a *mandamus* to admit, that the party had not been at a certain time able to pay 20s. in the pound, and the prosecutor were to plead to this return that he had established a fair and honourable character to the satisfaction of the subsequent court, he would be told that the question was for their decision. It would hardly be a matter for a traverse and for the decision of a jury whether he had done so; and if it were, it would only show more clearly the loose and dangerous nature of the bye-law. The consideration of the mode in which this power and discretion is to be exercised seems to me to show still more clearly that the decision is to take place after the election; as the question as to whether the discretion is to be exercised according to the facts in any particular case can only arise after the electors have selected the particular persons. It would seem imprac-

ticable, if not impossible, to exercise this power at the time of the election; and if it could be done, it would, I should think, be very objectionable; and I think the real meaning is, that the subsequent court is to have the discretion and power of dispensing with the disqualification; but whichever be the construction in this respect, I think the bye-law bad. Secondly, I am of opinion that the party being actually in the office, the court of assistants had no power to try his title, and that the proper course of removing him would be by *quo warranto*. Where the office was full, the Court of Q. B. could not, in case of an alleged disqualification, proceed except by *quo warranto*; and they could not, according to a well-established rule of law, grant a *mandamus* to proceed to a fresh election; and it would seem strange in such a case to allow the corporate body so to interfere. I agree with the observations of my brother Wightman in the Court of Q. B., in this respect. I do not look at this question as depending merely on the formal act of admission, but on the fact of the office being full of the party. The question of title in such case is, I think, always for the court of law, and not for the corporation, who cannot try the original title when the office is full of the party: (*Res v. Lyme Regis*, 1 Doug. 85.) The general rule of law being admitted, the answer offered, that the election or formal act of admission was obtained by fraud, and so was to be regarded as never having taken place, and therefore that the court of assistants might treat a party actually in the office as never having been in it, does not appear to me satisfactory. If the doctrine be pushed to its length, it would show that years after the party had been in the office he might at once be turned out by the corporation; and in cases where the enjoyment of the office for a certain length of time prevents the party from being removable by *quo warranto*, and so gives him a title, it might still be said that he never was elected or admitted, and never was in the office, because fraud renders all these things as if they never were. In any case where an election is alleged to have been obtained by bribery or by personation of voters, such an argument would equally prevail; and, in effect, title would constantly be tried, not by the established courts, but by the corporation authorities; and the greatest abuses might take place in corporations if, shortly before the elections, the majority might disqualify a large portion of the electors at once by saying, "You only got to be members of the corporation by trick or falsehood or bribery, and your acting as corporators by means of such fraud is null; you have never therefore been members of the corporation, and so we strike you off the rolls." In all cases of *quo warranto* the supposition is that there has been a wrongful assumption of the office as against the Crown; and I think it would be very dangerous to introduce any such qualification on the general rule as to the trial of such title, as that where the title is sought to be invalidated by fraud, the body themselves may try it. Understanding your Lordships' second question to mean whether the prosecutor was removable by the court of assistants? I answer your Lordships' question in the negative. And with reference to your Lordships' third question, I answer that I am still more strongly of opinion that the court of assistants could not legally remove the prosecutor without his having an opportunity of being heard. This, I think, was the part of the case which particularly struck the late Lord Chief Justice of the Court of Q. B. in the earlier proceedings in that court. For any sufficient corporate offence committed after the party is in office there is often a power of amotion in the corporation; and in such case it can hardly be disputed that the party must have an opportunity of being heard. Supposing this a case of amotion, the law is, I think,

too clear to admit of a doubt; and if this be taken as a case in which the court of assistants might assume to themselves the jurisdiction of trying the title, I cannot see how, on any principle of justice, they can dispense with calling on the party and hearing what he had to say. The argument the other way would not only give the court of assistants the jurisdiction of the Court of Q. B., but would enable them to act as no court could act without giving the party an opportunity of being heard. I answer, therefore, the third question in the affirmative. As to your Lordships' fourth question, I think that the Court of Q. B. ought to have granted the peremptory *mandamus* as they did. Where a party has been turned out improperly, I think that he ought to be placed in the same situation as he was before the improper removal took place; and I think the Court of Q. B., on the removal not being supported by the facts stated on the record, were right in ordering him to be restored. How far any discretion in the Court of Q. B. in such cases has been taken away by the statutes giving a writ of error in such cases, if any discretion previously existed as to awarding a peremptory *mandamus*, need not, I think, be discussed, as the state of the record in my opinion warranted the judgment, if it did not necessitate it, according to what was thrown out by my brother Blackburn in the Court of Q. B., which may probably be the correct view of the case; and even if there were any discretion, and if the exercise of such discretion were ground of error, in my opinion the discretion was properly exercised; for I think it a much greater mischief that bodies of this nature should exercise the right of trying such title without hearing the party than that there should be the inconvenience pointed out in the Ex. Ch. that a party should be restored by *mandamus* where he might probably be subsequently ousted by *quo warranto*. I answer your Lordships' last question, therefore, in the affirmative.

COCKBURN, C. J.—My Lords, I am of opinion that the first question put by your Lordships in this case should be answered in the negative. I must begin by observing that I have always had considerable difficulty in understanding how, when the constitution of a corporation is fixed by charter, a power to make bye-laws "for the good rule and government" of the body could ever properly be held to carry with it a power to limit the number either of the electors by whom the members of any constituent part of the corporation are to be chosen, or the number of those from whom the election is to be made, by superinducing any new qualification or ground of disqualification as to which the charter is silent. I should be disposed to consider a power to make bye-laws "for the good rule and government" of the body as relating rather to matters of an executive character, connected with the government, discipline and management of the corporation, and the conduct of its affairs, than to alterations in the constitution established by the charter of the Sovereign, or in the mode of filling up the component parts of the corporate body thereby prescribed. Without, however, dwelling on this debatable ground, or further troubling your Lordships on this subject, I will content myself with saying that any bye-law, the effect of which is thus to modify the constitution given by the charter, should be looked at with jealousy, and upheld in a court of law only if it manifestly appears to be necessary and conducive to the well-being of the corporation; if, to use the words of this very charter, it shall be proved to be "good, useful, honest and necessary." Now, this bye-law, as it seems to me, is plainly unnecessary, and—worse than useless—is positively mischievous. It is unnecessary, because the body in the corporation in whom the power of making bye-laws is vested, is the very same body by which the election of an assistant is to be made;

so that, if the principle upon which the bye-law is based be sound, they can give practical effect to it by rejecting any one labouring under the disqualification, whether the bye-law exist or not. So long as the bye-law remains un repealed, it must be taken that the legislative body in the corporation are of opinion that its principle is good. If so, it is to be presumed that, in their character of electors, they would give effect to it. The bye-law is, therefore, plainly superfluous. Let us see whether it be useful and good. Now the grounds on which this bye-law has been said to be reasonable are, that the office of assistant is in itself one of trust and confidence; that it leads, if the ballot shall so determine, to the office of renter warden, an officer who is the treasurer of the corporation, and keeps its funds; that bankruptcy and insolvency in the great majority of instances arise from misconduct or imprudence; that the corporation is justified in taking measures for ensuring that its government, and especially the management of its pecuniary affairs, shall be in the hands of solvent and respectable persons. While the force of this reasoning may be admitted, it is, on the other hand, to be observed that the effect of such a rule must necessarily be in some instances to exclude persons upon whom bankruptcy or insolvency may have come from circumstances involving no imputation either of misconduct or improvidence. The vicissitudes of fortune, the fluctuations of trade, the uncertainty of commercial speculation, the failure of others, causes which sometimes prove "enough to press a royal merchant down," may occasion bankruptcy or insolvency, without leaving the shadow of a reproach on the character of the individual. Why should a man thus circumstanced, on whom no suspicion or imputation rests, be excluded till he has established a fair and honourable character for seven years, when, to say nothing of the hardship and injustice done to him, his admission into the governing body might, during all that time, be highly advantageous to the corporation? The answer which has been given is, that laws should be adapted to cases of ordinary, and not of exceptional occurrence, and that, if general good result, individual hardship or partial inconvenience must be submitted to. I should feel all the force of this argument if this bye-law were necessary to secure the advantage which it is designed to effect. But, as I have already shown, for this purpose it is altogether unnecessary, and its practical working is, therefore, this: while unnecessary to exclude those whom it may be desirable to exclude, it only operates to exclude those whom it is acknowledged it would be desirable to admit. The law is, therefore, not only useless, but mischievous. But, my Lords, even if this bye-law could be taken to be good in law, I am of opinion that the prosecutor was not removable under it. When the bye-law in question speaks of bankruptcy or insolvency it must, I think, be taken to refer to something more than a mere inability to meet pecuniary liabilities or engagements. "Bankruptcy," in the meaning of the bye-law, must, I think, be taken to mean the legal status in which a man becomes placed when he has committed an act of bankruptcy, and is thereupon adjudicated a bankrupt; "insolvency" a man's position when he becomes subject to the laws relating to insolvents, and is brought within the jurisdiction of the insolvent laws; for, although at the time of the making of this bye-law the insolvent court of modern times had not been called into existence, yet there were statutes relating to insolvent debtors, and the term was one known to the law. How, unless some such positive standard is taken, can the period be fixed from which the seven years are to run, during which the good character required by the bye-law is to be maintained? The fact that this latter period is made to date from the bankruptcy or

insolvency is strong to show that these terms are used in the sense I have ascribed to them, and not as importing a mere inability to meet pecuniary liabilities, the precise date of which it may be difficult to ascertain, which may exist to-day and be removed to-morrow. But, if this be so, Mr. Dinsdale was not ineligible at the time of his election; he was elected on the 23rd April; his election was confirmed at a meeting of the 25th July; he was admitted on the 16th Oct.; he was not declared bankrupt till the 30th Nov. It does not appear that he had even committed an act of bankruptcy prior to his election and admission. In my opinion, therefore, even supposing the bye-law to be good, he was not disqualified under it. And even if this were not so, I am still of opinion that it was not competent to the defts. to remove Mr. Dinsdale. He had been elected by the proper electors. His election had been duly confirmed; he had been admitted; he had been twice summoned to attend and discharge the duties of his office, and had done so, and had partaken of its emoluments. Under these circumstances, he was to all intents and purposes in the office; and, if removable at all, on the ground of having been ineligible under the bye-law, could only be removed by proceedings in the nature of *quo warranto* in the Court of Q. B. But his removal is said to have been warranted on the ground of misconduct, in making a false answer to an inquiry by the officer of the corporation touching his solvency, prior to his admission. To this it appears to me that more than one answer may be given. In the first place, although the effect of the prosecutor's statement was his admission, it does not appear that the answer was made with any reference to admission to the office, or was intended as a fraud on the corporation. It is found expressly as a fact in the case that Dinsdale, at the time of making this statement, was not aware of his having been elected. The inquiry may have presented itself to his mind simply as an impertinent one. The answer may have been given with the design of protecting himself from the injurious consequences to his position as a trader, which the disclosure of his pecuniary circumstances might bring upon him. Secondly, the inquiry was one which neither the defts. nor their officer on their behalf had any right to make, and by the answer to which the prosecutor, therefore, ought not to be prejudiced. If the bye-law be, as I think it, bad, the inquiry was irrelevant and unwarranted. If the bye-law was good, the inquiry came too late: it should have preceded the election; for when an election has once been made by those to whom it appertains to make it, the admission to the office becomes a purely ministerial act. It would be an additional reason for holding this bye-law to be bad, as unreasonable, if upon an election made by competent authority, it superinduced a new qualification as the condition of admission. The defts. are, therefore, under the necessity of contending, that though the bye-law speaks of admission, the disqualification is carried back to the period of the election. If so, this question as to solvency, if it could be legitimately put at all, should have been put antecedently to the election. Once elected, Mr. Dinsdale might have declined to answer such an inquiry, and yet have been entitled to insist upon being admitted. But a short and conclusive answer to this alleged ground of removal is to be found in the affirmative answer which must necessarily be given to the question put thirdly by your Lordships. No proposition on the law relating to corporate offices can be more clear or indisputable than that a man liable to removal from an office for misconduct is entitled to be heard in his defence, and must have an opportunity of being so heard before he can be removed. It is unnecessary to trouble your Lordships with authority on a proposition which needs only

be stated to command assent. The cases will be found collected in Wilcocks on Corporations, para. 691 to 702. Being, on these grounds, of opinion that the removal of Mr. Dinsdale was unwarranted, and that he is entitled to a peremptory *mandamus* to restore him, I have no hesitation in answering your Lordships' fourth and last question in the affirmative.

Cur. adv. vult.

The LORD CHANCELLOR.—My Lords, the question in this case depends almost entirely on the validity of the bye-law, and again, the validity of the bye-law appears to me to depend on the meaning of these words, namely, "or become otherwise insolvent." With respect to the construction of these words, I think they must be held to mean notorious or avowed insolvency, such as would be the consequence of a public stoppage in business, or of a trader calling his creditors together and obtaining time or terms of indulgence, or of his entering into a deed of composition. These and other modes of avowed insolvency were common at the time of the passing of this bye-law, although no statute relating to insolvent debtors as contradistinguished from bankrupts was then in existence. This construction of the word "insolvent," as meaning avowed or notorious insolvency, is consistent with the provision for restoring the competency of the trader if he has established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency, where the word insolvency must mean a fact ascertained at some period of time from which the seven years may be computed. Thus fairly construed, I think the bye-law is good and reasonable, and that it does not contain any element of uncertainty. If this be the meaning of the bye-law, Mr. Dinsdale was not insolvent within such meaning at any time before the date of his election or admission, and was not, therefore, in my judgment, disqualified by the operation of the bye-law. It is unnecessary to consider the case of fraud alleged in the return, because I understand the return and finding of the jury to be intended to state that Kay Dinsdale, being ineligible within the true meaning of the bye-law, did by means of false and fraudulent representations of his solvency induce or procure the wardens or keeper and assistants to admit him to the office. But if it had been necessary I should have been of opinion that the answers given by Mr. Dinsdale on the 24th Sept. 1849 to the questions put to him by Mr. Clarke (who was not directed or authorised by the court to make any such inquiries) were not such false and fraudulent representations as the court of wardens and assistants could allege were made with the view of inducing or procuring them, and by which in fact they were induced and procured, to admit Mr. Dinsdale. He was elected in the month of April 1849, and his election was confirmed in the month of July 1849. He was admitted to the office on the 20th Oct. 1849, and the return states, that on the 20th Dec. 1849 the court of wardens and assistants did resolve and determine that Mr. Kay Dinsdale should be removed and discharged from being, and should no longer be, one of the assistants of the said art or mystery. Mr. Dinsdale was not summoned, nor was any opportunity afforded to him of being heard against this order of removal, which does not treat the original election as void on the ground of Mr. Dinsdale being ineligible. Under these circumstances I am of opinion, that even if my construction of the bye-law be not the right one, and if Mr. Dinsdale was disqualified by insolvency, yet that, as he was admitted to the office without fraud, he could not be legally removed from it without being heard in his defence. I am therefore of opinion that the judgment of the Court of Ex. Ch. ought to be reversed, and that of the Court of Q. B. affirmed, and that a peremptory *mandamus* should issue.

Lord CRANWORTH.—My Lords, in this case the learned judges whose assistance we had at the argu--

most, are divided almost equally in opinion as to the judgment which your Lordships ought to pronounce. Three of them think judgment ought to be given for the *pl. in error*; four that the judgment below ought to be affirmed. I have given careful attention to their able and well-considered reasoning, and have arrived at the conclusion that the judgment of the Court of Q.B. was right, and so that judgment ought to be given for the *pl. in error*. On the question of the validity of the bye-law, I concur with the judgment of the Ex. Ch., and the four judges who think that judgment right. I think the bye-law is good. I think so, because I interpret the word "insolvency" to mean, not mere inability of the person to whom it refers to pay his debts in full, but inability proved by some outward act, such as stopping payment, or compounding with his creditors. That such is the meaning seems to me clear from the provision that the disqualifying effect of the insolvency may be removed by fair and honourable conduct continued for seven years after the insolvency. This necessarily points to some specific act from which the seven years may be counted, and this interpretation is strongly confirmed by the word "insolvency" being coupled with bankruptcy. Upon any other interpretation of the word, I should not think the bye-law good. If the insolvency contemplated by the bye-law was mere inability to pay his creditors 20s. in the pound at any time within seven years next before the election, a door would be opened to inquiries which it might be impossible to answer, and which it would be impolitic to permit. On the question of the validity of the bye-law, therefore, I concur with the judgment of the Court of Ex. Ch.; but I do not think that the special verdict finds any such insolvency as is contemplated by the bye-law. It finds, indeed, that from the time of the passing of the resolution of the 23rd April 1849, electing the app. to be an assistant, up to the meeting of the 20th Oct. following when he was admitted and sworn in, he was in insolvent circumstances and unable to pay his creditors 20s. in the pound, and that he was indebted on judgments and otherwise in large sums of money to divers persons. This, however, does not show that he was insolvent within the meaning of the bye-law. It does, indeed, show that when on the 24th Sept. he represented to Mr. Clarke, the agent of the company, that he was solvent as any man of the court, and able to pay his creditors 20s. in the pound, he was stating what was untrue and what he must have known to be untrue. But I cannot think that the mere statement of a falsehood, even though it has been made with the intention of thereby inducing, and has in fact induced, the company to elect him, can have the effect of making the election a nullity. If he had been bankrupt within seven years previously to his election, and had falsely represented to the company that he had never been bankrupt, that would have been a false representation that he was eligible when in truth he was ineligible, and I will assume that such a falsehood would have rendered his election a nullity. But a mere false representation not affecting his eligibility would not have that effect. If, for instance, being solvent, he had falsely represented himself as worth 10,000*l.*, when in truth he was worth only 100*l.*, this false representation might have led to his being elected, but it would not have made the election a nullity. And the representation that he was not insolvent, using that word in a sense different from that in which the word insolvency is used in the bye-law, is merely the statement of a falsehood not material to the question whether he was or was not eligible, and therefore, even if it would afford ground for setting aside the election, it did not, in my opinion, make it absolutely null and void *ab initio*. This view of the case makes it unnecessary for me to consider the other questions raised in the argument.

No. 203.

It is impossible to contend that a person validly elected and admitted a member of the court could, behind his back and without notice, be removed from his office. And it seems necessarily to follow that judgment must be given for the *pl. in error*, and that a peremptory *mandamus* ought to issue. I ought to state that my noble and learned friend Lord Brougham, who is unable to be present here to-day, has authorised me to say that he concurs with us in our view of this case.

LORD WENSLEYDALE.—My Lords, the first question in this case is, whether the bye-law upon which the case principally depends is reasonable and therefore valid or not. The company have a power by their charter to make bye-laws, which they shall think fit in their sound discretion, for the good rule and government of the wardens, or keeper, or treasurer and commonalty of the mystery of saddlers. Under that power I do not feel the difficulty which has presented itself to the minds of some of the judges, that the body could not limit the number of the persons to be elected by superinducing new qualifications as to which the charter is silent. To secure the good government of the company it might be proper to make fit provision that those who have the rule and management of the affairs of the company should be well qualified, and it is very reasonable that those who are to have the care and custody of the money of the company should be trustworthy and respectable. I think, therefore, that there is no objection to a bye-law requiring that those elected and admitted to be assistants, who may, and in the ordinary course will, become reuter wardens, and as such have the custody of the money of the company, should not be persons who have been bankrupts, unless it be proved that after their bankruptcy they have paid their creditors in full, or established a fair and honourable character for seven years after their bankruptcy to the satisfaction of the court or a majority of them. In this respect I have no doubt as to the validity of the bye-law. Whether it is equally valid in the case of insolvency is the question, and that depends upon the meaning of that term in the place in which it occurs. If it means only secret insolvency—that is, if at any time, in case a person's liabilities and assets were reckoned up and compared together, in that comparison he was found to be incapable of paying all his creditors—I must think the bye-law is invalid. There would be great inconvenience from such an inquiry into private affairs. It is clear besides that the bye-law means such an insolvency as is manifested publicly; for from a secret insolvency the period of seven years cannot be well calculated, and therefore there is good reason for saying that a different kind of insolvency is intended. I cannot help thinking it is quite clear that the term "insolvent" means public insolvency—not necessarily taking the benefit or being made liable to the Insolvent Act; but being incapable to pay his debts in ordinary course, or, in other words, having stopped payment. In that sense I think the bye-law perfectly reasonable, and the seven years may be easily calculated from such an insolvency. Willes, J. has referred to several cases to show that such is the true meaning of the word. It may at least mean not paying as well as being incapable of paying. As in one sense of the word a bye-law is good, and in the other not, the rule is that it ought to be construed so as to make it valid, and not to defeat it, according to the principle laid down in the *Poulterers Company v. Phillips*, 6 Bing. N. C. 314. I think, therefore, that the bye-law is good in law on the supposition that public insolvency is meant by it. Was the *pl. then* removable under the bye-law (which I am satisfied is good) upon the facts stated in the return, and found by the special verdict? I think there is no substantial difference for this purpose between being admitted or

elected and admitted. The bye-law in substance forbids him from being permitted to be a member of the court of assistants. If the office had been full he could not have been removed without a *quo warranto*. That is perfectly clear. But the ground upon which the defts. appear to have intended to proceed, is that the relator was elected and admitted by means of a fraud committed by himself upon the company; that the office was never full, but was voidable by reason of the fraud, and that fraud makes all the transactions voidable at the election of the party defrauded, as long as the parties remain in the same condition, though not when new interests are acquired; and that here there are no new interests so acquired, and that if there was a fraud and the transaction was avoided on that ground, a notice would be unnecessary to the fraudulent party to come and defend himself in order to make the avoidance operative, and I am clearly of opinion that it would. The fraud meant to be relied upon in the return is a false and fraudulent statement by the relator as to his solvency. He is alleged to have falsely and fraudulently stated, both before his election and his admittance, that he then was solvent and able to pay his creditors 20s. in the pound, whereas he was then insolvent and unable to do so. The allegation that such statement was made before his election, is not attempted to be proved. There is nothing in the special verdict to support it. But that allegation may be rejected, and if the statement of a fraud as alleged before the admittance according to the true meaning of the allegation is made and proved, the return would be sufficient. In order, however, to make this a valid objection to the admittance after election, the return should state an insolvency within the true meaning of the bye-law. If a false and fraudulent statement, perhaps on any subject, had been made, which had caused the election to take place, probably the election might have been avoided by that fraud. But a fraudulent statement after election, in order to avoid the admittance made on that election, on the ground of insolvency, must be a statement of such insolvency as to create a disqualification under that bye-law. That insolvency must be not a private and secret insolvency, not a mere incapability on the full statement of his affairs to pay, but a public one, a stoppage of payment in the ordinary course, or a similar act. I have had a good deal of doubt on the point. After much consideration I have come to the conclusion that the return does not state that there ever was an insolvency of that character. I think it probable that the framer of it had no notion that a public insolvency was at all necessary in order to bring the case within the prohibition of the bye-law. The allegation is that the relator falsely and fraudulently stated to the wardens and keepers that he then was solvent and able to pay his creditors 20s. in the pound, whereas he then was insolvent and unable to pay his creditors 20s. in the pound, and that they never have been paid. That he was solvent at the time of making the statement does not, in the ordinary use of language, appear to mean that he had not then ceased to pay in the ordinary course, or stopped payment, or become insolvent, within the meaning of the bye-law; but merely that he was then capable of paying in full, and the proof of that representation which is stated in the special verdict confirms that view of the meaning of the allegation in the return, for it is said that it was made on the 24th Sept. 1849, in answer to an inquiry which was made by Clarke, the agent of the court, as to the relator's solvency, and was a statement that he then was as solvent as any man of the court, and able to pay his creditors 20s. in the pound; whereas he then was and has hitherto been insolvent. He was not asked whether he had ever become insolvent or stopped payment. On the ground

that the return does not allege a case of public insolvency and a fraudulent statement on that subject, I think it is bad, and therefore that the judgment of the Court of Ex. Ch. ought to be reversed, and a *mandamus* ought to go. It is unnecessary to consider whether the special verdict finds sufficiently that such statement was made to the wardens, keepers and assistants, as it is alleged in the return as being made only to Clarke, or that they removed the relator for that cause. It is sufficient for the decision of the case that the return is bad.

LORD CHELMSFORD.—My Lords, the question in this case turns upon the validity of the bye-law; for if that is invalid, all the proceedings founded upon it must necessarily fail. This question entirely depends upon the meaning which is given to the words "or become otherwise insolvent." If they mean that no person shall be a member of the court of assistants who at any previous time, if called upon suddenly by his creditors, had been unable to pay them 20s. in the pound, a state of circumstances scarcely capable of being reduced to precision, always fluctuating and uncertain, and not necessarily determining the solvency of a tradesman according to the notions of the commercial world, then the bye-law would be unreasonable and void. This would of course not be the case if the words are to be understood as importing insolvency in the strictest acceptance of the term, either by taking the benefit of the Insolvent Act, or by compounding with creditors; but if this is the proper interpretation of the bye-law, it would not have been applicable to Mr. Dinsdale at the time of his admission. But I think that a reasonable construction may be adopted which will both establish its validity, and bring Mr. Dinsdale's case within it. The words are not "has been a bankrupt or insolvent," but "has been a bankrupt, or become otherwise insolvent," which appear to me to point with sufficient precision to a state of circumstances which in a popular sense implies an insolvent condition, as where a person, to use a familiar expression, is unable to pay his way or to discharge his debts in regular course according to the habits of business of solvent tradesmen. This is an overt act of insolvency which is capable of distinct and definite proof as occurring at any particular time. The bye-law, therefore, is not objectionable on account of uncertainty, and this construction of it gives a precise period from which the inquiry by the court of assistants may commence, whether the person seeking admission to the court has paid and satisfied his creditors, or has established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency. This provision, intended to mitigate the rigour of the bye-law and to allow a failing man, even where he has not paid his debts in full, the benefit of the favourable consideration of the court of assistants after a period of purgation, is thus cleared of all difficulty, and the inquiry has a certain and definite range and object. The bye-law, therefore, appears to me to be valid, and if the fact of such insolvency as it contemplated had been established against Mr. Dinsdale at the time of his election, he would not have been eligible to the court of assistants. But, assuming him to have been ineligible, was it in the power of the court of assistants, by their resolution of the 20th Dec. 1849, after his election and admittance, to remove him from his office? I think it was not. I do not understand the word "admitted" to be used in the bye-law to signify admission as contradistinguished from election, but as a general and comprehensive word, equivalent to "become or be" a member of the court. Now, suppose Mr. Dinsdale to have been in insolvent circumstances within the meaning of the bye-law, but to have concealed the fact, and to have been admitted in ignorance of it, it can hardly be contended that

upon a subsequent discovery of the state of his affairs he could have been removed. The case against him is put upon the ground of fraud. It is alleged in the return, and found by the jury, that by means of the said false and fraudulent representations of his solvency, the said Kay Dinsdale induced and procured the wardens, or keeper and assistants, to admit him to the office. Now, the false and fraudulent representations referred to are those which are found to have been made to Mr. Clarke, clerk of the company, on the 24th Sept. 1849, long after the election of Mr. Dinsdale, which was on the 23rd April 1849, and confirmed on the 25th July 1849, and before it was communicated to him, or he was summoned or admitted to the office. It is not even positively and directly alleged that Clarke communicated Dinsdale's representation of his solvency to the wardens and assistants of the company before his admission. But the special verdict states argumentatively that the said representations were not communicated to any court of the then wardens and assistants until the 20th Oct. 1849, which was the first court of the said wardens and assistants held after the said representations were so made as aforesaid. But suppose it to be sufficiently averred that Clarke informed the court of wardens and assistants of the representations of Dinsdale before he was admitted on the 20th Oct. 1849, how would this justify the finding of the jury, that Dinsdale by his false and fraudulent representations induced and procured the wardens and keepers and assistants to admit him to the office? The representations to Clarke might be false, but they could not be called fraudulent, unless a misrepresentation of his circumstances by a tradesman, in answer to unauthorised inquiries, deserves that designation, or unless Dinsdale made the statement to Clarke in order that it might be communicated to the court of wardens and assistants, which, as the fraud charged, is one upon which the court ought not to have been left to conjecture, however probable, but should have been distinctly alleged. The mere communication of the fact therefore by Clarke to the court, though he is clerk to the company, goes no further to the establishment of a fraud upon the court by Dinsdale than if a stranger had repeated what he had heard from Dinsdale in the course of a casual conversation. The wardens and assistants might have been induced by the representations communicated to them to admit Dinsdale to the office; but it cannot with propriety be said that he induced and procured them by his representations so to admit him. But let it be assumed that Dinsdale made the communication to Clarke in order that it might be communicated to the wardens and assistants with the view of deceiving them, and obtaining his admission to the office of assistant, and that his election was therefore void *ab initio*. What course ought the court of wardens and assistants to have pursued? There can be no doubt that they should have treated the election of Dinsdale as a nullity, and have refused to recognise him for a single instant as an assistant, and have proceeded at once to a fresh election. Instead of adopting this course, they treat him as a person actually elected and admitted, and by their return state that, on the 20th Dec. 1849, at a meeting of the wardens, or keepers and assistants, they did resolve and determine that the said Kay Dinsdale should be removed and discharged from being, and should no longer be, one of the assistants of the said art or mystery—words which necessarily import that he had been admitted, and that he was actually one of the assistants at the time of the resolution. But, even assuming that the court of assistants were entitled to annul the election and admission on account of Dinsdale's insolvency, yet, according to the allegation in the return, they did not proceed at all upon this ground, but upon his

bankruptcy afterwards. They might have treated the bankruptcy, and the insignificant dividend which he paid upon it so soon after his admission, as proof of his insolvent circumstances at the time; but in itself it was no ground of removal under the bye-law. It appears to me to be clear, from the language of the return, that the bankruptcy was the real cause of Dinsdale's removal. It states that, after his election and admittance, he was adjudged a bankrupt; that assignees of his estate and effects were appointed, and the said adjudication and bankruptcy have thence hitherto remained in full force and effect, and the said wardens or keepers and assistants did thereupon, and whilst the said Kay Dinsdale was such bankrupt aforesaid, and wholly insolvent, resolve and determine that he should be removed and discharged from being, and should no longer be, one of the assistants of the said art or mystery. I cannot understand this in any other way than that, upon his becoming bankrupt, the court resolved that Dinsdale should be removed from being an assistant. Now it is unnecessary to say that under the bye-law the court had no power to remove for bankruptcy or insolvency subsequent to admission. And if they removed him for this cause, which was clearly illegal, I do not think they could set up the previous insolvency as a justification, on the ground of its rendering the election altogether void; or, if they could, they should have distinctly averred it for cause in their return, in order that it might be traversed and tried. As I am so clearly of opinion that the removal of Dinsdale cannot be justified, it seems unnecessary to consider the other questions; but I cannot forbear one or two remarks upon the arguments as to the supposed right to remove without previous summons and hearing. If Dinsdale's election was void *ab initio* on the ground of fraud, no doubt his case might have been summarily dealt with, and his admission cancelled without a hearing, because he would never have been a member of the court, and would have had no *locus standi* to be heard. But if he were actually in office as the return admits, and was to be removed from it for cause, it seems to be an invariable rule of justice that he should not be condemned unheard, and the court had no right to assume that he would have had no cause to show against his removal. I think that in this respect the proceedings of the court of assistants are open to objection. I agree, therefore, with the Court of Q. B. that a peremptory *mandamus* ought to issue in this case. I admit the good sense of the remark in the case of *Rex v. Griffith*, that it is idle to grant a *mandamus* to restore where the party could be removed again immediately. But I do not see how this could be the case with Mr. Dinsdale under the bye-law either upon his subsequent bankruptcy or insolvency, or on account of his insolvency if existing at the time of admission, there being no proof of any fraud designed or practised by him on the court of assistants, the only ground upon which he could have been deprived of his office after a regular election and formal admission. I agree with my noble and learned friends that the judgment of the Ex. Ch. ought to be reversed and that of the Q. B. affirmed, and that a peremptory *mandamus* ought to issue.

Judgment reversed.

Plt. in error's attorneys, *Keighley and Bull.*

Def't. in error's attorney, *G. Clarke.*

Judicial Committee of the Privy Council.

Reported by JAMES PATERNON, Esq., of the Middle Temple,
Barrister-at-Law.

Thursday, June 18.

(Present the Right Hon. Lord KINGSDOWN, BRUCE,
L.J., and TURNER, L.J.)

BOOTH v. A'BECKETT.

*Trust—Will—Power to lease—Fraud on power—
Notice of trust.*

J. by will devised certain lands to P. and W., as trustees, for the use of E. on E. attaining twenty-one. The will gave power to the trustees to lease the lands for any term of years at the best yearly rent, without taking any fine or premium, and so as to reserve a power of re-entry on nonpayment of rent. There was also power to appoint any other fit person or persons to be trustees in the place of the trustees if desirous of being discharged. Soon after J.'s death P. and W. appointed R. sole trustee to hold on the trusts of the will. R. let the lands for twenty-one years to B. at a rent specified, but five years' rent to be paid in advance. There was some dispute as to whether the lands in question passed by the devise:

Held, that the lease was a breach of trust, and not authorised by the power; and, whether the lands passed by the devise or not, R. was ex facie a trustee for E.; moreover, that in the circumstances B. must be taken to have had sufficient notice of the trust to have put him on his guard.

This was an appeal from a decree of the Supreme Court of Victoria.

John Mills, by his last will and testament bearing date the 26th July 1841, after directing the payment of his debts and legacies out of his personal estate, devised, together with other lands, all that his piece of land situate in the town of Melbourne, and being part of allotment No. 8 of sect. 20, whereon was built a house and shop, then in the occupation of James Taylor, together with the yards, outbuildings, and other appurtenances used and occupied therewith, unto and to the use of John Jones Peers, of Melbourne aforesaid, gentleman, and William Witton, of Melbourne aforesaid, ironmonger, their heirs and assigns, upon trust, from time to time to receive and take the rents, issues, and profits thereof, as and when the same shall become due, until the plt. should attain her age of twenty-one years, and should, out of the said rents, issues, and profits, pay the yearly sum of 200*l.* for the maintenance, education, and support of the plt.; and testator thereby directed, that when and so soon as plt. should attain her age of twenty-one years, the said John Jones Peers and William Witton, and the survivor of them, and the heirs and assigns of such survivor, should stand seised and possessed of the said trust premises in trust, for the only use of plt., her heirs and assigns for ever; but he thereby directed, that if plt. should depart this life under the age of twenty-one years, and whether she should have been married or not, the said John Jones Peers and William Witton, and the survivor of them, and the heirs and assigns of such survivor, should stand seised and possessed of the said trust premises, for the use and benefit of his wife, the said Hannah Mills, and his brothers George Mills, Job Mills and Thomas Mills, and his sisters Elizabeth Mills, Susan Mills, Harriett Mills, Catherine Mills, Ann Mills and Hannah Mills, and to their several and respective heirs and assigns absolutely for ever. And the said testator devised all the residue and remainder of his real estate and property not specifically devised, whatsoever and wheresoever, unto and to the use of his said brothers Job Mills and Thomas Mills, as tenants in common,

and to their several and respective heirs and assigns absolutely for ever. And the said testator declared that it should be lawful for the said John Jones Peers and William Witton, and the survivor of them, and the heirs and assigns of such survivor, during the minority of plt. (as to all, or any and every of the hereditaments and premises so thereby devised by him upon trust as aforesaid, and as to all and every any of the real estate so to be purchased as therein aforesaid), by any deed or instrument in writing to be respectively sealed and delivered by them or him respectively from time to time, to demise and lease all and every the said several and respective hereditaments and premises and real estates, or any part or parts thereof respectively, to any person or persons whomsoever, for any term or number of years, to be computed from the making thereof respectively, or some prior time, at the best yearly rent that could be reasonably gotten for the same respectively, without taking any fine or premium for the making thereof, but so that there be therein respectively contained a condition of re-entry for the nonpayment of the rent thereby to be reserved, and so that the respective lessees do execute a counterpart thereof respectively, and thereby also covenant for the payment of the respective rents, and so also that no such lessee or lessees be made punishable for waste by any express words to be therein respectively contained; and directed, that if the said John Jones Peers and William Witton, or either of them, or any other trustee or trustees to be appointed as hereinafter mentioned, should die, or leave the colony of New South Wales for a permanency, or become incapable of acting, or should be desirous of being discharged from further acting in the trusts of his said will before the same should be fully executed and performed, it should and might be lawful for the surviving or continuing trustee for the time being thereof, and other the heirs of the last surviving or continuing trustee, from time to time, and as often as the case should require, by any deed or instrument in writing, to nominate and appoint any other fit and proper person or persons to be a trustee or trustees in the place or stead of the trustee or trustees so dying, leaving the colony, becoming incapable of acting, or being desirous of being discharged from further acting as aforesaid; and that, immediately after such nomination or appointment therein as aforesaid, the said trust, hereditaments and premises, securities, real estate, property, and other the premises therein aforesaid, should be conveyed, assigned, settled and assured, so and in such manner that the same might vest in such new trustees or trustee jointly with the surviving or continuing trustee, or solely, as the case might require, upon the trusts and for the ends, intents and purposes thereinbefore by him expressed and declared, of and concerning the same, and that every such new trustee or trustees should have and be entitled to, &c.

The testator John Mills died in 1841, leaving Emma Mills his only child surviving. In 1842 the testator's widow married T. Robinson. Peers and Witton the trustees in 1845 executed a deed dated 9th Dec. 1845, by which, after reciting the power in the will to appoint new trustees, they appointed T. Robinson trustee of the will, and conveyed to him among other property "All that other piece or parcel of land situate in the town of Melbourne, and being part of allotment number 8 of section number 20, commencing at the south-east corner of said allotment, and bounded on the south by Bourke-street, by a line bearing west 63 feet; on the west by a line at right-angles to the last-mentioned line, bearing north 73 feet; on the north by a line at right-angles to the last line, bearing east 63 feet; and on the east by Elizabeth-street, by a line bearing south to the commencing point 73 feet; together with the yard, outbuildings, and other appurtenances used and occupied therewith, and all other

the freehold hereditaments then vested in the said John Jones Peers and William Witton, as such trustees of the hereinbefore-recited will of the said John Mills, to hold the premises thereby conveyed unto the said Thomas Robinson, his heirs and assigns, to the use of the said Thomas Robinson, his heirs and assigns, for ever, upon the trusts and for the intents and purposes, and with, under and subject to the powers, provisions and declarations expressed and declared in and by the hereinbefore-recited will of the said John Mills, deceased, concerning the freehold hereditaments thereby devised, or such and so many of the same trusts, intents and purposes, powers, provisions, and declarations as were then subsisting undetermined and capable of taking effect, and upon or for no other trust, intent or purpose whatsoever."

In 1854 Robinson executed a lease of part of the property allotment 8 sect. 20 to Isaac Booth, the app., for twenty-one years at a rent of 1100*l.*, the first five years' rent to be paid in advance and secured by mortgage.

Emma Mills in 1855 married W. A'Beckett, and soon afterwards filed her bill to set aside the above lease as a fraud and breach of trust. After evidence on both sides the learned judge (Sir R. Barry) declared the deed a fraud. The material parts of his judgment were as follows. After stating that the doctrines of estoppel and notice had an important bearing on the case:—And first, as to Robinson's notice of the trust. He knew of the testator having made a will and knew its contents; he married the widow of the testator; he received rent from the tenants put in by the testator; he took the assignment from the trustees under the will; he repeatedly stated that he was acting as trustee for the infant. By such statement alone he would be estopped from now averring to the contrary. But I conceive that he is also estopped further. It was objected by the deft. Booth that this deed of assignment by the trustees was not admissible in evidence, because it had been altered after execution in a material part of it, the date. Then, if not admissible, what title can the deft. Robinson have? Certainly none as trustee under it. What, then, can he convey to Booth? To this it was suggested that this deed, though inadmissible for the purpose for which it was proposed by the plt. to use it, was to be taken as making Robinson a proprietor of the land, the reply to which is obvious. If it were a transfer of proprietary right to him, and not of a fiduciary right, what consideration for the purchase has been shown? What, however, are the facts? This deed was executed; some time after the execution it was altered. What effect did that alteration produce? The estate had vested by the execution; what became of the estate on the alteration? It could not be said that the estate had been reconveyed by the alteration, or that it thereby passed out of Robinson again and revested in Peers and Witton. Being executed by the two trustees appointed by the will, the trust estate was transferred to Robinson. There is no ground whatever for the pretence that Robinson was a purchaser of the estate. It was also objected that there was an undue and irregular execution of the power on that point. *Stones v. Roden* is one only of many cases which show the course that ought to be adopted in appointing a new trustee under such a power: but the deft. who now sought to avail himself of the objection taken as to the informality of the appointment to discharge himself from the trust, cannot be permitted to do so. *Racken v. Seddell*, 16 Sim. is an authority to prove that when a trust was assumed even by mistake and acted upon, the person so acting was bound by the trust, and could not avoid his own act. There was also a deed of release dated the 21st Sept. 1847, Robinson to Taylor. In that deed it was recited that Robinson was appointed to execute this

trust, deriving his authority from Peers and Witton, the original trustees. That deed was conclusive on him, even if there were not innumerable other acts that bound him. He took the girl to the tenants and told them he was her trustee; further, he defended the action of ejectment, a litigation in which the tenants were assailed by Job and Thomas Mills, the very persons from whom he now pretended to deduce some title which he did not show to the court. Writing respecting these actions of ejectment to Witton, one of the original trustees, he said "I am defending for the tenants; if you have any information that would be useful I beg you to communicate it to me; the above premises (the premises comprised in the ejectments) were left by the will to Emma Mills." If other evidence were not conclusive, this letter is conclusive; and as many of the instances enumerated are connected with acts done and deeds executed, it is clear not only that he had notice, but that he is estopped from saying that he had not, and moreover estopped from averring that his acts were not done in the character he assumed at the time they were done. Robinson is therefore effectually estopped; estopped by his knowledge of the will, and estopped by his own acts from denying that he was a trustee, or from saying that this land was not the subject of the demise. With reference to the subject of notice as it affected Booth, it is hardly necessary to observe that there are two kinds of notice, actual and constructive; actual notice pervaded all the acts of Robinson, and as regards Booth it appears that he has had notice both actual and constructive. In his answer he begins with a declaration that he had no actual notice of the deed from the original trustees, Peers and Witton, to Robinson. That qualified negative is in itself significant and suspicious. He afterwards acknowledges that he knew there were tenants in possession, and that they were the tenants of Peers. Admitting such knowledge, is seemed strange that he should rely upon his first negative of "actual" notice, notice of a deed from Peers to Robinson, to protect him from the consequences of notice of such a link between Peers and Robinson. It has been argued that no purchaser is bound to ask for deeds. Without any disposition to dispute the decisions cited, I do not feel at all pressed to subscribe to that doctrine to the extent that would make it apply to the position of Booth. A person who sees tenants in possession of land which he is about to purchase or deal with, is bound to inquire into the title of a person who professes to give him merely a lease, concurrent with the lease under which these tenants hold. If there could be any possible case in which a person was bound to ask for deeds, and, having declined to do so, was affected with notice of the probable contents of such deeds, it is this. But Booth further admitted that he had knowledge of the letter of Robinson to Witton respecting the ejectments, and that he had knowledge of the litigation in which Robinson had successfully litigated the title to these very premises on behalf of the plt. against the claims of Job and Thomas Mills. This leads to the doctrine of estoppel as it applies to Booth. Booth did not deny his landlord's title, but is estopped, by his knowledge and conduct, from setting up now any other title than that which he knew his landlord had set up, and that he himself acted on during these proceedings. When, at any time, had Booth set up any title but a title derived through Robinson? It remains now to deal with the points of which the lease was assailed. It is said it was a lease concurrent with leases in existence when it was made; that cannot be denied—that it was a lease not in possession but in reversion, and therefore at variance with the power created by the will; upon that there can be no dispute—and that it was further at variance with the will because a fine had been taken. The term "fine,"

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BOOTH v. A'BECKETT.

[PRIV. CO.]

or foregift, almost explains itself. There were many devices for evading the usual prohibitions against taking a fine or foregift, and in my opinion this taking of five years' rent in advance, as has been practised in this case, is one of those devices; it is an attempt to evade an express direction of the will; and although the objection be taken by the tenant for life, for whose benefit it might be supposed to operate, that is not now the question. The persons who would be the most interested to prevent the taking of a fine certainly raised no objection; nevertheless, it is now urged that this is not a legal execution of the power, and that the court has only to say whether it be such or not. A fine in effect, though not perhaps *eo nomine*, has been taken here. The payment is in the answer of Booth, and out of his own mouth let him be judged. On this question he says that he purchased this lease from Robinson with the sum of 5500*l.*, being five years' rent. After this it is impossible for him to contend with success that this payment was not in the nature of a fine. The arrangement clearly was that by giving a sum certain in hand to the landlord, the yearly rent might be refined or reduced. The question to be decided therefore is, has this lease been executed according to the power? and treating it in the language of the deft. himself, that it was a purchase, he must be held to his own terms, and it must be declared that he is not entitled to retain it. As to the other objections, that the lease did reserve the right of re-entry, that it was a lease concurrent with leases not yet expired, and having two years to run, it did not in fact, however it did in terms, reserve this right of re-entry for non-payment of each year's rent as required by the will, it is not necessary to give an opinion. On the other ground, however, it appears that the power was not well exercised, and that the lease is void. There is also another circumstance, which cannot but be considered very remarkable. The lease is not supported by the lessee. Booth has not come forward to give any evidence; this must lead to the conclusion that there is a misgiving on his part as to the *bona fides* of the transaction. This has been called an ejectment bill, but it is not. When the plt. made such a case as was made by this bill, it is not sufficient for the deft. to lie by; he should be prepared to give some definite account of the transaction, should offer some evidence, not only with a view of supporting his title, but also with a view to determining the question of costs. My opinion is that the prayer of the bill should be granted, and with costs. The plt. has made out his title to the land. Booth had not shown that the lease to him was executed in accordance with the power, that he obtained that lease from any person authorised to make it, or that Robinson, through whom he pretends to deduce his title, derived any estate from any channel, source, or fountain of title whatever, except as he assumed to be the trustee of the plt.

The present appeal was brought against this decree.

The *Solicitor-General* (Palmer) and *Mundell*, for the apps.

Rolt, Q.C., *Cairns*, Q.C., and *Terrell* for the resps.

Lord Justice KNIGHT BRUCE.—This appeal is from a decree dated 22nd Oct. 1858, made by the Supreme Court of the colony of Victoria, in a suit in equity instituted there by the resp. before us, Mrs. A'Beckett, formerly Miss Mills, for the purpose of setting aside a lease of certain landed property at Melbourne, dated 15th Dec. 1854, which had been granted by one Thomas Robinson to Mr. Isaac Booth, the app. before us. The title alleged by the resp. was under the will of her father, John Mills. It is dated 26th July 1841, the year in which the testator died. The resp. was then and for several years afterwards an infant. Her case was and is, that the property comprised in the impeached lease was part of the real estate of the

testator, and was comprised in the devise contained in the will to John Jones Peers and William Witton, in fee of certain property, upon trusts by the will declared, trusts mainly or solely for the resp.'s benefit, she having lived to attain her majority; that Messrs. Peers and Witton, soon after the testator's death, by an instrument purporting to be dated in the year 1842, did in professed exercise of a power contained in the will, profess to appoint her stepfather, Thomas Robinson (already mentioned), a trustee under it in the place of Messrs. Peers and Witton; that afterwards Thomas Robinson made the impeached lease dated (as has been said) in 1854; and that whether he had been regularly or irregularly, duly or unduly appointed a trustee, the lease was not authorised by the power of leasing contained in the will, was a breach of trust, and was bad against the resp. The defence of the app. was in the main that, as he alleged, the property so devised to him was not comprised in the devise under which the resp. claims, and he insisted on the validity of the lease, and claimed the benefit of it against the resp. There was much evidence in the cause on each side. Three of the questions were, first, whether the property purporting to be demised by the impeached lease was comprised in the devise to Messrs. Peers and Witton, in trust for the plt.; secondly, whether, if it was, Thomas Robinson had been duly appointed a trustee under the will; thirdly, whether, whatever the proper answer to the second question, the impeached lease was an instrument in fraud of the power of leasing given by the will, or made in an undue and improper exercise of the power. As to the first question, the words of the will alleged by the resp. to comprise the property in dispute are, "And also all that my other piece of land, situate in the town of Melbourne, and being part of allotment number 8 of section number 20, whereon is erected and built a house and shop, now in the occupation of James Taylor, together with the yard, outbuildings and other appurtenances used and occupied therewith." Considering the whole of the evidence, their Lordships think this question open to reasonable argument. They are not satisfied that it ought to be answered against the resp., but, upon grounds to be presently noticed, abstain from answering it for or against her. They abstain also from answering the second question. But as to the third question, they are of opinion clearly that it must be answered in the resp.'s favour, subject of course to the first question. This third point was indeed properly conceded on the app.'s part; for, assuming that in this suit and for its purposes Robinson should be taken to have become, as to the land in dispute, a trustee under the will, it is manifest that we must treat the lease as a gross breach of trust. The title to the fee of the land in dispute, thus demised by Thomas Robinson to the app., must be considered as having, at the time of the demise, been either in Thomas Robinson or in the residuary devisees of the testator. But if in Thomas Robinson, it was vested in him as a trustee for the resp., so appointed, whether regularly or irregularly, after the testator's death, in the place of the trustees named in the will. Then as to the alleged title of the residuary devisees, there has been a decision against it by a competent court of law, as between them and Mr. Witton, one of the trustees appointed by the will. There is, however, more. The instrument purporting to be dated Dec. 9, 1843, which contains the appointment of Thomas Robinson to be trustee under the will, purports to convey the land in dispute to Thomas Robinson expressly as a trustee under the will, and in effect as a trustee for the resp., the trusts declared by the deed being thus: "To have and to hold the said piece or parcel of land and premises hereinbefore mentioned, and hereby released, or intended so to be, unto the said Thomas Robinson, his heirs and

assigns, to the use of the said Thomas Robinson, his heirs and assigns, for ever, upon the trusts and for the intents and purposes, and with and under, and subject to the powers, provisos and declaration expressed and declared in and by the hereinbefore recited will of the said John Mills, deceased, concerning the said freehold hereditaments hereby devised on such or so many of the same trusts, intents and purposes, powers, provisos and declarations as are now subsisting undetermined and capable of taking effect, and upon or for no other trust, intent, or purpose whatsoever." The deed, in effect, declares that the land now in dispute was devised by the will to Mr. Peers and Mr. Witton in trust for the resp., and substituting Thomas Robinson for Mr. Peers; and Mr. Witton declares Thomas Robinson a trustee for the resp. accordingly. This appointment and conveyance, accepted by Thomas Robinson, bound him, as between him and the other parties, to it, and as between him and the resp. By it, as between her and him, he became her trustee of the land, whatever the true reading of the will, and that character, so accepted and acquired, he never, as between them, became entitled to cast off or disclaim; but the lease in dispute, granted by him to the app., was plainly in breach and violation of that trust, and at least, as between Thomas Robinson and the resp., void. Is it, then, a just inference, from the pleadings and evidence, that the lease was taken by the app. with notice of the position in which Thomas Robinson stood at the time with regard to the property and to the resp.? Their Lordships consider that it is, and that on the whole of the matters before them the app. is shown to have against the resp. no better title than Robinson could or can claim, at least so far as the lease is concerned. The notice that the app. acknowledges of the instrument of demise to Ashurst, dated 1st Feb. 1842, which included part of the property afterwards demised to the app., seems alone sufficient for the purpose, the reference in it to the testator's title being express, but it is not all the notice that the app. had. He knew enough to render it his duty as between himself and the resp. to ascertain all the material facts relating to Robinson's title before accepting the lease of 1854; and, therefore, if the app. is to be taken to have in the pleadings set up, the defence of a purchase for valuable consideration (without notice of which, however, their Lordships are not satisfied) the defence fails in their opinion upon the facts and merits. It is almost, or quite superfluous to add that, of course, not any dealing between Robinson and the app., or either of them on one hand, and both or either of the residuary devisees on the other, which may have taken place after Robinson's acceptance of the trusteeship can possibly assist the app. in the present contention, whatever may be the true construction of the will. The decree has not granted an injunction, has not dealt with the possession of the land, and has done no more than declare that the said indenture of lease of 15th Dec. 1854, was fraudulent and void, and a breach of trust, and ought to be set aside, and doth order and declare the same to be set aside accordingly. And this court doth order and decree that the said Isaac Booth and Abraham Booth, according to their respective estates and interests in the premises, do execute a proper deed of assignment or surrender of the premises comprised in the said indenture of lease for all the residue of the said term thereby granted unto such person or persons as shall be appointed trustee or trustees of the will of the late John Mills, such deed or deeds to be settled by the Master in Equity, in case the parties differ concerning the same, in which all parties are to join. And it is ordered that it be referred to the Master in Equity of this court to tax the plt.'s costs of this suit, such costs when taxed to be paid by the said Isaac Booth and T. Robinson to the plt. or to F. M.

Selwyn her solicitor. Their Lordships consider that the decree could not with justice or propriety, consistently with principle or precedent, have been less favourable to the resp., and they will therefore humbly recommend to Her Majesty that the appeal should be dismissed with costs.

Decree affirmed with costs.

App's solicitors, *Holmes and Co.*

Resp's solicitors, *Young, Jones and Vallings.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

Tuesday, July 21.

(Before the LORD CHANCELLOR.)

WYLLIE v. POLLEN.

Mortgage—Judgment—Constructive notice—Solicitor and client.

The doctrine of constructive notice only applies where a solicitor acts as the adviser of his client. Where, therefore, he merely performs a ministerial act, such as in getting certain deeds executed, he does not come within the rule.

In order that the knowledge of an agent may affect a principal, the knowledge must not only be derived from the particular transaction, but it must be material to the transaction. A solicitor, advising his client to take a transfer of a legal mortgage, is not bound to inform him of a subsequent judgment.

This was an appeal from a decree of Stuart, V. C. By a deed of appointment dated the 28th March 1835, in consideration of the sum of 1600*l.*, D. H. James and Margaret his wife, appointed certain freehold hereditaments to the use of Wm. Reynolds, his heirs and assigns, subject to the proviso for redemption on payment of the said sum of 1600*l.* By two indentures of appointment and further charge, dated respectively the 9th and 23rd Dec. 1839, the said D. H. James and Margaret his wife, appointed certain other freehold hereditaments unto Sarah Harries her heirs and assigns, by way of mortgage, and further charge to secure the respective sums of 900*l.* and 700*l.* and interest thereon respectively at the rate of 5 per cent.

In the year 1848 Thomas Richards, one of the defts., commenced an action against the mortgagors on their joint and several promissory note, he obtained judgment, which he duly registered on the 25th June 1848. By an indenture dated the 3rd Sept. 1852, the said several mortgages were, in consideration of the sum of 2056*l.* 1*l.* 10*d.*, transferred to S. H. Walpole and Robert Walpole, subject to such right and equity of redemption as the same premises were then liable to by virtue of the same indentures of mortgage and further charge. By an indenture dated the 18th May 1853, the said S. H. Walpole and Robert Walpole advanced the further sum of 1800*l.*, upon the security of the said hereditaments.

The plt.s., who were assignees of the said Messrs. S. H. and Robert Walpole, claimed to be entitled in priority to the deft. Richards, who contended that his judgment-debt gave him priority over the further advance of 1800*l.*, by reason of the knowledge of Cooper, who, as he alleged, was solicitor to the mortgagors, and had acted as solicitors also to Messrs. Walpole, whose advising solicitors were Messrs. Pemberton and Lee.

The V. C. made a foreclosure decree, and gave the deft. Richards priority in respect of his judgment-debt. *Greene, Q. C.* and *Hull* appeared for the appa. *Bevir (Malins, Q. C. with him)*, for the resp. Richards.

Greene, Q. C., in reply.

Cases cited:—

Lane v. Jackson, 20 Beav. 535;
Tyler v. Webb, 6 Beav. 552;
Fisher on Mortgages, 308;
Jones v. Smith, 1 Hare, 48; s. c. on appeal, 1 Ph. 244;
Cooke v. Wilton, 29 Beav. 100.

The LORD CHANCELLOR, after stating the facts, said:—That he regretted he was unable to agree with the V. C., either in his conclusion of fact or his inference of law. It was proved that Messrs. Pemberton and Lee were the solicitors of the Messrs. Walpole, this was fully established by the evidence of Pemberton, distinctly corroborated by the diary of his deceased partner. They were the solicitors of the Messrs. Walpole in the proper sense of the word. But that was quite consistent with their entrusting part of the business to another solicitor. It was constantly the practice in business, and quite consistent with one firm being the professional advisers and principal solicitors of a client, that another firm should be employed in detached portions of the business; but persons so employed in a simply ministerial office, were not constituted the solicitors of the client in such a sense as to attach the operation of the doctrine of constructive notice. It seemed probable (though the evidence was not clear on that point) that Lee and Pemberton had delegated to Cooper the duty of obtaining the signatures of the mortgagors to the deed of transfer and had employed him to discharge the ministerial office of procuring signatures to a document, the draft of which they had themselves approved on behalf of the assignees; but this did not divest Messrs. Lee and Pemberton of their character of solicitors to the assignees, nor invest Mr. Cooper with that character. His Lordship agreed with those of his predecessors, who had expressed their opinions that the doctrine of constructive notice ought not to be extended. In order to affect the principal with notice, the knowledge of the agent must be derived by him in the particular transaction, or be shown to be then present to his mind, and must be knowledge of something which was material to the particular transaction, and which it was the duty of the agent to communicate to his principal. The whole doctrine of constructive notice rested on the ground of the existence of such a duty on the part of the agent. In the present case, even if Mr. Cooper had acted as the solicitor of the Messrs. Walpole in the matter of the transfer, the existence of the judgment was immaterial to the transferees; there was, therefore, no duty imposed upon Mr. Cooper to communicate to the transferees his knowledge of its existence, and consequently the ground on which the doctrine of constructive notice rested, was entirely absent. It had been stated by Mr. Bevir (whose clients had no reason to regret the absence of his learned leader, as his argument had embodied everything that could properly have been urged on their behalf) that Mr. Cooper ought to have communicated the fact of the judgment debt, because it was important to warn the transferees of the mortgages against making further advances; but his Lordship, was of opinion that he was not bound to do so; the elastic and indefinite doctrine of constructive notice required certain boundaries. It would not, in his Lordship's opinion, have been the duty of Mr. Cooper, even if acting as the solicitor of the Messrs. Walpole, to have informed them of the debt's judgment, and no responsibility would have been incurred if the information had been withheld. But, on the other hand, if it had been the duty of Mr. Cooper to have communicated the fact, the Messrs. Walpole would have been affected with notice, and could not have been permitted to say that the communication was not in fact made, or that they had forgotten the circumstance. As the Messrs. Walpole were clearly possessed of the legal fee, by

the transfer of 1852, and had made the further advances on the credit of that security, without any knowledge of the judgment debt, the apps., their assignees, were entitled to hold that legal estate, according to the decision in *Brace v. Duchess of Marlborough*, 2 P. W. 491, until not only the original mortgage debt, but also the further advance was redeemed. The declaration of the V. C., that the judgment debt was entitled to priority over the further advance must be struck out of the decree.

Solicitors for the apps. *Robinson and Preston*; for the defts., *Eyre and Lawson*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Saturday, July 4.

Re PARKER'S TRUSTS.

Endowment of vicarage—Bequest in augmentation of—Commemorative sermon—Sequestration—Insolvency—Costs.

A testatrix in 1763 bequeathed the residue of her personal estate to trustees, "for the sole use and benefit of the vicar for the time being of the vicarage of N. . . . such vicar for the time being, in the forenoon of every 21st June for ever, preaching in the parish church of N. aforesaid, immediately after divine service, an anniversary sermon in commemoration of her, and of that her bequest." The testatrix also directed that the "yearly or other dividends or proceeds of the whole of her said residuum should from time to time for ever be received and paid to the vicar of the said vicarage of N. in augmentation thereof."

In 1841 the present vicar of N. was duly instituted: but he was ignorant of the existence of the bequest, and of the duty thereby imposed on him, and no sermons were preached by him. In 1847 a sequestration was issued against him. In 1852 he took the benefit of the Insolvent Debtor's Act, and an assignee of his estate and effects was duly appointed.

In 1858 the vicar became aware of the bequest, and the preaching of the sermons was resumed. In 1863 there was a sum of 447l. 19s. 9d. in the hands of the trustees, representing arrears of the dividends on the testatrix's estate, accrued from 1841 to 1858. Upon the question who was entitled to such sum of 447l. 19s. 9d., it was

Held, that the present vicar of N. was entitled to so much of the sum as represented the arrears accrued prior to 1847, and the sequestrators to that which represented the arrears accrued subsequent to that period; and that the costs must be paid out of the fund, and be apportioned between the parties.

Mary Parker, the testatrix in this matter, by her will, dated the 3rd May 1763, and duly executed and attested, bequeathed the residue of her personal estate as follows: unto Thos. Adderley, his executors and administrators, in trust "to be by him or them within six months next after my decease invested in the public funds, in the best, safest and most beneficial manner, in the name of him the said Thomas Adderley, or of his executors or administrators, for the sole use and benefit of the vicar for the time being of the vicarage of Newton, near Swaffham, in Norfolk (which is a very small and poor vicarage), whereof my late deceased husband was vicar, for ever, such vicar for the time being, in the forenoon of every 21st day of June for ever, preaching in the parish church of Newton aforesaid, immediately after divine service, an anniversary sermon in commemoration of me and of this my bequest. And I do hereby will, order, and direct that the yearly or other dividends and proceeds of the whole of my said

residuum shall from time to time for ever be received and paid to the vicar of the said vicarage of Newton for the time being, in augmentation thereof, which is agreeable to the intent and desire of my said late dear husband deceased, who had but very small preferment himself in the church; and that the said Thos. Adderley, his executors and administrators, and every of them, shall from time to time, as occasion shall be or require, declare the trusts thereof accordingly." The testatrix appointed Mr. Adderley the sole executor of her will, and he duly proved the same.

The testatrix died some time prior to the year 1776, and the residue of her estate was duly invested by her executors in the purchase of 827l. 8s. 9d. Reduced Bank Annuities in the joint names of the then Bishops of Ely and Norwich and Mr. Adderley. By an indenture dated the 11th April 1776, and made between the Bishops of Ely and Norwich and Mr. Adderley of the one part, and the Rev. Joshua Crofts, then vicar of Newton, of the other part, those parties accepted the trusts of the testatrix's will; the trusts of the said bank annuities were declared accordingly, and the Bishops of Ely and Norwich for the time being were constituted the trustees thereof.

By an indenture dated the 25th Jan. 1839, and made between the then Bishops of Ely and Norwich of the one part, and the Rev. Thos. Watson, then vicar of Newton, of the other part, the trusts of the said bank annuities were again declared; and in that indenture mention was made of the condition that the vicar of Newton for the time being should yearly preach a commemoration sermon, as directed by the will of the testatrix. That indenture was not executed by Mr. Watson; but it appeared that he was fully cognisant of the preparation of the deed, and that he received, by himself or his sequestrators, the dividends on the trust-funds.

In 1841 the Rev. John Hague Bloom was instituted vicar of Newton; but it appeared that he was not then informed of the bequest made by the will of the testatrix, or of the sermon to be preached in commemoration of her.

On the 11th Jan. 1847, a Mr. Stepping entered up a judgment against Mr. Bloom, and a sequestration was, on Mr. Stepping's death, duly granted to his executors.

In 1852 Mr. Bloom took the benefit of the Act for the Relief of Insolvent Debtors, and an assignee of his estate and effects was duly appointed.

By an indenture, dated the 28th July 1858, and expressed to be made between the present Bishops of Ely and Norwich of the one part, and the Rev. J. H. Bloom of the other part, the trusts of the said bank annuities were again declared, and mention was made of the condition as to the commemoration sermon. That indenture was prepared without the knowledge of Mr. Bloom, and he never executed the same. In Sept. 1858 the bishop's registrar informed him of the bequest in the will, and at the same time told him that the sermon was to be preached on St. Thomas's-day, the 21st Dec. It was so preached in that year, but upon its being ascertained that it ought to have been preached on the 21st June, the mistake was rectified, and the sermon had been preached on the last-mentioned day since the year 1859.

No sermons had been preached from 1841 till the year 1858 as aforesaid, and the dividends on the trust-fund had been received by the Bishops of Ely and Norwich during that period. There was now in their hands a balance in respect thereof amounting to 447l. 19s. 9d.

Mr. Bloom alleged that, when he was instituted to the vicarage, he was not aware of the existence of the bequest in the testatrix's will, or of the duty imposed upon him of preaching the commemoration sermon, and that he only became acquainted therewith in the

month of Sept. 1858. He now claimed so much of the 447l. 19s. 9d. as represented the arrears of the dividends accrued prior to 1847. The sequestrators claimed so much as represented what had accrued subsequent to that date; and the assignee of Mr. Bloom also claimed the latter amount. The opinion of the court was now, therefore, sought as to the rights of the several parties.

Speed appeared for the Bishops of Ely and Norwich. *Erskine*, for the Rev. Mr. Bloom, submitted that "wilful default" and neglect of the testatrix's directions could alone disentitle him to the amount of the dividends which he claimed. But he was ignorant of the bequest till informed thereof by the bishop's registrar in 1852. He cited

Re Conington's Will, 2 L. T. Rep. N. S. 535.

Dickenson and Phear (of the common law bar) for the sequestrators.

Jessel, for the assignee in the insolvency, contended that the sequestrators were only entitled under the sequestration to whatever formed part of the endowment of the benefice; the dividends now in question, viz. those accrued since 1847, formed no part of it, for to make them such there ought to have been a deed of endowment or annexation, coupled with the consent of the patron and the acceptance by the ordinary. Here there were no such formalities, and therefore the assignee in insolvency was entitled to the share of the dividends which he claimed. He cited

3 Burn Eccl. Law, 390;

1 & 2 Vict. c. 110, s. 55.

THE MASTER OF THE ROLLS.—I am of opinion that the sequestrators are entitled to the dividends which have accrued on the funds in question in this matter since 1847. No doubt a gift to provide a fund for the purpose of having a sermon preached in a parish church on a certain day in the year, is not in itself an augmentation of that ecclesiastical benefice; but it is open to any person to augment any benefice in the country, provided that in making such augmentation by means of land he complies with the provisions of the Statutes of Mortmain. It is also open to any person to annex any condition which is not illegal in its character to his grant or gift, if the ordinary thinks fit to accept it. In the present case I will assume that, as the gift in question has been so long acted upon, the consent of the patron and the acceptance of the ordinary have been duly signified and given. That being so, the only question is as to the construction of the testatrix's will. If the bequest had stopped after the words "for the sole use and benefit of the vicar for the time being of Newton, which is a very small and poor vicarage," it would have been clearly an augmentation of the benefice. But the testatrix then goes on to direct the sermon to be preached. The preaching, however, of the sermon was not the real object of her bounty. Her real object was to augment the living. She annexed a certain condition to the bequest, the compliance with which was to entitle the vicar to obtain each particular dividend on the fund as it accrued. If in any year the vicar had wilfully failed to comply with the condition, the dividends would then probably have been administered and applied by the court *cy pres*. The testatrix further directed that the dividends on the residue of her estate should "from time to time for ever be received by and paid to the vicar of the same vicarage of Newton in augmentation thereof." The question is, whether such gift is illegal, or whether it requires any particular formalities in order to carry it out? I am of opinion that no particular formalities are necessary beyond the assent of the patron and the ordinary. The fund forms a part of the endowment, and is applicable in the same way as the produce of the small tithes. The sequestrators are therefore entitled to so much of the

arrears as accrued since the sequestration in 1847; and the vicar is entitled to the arrears accrued before the sequestration. The costs of the present application must come out of the arrears of the dividends; and must be apportioned between the parties.

Solicitors for the parties: *Burder and Dunning; Treherne and White.*

Monday, July 6.

STEVENSON v. ABINGTON.

Legacy—Forfeiture of.

Where a legacy is bequeathed to trustees, in trust for a legatee, with a clause of forfeiture in a particular event, and followed by a gift over of the legacy thereon, it would seem that such a clause may be enforced at any time before the legacy is paid.

A testator, by a codicil to his will, bequeathed legacies to A. and B., and declared that, if any person interested under his will and codicil, or either of them, should attempt to set them, or either of them, aside, he should forfeit his interest thereunder, and it should sink into the residue, of which he had disposed by the will. The testator died, and his will and codicil were duly proved. A. survived the testator, and by his will appointed B. his executor and residuary legatee. B., as such executor and residuary legatee, instituted a suit in the Probate Court to recall the probate of the original testator's will and codicil:

Held, that he had forfeited his legacy under the codicil.

This suit now came on to be heard upon further consideration, and the question was, whether Edward John Ridgway, a legatee named in a codicil to the will of the testator in the suit, had forfeited his legacy thereunder?

The facts of the case were these:—Joseph Mayer, the testator, by his will, dated the 23rd April 1860, devised and bequeathed all his real and personal estate to his executors and trustees, Leonard James Abington, Paul Smith and Thomas Goddard, in trust to sell, and get in the same, and to hold the produce in trust for his first cousins and the issue of deceased's first cousins. By a codicil, dated the 26th June 1860, the testator bequeathed several legacies, including one of 20,000*l.* to John Ridgway, one of his cousins, and another of 5000*l.*, to Edward John Ridgway, a son of a cousin, named William Ridgway; and he also made a specific devise of part of his real estate. He then declared that John Ridgway, Edward John Ridgway, and certain other legatees therein named, should not be entitled as cousins, or issue of cousins, to any share of the residue, the provision thereby made for them being intended to be in lieu of all interest to which they might have been entitled under the will. The codicil then contained the following declaration:—"I declare that if any person or persons interested under my said will and codicil, or either of them, shall attempt to set aside my said will and codicil, or either of them, then such person or persons shall forfeit all moneys, shares of moneys and interest to which he, she, or they might have been entitled. And I declare that such moneys, shares and interests so forfeited shall sink into the residue."

The testator died soon after the date of his codicil. The will and codicil were duly proved. This suit was instituted on the 12th Sept. 1860 for the administration of the testator's estate, and the usual administration decree was made on the 24th Nov. 1860. On the 17th Jan. 1863 the chief clerk made his certificate, by which he found that the legacy of 5000*l.* was due to Edward John Ridgway, and that certificate was duly approved and filed on the 23rd May 1863. John Ridgway survived the testator, but died on the 3rd Dec. 1860. William Ridgway was still living. In the

month of July 1862 Edward John Ridgway instituted a suit in the Probate Court against the executors of the testator in this suit, for the purpose of obtaining the revocation of the probate of his will and codicil. Edward John Ridgway, by his petition in the Probate Court, stated the death of John Ridgway, and that he by his will had appointed the petitioner and two other persons executors, and had named the petitioner his residuary legatee. The petitioner accordingly purported to sue there as "executor and residuary legatee of John Ridgway," who was one of the testator's next of kin. Afterwards, at the instance of his two co-executors, the petitioner was compelled to amend his petition by striking out the words "executor and" therefrom, and so purporting to sue in his character of residuary legatee only. That suit was concluded on the 26th June 1863, when a verdict was found for the resps. therein on all the issues, and the petitioner was ordered to pay the costs of it.

Under that state of circumstances notice was given to Edward John Ridgway that the executors and residuary legatees of the testator in this suit would dispute his right to the legacy of 5000*l.*, in consequence of his proceedings in the Probate Court.

Baggallay, Q. C. and Casson, for the plt., who was one of the residuary legatees of the testator, contended that Edward John Ridgway's legacy was clearly forfeited; being within the precise terms of the codicil. They cited

Lloyd v. Branton, 3 Mer. 108.

Southgate, Q. C. and G. Lovell, for Edward John Ridgway, insisted that there must be a fixed and ascertained time for the operation of such a condition as the present; that the chief clerk having made his certificate, and found the 5000*l.* legacy to be due to Mr. Ridgway, it was now too late to vary the certificate; besides, Edward John Ridgway only disputed the testator's will as executor and residuary legatee of John Ridgway, not on any personal grounds as between himself and the estate of the original testator; and, lastly, that the condition imposed by the codicil was one in *terrorem*, contrary to public policy, and therefore void. They cited

Osborn v. Brown, 5 Ves. 527;

Cooke v. Turner, 14 Sim. 493; and 15 M. & W. 727;

Cage v. Russell, 2 Vent. 352; and

Reeves v. Herne, 3 Mer. 113.

Selwyn, Q. C., Hobhouse, Q. C., Osborne, Q. C., J. H. Palmer, Q. C., Rowcliffe, Townsend, F. White, Key, De Gez, Besir and Martindale appeared for other parties.

THE MASTER OF THE ROLLS.—I am of opinion that Mr. Edward John Ridgway's legacy is clearly gone. The case is exactly within the terms of the codicil. It was held by Sir William Grant in *Lloyd v. Branton*, which has since been followed in other cases, that where, as here, there is a gift over on such a condition as the present, the gift over is good, and that the condition, therefore, is not one in *terrorem*. It was argued that Mr. Ridgway had no personal interest in disputing the testator's will or codicil, but that was a matter for the Probate Court to decide, and to say whether it would allow him to do so. He seems to me to have maintained the suit in that court as representative of John Ridgway. My impression is, that no step on the part of the executors of John Ridgway could have forfeited his legacy after his death, as he did not contest the testator's will. Then it was said on behalf of Mr. Edward John Ridgway, that, as he did not contest it in his own character, he had not forfeited his own legacy. But I cannot accede to that argument. The testator might impose any condition he thought fit, however capricious, as for example, that his legatee should go to Rome. I am of opinion that, as this legatee Mr. Edward John Ridgway has in fact

contested the testator's will, he has lost the legacy of 5000*l.* The court cannot listen to the argument upon the point of form. If this gentleman had been taken by surprise I should have dealt leniently with him, but that is not the case. I wish to make one observation upon the question, within what time such a clause of forfeiture is to be enforced? On a case where the legacy has been paid to the legatee I express no opinion; but I think, that where it has not been paid, it is open to any one to stop it before it is so paid.

Solicitors for the parties: *Gregory and Rouclifes; Rennolls, and Tilleard and Co.*

Friday, July 31.

PASKE v. HASELFOOT.

Power of appointment—Death of an object of the power before the exercise of it—Appointment to some of the surviving objects—Validity of appointment.

Where certain funds were bequeathed to trustees upon trust to transfer the same "to the wife of T. T. P. alone, or to her and all, or such one or more exclusively of the other or others of the child or children of T. T. P. in such shares or proportions, at such ages or times, and in such manner or form, as T. T. P. should, by will, appoint: the wife died, and T. T. P. then, by will, appointed the funds to some only of his surviving children. It was

Held, that the appointment was valid.

Robert C. Haselfoot, the testator in this suit, by his will dated the 13th March 1849, bequeathed a fund to trustees upon trust to pay the income of the fund to Thomas Theophilus Paske for his life, and after his death to transfer one moiety of the capital of the fund to Ann Paske, daughter of Thomas Theophilus Paske, and the other moiety "to the wife of him the said Thomas Theophilus Paske alone, or to her, and all or such one or more exclusively of the other or others of the child or children of him the said Thomas Theophilus Paske, in such shares or proportions, at such ages or times, and in such manner or form as he, the said Thomas Theophilus Paske, shall by will appoint." The will then contained a bequest of the last-mentioned moiety, upon trust, in default of any appointment thereof, for all the children of Thomas Theophilus Paske, who should be living at his death, equally.

The testator died soon after the date of his will. The wife of Thomas Theophilus Paske died in Aug. 1858. Thomas Theophilus Paske had seven children by his wife. By his will, dated in Nov. 1858, after reciting the above-stated power of appointment, and the death of his wife, he purported, in exercise of the power, to appoint one moiety of the trust fund to two of his sons and three of his daughters equally, omitting the other two children. The question was, whether the power was or was not gone, by the death of Mrs. Paske in her husband's lifetime?

Selwyn, Q. C. and *Morris*, for the two children who were not named in the will of Thomas Theophilus Paske, contended that the power was gone by the death of their mother in their father's lifetime, and that therefore, the gift in default of appointment took effect.

Baggallay, Q. C. and *Wickens*, for the children named in the will, contended that the power contemplated an exercise of it, in favour of either the wife or the children, and that therefore it was well exercised.

Hobhouse, Q. C. appeared for the trustees.

Selwyn, Q. C. in reply.

The following authorities were cited in the arguments:

Sugd. Powers, 416, 8th edit.;

Reade v. Reade, 5 Ves. jun. 744 ;

Houston v. Houston, 4 Sim. 611 ;

Boyle v. The Bishop of Peterborough, 1 Ves. jun. 299 ;

Ricketts v. Loftus, 4 Y. & C. C. C. 519 ;

Butcher v. Butcher, 1 V. & B. 79.

The MASTER of the ROLLS referred to

Woodcock v. Renneck, 1 Ph. 72.

The MASTER of the ROLLS said.—The point to be decided in this case is a short one; but it is one on which, I own, I at first felt some hesitation. The question is this, whether Mr. Thomas Theophilus Paske could, in the events which have happened, exercise the power of appointment over certain trust-funds given to him by the will of the testator in the suit? whether, in fact, Mr. Paske, after the death of his wife (who was an express object of the power, and was intended to take something under the appointment, could exercise the power at all? After considering the case, and the authorities cited, I am of opinion that the appointment made by Mr. Thomas Theophilus Paske is good. It is settled by a series of cases, beginning with *Boyle v. The Bishop of Peterborough*, that the death of some members of a class will not prevent the exercise of a power in favour of the survivors of that class. In the case of *Woodcock v. Renneck*, there was a power to appoint a fund among the children of the donees of the power. At the death of the donor of the power, there were three children living, but an appointment to the sole surviving child of these three was upheld. The difficulty in the present case is this, that the testator's will expressly directs the appointment to be made to a person by name, as one of the class intended. But still, I think, upon consideration that that will not affect the decision of the case. If, in *Woodcock v. Renneck*, the testator had specified the three children then alive of the donees, as objects of the power, and had added as further objects of it such children as they might afterwards have, the result would have been the same. The case of *Houston v. Houston* is the nearest to the present one, and must, I think, govern it. There the children, and not the wife, failed, but the appointment was held good. The present case, I admit, is not exactly the same, but it is the converse one, and the appointment now in question must, accordingly, be declared to be a valid one.

Solicitors for the parties, *J. Turner, Hawkins, Blozam and Hawkins.*

DALLY v. WONHAM.

Vendor and purchaser—Sale of reversion—Mistake as to title—Inadequate consideration—Sale set aside.

The plt. was entitled to an estate for her life for her separate use in certain freehold property, the reversion in which was vested in her husband, in fee. Her husband sold the fee-simple of the property in possession, for an inadequate consideration, to a person who knew the real value of the property. The plt. knew of the sale, but did not assent to it; was no party to the conveyance, and did not concur therein, or assent thereto; and it appeared that at the time of the sale the parties thought her husband had the fee-simple of the property, and could sell it. The husband died, having devised all his property to the plt. Soon after her husband's death she filed a bill against the purchaser to set aside the sale on the ground of inadequacy in the price paid for the property, and undue advantage taken by the deft. of his knowledge of its value:

Held, that the sale must be set aside, and the property reconveyed to the plt.; that the deft. must account for the rents and profits received by him since the purchase (all just allowances being made to him in taking the accounts), and that the plt. was entitled to her costs of the suit.

This suit was instituted for the purpose of setting aside a sale and obtaining a decree for the reconveyance of an estate at Bognor.

The facts of the case were shortly these:—

In 1861 the *plt.* Frances Dally was entitled to certain freehold property at Bognor for her life, for her separate use. The reversion of the property was vested in her husband, in fee. Mr. Dally employed the *def't.*, a builder, as his agent to receive the rents and manage the property (the net value of which averaged about 40*l.* per annum), and the *def't.* accounted for the rents to Mr. Dally. In the month of July 1861 Mr. Dally, in consideration of an annuity of 40*l.* payable by the *def't.* or his representatives to the *plt.* and her husband during their lives, and the life of the survivor of them (and secured by the *def't.*'s bond), conveyed the fee simple of the property, as in possession, to the *def't.* The *plt.* was not a party to the conveyance; and although she knew of it, she did not in any way concur in it. At that time she appeared from the evidence, to have been ignorant of her own interest in the property; and that interest was either unknown to her husband and the *def't.*, or ignored by them. In 1862 the *plt.*'s husband died, having by his will devised and bequeathed all his real and personal estate to her absolutely.

Evidence was adduced to show that the annuity of 40*l.* per annum, which formed the consideration of the conveyance to the *def't.*, was not the full value of the fee simple of the property in possession; and that the *def't.* knew that fact, though Mr. Dally did not when he executed the conveyance. The *plt.* had offered to release the reversion to the *def't.* upon certain terms, which he had declined. On the grounds, therefore, of the *def't.* having taken undue advantage of his position as manager and agent, and of inadequacy in the consideration for the conveyance to him, the *plt.* sought relief against the sale of the property by her husband, and filed the bill in this suit, praying to the effect already stated.

Selwyn, Q.C., Roberts and Jessel, appeared for the *plt.*

Southgate, Q.C. and Babington, for the *def't.*

The MASTER of the ROLLS said.—I think that the evidence in this case clearly shows that when the *plt.*'s husband conveyed, or purported to convey, the fee-simple of the property in possession to the *def't.* the price paid, or agreed to be paid by him, was grossly inadequate for the interest so purchased. I think the evidence also shows that the vendor did not know the real value of the property at that time; but that the *def't.*, from his position, must be taken to have been well acquainted with it. I am of opinion, therefore, that the sale could not have been upheld, even if the husband had possessed the absolute ownership of the property. But that was not the case, for the *plt.* had a prior life estate for her separate use in it; and that prior estate her husband did not sell, and could not sell. It seems, however, from the evidence (and it is one great peculiarity in the case), that the parties believed, when the conveyance was executed, that the husband had the fee-simple, and could sell it if he thought fit; but it is obvious in point of fact, that the *plt.* is entitled to be put into possession of the property for her life. The questions then are what is to be done with the reversion on the one hand, and how is the court to deal with the agreement between the *plt.*'s husband and the *def't.* on the other? If the whole transaction is set aside the *plt.* will be entitled to the fee-simple of the land; for then the reversion would become part of the property of her husband. As she was the sole devisee and legatee under his will, it would pass on his death to her absolutely; and in it his life-estate would merge. In order to see how the matter stands in that respect, I will consider how it would stand if the husband were now

alive, and the wife had enforced her rights by taking possession of the property, and entering into the receipt of the rents of it for her separate use for her life. What, in that case, would have been the relative position of the husband of the *plt.* on the one hand, and the *def't.* on the other, with respect to compensation under the agreement, or a conveyance to the latter? It is clear that, if the husband came here to reverse the arrangement, he could not—assuming for a moment that the consideration was sufficient—compel the *def't.* to pay him the annuity of 40*l.*, which was stipulated for only in the event of the *def't.* obtaining immediate possession of the fee-simple of the estate. But it is equally clear that, as the consideration was not sufficient, the *def't.* could not insist on his right to keep the reversion without paying for it. One thing is indisputable—that the transaction was not intended to be a gift of the property, in any sense, to the *def't.*; but if not a gift, then it must, under the circumstances, have been a purchase; and if so, a proper consideration must be paid for it. As against the *plt.*'s husband, I think the *def't.* might, if he had pleased, have taken the reversion (which was all the husband had to convey) on paying for it, the consideration which he agreed upon as for the whole estate in possession. But I doubt whether the *def't.* could have maintained a suit against him for the purchase of the reversion on the basis of making such a deduction from the purchase-money (that is, from the 40*l.* per annum), as the court might think proper. That would, in fact, be calling upon the court to make a new and totally different contract between the parties. The husband might reasonably say, "I thought I had the fee-simple, and that was what I intended to sell, and nothing else; and I object to sell the reversion for a proportionate part only of an annuity of 40*l.* a-year." But if that could not have been done as against the *plt.*'s husband, neither can it be done against his representative. Even where sales of clear reversions have been completed, this court has frequently set them aside on proof of inadequate value having been given. The court cannot consider a contract for the sale of an estate in possession as one for the sale of a reversion; and then compel specific performance of it, on terms according to which, if it had been actually carried into effect between the parties themselves, the court would have set the transaction aside on the ground of inadequate value. If the court, to avoid that, were to attempt to fix the value of the reversion, such a proceeding would, I apprehend, be still more at variance with its rules, for it would by so doing compel one man and the representatives of another to enter into a contract for the purchase of that which the latter never intended to sell. I have therefore come to the conclusion that the conveyance executed by Mr. Dally, and the bond entered into by the *def't.*, and the contract on which they are founded, were wholly inoperative and incapable of being enforced by this court. Those two instruments therefore, viz., the conveyance of 1861 and the bond must be delivered up to be cancelled. The *def't.* must reconvey the estate to the *plt.*, who must be put into the possession of the rents and profits of it; an account must be taken of the rents and profits received by the *def't.* since July 1861; and in taking those accounts he must be allowed all sums of money properly expended by him in repairs or lasting improvements, and also all sums paid by him in respect of the annuity; and the *plt.* must have her costs of the suit.

Solicitors for the *plt.*, *G. Becke*.

Solicitors for the *def'ts.*, *Poolo and Johnson* for *F. W. Lanchester*.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn,
Barrister-at-Law.

July 10, 11 and 13.

COOPER v. GOSTLING.

Conveyance by married woman—Lands Clauses Act, sect. 7—Conversion—Acquiescence.

Lands were devised by will to A. for life, remainder to a husband and wife, their heirs and assigns for ever. By a deed in pursuance of the Lands Clauses Act, which was executed by the tenant for life, the husband and the wife, but not acknowledged by the wife, the lands were conveyed in fee to a railway company. The purchase-money was invested in Consols, and the dividends paid to the tenant for life. The husband died, then the wife died, having bequeathed her personalty by will, but intestate as to real estate; and, lastly, the tenant for life died. Upon the death of the tenant for life, the heir-at-law of the wife claimed the fund as realty.

Scilicet, the interest of the wife was such an interest as would pass under the 7th section of the Lands Clauses Act, as being the estate or interest of "a married woman seized in her own right."

But if this were not so, it was held that the heir-at-law could not claim the fund as realty, inasmuch as he did not seek to impeach the conveyance to the company, but only to impress upon the purchase-money the character of land.

The sale to the company having been treated by all parties as valid, and the purchase-money having been dealt with by those who claimed under the wife as money, it was

held, that the legatees under the wife's will were entitled to the fund, and not the heir-at-law.

The principal question in this cause arose in the following manner:—

Edward Gostling, by his will dated in 1844, devised all his eight acres of land situate in Walsingham, in the county of Norfolk, unto his wife Mary during her life, with remainder to John Gostling and Elizabeth his wife, their heirs and assigns for ever. He died soon after the execution of his said will.

On the 28th April 1846 Mary Gostling, John Gostling and Elizabeth his wife, executed a deed, by which they purposed to convey the above eight acres to the Lynn and Ely Railway Company. The deed so far as is material was in these terms: "We, Mary Gostling, of &c., and John Gostling, of &c., in consideration of the sum of 900*l.* paid to us pursuant to the Lynn and Ely Railway Act 1845, by the Lynn and Ely Railway Company incorporated by the said Act, and I, Elizabeth, the wife of the said John Gostling, for the considerations aforesaid, do, and each and every of us doth, according to our respective estates and interests therein, hereby convey to the said company, their successors and assigns, all that piece or parcel of arable land, containing 8a. Or. 29p., more or less, bounded, &c., together with all ways, rights and appurtenances thereto belonging, and all such estate, right, title and interest in and to the same, as we or any or either of us are or is or shall become seized or possessed of, or are or is by the said Act empowered to convey. To hold the premises to the said company, their successors and assigns for ever, according to the true intent and meaning of the said Act."

This deed (which corresponds with the forms of conveyance appended to the Lands Clauses Act, 8 & 9 Vict. c. 18, and was made in pursuance of the 7th section of the Act), was signed and delivered by the three parties therein mentioned, but was not acknowledged by Mrs. Gostling. The purchase-money was invested in the sum of 914*l.* 2s. 8d. Consols, in the

names of Mary Gostling, John Gostling and James Raven; and by an indenture or deed of trust, which was executed by Mary Gostling, John Gostling and James Raven alone, but was not executed or assented to by Elizabeth Gostling, it was declared that the dividends should be paid to Mary Gostling for her life, and after her decease that the stock should be transferred to and to the use of John Gostling, his executors, administrators and assigns.

John Gostling died in Nov. 1852, having by will, dated the 21st July 1841, devised all his lands and hereditaments situate in Castle Acre, in the county of Norfolk, or elsewhere in the said county, with the appurtenances, and all his estate and interest therein, with the rights, members and appurtenances thereto belonging, unto his wife Elizabeth Gostling, and her assigns, to hold the same to her for her life; and after her decease, he gave and devised the said lands and hereditaments unto his son the deft. Samuel Gostling, to hold the same with the appurtenances unto the said Samuel, his heirs and assigns for ever. Testator bequeathed all his personal estate of every description to his said wife Elizabeth Gostling, whom he appointed his sole executrix.

Elizabeth Gostling died in Aug. 1856, having by will, dated the 6th Feb. 1850, appointed the plt. Charles Cooper and her two sons, the defts. Samuel and John Gostling, her executors and trustees. Testatrix bequeathed all her personal estate to the above-named trustees, upon trust, for the benefit of all and every her children who should attain twenty-one, or die under that age leaving issue, in equal shares. She made no devise of real estate, and left Samuel Gostling her heir-at-law.

Elizabeth Gostling left seven children: Sarah Gostling; the plt. Susan, wife of the plt. Charles Cooper; Charlotte, wife of Jacob Miller; Elizabeth Gostling, Edward Gostling, and the two sons above-named.

Mary Gostling, the tenant for life, died on the 5th Jan. 1858. Upon her death, Samuel Gostling claimed the whole of the sum of 914*l.* 2s. 8d. Consols as real estate. The plts. Susan—as one of the seven children—and her husband, on the other hand, claimed to be entitled to one-seventh of the fund as personalty.

In April 1860 Samuel Gostling was declared a bankrupt. The assignees had disclaimed.

By the 7th section of the Act it is provided that "it shall be lawful for all parties being seized, possessed of, or entitled to, any such lands or any estate, or interest therein, to convey or sell, or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose; and particularly it shall be lawful for all or any of the following parties so seized, possessed or entitled as aforesaid, so to sell, convey, or release (that is to say), all corporations, tenants in tail, or for life, *married women seized in their own right*, or entitled to dower, &c., and the power so to sell and convey, or release as aforesaid, may lawfully be exercised by all such parties, &c., and as to such married women, whether they be of full age or not, as if they were sole and of full age," &c.

Malins, Q. C. and Herbert Smith, were for the plt. They contended that Mrs. Gostling's interest was such as could and did pass under the deed of 1846, by virtue of the 7th section of the Lands Clauses Act; that the deed effected a conversion of the land into money; and that, if not, Samuel Gostling himself and all parties had, by their acts, elected to take the fund as money, and not as land. They referred to

Pye v. Daubuz, 3 Bro. C. C. 595.

Bacon, Q.C., Craig, Q.C. and W. H. Terrell, for a deft. in the same interest as Samuel Gostling, argued that the 7th section contained no words authorising the

disposition by a married woman, of an interest of this nature, by a simple deed without acknowledgment. Mrs. Gostling was not "a married woman seised in her own right." She and her husband were tenants by entireties of the reversion in the land; her husband had not any right, as against her, to alien any part of the land; but on his death in her life-time the entirety belonged to her: (2 Preston on Abstracts, pp. 39, 41, 43.) She was not "seised" during the life-time of the tenant for life; seisin can have no reference to an estate not in possession; a reversion cannot be the subject of seisin. Hence the deed was inoperative under the Lands Clauses Act as against the wife, and, not being acknowledged, it was a mere nullity as against her. The result was, that it failed to operate as a conversion of the land into money. Hence the purchase-money remained impressed with the character of land, and, not being affected by any devise in Mrs. Gostling's will, passed to her heir-at-law. They cited

Ex parte Cramer, 1 Sm. & Giff. 32;
Midland Railway v. Oswin, 1 Cole. 74.

There was no evidence to show any acquiescence on the part of Samuel Gostling that the consideration for the purchase should be treated as money.

Graham Hastings appeared for the assignees.

The VICE-CHANCELLOR.—This bill is framed with a view to establish the right of the plt. to money produced by the sale of land to a railway company as personal property. For the deft. it is insisted that that money, although personal property, has impressed upon it the character of land, and that no act was ever done by the person entitled to the money to manifest an election to enjoy it as money and not as land. Upon this part of the case there is a good deal of evidence, tending to show that the right of election was exercised. This part of the argument assumes that the land was converted into money, which retained the character of land and must be considered as land until some act of election was shown, and the evidence goes to show that the parties entitled to it elected to take it as money and not as land. But the assumption that this money was impressed with the character of land, and that it required some act, as an act of election, to entitle those who claim it to enjoy it as money, seems to me to be an assumption not warranted by an accurate view of the nature of the transaction by which the conversion into money took place. In this case, not by the intervention of this court, but by an agreement which the parties entitled to the land entered into out of court with the railway company under the statutory powers of the Act, a bargain was made by those parties with the railway company to sell the land and convey it, and to take the money as purchase-money instead of land. But for the 7th section of the Act such a transaction could not have been effected, because the case is one in which the person in whose right those who now claim the money are entitled (I mean Elizabeth Gostling) was, at the date of the transaction, under the disability of coverture; and the land in question, as to her reversionary interest in it, was in that anomalous position in which in this country real property is placed during coverture, where land is the property of the wife. That however, is of little importance, because the question now to be decided is, whether the transaction of the sale to the railway company of this land, and converting it into money, was a transaction authorised by the 7th section. Either it was authorised by that section, or it was not. The first question is, whether it was authorised by the section. In my opinion it was. The preliminary words of the 7th section of the Lands Clauses Act are as wide and general as any words can be; and the words relied upon in the argument for the invalidity of the deed under this clause, "married women seised in their own right,"

do not appear to me, looking at the construction of the language of the whole of the section taken together, to describe the nature of interest of a married woman which is in any way different from the interest which the married woman had in the land in this case. She was, in my opinion, a married woman, seised in her own right. But taking it not to be so, and taking it that in this case the transaction of the sale was an invalid transaction, if the transaction was invalid, the land was recoverable by the wife and by those who claim under her as land. There has been no conversion, the money cannot be her property if the land is hers. It has been said indeed that the deft., who asserts the right to the money as land, does not seek to question the right of the railway company. But if he claims the property as land, he must question the right of the railway company; and if he says, as he has argued upon the other head of his dilemma, that the deed is invalid, the land is his, and the company have no title. I cannot recognise the right asserted by him in this suit, when the transaction which, as regards the railway company, the deft. says he does not seek to dispute, has been treated by all parties as valid. That leaves the money necessarily as money. In no view of the case, looking at the dilemma which the argument presents, is it possible to say that the deft. has shown any right to the money in question, as being anything else than money the property of the wife, and of those claiming under the wife, who have, as the evidence shows, dealt with it as money; and my opinion is, that the plts. have established a right to the decree which they ask, and which I must give them in the present case. There will be a decree for payment to the plts. of one-seventh of the fund, with interest from the death of the tenant for life. I think the costs must follow the decree. As to the costs of the assignees, their costs up to the filing of the disclaimer must be taxed and paid by the defts.; but the costs subsequently to that disclaimer must be taxed and paid by the plt.

Solicitors: for the plts., *Thomas M. Wilkin*; for the defts., *Cloves, Hickey and Keary*; for the assignees, *Plimsaul*, agent for *Marcon*, *Swaffham*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

July 1, 3 and 4.

PRYOR v. PRYOR.

Settlement—Power of appointment—Appointment in favour of persons not the objects of the power, set aside.

By a marriage-settlement power was given to husband and wife to appoint real estate to the children of the marriage.

They appointed to two of their sons in fee, on the understanding that they would resettle the property in favour of children of the marriage, and also in favour of remoter issue (grandchildren) not objects of the power, which they did:

Held, that this was a fraud upon the objects of the power, and the appointment set aside, although no corrupt motive was alleged or proved.

This cause came on for further consideration on the chief clerk's certificate.

The bill was originally filed by the trustees of indentures of settlement, dated in Dec. 1808, after mentioned, praying that the rights of all parties interested in the hereditaments comprised in an indenture of appointment of the 18th June 1846 (1847), and of resettlement of the 19th June 1847, might be ascertained and declared under the direction of the court.

By the decree made on the hearing of the cause in March 1862, several inquiries were directed in chambers as to the state of the property, and of the families of the parties claiming under the settlement, and by the 6th inquiry it was directed that it should be certified under what circumstances the indentures dated the 18th June 1846, and the 19th June 1847, and the indenture dated the 26th April 1855, in the plt.'s bill mentioned, were respectively executed, regard being had to the fact that the validity of the appointment made by the deed of 18th June 1846 was disputed.

By settlements of the 10th Dec. 1808, made on the marriage of Vickris Pryor and Jane Anne Peacock, certain real estate was vested in the trustees in fee to be held by them upon the trusts declared in those deeds. By one of these indentures it was declared that the trustees should stand possessed of such property from and after the decease of Jane Anne Peacock, subject to a life-interest given to Vickris Pryor in the event of her dying in his lifetime, to the use of all and every of the children of the body of the said Jane Anne Peacock by the said Vickris Pryor, her intended husband, to be begotten, in case there shall be more than one child, or of such one or more of them exclusive of the others or any other or others of them, in such parts, shares and proportions, for such estates and interests, to take effect in possession at such ages or times, charged and chargeable with such sum or sums of money, either annual or in gross, and with, under and subject to such powers, provisoes, remainders and limitations over (such charges of any sum or sums of money, annual or in gross, and also such powers, provisoes, remainders and limitations over being for the benefit of the same children, or some or one of them), and in such manner in all respects to the use of an only child of the said marriage, and if there shall be but one such child, for such estate and interest, to take effect in possession at such age or time and in such manner in all respects as the said Jane Anne Peacock and Vickris Pryor should at any time or times during their joint lives appoint by deed or instrument in writing (with a similar power to the survivor of husband and wife), and for want of and subject to any such appointment, "to the use of all and every the children, both sons and daughters, of the body of the said Jane Anne Peacock by the said Vickris Pryor, her intended husband, to be begotten, equally to be divided between them the said children, if there shall be more than one such child, share and share alike as tenants in common, and not as joint tenants, and of the several and respective heirs of the bodies of such children lawfully issuing," with benefit of survivorship and accretion between these children if there should be more than one. In default of issue with divers remainders over, the ultimate limitation being to Thos. Caprel in fee.

There were five sons and four daughters of this marriage. One son died an infant previously to 1846, and one of the daughters died in 1838, having been married, leaving a husband and one daughter surviving her.

By an indenture dated 18th June 1846 (which, however, ought to have been dated 18th June 1847, it having been then executed), Vickris Pryor and Jane Anne his wife, in exercise of the joint power of appointment reserved to them by the marriage-settlements, appointed part of the property comprised therein (subject to their respective life-interests) to two of their sons, Felix and Arthur, in fee as joint tenants.

By an indenture dated the following day, the 19th June 1847, Felix and Arthur resettled this property upon trust to secure an annuity of 50*l.* for each of their sisters then living, during their lives, to their separate use without power of anticipation, and also to secure a like annuity of 50*l.* to be paid to their brothers Richard and Thomas during their joint lives, and to

the survivor during his life, subject to such annuities, to the use of the four sons of the marriage then living, during their respective lives, in equal shares as tenants in common, and after the death of each respectively to the use of their children and issue in manner as therein mentioned, and in default of issue of the sons to the use of Jane Anne Pryor, her heirs and assigns.

On the death of Jane Anne Pryor (who survived her husband) questions arose whether the last-mentioned deeds were not a fraud upon the power or the objects of it, and hence the present suit.

The effect of the chief clerk's certificate as to the circumstances attending the preparation and execution of these deeds was, that in April 1846, Mr. Veasey, the solicitor of Mr. and Mrs. Pryor, in consequence of instructions received through Arthur Pryor, which he (Veasey) understood were from Mrs. Pryor; but in his (Arthur Pryor's) handwriting, for the settlement of the property comprised in the indentures of settlement of 1808, on her four sons and their issue, on condition of the sons paying an annuity of 50*l.* each to their sisters then living, and the husband of a deceased sister. In consequence a case was laid before counsel by Mr. Veasey, and opinion given that the settlement could not be carried out in the form proposed, and he recommended that an appointment should be made to the sons in fee, and that the estate might then be resettled in favour of the sons and their issue, subject to such provisions for the daughters as might be thought proper.

The result was, the execution of the above mentioned indentures of appointment and resettlement in June 1847, the appointment being made to two of the sons only, as one was then under age, and the other declined taking any part in the arrangement.

In the interval between April 1846 and the execution of these deeds, a considerable correspondence took place between Arthur Pryor and Mr. Veasey, the solicitor, in reference to the instructions for the deeds and the arrangement generally. In answer to one from Mr. A. Pryor, dated the 13th Feb. 1847, to Mr. Veasey, asking for an explanation as to the "nature of the trust" which he (Veasey) wished him (Mr. Pryor) to get accepted, Mr. Veasey informed Mr. Pryor that the appointment was to be made upon "the understanding that the appointees should, by a deed to be immediately afterwards executed by them, resettle the property appointed to them."

The principal letters in this correspondence are stated and commented upon by the V. C. in his judgment.

Rasch, for the plts., the trustees of the original settlement, submitted the questions to the court.

Rolt, Q. C. and *J. G. N. Darby*, for Wm. Gould and wife, and Alfred Pryor and wife, parties desiring to set aside the indenture of appointment of June 1846 and resettlement of 1847, contended that the facts disclosed a bargain with the appointees, that the properties should be resettled for the benefit of parties not the objects of the original power, and on that ground ought to be set aside.

Willcock, Q. C. and *Surrage*, *Daniel*, Q. C. and *Fooks* for parties in the same interest. They cited

Birley v. Birley, 25 Beav. 299;

Re Marsden's Trusts, 4 Drew. 594;

Daubeny v. Cockburn, 1 Mer. 626;

Topham v. Duke of Portland, 32 L. J. 81, Ch.;

on appeal, 258; s. c. 8 L. T. Rep. N. S. 180,

and on appeal, 678;

Salmon v. Gibbs, 3 De G. & Sm. 343;

Tucker v. Sandys, M'Cle. 435.

Giffard, Q. C. and *E. Macnaghten*, for Arthur Pryor and others, supporting the deeds of appointment, contended that the whole was a family arrangement; that it made no difference whether the settlement was on marriage or not; and drew a difference between this case and *Topham v. Duke of Portland*.

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Sir *H. Cairns*, Q.C. and *Wickens* for parties in the same interest. They cited

Sugden on Powers, 670 ;
White v. St. Barbe, 1 Ves. & B. 399 ;
Goldsmid v. Goldsmid, 2 Hare, 187 ;
Re Gossett's Estate, 19 Beav. 539 ;
M'Queen v. Farquhar, 11 Ves. 479 ;
Agassiz v. Squire, 18 Beav. 431.

The VICE-CHANCELLOR said :—I wished to see the last edition of Lord St. Leonards' book, to ascertain what was the view taken in *Tucker v. Tucker*, and I think this case comes within the class of cases there referred to. No doubt the point may be difficult in some cases, though in the present it is too clear to leave any doubt on the subject. In many cases the distinction may be fine as to whether or not the appointment is what it ought to be—the appointment by a parent to a child an object of the power, the child being desirous that some settlement should be made, and being anxious or agreeing and concurring in the settlement ; or whether it is just, as was put in the argument, that the trustee really has no voice in the matter, but that he is merely the instrument selected by the parent to make an appointment which is beyond the objects of the power. The authorities do not depend upon whether it be from a corrupt motive, or whether it is from an honourable and reasonable motive. Nobody imputes corrupt motives to this lady, and I should be sorry that any suggestion of the kind should be made. The appointment of June 1847 is made to the two brothers, and they, by a subsequent deed, make the settlement in favour of their sisters and in favour of the husband who are not objects of the power, and in favour of grandchildren who are not objects of the power ; and I apprehend that though the parent may, as far as moral considerations are concerned, wish to provide for the remote issue, yet the rule of law which prohibits the parent from having any power of providing for that remoter issue, that rule of law carries it on to this, that it cannot be done at the sole will of the parent. If it is done at all it must be done in a *bona fide* manner by an appointment to one of the objects of the power, and that object of the power thinking it reasonable that other provision should be made. In all cases where a parent appoints to a child, and the child marries, the case is a very simple and a very easy one to deal with. It may be the very thing the child might wish, and although there may be parental influence exercised, if the property were the child's own property, without any appointment at all taking place, proper influence might be exercised, and no one could complain of that. The case of *Goldsmid v. Goldsmid* is a case that goes further in some respects than any of the other cases, though in principle it does not go beyond them, because *Wigram v. C.* was too careful to do anything of that kind. But the case of *Goldsmid v. Goldsmid* is one that struck me as being the strongest case on the subject, and it is this :—The appointment was made by an indenture of the 25th April 1821, executed by all parties, reciting an agreement "that the property should be disposed of as hereinafter mentioned ; it was expressed that in pursuance of and in obedience to the said deed-poll and in consideration of the premises, it was thereby agreed and declared between and by the parties thereto, that they the said Ann Goldsmid, Daniel Eliason, and Isaac Lyon Goldsmid, and their executors, administrators and assigns, should, subject to the power of revocation reserved by the said deed-poll, stand and be possessed of, and interested in, all and singular the ten equal twentieth shares," and so on, "upon trust from time to time to lay out and invest the said trust-moneys, and during the life of the said Ann Goldsmid" (she was one of the objects of the power ; then there was this trust declared to which she was a party) "and pay the interest, dividends and annual produce of the

same unto, or permit the same to be received by, the said Ann Goldsmid and her assigns for her and their own benefit, and that from and immediately after the decease of the said Ann Goldsmid, the said trust-moneys, and the interest, dividends and annual produce thereof, should be divided into four equal shares, and one of such shares allotted to each of them the said Moses Goldsmid, Esther Goldsmid, Mary Levein and Elias Goldsmid, and the shares so respectively allotted to each such son or daughter of the said Abraham Goldsmid to respectively remain and be upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations in favour or for the benefit of the son or daughter to whom such share should be allotted, and his respective wife and child or children, or her respective child or children (as the case may be), with such provisions for his, her, or their respective maintenance and education, and at such time or respective times, and in such shares and manner, and with such limitations over in favour of all or any other of such sons or daughters," and so on, "as Ann Goldsmid, by her last will and testament in writing, or any codicil or codicils executed as therein mentioned, should direct or appoint." Then she made a direction and appointment, and that carried it beyond the objects of the power. In that case there was really nothing on the face of the transaction to show that it was not what it purported to be, namely, an appointment to her and a choice on her part to make that in the manner described. In all cases the court would be anxious to uphold a transaction of this kind, unless in a case where it clearly can get behind it. But if upon the whole transaction the evidence is so clear that you can have no doubt that the transaction is this,—not only that the appointment would not have been made, which would be a difficult point to determine, because that rests in the breast of the appointor, unless the appointor had settled *a priori* that an agreement would be made by the child to settle in this manner, which might be done in this way : the parent might say, "I think it is very desirable that you should make a settlement on your children, are you minded so to do ?" That might be talked about, and the child knows the parent has the power, so that the thing becomes very fine, and knowing that, the child says, "Yes, it shall be as you desire." It is said, the appointment is made. The child says, "No ; the appointment is not made."—the court cannot get behind it, nor would it think it right to endeavour to get behind it. But if you had the clear evidence of this,—Here is an appointment about to be made to you on the understanding, which is the same thing as condition, it is going to be made to you two as joint tenants upon the understanding that you resettle that immediately in a manner that is prescribed, and that is accepted,—I apprehend then it would be a fraud on the donee of the power, supposing that donee of the power had the right to make that application of it. It would have been a fraud on the donee of the power for these persons to have held it upon other trusts, and it would be also a fraud upon the objects of the power that the donee of the power should be able to point out anything which is not an object of that power. To allow the trustee to hold it and not to carry into effect the intention of the donee of the power would be a fraud on that donee ; the trustee holding it making himself simply the conduit-pipe for a trust which he has undertaken to perform, that becomes a fraud on the objects of the power. Now, in my opinion, the evidence is too clear to leave the case open to any doubt or contradiction. The evidence is this. The following is stated by the chief clerk as to the circumstances about which there can be no dispute or exception : "Samuel Veasey was the solicitor of Mr. and Mrs. Pryor, that is, the father and mother, the donees of the power, and he was employed under instructions

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given him in the preparation of the two deeds, namely, the deed of appointment and the deed of settlement. The deed of appointment, which is dated the 18th June 1846, was executed in 1847, and the other is the 19th June 1847. The deed of appointment of the 18th June 1846 was executed by Mr. and Mrs. Pryor in the presence of Mr. Veasey and his partner, and no one else is believed to have been present. It is not known accurately on what day in June 1847 the deed dated the 19th June was executed." Now come the circumstances which are the important circumstances in the case. "Mr. Veasey received instructions for the settlement in writing from the hands of Mr. Arthur Pryor, one of the appointees, on the 6th April 1846, which instructions were in his the said Arthur Pryor's handwriting, and had been taken by him, as the said Samuel Veasey understood, from the said Jane Anne Pryor his mother, and such instructions were as follows:" setting out those instructions. That is not evidence as to what he (Mr. Veasey) understood; he does not say what is said or done. That those instructions were brought by Mr. Arthur Pryor in his own handwriting is so far favourable to the notion of their being his words. The instructions are then given as to how the property shall be divided: "The Lambeth and New-street, Covent-garden, property I leave to be equally divided among my four sons, on condition that they pay their three sisters, and Herbert Randolph in the place of their fourth sister, 50*l*. per annum each during their respective lives, and that the income over and above the sum mentioned be equally divided among the four sons or their issue, and that on the death of one son without issue his share be equally divided among the three surviving sons and their issue, and so on, the last survivor to have power to will." Now there is a clear indication on the part of this lady as to intention. The matter has not been examined into. Mr. Veasey is the family solicitor; he takes this as an instruction from the person who says, "I mean to do this, and it is to be left to the four sons." We shall presently find how it became reduced to two. It is to be left to the four sons upon express condition, and one of the persons who is to take upon that express condition brings the document. The facts as certified by the chief clerk's certificate are thus stated:—"On receiving these instructions the said Samuel Veasey considered that he could not act on them without the opinion of counsel is taken; he consequently laid them before Mr. F. Turner." The opinion of counsel is, that the limitations to the grandchildren and the husband cannot be made. Then "Mr. Veasey communicates this opinion to Mr. and Mrs. Pryor, and had general instructions from them to proceed according to the opinion, and he instructed counsel accordingly to carry out the arrangement as well as it could be done. The said last-mentioned instructions were in writing, and as follows:—"Mr. Turner will be so good as to draw an appointment to the sons of Mr. and Mrs. V. Pryor in fee as suggested by his opinion, subject of course to the life-estates limited to the parents by the settlement, and will also draw such a deed of re-settlement of the reversion as will carry out the intentions of the parties, which by the annexed paper originally submitted to Mr. Turner appear to be for the four sons, as tenants in common for their respective lives, remainder among their respective children or issue of children or to an only child," and so on in the form so described. Now who can be the parties there? The parties must be one of two sets of parties, either Mr. and Mrs. Pryor or the donees of the power, or you may say both. There were to be four appointees. If you take the four you must take the four sons who are giving the directions. Then the draft is made, and then there are variations made in it. Then comes a letter from Mr. Arthur Pryor, of the 12th Feb. 1847, asking what is the nature of

the trust, "Please give a letter explaining the nature of the trust you wish me to get accepted. Please give a letter explaining, as I shall make but a cock-and-bull story before two barristers." Mr. Veasey explains it clearly, in his letter of the 1st March, "My dear Sir,—I must beg your indulgence for my delay in reply to yours of the 23rd Feb.," and so on. This is in answer to the question "What is to be done about the trust?" Mr. and Mrs. Pryor's proposal to exercise their powers of appointment as to the New-street houses and the Lambeth estate is as follows:—"They desire, subject to their own life-interest in both properties, first, as to New-street, to appoint same absolutely among their four sons in equal shares in fee; secondly, at to Lambeth, to appoint same to the four sons in fee upon the understanding that they do by a deed, to be immediately afterwards executed by them, resettle such estate." Then there came afterwards, what is important to refer to, a correspondence which took place with one of the sons, which was a source of annoyance to Arthur Pryor—there were four sons, one of them died, and then the chief clerk says: "The name of Mr. Thomas Pryor was struck out of the deed of 1846, because he was at that time under age; and the name of Richard Vickris Pryor, who was originally made a party, was afterwards struck out in consequence of his withdrawing, and on this account the deeds were altered; and the said Mr. Veasey received a letter from the said Richard Vickris Pryor on the subject, dated some time prior to the 25th March 1847," which was a letter complaining of what had been done because he sends it with this letter. He has not a copy of Mr. Pryor's letter, but he sends it, with a copy of his own answer, to Mr. Arthur Pryor, the trustee. It is dated the 25th March 1847:—"My dear Sir,—I do not like to trouble your mother, who, I was grieved to hear from your father the other day, was far from well; but, as he gave me yesterday a much better account, I will not delay sending, through you (that is, to go to Mrs. Pryor), a letter which I have received from Richard, which, sooner or later, you must have seen, and can better, perhaps, talk over with Mrs. Pryor when you have read my answer, also of which I inclose a copy. Of course both are sacred to me;" and so on. That is sent off. Now we judge what it is from Arthur Pryor's reply the next day. He writes to Mr. Veasey:—"My dear Veasey,—I am sorry to read my brother's letter; it is a most serious misconception. I am happy it was addressed to one who could answer it in the kind, simple, gentlemanly, business-like manner of the copy of your reply. I am sure I could not have done so, and I thank you much for it. I cannot imagine anything more fair than the settlement of the Lambeth property; however, this cannot alter my brother's views. With me it was a simple matter of duty to propose the plan in question. My mother asked me for my advice, I advised, and strongly, as I think you know, that it should be left to the eldest" (this advice is not taken), "subject to burdens, and entailed on issue or heirs male. My first reason in this was, that I thought the estate would be better looked after by one than by four, and the liability to dispute entirely done away with, the whole arrangement being so usual with landed property; he can hardly have forgotten that children," and so on. Then he says: "You know my intentions were to carry out my mother's wishes, and thence came the plan now in question, the first not being thought feasible. As to the plan, this is not the plan that I desired, I desired a different plan; here are my mother's intentions, and I think it my duty to carry them into effect." Mr. Richard Vickris Pryor knows he is to be a trustee, he says, "I will not be a trustee on these terms." It appears to me to be as plain as

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possible that it is brought within the rule to say that, if you make an appointment to a person upon the express trust that he is to hold for others who are not objects of the power, that appointment cannot stand, and it must fail *in toto*.

Minute:—Declare that the deed of the 18th June 1846 is void, as having been executed under a previous agreement (or understanding) between the parties for a resettlement of the estates therein comprised in favour of persons not objects of the power of appointment contained in the settlement of the 10th Dec. 1808. Declare that the deed of the 19th June 1847, and the indorsed deed of the 26th April 1855, are void as giving, or purporting to give, interests to grandchildren not the objects of the said power. Declare that the plts. are trustees of the property comprised in the deeds of the 19th June 1847 and 26th April 1855, for the persons entitled thereto under the settlement of 10th Dec. 1808, as in default of appointment. Consequential directions as to costs, &c.

Solicitors: *A. Balderston; Tanqueray Willaume and Co.*

July 17, 20, 21, and 26.

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Misrepresentation—Vendor and purchaser—Contract—Voidable contracts—Shares in mines.

A., in consequence of an advertisement in a newspaper for the sale of certain shares in mines, which were offered at lower prices than the current list of sales of the same shares in the same publication, purchased of B., a sharebroker, the shares so advertised, which he (A.) believed from the advertisement to be the property of a third person. They turned out to be the property of B., the broker:

Held, that such a sale was voidable on the ground of misrepresentation.

A. also gave B., the broker, an order to purchase other shares for him.

B. sold shares of his own to A.:

Held, that such a transaction might be set aside.

On some of these shares so purchased calls had subsequently been made. A. had not paid up these calls, and the shares had thereby become forfeited and were sold. It was admitted that A. had not informed him of these calls, although it was alleged that B. was chairman of the committee of management of the mining company, and must have known of the cause of forfeiture:

Held, that A. was entitled to an inquiry in chambers as to all the circumstances attending the forfeiture and sale of these shares.

The plt. was a captain in a militia regiment. The deft. a sharebroker, carrying on business in Lombard-street, under the firm of Tredinnick and Co.

The bill was filed for the purpose of having certain purchases of shares in several mining concerns, made by the plt. with the deft. set aside, and for an injunction to restrain any proceedings which might be taken by the deft. against the plt. at law, on certain bills of exchange in the hands of deft., connected with these purchases.

The plt., being in Dublin in the month of Jan. 1860, read the following advertisement in the publication called the *Mining Review*, of the 19th Jan.:

"For sale. Twenty shares in Nant-y-Jago, at 5s per share; twenty Buller and Bertha, at 5s.; twenty Basset-United, at 2s.; two Bryn Gwiog, at 50s.; twenty Carnewas, at 20s.; twenty Catherine and Jane, at 15s.; twenty South Buller and West Penstruthal, at 1s.; ten Rose, at 5s.; two West Frances; three South Basset.—Apply to Mr. Carpenter, 2, South-grove east, Mildmay-park, London, N."

In the same publication there was a mining share

list, which purported to give the market price of mining shares and the business actually done in them during each day of the preceding week, and statements by which it would have appeared that great advantages would accrue to the holders of shares in these respective mines.

The plt. compared the prices in said "mining share list," with the prices mentioned in the advertisement, and found that the prices mentioned in the share list either agreed with, or were above the prices mentioned in the advertisement, and the plt. desirous of investing money, wrote a letter, addressed to "Mr. Carpenter, 2, South-grove east, Mildmay-park, N.," and sent it by post, offering to buy the shares so advertised, as he then supposed, by the said Mr. Carpenter. To which he received the following reply:—

"Sir, 78, Lombard-street, London, Jan. 28, 1860.

"We are instructed to acknowledge the receipt of your letter to Mr. Carpenter, and accept your offer of

"102l. 10s. for 20 shares in Nant-y-Jago.

"100l. 0s. for 20 shares in Buller and Bertha.

"50l. 0s. for 20 shares in Buller and Basset.

"20l. 0s. for 20 shares in Carnewas.

"25l. 0s. for 20 shares in South Buller and West Penstruthal.

"297l. 10s.

"We note that you will be in town on Wednesday next, and on that day, or Thursday following, we shall be prepared to convey to you the shares in question, and receive the purchase-money amounting to 297l. 10s. We beg to remark that our opinion of Nant-y-Jago and Carnewas is so favourable that we hold largely in each.

"Our appointment for settlement is one o'clock Wednesday or Thursday next, at our offices.—We are, Sir, your obedient servants,

"TREDINNICK and Co.

"To Charles Maturin, Esq., Imperial Hotel,

"Sackville-street, Dublin."

The newspaper was alleged to be the property of the deft. or over the conduct of which he had considerable influence.

The plt. on the receipt of the above letter, wrote to deft., stating his surprise that Mr. Carpenter had not replied, and that if they (Tredinnick and Co.) were to act in the transaction, he would wish to be informed whether he would be put to any charge, or expense on account of their so acting, in addition to the price he was to pay for the shares.

To this Tredinnick and Co. replied—

"78, Lombard-street, Jan. 31, 1860.

"SIR,—We have the pleasure to acknowledge the receipt of your letter, and in reply, beg to inform you that we make no claim upon you in respect of the shares purchased of Mr. Carpenter, that gentleman having employed us solely to expedite the transaction, and save you unnecessary trouble in completing the same.

"We are, &c.,

"C. Maturin, Esq." "TREDINNICK and Co."

Shortly after the receipt of this the plt. went to London and completed the transaction at the office of Tredinnick, the deft., who in fact was the sole member of the firm of Tredinnick and Co.

The transfers were made from the name of Tredinnick to Maturin, but this the plt. swore that he did not observe at the time.

The deft. at this interview strongly recommended the plt. to purchase more shares in the Nant-y-Jago mine, and in consequence of the representations made as to their prospects, the plt. directed deft. to purchase 100 more shares in this concern if they could be obtained, and it was arranged that the plt. should call again upon the deft. two days afterwards, and pay for such shares as he might have been able

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to procure, deft. having said he knew a party of whom he thought he could obtain 80 of them.

Two days after the plt. called and paid for and had transferred to him 100 more shares in the mine, the transfers also being made from the name of Tredinnick to Maturin.

In the result it was discovered that the whole of the shares purchased by the plt. of the deft., were the property of the deft. Tredinnick.

Carpenter was a domestic servant of the deft.—had never possessed a single share—and, as the deft. designated him in some of the correspondence, was used “simply as a medium for realisation.”

Previously to filing the bill, the plt. had sold twenty of the Nant-y-Jago shares; he had also neglected to pay a call made in March 1861, in respect of these latter shares, and under the terms and provisions of the rules of the company, his shares had become forfeited. Under a resolution of the managing committee—the deft. being the chairman—these shares were sold as forfeited shares in 1860.

It was alleged by the deft. that others of the shares bought by the plt. had become forfeited for nonpayment of calls, and it was admitted by the plt. that he had taken no steps to inform the deft. of the fact that calls had been made in respect of such shares.

In the course of these transactions certain acceptances had been given by the plt. to deft., for sums stated to be in respect of purchase of other shares, calls, &c. &c., and the negotiation of which were by the bill sought to be restrained.

The general effect of the evidence is stated in the V.C.’s judgment.

Daniel, Q. C. and *Thos. Stevens*, for the plt., contended that the representations made by the deft. as to the ownership of these shares was alone sufficient to have the sales declared invalid, and ought to be set aside: that the representations as to value, and the general character of these shares were also fictitious. They cited

Brookman v. Rothschild, 5 Bligh, N. S. 165;

Gillet v. Peppercorne, 3 Beav. 79.

Wilcocks, Q. C., and *Rosburgh* for the deft., urged that the plt. had not been misled as to the ownership of the shares. The transfers were in the name of Tredinnick, of which the plt. had or might have had full knowledge. Some of these shares had been sold by the plt. others had been forfeited in consequence of nonpayment of calls by the plt., which he was bound to make, and by this means he was not entitled to the relief prayed by the bill, which in fact could not be given.

Clarke v. Dickson, 27 L. J., Q. B., 224.

Daniel, Q. C., in reply.

July 26.—The VICE-CHANCELLOR said.—Probably some future inquiry may be necessary if the plt. chooses to have it; but as regards the contract itself, in his (the V.C.’s) opinion it was based on a negotiation of such a character that it was quite impossible to hold that the plt. was bound by it now that the true nature of the transaction had been developed. It seems that the deft. Mr. Tredinnick, had been in the habit of a course of dealings which might or might not be usual, but which the V. C. trusted was not common with persons engaged in transactions like these, namely, a course of dealing of this description—that when he wished to sell shares in a mine, knowing that the circumstances of his being a large dealer in shares would influence the price of them with the public, and induce them to suppose that if he allowed his name to appear in an advertisement for the sale of shares, that the concern was a losing concern, and consequently would decrease the value of his own property, he does not content himself with the legitimate expedient of wishing to sell shares and advertising simply that shares are to be sold, which as a broker he might have had no diffi-

culty in doing, because it might be supposed that he was dealing merely for others and not for himself—when he has got shares to sell and shares to buy. He, the V. C., should have thought the straightforward course would have been to advertise that he had shares to sell and shares to buy in the mines, which would lead the public to the conclusion that he was standing in the position of broker simply. But instead of that, he thinks it right to insert in the name of a servant of his an advertisement inducing people to buy them, in ignorance that he was his servant, but saying that he is Mr. So-and-So; and then to put in the name of the person who, in fact, blacks his shoes, or does things of that description, another advertisement stating that he, the advertiser, wishes to sell shares, or that he is the person to whom people are to apply who wish to become purchasers of a certain given number of shares. That course having been taken, Carpenter, the person employed in these sort of transactions by the deft., has an advertisement put in, in the name of this man Carpenter, to say that there are twenty shares in the Nant-y-Jago, twenty in the Buller and Bertha, twenty in the Buller and Basset, twenty in the Carnewas and twenty in the South Buller and West Penstruthall mines, and that you are to apply to Mr. Carpenter, 2, South-grove east, Mildmay-park, London, which seems to be Mr. Tredinnick’s own residence. I should think this strange course of dealing could not continue very long, because the public would soon find out that Mr. Tredinnick lived at No. 2, South-grove east, Mildmay-park, and would be astonished to find a number of advertisements issuing from that quarter. Like most of these indirect modes, the straightforward and honest course is always the best, and he (the V. C.) could not conceive that in the long run such a course as that would be successful. But the case does not quite rest there, because I cannot help thinking, that Mr. Tredinnick has been guilty of an intention to mislead, when we find that he is the proprietor of that journal which contains an account of the transactions of the day, and a representation of the sales of these shares; and in that same paper is contained these fictitious advertisements which are to all intents and purposes to advertise sales at lower prices than what appear in the list of the transactions of the day. That is in itself a mode of attracting customers; but Mr. Tredinnick does not stop there, because having done this he finds the plt. is caught by one of these advertisements, and he is then to be landed, and the mode of doing it is this: The plt. writes to Mr. Carpenter; Mr. Carpenter probably would not be able to answer the letter in any sense; however, Mr. Tredinnick, his master, answers it for him, and he writes in this way to the plt.:—“Sir, —We are instructed to acknowledge the receipt of your letter to Mr. Carpenter, and to accept your offer of, &c. [Then going through the shares mentioned in the advertisement.] We note that you will be in town on Wednesday next, and on that day or Thursday following we shall be prepared to convey to you the shares in question, and receive the purchase-money, amounting to 297*l.* 10*s.* We beg to remark that our opinion of Nant-y-Jago and Carnewas is so favourable that we hold largely in each. Our appointment for settlement is one o’clock Wednesday or Thursday next, at these offices.—We are, Sir, your obedient servants, Tredinnick and Co.” Now, what could any man suppose on receiving that letter, but that Carpenter was the holder, that these gentlemen were his agents in some way or other, when they throw in the remark that we—that is, these agents—wish to represent to you not only is Mr. Carpenter anxious to sell, but “we have our own opinion of the value of these matters, and we hold a considerable number of shares ourselves?” The plt. answers that—in a letter in which he showed the only sort of judgment which he has shown in the

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whole transaction—he desires to escape the payment of brokerage, and he writes a letter which it is not necessary to read, but the effect of which is, he does not understand why his letter to Mr. Carpenter is to be answered by Mr. Tredinnick, of whom he knows nothing, and wishes to have that explained, because he does not wish to pay brokerage. Then he gets an answer to that letter on the 31st, in which the misrepresentation is still continued. “Sir, we have the pleasure to acknowledge the receipt of your letter, and in reply beg to inform you that we make no claim upon you in respect of the shares purchased of Mr. Carpenter, that gentleman having employed us solely to expedite the transaction and save you unnecessary trouble in completing the same.—We have the honour to remain your obedient servants, Tredinnick and Co.” Who, after reading that, could suppose that Carpenter was what he was, and that these gentlemen were not the simple agents in the transaction? Thereupon the plt. goes to Tredinnick and sees him. Here unfortunately there is a great discrepancy in the evidence, but if I am doing Mr. Tredinnick any injustice in this case, I must say he has only himself to thank for it, because, of course, if I give preponderance to the evidence of the plt. and another gentleman who is disinterested entirely—Mr. Johnson—if I give a weight to their evidence, which in my mind overbalances the testimony given by the defts., the defts. cannot complain, who starts in the outset with a gross misrepresentation of this description, for by no other name can it be called. I should perfectly accede to his view in this, nor do I at all mean to hold that it is necessary for a man who is selling shares to tell all the world that he is a seller; but I do say that it is necessary for him not to misrepresent and say that someone else is a seller. He may keep it a secret in his own bosom and deal with it as he pleases, but he is not justified in this court at least, and he the V. C. trusted that this would become more and more known to those who were so frequently unfortunately brought before the court in cases of this description, that no man can ever uphold before this court a contract founded on false representations. The plt. then goes and sees Mr. Tredinnick, and then a controversy arises. The plt. says, I went through the whole transaction in the firm belief on that day that I was settling the matter between me and Mr. Carpenter. I thought I was buying the shares, amongst others the twenty Nant-y-Jago, which is the most important part of the case. He says, when I saw the defts. he represented to me that the concern—(everybody engaged in mining matters takes a very sanguine view of them)—was a very good investment. He had invested considerably in the property, and continued to hold a good deal of the property. I have no reason to disbelieve that part of his statement. But the plt. says besides his representation of the value of the transaction he represented also that there would be a difficulty in obtaining shares. He asked me if I had any more money to invest. I told him I had some 500*l.* or 600*l.* more at my disposal, which I could invest, and which I wished to invest safely, and in such a manner that I should not lose. Now in dealing in mining transactions, the plt. must have known that in all such there were contingencies which he could not at all have guaranteed to him. Thereupon the defts. says, “This Nant-y-Jago is just the thing for you, and what price will you give for shares,” and so on. He says he will not give more than he has given before, upon which it is represented to him that there will be a difficulty in getting more shares, but the defts. thinks he can get him 80 more, and will try and get 100 for him. That is the plt.’s account of the conversation. The defts.’s case is, “That when the plt. came to me before I made the transfer of the shares, and they are all made in my own name, he fully knew,” as he puts it in his own peculiar

language, “that I used Carpenter only as ‘my medium of realisation.’” This is a peculiar designation for a groom. He says he was quite aware of that fact, and then he says, “he, the plt., went on to deal with me for 80 more shares than the shares which I had at my disposal. I thought I should have had 100, but I had made some other sales to some one else previously, which prevented my being able to offer him 100; but I offered him 80. He took the 80, and I said I would get him the other twenty if I could by the following Monday”—that was on the Saturday. Accordingly, he says the transfer was made, and was accepted, of the 100 shares as on that day (and so it appears by the defts.’s books). “He came to me on the Monday and then took the remaining twenty shares. Of course he did not come prepared with the money to pay for this larger purchase, but he said he would come on the Monday and bring it with him, and I undertook to get the whole thing registered for him, and got it done, and accordingly on the Monday I handed him over the certificates for the transfer.” Now the question is, which of these two stories is true. If the plt.’s story is true, it is quite clear that the contract cannot stand as to anything affected to be sold by Carpenter, and afterwards sold really by the defts. for this reason, the plt. when cross-examined gave a sufficient reason fully corroborated by Mr. Tredinnick’s own answers to the questions I put to him myself, and common sense of course would suggest it to anyone. The plt. says, “if I had thought that Mr. Tredinnick was puffing his own shares instead of giving me disinterested advice about the mine, and had told me ‘I am a holder in the mine myself, I am selling those shares for Carpenter, it is a good thing’ and so on—if I had thought, Mr. Tredinnick was only parting with his own shares, I should have had a different view of the transaction.” What does Mr. Tredinnick himself say in answer to a question of Mr. Daniel in justification of putting these advertisements in? He says, “when I want to buy, I advertise in my groom’s name so many shares, because of course I should have had to pay higher if it were known that I wanted to buy.” It suggested itself to my mind to ask him, “When you advertised in the shoeblack’s name to sell, was it not that you might sell at a better price; for if people knew you were a seller, of course down would go the price?” That is the object. Therefore, if the plt. believed Carpenter to be the seller, and not Tredinnick, the plt. is misled most materially in that which would guide him to the proper price which he was to offer. No doubt many facts are strongly in favour of the defts. The fact that the transfer does bear date the day he says, the fact that it appears there, “I Richard Tredinnick have this day sold to Captain Maturin so many shares,” and the fact that there is at the bottom, “accepted, Maturin, Captain,” under the name of Tredinnick, agreeing to hold on the same terms as Tredinnick lately held; all that is strongly in favour of the defts. But the answer made by the plt. is this. I was so impressed with all that you represented to me up to the last moment the letter (which is a very important letter), of January 1861, saying that Mr. Carpenter has put the thing wholly in our hands, I took them as transfers of shares, I never read them at all; that is his statement. Upon hearing the witness he (the V. C.) had no reason to doubt that gentleman’s statement; he thought and he came there impressed throughout by the studied representations of the defts. that they were Carpenter’s shares. Now having made that studied representation, the defts. cannot clear himself of it without a studied and a clear representation of the truth. He has not done so. He had the means of righting himself a little in this transaction, of which he has not availed himself. There is a witness to this transfer who would be of

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some little importance about these dates, and a witness who might have spoken as to what was Captain Maturin's demeanour. He might have told us whether Maturin did or did not read that transfer; he had it in his hand that night. It is said it was taken away, and he has had it ever since in his custody no doubt, but there was a witness (Duke), who was then clerk to the deft., but not now. I asked the deft. himself whether he was living, and he says he is living and in this country, and he is not called; the deft. has had an opportunity of helping himself as the plt. has helped himself, namely by Mr. Johnson, and I must look to the evidence of a disinterested individual, and the only one we have disinterested in the question, and Mr. Johnson says this, "I was well acquainted with the plt., and being in London in the early part of Feb. 1860, I accompanied him on the 4th of that month into the city, where he informed me he had business to transact with a mining broker, and we went together to the counting-house of deft., and I was present during the whole of the interview which took place between them on that occasion. The plt. on that occasion proposed to complete the purchase of certain mining shares which he had contracted to buy, and inquired of deft. whether it would be necessary for plt. to employ any other broker on his part, and was informed by deft., in reply, that it was wholly unnecessary, and that deft. would do all that was necessary to be done for the plt. The deft. also stated that the plt. could not have made a better selection of shares than those he was going to purchase, and had got a great bargain in them." This gentleman is not cross-examined. The deft. says that this is not exactly the conversation that passed. He does not verbatim go through it and deny it word by word, but he does not deny that a conversation passed. Of course if the conversation passed, as far as I have read it, it is clear that the misrepresentation as to Carpenter passed; he would not have said that of himself. "You have got a great bargain," and so on; he is evidently talking of some one who sold them to him. He says, "The deft. then produced some paper documents, and which I understood to be deeds of transfer, which were executed by the plt., who handed to the deft. the money he was to pay for them." He again might have been asked in cross-examination whether the plt. had perused them and carefully examined them, or the like. Then he says at this interview there was much conversation; then the plt. asked the deft. whether he could command any more money, he said he could command 500*l.* more, and he should like to invest it for a short time in some mine where he could dispose of it, and without loss, whereupon the deft. said the Nant-y-Jago was a very good mine, was choked with ore, which was about to be sold. The deft. then strongly recommended to the plt. to increase his interest in the mine, and assured the plt. he would run no risk whatever by doing so. The deft. also informed the plt. that he did not think there would be any more calls on the shares in the mine, as the directors had ample funds to pay all the expenses. Then the deft., at the same interview, said that there would be a general meeting of shareholders, when a dividend would be declared. "He then produced a paper and read over several of the names of shareholders in the Nant-y-Jago mine, whom the deft. represented to be persons of wealth and position, and who would not sell any of their shares in the mine until they had risen much higher in price. He also added that he would at any time advance the plt. half the amount of the purchase-money of the shares if he should be in want of funds before the proper period arranged for selling the said shares. Then he offered the plt. if he liked to guarantee him against loss, taking 10 per cent. of his profits. The plt. being a very eager purchaser, no doubt, said he would rather have the profit himself. The deft. also produced letters from

various persons." The deft. does not contradict this paragraph at all. "The deft. produced letters from various persons who, as he alleged, were clients of his and shareholders in the Nant-y-Jago mine, and in particular a letter from a clergyman, who, as the deft. read from such letter, authorised the deft. to sell his shares at some price named," which the witness recollected, "but which the plt. declined to give for them, and plt. said he would not give more than he had given for the Nant-y-Jago shares, formerly purchased, including the charge for commission, whereupon deft. said in that case he must buy them at such a price as would cover his commission, or words to that effect, and expressed a doubt whether the plt.'s order could be executed at that price, but added that he thought he knew a party who might be induced to sell eighty shares at the price named by the plt., including commission, and that he would procure them for him if he could." That really is not denied by the deft. at all, and he (the V. C.) certainly thought that paper might probably have some sort of bearing—the paper which was put into the plt.'s hands at last—about these additional eighty shares, but on the other hand, in the absence of all cross-examination, I cannot leap to that conclusion in the plt.'s favour, and there is certainly nothing here whatever to show the least intimation, from beginning to end, of Carpenter's being a mere nominal person. "The deft. at this interview, and in the course of the conversation, told the plt. that, in giving him the aforesaid information as to the approaching dividend in the Nant-y-Jago mine, he was going out of his way to put a good thing into the plt.'s hands, and that the deft. said so in order to secure the plt. as a client in future, and gain the recommendation of the deft. to his (plt.'s) friends and brother officers as a shareholder." Now, he (the V. C.) was bound to say that, looking to the unfortunate way in which the deft. starts his case, with such a gross misrepresentation as that which I have already commented upon, when it comes to a matter of difference between plt. and deft., which of the two was to be believed on oath, and the plt. is supported, to the extent to which he is supported, largely by an independent witness, when the deft. has an independent witness, to a certain extent, who was his clerk at that time, but is not so now, who might have, to some degree, corroborated his view, he (the V. C.) could not but say that the plt.'s evidence preponderated. Then, as to the additional shares, the case fell within that at the Rolls and the case of *Hooper v. Rothschild*, and that class of cases; therefore upon that it would be perfectly clear that the deft. undertaking, as agent, to get shares, cannot sell the shares as his own, and the transaction cannot stand as to the twenty or as to the eighty shares. As to the circumstance of the plt.'s keeping the certificates for a long time in his hands and never reading them, he (the V. C.) did not see any ground for distrusting that statement; and even more, if they had been read, it does not appear that they would have led to such a clear conclusion, as is supposed that they would, that they were the deft.'s original shares, "I am a broker, and I got the shares in the market. I transfer them into my own name, and hand them over to you." The plt. is a witness deposing to a transaction in which he is evidently not much versed, and there was no reason to suppose that he was stating that which was not accurate. The only portion of the case which has pressed upon him (the V. C.), and upon which he had called for a reply, was as to the sale of the shares. If a man buys 100 shares, and before the discovery of the fraud sells twenty at a certain price per share, he can have no remedy as to the twenty because he cannot return the twenty, and he must bear his loss. But he would, upon restoring the eighty shares, be entitled to the price of them. That would be so, supposing the case of one set of shares in one

[Prob.]

In the Goods of BURGESS—OWEN v. WILLIAMS.

[Prob.]

mine. But here the transaction is with respect to shares in different mines. That I take to be the whole contract. The price of shares in one mine may go up or down altogether as one concern; but different mines oscillate and vary in their shares, and you cannot upon a contract in several mines say, "Here are the bad and worthless shares, I will hand them over to you; all the good ones are gone, and I seek to rescind the contract." As to the forfeited shares it stands thus: A dispute arises in Oct. 1860, when the plt. asked for a return of his shares; in March 1861 there is a call. By the deed of settlement, the shares are absolutely forfeited on non-payment of the call; but of course they are not out of the plt.'s power altogether, irremediably until the actual sale is made. The bill is filed in May; they were forfeited undoubtedly at that time. The deft. is chairman, in fact almost everything in the concern. There are only two other persons concerned who appear to attend the meetings. The deft. after bill filed, and after knowing of this transaction, is himself a party to the resolution for selling the shares. Now if a man after bill filed is himself a person taking active steps in selling the shares by way of forfeiture, it does not appear to me as at present advised, that that would preclude the sale. He (the V. C.), was not as to that part of the case, clear that that alone would disentitle the plt. to relief; but if it turned out he cannot return these Carnewas and other shares, it appears impossible that the contract can be dealt with in dribblets, and therefore that what I ought to do is this, in the present stage of the case, to direct an inquiry, if the plt. thinks it worth his while to take it, under what circumstances the shares in the Nant-y-Jago mine other than the twenty sold by the plt. were sold and disposed of by the company, and an inquiry whether the twenty shares in the Buller and Basset mine, and the twenty shares in the Carnewas mine, and the twenty shares in the South Buller and West Penstruthall mine sold to the plt. as Carpenter's shares are now in the possession of or subject to the control of the plt.

The case stood over for the plt. to decide whether he would take this inquiry, and on the 26th July he assented to do so.

Decree accordingly, with an inquiry as above stated. Solicitors, Venning Naylor and Robins; Tucker and Co.

Common Law Courts.

COURT OF PROBATE.

Reported by Dr. SWABY, of Doctors'-commons.

Tuesday, May 12.

In the Goods of BURGESS, deceased.

Administration—Practice—One of next of kin of full age, but abroad—Limited grant to the guardian of the others who were minors—20 & 21 Vict. c. 77, s. 73.

A. died intestate, leaving four children, of whom one was of age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the court, under the 73rd section of the 20 & 21 Vict. c. 77, granted administration to the duly elected guardian of the minors for their use and benefit, limited until one of the children should apply for a grant.

Catherine Burgess, widow, died on the 16th March 1863, intestate, leaving four children by three husbands. The eldest child, Edwin Green, the issue of the first husband, who was of full age, was absent from England. The other three, who were minors, of the respective ages of seventeen, fourteen and ten years,

had elected their uncle, Robert Watson, as their guardian. The value of the deceased's estate was 209*l*.

It was necessary that an administrator should be immediately appointed, in order to get payment of a note of hand for 100*l*., which formed part of the deceased's estate, and was just coming due, and to give notice to quit to the landlord of the house occupied by the deceased.

Dr. Spinks now moved the court to grant letters of administration of the effects of the deceased to Robert Watson, the duly elected guardian of the minor children, for their use and benefit, limited until the eldest son of the deceased should apply for the grant. The uncle is willing to give justifying security.

Sir C. CRESSWELL.—I am informed by the registrar that, according to the practice of the Prerogative Court, administration would not, under these circumstances, have been granted, limited until the eldest son should apply for the grant, because he is entitled to it at any time. The 73rd section of the 20 & 21 Vict. c. 77, however, gives me a larger jurisdiction than the Prerogative Court had, and under it I think I may make the grant to the guardian limited until some one of the children applies for it. He must give justifying security.

Motion granted.

Thursday, May 28.

OWEN v. WILLIAMS.

Attesting witness, examination of—Practice.

Where the party propounding a will in a contested suit, the only issue being due execution, and notice under the 41st rule having been given, called one of the attesting witnesses, who gave evidence against the due execution, the court held that he was bound to call the other attesting witnesses.

The plt. in this case had called in the probate of the will of Hugh Jones, late of Dolgelly, and prayed that it might be revoked.

The deft. having propounded the will as executor thereof, the plt. pleaded that it was not duly executed, and gave notice under rule 41 of Rules for Contention Business, that he merely insisted upon having it proved in solemn form, and did not intend to call evidence.

The case came on for trial before Sir C. Cresswell, without a jury.

Collier, Q. C. and Dr. Spinks, for the executor.

O'Malley, Q. C. and R. E. Turner for the party opposing the will.

One of the attesting witnesses, Hugh Jones, was examined on behalf of the executor, and his evidence was, that the will was not duly executed. Evidence was given to contradict him, but the other attesting witness was not called.

At the close of the deft.'s case,

O'Malley asked for leave to call the other attesting witness, notwithstanding the notice which had been given by the deft.

Sir C. CRESSWELL.—You are certainly at liberty to call him.

The hearing was then adjourned. When it was resumed (May 28th),

Sir C. CRESSWELL said he had been considering the question, and he was of opinion that the executor propounding the will was, in these circumstances, bound to call the other attesting witness.

The other attesting witness, Hugh Owen, was accordingly called on behalf of the executor, and he also gave evidence against the will.

The COURT did not credit the evidence of the attesting witnesses, but pronounced for the will, and ordered probate to be delivered out to the deft. It refused to make any order as to costs.

ADM.]

FOALE v. TRETHEWY AND BROWN—DIGEST OF MARITIME LAW CASES.

[ADM.]

May 27 and June 9.

FOALE v. TRETHEWY AND BROWN.

Earlier and later wills—Executors—Costs.

Where the executors of an earlier will, being disinterested persons, opposed on reasonable grounds a will of later date, and the verdict of the jury established the later will, the executors of the earlier will were held to be entitled to their costs out of the estate of the deceased.

This was a question as to costs. The plt. as executor, propounded a will made in 1862, the defts., as executors of a former will dated 1858, pleaded undue execution, incapacity, and not the will of the deceased; also that deceased duly executed his last will in 1858. Issues on these pleas were tried before Byles, J. at the assizes at Exeter, and a verdict found for the plt. on all issues as to the will of 1862.

As to the will of 1858, the verdict of the jury was in favour of the defts.

Collier, Q.C. now moved for probate of the will of 1862, and for costs against the defts.

Dr. Wamsey, for the defts., submitted it was a case in which so far from being condemned in costs, they should have their costs out of the estate; they had no interest themselves in the will of 1858, and in resisting the later will merely discharged their duties to the legates under the will of 1858. The notes of the learned judge who tried the cause, may show that there was considerable evidence of incapacity.

Sir C. CRESSWELL.—I must communicate with my brother Byles who tried this case. *Cur. adv. vult.*

June 9.—I am informed by my brother Byles that he considered the verdict a right one, but that there was ample ground for disputing the will. That being so, and the defts. disinterested persons, I think their costs ought to be allowed out of the estate.

DIGEST OF MARITIME LAW CASES (EXCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from p. 54.)

R.R.—THE LAW TIMES REPORTS, N.S., will give all the Maritime Law Cases decided from Michaelmas Term 1859. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1860. A Digest of the Salvage Cases during the same period is appearing in the LAW TIMES.

SHIP (continued.)

The following five numbers were omitted in their regular order, under the head "Loss," last week:—

2054. Claim of shipowner for total loss not sustained by a jury, on the ground that the lower bow port was not properly secured, and that the vessel was never on the rocks as alleged: (*Robinson v. Brockett, &c.*, Newcastle-on-Tyne Assizes, Feb. 28 (*Shipping Gazette*, March 3, 1840).)

2050. Underwriters on a time policy held not liable for a total loss of ship, the jury finding that she had been employed in the slave trade: (*The Formidable; Blyth v. Forbes*, C. E., Feb. 23 and 23, 1844. Rule for new trial refused, C. E., April 29, 1844, *Shipping Gazette*.)

2050. Ship sold at Gambia, where repairs could not be done. Underwriters held liable. The policy admitted the ship to be seaworthy when she sailed, and the underwriters, therefore, were barred from pleading that the loss proximately caused by perils insured against, arose from the unseaworthy state of the ship: (*Parfit v. Thompson, &c.*, Bristol Assizes, Aug. 23, 1844; 13 M. & W. 392; *Arnould*, 698.)

2061. Vessels fishing for sea elephants and seals in the South Seas, are usually accompanied by tenders in which the fishing is carried on, the vessel herself being moored in some convenient harbour, and often without any of the crew being left on board. Verdict against underwriters for a total loss, the vessel having been driven from such moorings when the crew were absent, and vessel never afterwards heard of. The jury did not give interest on the loss, as no custom of Lloyd's to pay interest on losses was proved: (*The Esther; Sturge v. Haldemand*, C. E., Feb. 28, 1848, *Shipping Gazette*.)

2062. Loss of a ship occasioned by the wrongful act of the master in sending her to sea when she was not in a fit condition to go to sea, and improperly permitting her to be

on the high seas near the shore for a great length of time without a proper crew, whereby she was wrecked, held not to be recoverable from underwriters on a time policy effected while the ship was lying underwound at the place of the owner's residence, although there be no implied warranty of seaworthiness in such a case: (*The Mary Graham; Thompson v. Hopper*, Q. B., Feb. 23 (*Shipping Gazette*, March 7), and Nov. 10, 11 and 25, 1856; *Harrison's Digest*, 102 and 120; 6 El. & Bl. 172 and 937; 3 Jur. N. S. 133 and 608; 25 & 26 Q. B. 18 and 240; W. Rep. 360 and 83. See as to this case, "Seaworthy," No. 2030.)

III. SALE OF SHIP.

2073. Claim of damages consequent on resale of ship sustained against brokers, where payment of the price of the ship was guaranteed by the brokers, and the purchaser failed: (*The Dundonald; Finnie v. Tonge*, Liverpool Assizes, April 9, 1855, *Shipping Gazette*.)

2074. Restitution of a captured ship, claimed because of its having been sold by an enemy to a neutral before declaration of war: (*The Baltica*, A. C., Aug. 6, 1855; *Spinks' Prize Cases*, 264; Judgment reversed by J. C. P. C., Feb. 3, 1858; 11 Moore, 119.)

2075. Claim for damages on account of failure of guarantee that a new ship built at Quebec and sold to the plaintiff by the defendants, should class seven years A 1 in Lloyd's Register: (*The Saldanha; Baines v. Gibbs, Bright and Co.*, Northern Circuit, Liverpool, *Shipping Gazette*, April 11, 1856.)

2076. "A British ship being at Savannah, entirely unseaworthy, and the master without funds, the owner refused to open a credit, and directed the master to raise money on bottomry, which proved to be impossible, and the costs of the repairs would have exceeded the value of the ship. Held that the master was justified in selling without waiting to communicate again with the owner." Examination of circumstances constituting a sufficient case of necessity for sale. Burden of proof. Expense of detention. Costs: (*The Glasgow*, A. C., Aug. 8, 1856; 1 Swabe, 145, 146; 9 M. L. R. 518; *MacLachlan on the Law of Merchant Shipping*, 149.)

2077. The sale of a ship by the master at a foreign port without authority, having been effected by fraud and forgery, possession decreed to the original owner. "It is a misfortune to the purchaser to have paid his money on a bad title, but such is the case of every one who is the victim of fraud:" (*The Empress*, A. C., Dec. 6, 1856, *Shipping Gazette*.)

2078. Assignment of freight after sale of part of ship held good only so far as concerned shares in the ship which remained in name of the seller. Ship's expenses earning the freight to be paid out of it before any division being made. As a general rule a sale of the ship implies a sale of the earnings. "The co-owners entitled, in the absence of express notice from the assignees to insure the ship and deduct the expense from the freight:" (*Lindsay v. Gibbs*, M. R., July 23 and 24, 1856; 22 Beav. 522; 2 Jur. N. S. 1039; *Harrison's Digest*, 194; and see 26 Beav. 31; 28 L. J. 692, Ch.; *Law Digest* for 1859, 962; affirmed by Court of Appeal, Feb. 16, 17 and March 1, 1859; 33 L. T. Rep. 20; "Assignment," 155 b.)

2079. Sale of ship by master, the son of the owner falsely describing himself as owner. Vessel restored: (*The Empress*, A. C., Nov. 23 and Dec. 6, 1857; *Harrison's Digest*, 195; 3 Jur. N. S. 119.)

2080. Leading case relative to purchase of ship by a neutral from an enemy in anticipation of war. Cases cited and commented upon: (*The Sechs Geschwistern*, 4 Rob. 100; *The Warre*, 8 Price, 269; *Stephenson v. Dawson*, 3 Beav. 342; *Langton v. Horton*, 1 Hare, 549; *Leslie v. Guthrie*, 1 Bing. N. R. 697; *The Tobago*, 5 Rob. 218; *The Marianna*, 6 Rob. 24; *The Christine*, 1 Spink's Adm. Cases, 21; and the American decisions in *The Frances*, 8 Cranch's Rep. 417, and *The San Jose*, 2 Gullison's Rep. 283. Restitution decreed in a case of capture: (*The Ariel*, J. C. P. C., Feb. 19 and March 21, 1857.)

2081. Sale of ship under statutory power given by 71st section of 17 & 18 Vict. c. 104 (the Merchant Shipping Act). Sundry questions with mortgagees: (*The Schoodiack; McLarty v. Middleton*, V. Ch. C., Jan. 23, 1858, and Ch. C., Aug. 6, 1858, *Shipping Gazette*.)

2082. "The want of repairs, the possibility of repairing, the expense of repairs, and of remaining in port, the want of funds or credit, the impracticability of communicating with the owners, and other circumstances may, in combination, constitute the necessity which alone gives the master authority to sell the ship at a foreign port:" (*The Margaret Mitchell*, A. C., Aug. 6, 1858; 4 Jur. N. S. 1193; see *MacLachlan on the Law of Merchant Shipping*, 145, 149.)

SHIP AGENCY.

2083. Purchase of yellow metal for a ship. The persons ordering it having been treated with as principals, and a bill granted by them; under Mr. Justice Willes' direction to jury, shipowners held free from liability, having settled accounts with the persons who gave the order, and became bankrupt before the bill was paid: (*The Forrester; Ashton and another v. Hudson and others*, C. E., Feb. 18, 1858, *Shipping Gazette*.)

[IRELAND.]

GRAHAM v. THE MAGISTRATES OF BALLYCASTLE.

[IRELAND.]

SHIP'S ARTICLES.

2084. Indorsement on ship's articles inadmissible as evidence of the ports to which she went: (*The Justina*; *Borrell, &c. v. Johnson*, C. E., Feb. 17, 1848, *Shipping Gazette*.)

2085. An agreement with seamen being held to be for a voyage from Shields to Barcelona, thence to Quebec and back to the United Kingdom, the Vice Admiralty Court had not under 17 & 18 Vict. c. 104, jurisdiction to entertain a suit for wages of the mate: (*The British Tar*; *Smith v. Charlesken*, Vice A. C., Quebec, July 6 (*Shipping Gazette*, Aug. 4), 1858.)

SHIPBROKER.

(See "Broker," "Freight.")

2086. Claim for commission on freight: (*The Mary Howes*; *Suter and another v. Ryley*, Liverpool C. C., March 17, 1858, *Shipping Gazette*.)

2087. A shipbroker obtaining a charter for a cargo of iron, held entitled to commission on freight, though charter-party effected for same cargo through another broker: (*Jones, Brothers v. Drewett*, Newport C. C., March 18, 1858, *Shipping Gazette*.)

SHIPBUILDER.

2088. Shipbuilder found liable in damages for loss through a profitable charter not being obtained in consequence of his failing to build and deliver a ship within the time specified in his contract: (*The Startled Fawn*; *Fletcher v. Tayleur*, Northern Circuit, Liverpool, Aug. 27, 1855, *Shipping Gazette*.)

2088 a. Case relative to passing of property in ship before bankruptcy, under a contract for building, &c., and as to special damage for detention: (*Wood v. Bell*, Q. B., Nov. 17, 1855; Jan. 12, 1856.)

2089. Engineer and boiler maker found liable to steam collier company in damages for non-completion of two steam colliers contracted for: (*The Union Steam Collier Company v. Humphrey*, E. C., Feb. 22, 1856, *Shipping Gazette*.)

2089 a. Question relative to damage for undue delay in completing ship according to contract, and interest claimed on money lying idle through the detention: (*Wood v. Bell*, &c., E. C., June 2, 1856.)

2090. Verdict against shipbuilder for damages for breach of contract in not completing and delivering an iron vessel within the time specified in the contract. Evidence as to average profits derived by shipowners: (*The Deerslayer*; *Blythe, &c. v. Tayleur*, Northern Circuit, Liverpool, April 4, 1856, *Shipping Gazette*.)

2091. Payment by instalments of the price of a ship in course of building. Certificate of approval of work: (*Tayleur v. Blythe*, Q. B., May 2, 1856; 9 M. L. R. 164.)

2092. Action against a surety for noncompletion of a ship in time: (*The General Steam Navigation Company v. Rolt*, C. P., Jan. 21 and Feb. 1, 1858, and E. C., June 19, 1858, *Shipping Gazette*.)

2093. Claim of damages for not supplying a suitable steamship in terms of contract: (*The Aberdeen, Leith and Clyde Shipping Company v. Stephen and Son*, Court of Session, Scotland, March 25, 1858, *Shipping Gazette*.)

2094. A shipbuilder having built a ship of larger size than contracted for, and the purchasers having taken delivery and paid a higher price as charged, held that the latter could not claim "repetition" of the difference in price: (*Duff, McIntroy and Co. v. McMillan and Son*, Court of Session, Scotland, June 3 (*Shipping Gazette*, June 9), 1858.)

(To be continued.)

Ireland. (a)

COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

Jan. 24 and 25.

REG., AT THE PROSECUTION OF DUNCAN GRAHAM v. THE MAGISTRATES OF BALLYCASTLE, IN THE COUNTY OF ANTRIM.

Certiorari—*Fishery Acts*, 5 & 6 Vict. c. 106; 11 & 12 Vict. c. 92; 13 & 14 Vict. c. 88—*Jurisdiction of magistrates when a claim of title is put in by deft.*

Duncan Graham had been summoned for trespass upon a several fishery. The plt. gave in evidence the record of the court showing former convictions for similar offences, and certain patents whereby a several fishery in the neighbourhood was granted to the party through whom he claimed, but whether it was the several fishery in question did not thereby sufficiently appear. The defts. put in evidence of long user, and claimed a right to fish therein, and

offered security for costs in case plt. would institute a civil action:

Held, that this was such a *bonâ fide* claim of title as ousted the jurisdiction of the magistrates.

In Hilary Term a conditional order for a *certiorari*, directed to the justices in and for the county of Antrim, had been obtained, for the purpose of having removed into this court all and singular the convictions, together with all things touching the same, for fishing in a several fishery in the bay of Ballycastle, in the county of Antrim, whereof, at a petty sessions in said county, on the 4th Nov. 1861, Duncan Graham and seven others were, on the complaint of one George Morton, convicted, in order that such convictions may be quashed, on the grounds that such convictions are irregular, "illegal, and void," and that same are illegal and void on the ground that no such several fishery as is, by the said conviction supposed, was proved, or in fact existed; that a right exists in the public to fish in the *locus in quo*, and was insisted on at the investigation of the complaint aforesaid; that the jurisdiction of the justices to hear such complaint or make such conviction was ousted by reason of the accused parties insisting on a *bonâ fide* right to do the acts complained of; that they insisted on that right at the investigation of this complaint aforesaid, and that the justices exceeded their jurisdiction therein. The summons on which the case was tried before the magistrates at Ballycastle, was for entering upon a salmon fishery in the sea, in the bay of Ballycastle, in the county of Antrim, under the pretence of taking fish therein, said fishery being a several fishery within the meaning of the 11 & 12 Vict. c. 106, not having been authorised by the owner, occupier, or lessee thereof. The affidavits filed by Duncan Graham and the other convicting parties were to this effect, that the public had fished in the *locus in quo* since 1808. At the trial there were only two witnesses for the plt., and the only other evidence he produced was a lease made to John McGildowney by the Court of Ch., *Re H. Bush*, a lunatic, for twenty-one years from 1852, in which there was no reference whatever to a charter or patent granting a several fishery in the *locus in quo*. While the affidavits were being prepared for the purpose of procuring a prohibition, the arrests were made of this accused. The warrants purported to be signed by C. Hunt, but were not signed by him, or only signed in blank no committals were made out, and the warrants were handed to the jailer. At the trial the plt. had produced evidence of convictions for similar offences in the month of October next previous, and of another in 1850, also a patent granting a several fishery to Sir R. MacDonnell, which he alleged to be the fishery in question, and to which he deduced title through Sir R. MacDonnell. The defts. produced no evidence of title on their part. The parties were convicted, when, in course of suing out a writ of prohibition, they were imprisoned for four days, and then liberated. The *locus in quo* was nearly two miles from shore. At the trial the attorney for the prosecutor swore that the attorney for the convicted parties had admitted in conversation that the prosecutor was entitled to a several fishery in the *locus in quo*.

MacDonough, Q. C. (with him E. P. Levinge) moved that the above-mentioned conditional order be made absolute.—In order to obtain a conviction before the magistrates, the existence of a several fishery must first be established. A party may have a several fishery a little way from land, but the *locus in quo* here was nearly two miles out to sea, where there cannot be a several fishery. There was no evidence given by the prosecutor at the trial that the *locus in quo* was part of a several fishery, and no title on his part was produced by grant or prescription.

(a) From the *Irish Jurist*, by permission.

And even if there were evidence of a several fishery existing in the *locus in quo*, the convicted parties had insisted on a *bond fide* right to fish there for herrings and other fish. There was nothing more proved against the parties convicted, than that they had been guilty of an alleged trespass, and yet the magistrates refused to dismiss the case on the prisoner's application though they offered to give security for costs, and to defend a civil action if the prosecutors would so proceed against them. The allegations of prosecutor's attorney has been contradicted. What a several fishery is, is defined by 5 & 6 Vict. c. 106, s. 94, and the penalties for infringing on the rights of other parties to such several fisheries, are enacted by 11 & 12 Vict. c. 92, s. 41, and the only way that the alleged offence can be brought home to anyone, is by reference from the latter to the former section, and so far there is no doubt as to inland fishery; but the 13 & 14 Vict. c. 88, raises doubts as to fisheries in the sea, and if any several fishery existed in this case, it was a sea fishery. The 13 & 14 Vict. c. 88, s. 1, gives a further definition of a several fishery. But the penal provision can only be enforced under the 11 & 12 Vict. in case the 5 & 6 Vict. is read with it, for there is no new penal provision referable to the altered definitions in the 13 & 14 Vict. The magistrates had no jurisdiction, when there was a *bond fide* claim, as to title made by the persons prosecuted.

Paley on Convictions, 188;

Reg. v. Dayman, 7 Ellis & Bl., 672;

Gwynne v. Knight, Cox's C. C. Cas. 47;

Reg. v. Justices of Donegal, 5 Ir. Jur. N.S. 185.

Chatterton, Q. C. (with him F. Falkner) contra.—The question is, whether the magistrates had jurisdiction. It has been already decided that there was a several fishery in the *locus in quo*, and this is not the place to inquire into the propriety of that decision. By the Fishery Act, complaints of this kind are to be brought in the first place before the petty sessions, 3 & 6 Vict. c. 106, s. 99; and if the parties are dissatisfied with the rule made by the magistrates, they may appeal to the quarter sessions. Other parties were convicted on the same day of a similar offence, and, in addition to this, there was quite evidence enough produced at the trial that the prosecutor had a good title to said several fishery; there was the patent to the Boyd family, the lease, the affidavits, and the previous convictions to establish the jurisdiction, and the assertion of title on the part of the defendants, as against the prosecutor, was only for the purpose of ousting the jurisdiction:

Brittain v. Kinnaird, 1 Brod. & Reg. 432;

Reg. v. Bolion, 1 Q. B. 66;

Reg. v. Dayman, 7 El. & Bl. 672;

O'Neil v. Allen, 9 Ir. Com. Law, 132.

The COURT was unanimous in their judgment, which was delivered by the C.J., to the effect that they believed the convicted parties had acted in the exercise of a *bond fide* claim to a right to fish in the *locus in quo*, and they directed the *certiorari* accordingly.

Friday, April 25, 1862.

LLOYD v. THE LIMERICK AND WATERFORD RAILWAY COMPANY.

Railway and Canal Traffic Act, 17 & 18 Vict. c. 31—*Railway Company Carriers—Conveyance of live stock—Special contract—Reasonableness of conditions.*

A special contract for the conveyance of horses by railway was signed by the person sending them, whereby it was agreed that the defendants should in no case be responsible for the delivery of said horses at any particular time, and should be free from all

liability with respect to them, whether in loading or unloading during conveyance, or while in the company's vehicles or on their premises. This contract was contained in a printed form, and was called condition A. Under condition B., at a higher rate, the company were to be! No for any injury pointed out at delivery. Plt. paid at lower rate. The horses were injured in transit by the rail, and the special contract was pleaded in defence to an action for damages. To this there was a replication by plt., and on demurrer to the replication it was

Held, that condition A., by itself, was unreasonable, and that the contract could only be made reasonable in case the alternative condition B. were reasonable; that condition B. was unreasonable in obliging the party to point out the injury at the time of unloading, and consequently that the contract was unreasonable.

This was an action for 800*l.* damages for injuries sustained by the plt.'s horses while in the charge of the defendants, and for breach of contract. The summons and plaint contained three counts, namely, first count, that the defendants were carriers from Limerick to the Limerick Junction Railway station; that as such carriers they received seventeen horses from the plt. to be carried for reward to the Limerick Junction Railway station, and there delivered within a reasonable time. Breach thereof alleged. That the said horses were injured, owing to the want of due care on the part of the defendants. Second count, that the defendants agreed with the plaintiffs to carry seventeen horses, and deliver them as in first count mentioned. Averment of conditions precedent. Breach thereof alleged, whereby said horses were injured. Third count, that defendants being carriers contracted to carry said horses as in first count mentioned, and deliver them in time to reach Dublin same day. Breach thereof and negligence alleged, whereby said horses did not reach Dublin till the close of the same day, and were thereby injured. Damages 300*l.* Six defences were put in, viz., first, for a defence to the first, second and third counts, and to each respectively that the plaintiffs did not deliver to the defendants said horses for the purposes, and on the terms alleged. Second, further defence to the first count, that defendants did carry said horses from Limerick to the Limerick Junction Station, and there delivered same within reasonable time, taking due care thereof. Third, further defence to the second count, same as last defence, omitting allegation of due care. Fourth, further defence to third count, that defendants carried said horses to, and delivered them at, the Limerick Junction Station, at such an early hour on the day of their departure from Limerick that they were there in sufficient time to be carried thence to Dublin, so that they should reach Dublin before the close of the same day. Fifth, further defence to the first, second and third counts, and to each of them, that said horses were received by defendants from plaintiffs to be carried by defendants as aforesaid at a certain special reduced rate of charge, and under and subject to a certain contract made between the plaintiffs and the defendants, and signed by the plaintiffs, whereby it was agreed that the defendants should in no case be responsible for the delivery of said horses at any particular time, and should be free from all liability in respect of them, whether in loading, unloading, during conveyance, or while in the company's vehicles, or on their premises, and that said injuries complained of occurred at some of these times aforesaid. Sixth, further defence to first, second and third counts, and to each of them, that defendants carried said horses as aforesaid with due care, within a reasonable time, and without delay or detention, and that alleged injuries did not occur by neglect, default, or breach of duty on part of defendants. It appeared that before the plaintiffs delivered the horses at the railway, ha

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wrote a letter to the station master, at Limerick, requesting to know whether his horses could be forwarded to the Limerick Junction station in time to reach Dublin, and be shipped to England the same day, to which the station master replied by a memorandum, that "the horses might be sent for the special 8 a.m. train next day." The printed form to be filled by the sender of live stock, purported to be signed by Mr. Whiteside, the plt.'s assistant. It was not signed by him, though it was by the clerk under his authority, but Mr. Whiteside had no authority to depute a third person to do so. Liberty had been obtained by the plt. to reply to the fifth defence, that the contract in defence mentioned was contained in the printed form presented for signature at the time the horses were received, setting out said printed form in full, and averring that such contract is unjust and unreasonable. Replication accordingly to fifth defence. The printed form referred to contained a statement of two rates of charge and conditions referable to each respectively. Condition A., for the lower rate, absolved the company from all liability in respect of said horses. Condition B., attached to the higher rate of 20 per cent. extra, was that the company would not be liable for any injuries unless it was pointed out to the company's agent at the time of unloading; that the company should not be responsible for the delivery of horses at any particular time, or for any particular market or race meeting; that the company would not be liable for more than the value of horses specified in the Railway or Canal Traffic Act 1854, unless the excess of such horses' value be declared at time of delivery, and there will be a charge of 5 per cent. extra on such excess of value. The ticket to be given up on arrival. The plt. had paid at the lower rate. To this replication the defts. filed a demurrer that it did not disclose ground of reply to fifth defence, good in substance, because it affects to put in issue matter of law and judicial opinion only, and because it is immaterial whether such contract be just and reasonable or not, and because, if material, the justice and reasonableness thereof sufficiently appears by the terms thereof, and by the facts of said defence, and because the plt., by admitting existence of said contract signed by himself, and by withdrawing question as to reasonableness thereof from inquiry, is estopped from averring that it is not just and reasonable. The demurrer-book contained the following points:—1. That the question whether said contract was just and reasonable can only be material under the provisions of the Railway and Canal Traffic Act 1854, and it does not appear whether the plt. has relied on said Act in his pleadings. 2. That even if the plt. does rely on said Act, the gist of the action is not for any loss or injury within the said Act. 3. That even if the gist of the action were for such loss or injury, it would be immaterial whether such contract be just and reasonable or not. 4. That if the justice or reasonableness of such contract, or of any of the conditions thereof, be material, they sufficiently appear by the terms thereof, and the facts in said defence stated. 5. That the plt. by admitting the existence of said contract signed by himself, and by withdrawing the question of the reasonableness thereof from inquiry at the trial, is estopped from averring that it is not just or reasonable. 6. That the second breach in the first paragraph discloses no ground of action good in substance; because no duty is shown in the defts.' to prevent said horses from being frightened, and the residue of said count is answered by the third condition of said contract without any question of justice or reasonableness. 7. That the allegations of injury in the first, second, and third paragraphs respectively are remote and disconnected from, and no part of the gist of the action, which is answered by the third condition as aforesaid. 8. That the replication

is bad for referring to the jury mere matter of law and of judicial opinion.

W. Boyd (with him *Sullivan*, Serjt. and *Chatterton*, Q.C.) in support of the demurrer.—The condition embodied in the contract is reasonable, and the question in the case of *M'Manus v. The Lancashire and Yorkshire Railway Company*, 4 Hurl. & Nor. 327, does not bear on this one; it is distinguishable in every point. The party bringing the goods to the railway have the option of paying either the low or the high rate; and if he knowingly pays the low rate, he is barred from afterwards questioning the condition, which is a reasonable one. The Railway and Canal Traffic Act was passed to facilitate the transport of horses, and any contract signed under it must be taken to be reasonable:

Shaw v. The York and North Midland Railway Company, 13 Q. B. 347.

Dillon (with him *J. E. Walsh*, Q.C.) contra.—The Land Carriers Act was passed to relieve carriers of embarrassments, and all cases decided before the passing of the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, are *dehors* consideration here:

Carr v. Lancashire and Yorkshire Railway Company, 7 Ex. 707, was decided in 1852;

Coggs v. Barnard, Smith's Lead. Cas. 1, 147;

Simons v. Great Western Railway Company, 18 C. B. 805;

are not to be reconciled with *M'Manus* case, 4 Hurl. & Nor.; and *Harrison's* case, 6 E. Jur., do not bear on the present one. The question is, whether the two conditions, separately or together, can be considered by the court as just and reasonable. The condition A. cannot be regarded as reasonable, and no additional charge superadded can make it reasonable. No one can make a contract and hold out that he is not liable on the face of it. What is the meaning of condition B.? That the company is not to be liable for injury unless pointed out at the time of delivery, *i. e.* when it is, and necessarily must be unknown. The four authorities—*Partington's* case, 1 Hurl. & Nor., decided in 1856; *Wise v. Great Western Railway*, 1 Hurl. & Nor. 63, in 1856; *Simons v. Great Western Railway*, same year; and *M'Manus* case in the Court of Ex., cited in argument on the other side, cannot be supported since the decision of the latter case in the Ex. Ch., 4 Hurl. & Nor. 327. But the condition B. is equally unreasonable, and the contract falls to the ground.

The following cases were referred to in the arguments:—

Shaw v. The York and North-Western Railway Company, 13 Q. B. 347;

Parlington v. South Wales Railway Company, 1 Hurl. & Nor. 392;

Harrison v. The London, Brighton and South Coast Railway Company, 6 E. Jur. 954;

Lewis v. The Great Western Railway Company, 5 Hurl. & Nor. 867;

Real v. South Devon Railway Company, 5 Hurl. & Nor. 875; s. c. 29 L. J., N. S., 441;

Phillips v. Edwards, 3 Hurl. & Nor. 813;

Phillips v. Clark, 2 C. B., N. S., 620;

Simons v. Great Western Railway Company, 2 C. B., N. S., 620;

Peck v. North Staffordshire Railway Company, 29 L. J., N. S., Q. B. 97;

Ransome v. Eastern Counties Railway, 8 C. B., N. S., 709;

Lyons v. Mills, 5 East. 428;

M'Canse v. London and North-Western Railway Company, 6 E. Jur., N. S., 1304; s. c. 3 L. J., N. S., Ex. 65;

Times Fire Insurance Company v. Hawks, 28 L. J., N. S., Ex. 317. *Cwr. adv. vult.*

May 8th.—By the COURT.—We disallow the

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demurrer in this case on the grounds that the condition A., as it stands by itself, was an unreasonable one, and that the contract for conveyance could only be made reasonable in case the alternative condition B. were reasonable; and as that part of the condition B. which obliged the party to point out at the time of unloading any injuries the animals might have sustained in their transit or conveyance was unreasonable, and therefore that the contract was unreasonable.

Agent for the plt., *R. D. Kane*.

Agents for the defts., *F. and E. Morgan*.

COURT OF PROBATE.

Reported by *W. R. MILLER, Esq., LL.D., Barrister-at-Law.*

FORSTER v. MURPHY, and in the Goods of MURPHY.

Administration—Creditor—Next of kin—Costs—Delay.

Administration refused to a creditor who had cited next of kin to accept and refuse, though the estate was insolvent, and considerable delay on the part of next of kin in applying for a grant had occurred; but in each case the creditor was allowed his costs out of the estate.

Dr. Miller, on behalf of the plt., moved for liberty to apply for and obtain letters of administration of the goods of the deceased, or if that should not be granted, then that the deft. should be ordered before he extracted a grant to pay the costs incurred by the plt. in the proceedings he had taken in order to get such grant, or in default that the plt. might get the grant. It appeared from the affidavit of the plt. that the deceased had died in the beginning of Nov. 1862, in France, intestate, leaving a widow and four children him surviving, one of whom is the deft., who was permanently resident in England. The deceased died greatly embarrassed, far beyond any assets he left. There were, however, assets amounting to 100*l.* in Ireland. The plt. had in 1852 recovered against the deceased in the Q. B. a judgment for 18*l.* 11*s.* 6*d.*, but having been driven to take proceedings on his judgment it now amounted to 55*l.* 17*s.* 11*d.* On the 3rd March 1863 the deft. and the other next of kin and the widow of the deceased were duly served with a citation on behalf of the plt. to accept or refuse letters of administration of the goods, &c., of the deceased, otherwise to show cause why the same should not be granted to the plt.; and on the 2nd May 1863 the deft. appeared and consented to accept the grant. As to the first part of the motion, it was laid down by Sir John Nichol, in *West v. Wilby*, 3 Phil. 374, that a next of kin, when he has no interest and where the estate is insolvent, may be excluded. Several cases are cited in that case, pp. 380 and 381, exactly in point, where the widow and next of kin were passed over in favour of creditors, and where the debts exceeded the assets; and in *Witby v. Mangles*, 10 Cl. & F. 248, those cases were approved of by Lord Cottenham. The right of the next of kin is not a legal but a beneficial right, having regard to their interest, different from that of an executor who cannot be passed over. With respect to the second branch of the motion, if the court should not think the plt. entitled to the grant, he is clearly entitled to his costs. The next of kin delayed so long that he was bound to issue the citation, and six months has been held such delay as entitled the creditor issuing a citation to his costs: (*Cole v. Rea*, 3 Phill. 428.) It is not said there that the costs were given out of the estate; on the contrary, it would appear from Sir John Nichol's language—viz., "It was the duty of the next of kin to have taken out this representation earlier; the creditor has been compelled to take these steps to recover his debt, he is, I think, entitled to his expenses"—as if the next of kin was

ordered to pay them. In the *Goods of Spilly*, 16 Jur. 92, they were also in a similar case ordered by Dr. Lushington; but as the learned advocate who applied on behalf of the creditors only asked for them out of the estate, perhaps they were so given there. No other creditor has applied, as it is understood that the most of them are protected by policies of insurance.

Dr. Ball, Q. C., for the deft., resisted the motion.—The next of kin had a right to the grant, unless excluded by settlement or the like, but there might be many duties for the administrator in this case to discharge, though the estate of the deceased appeared insolvent, and it was not desirable that a stranger should be mixed up in his family transactions.

KEATINGE, J.—There may be a good deal to do respecting the policies of insurance, and I do not consider that I can pass over the right of the next of kin in this case; but as regards the plt.'s costs, I think he is entitled to them, but only out of the estate. I will therefore order that the deft. be at liberty to apply for administration, and that he do extract within fourteen days from this date, and in default, that without further order the plt. be at liberty to extract, and that he be paid out of the estate the sum of 12*l.* as and for his costs.

Order accordingly.

[Note.—In this case, probably, the form of the citation had some weight on the court, it being to accept or refuse, &c., which, in *Nevin v. Nevin*, Milw. 569, was held an admission of the right of the party cited, and an estoppel; but for that the authorities cited would appear conclusive, that if the estate is clearly, as it was in this case, insolvent, a creditor would be preferred to a next of kin. Perhaps in similar cases the citation should be only "to show cause why administration should not be committed to A. B."]

KELLY v. KELLY.

Administration—Widow—Joint grant.

It is no ground for passing over the widow in the choice of an administrator that the assets consist principally of a farm, which would require the superintendence of an active and intelligent farmer—the widow being advanced in life:—a joint grant never forced by the court.

Dr. Townsend, for Anne Kelly, the widow of the deceased, intestate, moved for liberty to apply for and obtain a grant of letters of administration of the goods, &c. of the deceased. The deceased was a farmer possessing eighty acres of land, and left a widow, but no children. The deft. is a brother of the deceased, and one of his next of kin; and there were several minors, the children of a deceased sister. No ground for passing over the widow was made, as though advanced in life she was quite competent to direct the farm to be sold and to divide the produce, and would give ample security.

Dr. Ball, Q. C.—It would be more for the advantage of all parties that the farm should be cultivated and not sold yet, as there was a depreciation at present in the value of land; and therefore it would be more desirable that the deft., who represented all the next of kin, and was a competent farmer, should have the grant, or, at all events, that he should be joined in the grant with the widow, who was advanced in life and not competent to manage the farm.

KEATINGE, J.—The deft. wants to coerce the plt. to give up her own judgment as to the propriety of selling the farm or not; and unless on consent the court never forces a joint grant. I will therefore give the plt. leave to apply for and obtain in the registry letters of administration of the goods, &c. of the deceased; and as each party represents a moiety of the assets, let each party have their costs out of the estate.

Order accordingly.

[IRELAND.]

Re CHARLES LYSTER.

[IRELAND.]

COURT OF BANKRUPTCY AND INSOLVENCY.

Reported by JOHN LEVY, Esq., Barrister-at-Law.

Re CHARLES LYSTER.

Final examination—Want of proper books—Fabricated statement of accounts, with a view to gain indulgence and fresh credit—General misconduct with regard to former partner.

Where the business of a partnership was prosperous up to the time of dissolution, when one partner went out upon an arrangement that he was to be secured an annuity, no portion of which was ever paid, although the outgoing partner was obliged to file a bill to raise the amount; and where regular books were discontinued, and accounts kept on slips of paper, the inference is that it was done for a fraudulent purpose. If a trader submits fabricated accounts for the purpose of obtaining forbearance and fresh credit, and is guilty of criminal acts, the court is not bound to pass the examination, although he may fully account; but where regular books are not kept, and the entire accounts are not satisfactory, it is evidence that a true disclosure has not been made, and the examination will be adjourned sine die.

The bankrupt had been a wine merchant in Fleet-street, and succeeded Mr. Furlong, with whom he had previously been in partnership. The case had been two or three times before the court, for the purpose of passing the final examination, which had been opposed by Mr. Furlong, on the ground of fraud and the want of proper books to vouch his dealing and transactions.

Heron, Q. C. and Leech appeared for Mr. Furlong.

Purcell appeared for the Royal Bank, who opposed on the ground of his having made to them a false and fraudulent representation of the state of his affairs, and that by using a fabricated statement, he induced them to stay proceedings against him.

Kernan, Q. C. was for the bankrupt.

The facts fully appear in the judgment.

LYNCH, J., in giving judgment, said:—This case is now before me upon the final examination of the bankrupt, and two parties principally object, to wit, namely, Mr. Furlong, and the Royal Bank. As far as Mr. Furlong is concerned, the case is one of grievous hardship and oppression. The bankrupt was formerly in his employment; he afterwards, having saved some money, was taken by him into partnership in the year 1856. The partnership lasted until 1859, when it was dissolved, and articles of dissolution duly prepared, giving an annuity of 250*l.* a-year, at least, to Mr. Furlong, and making other provisions for him with respect to his share of the capital in the concern; and it now appears plainly that the trade was a prosperous one up to the time of the dissolution of the partnership, and yet Mr. Furlong has never since been paid his annuity, but on the contrary, has had to pay enormous costs in an equity suit, and has now a bankrupt estate to look to for his valuable trade, and his successful suit, to have the partnership accounts settled. The result is, that ruin has been brought on all the parties, the trade has been put an end to, the property all wasted in litigation, and, in my judgment, all mainly through the default of the bankrupt, for the Court of Ch. has altogether placed the bankrupt in the wrong. It has been remarked that Mr. Furlong was himself the plt., and that if the assets have been wasted in litigation, he is to blame; but the bankrupt had possession of all the property—he had everything in his power; he was in, and Furlong was out, and unless Mr. Furlong had submitted to an unfounded claim, he had no other course but to institute proceedings; but he did not anticipate

that, although successful in establishing his claim, the answer to it was to be insolvency, and, judging by the nature of the defence made by the bankrupt in this suit, I do not consider that he acted *bona fide* in those proceedings. The judgment of Master Littton (than whom a higher authority cannot exist) has remarked on the state of the books, as kept during the partnership. These books were not before me, but every word of that judgment with additions thereto, might fairly be used in reference to the books of the bankrupt produced here. The evidence taken in this court shows the nature of the book-keeping disclosed in this case. Regular books were abandoned—loose sheets torn out of books adopted instead—entries made said to be taken from others in regular books, but how taken? Why, by totally changing them. It is said by way of excuse that the Chancery suit so occupied the time of himself and his clerk, that the books could not be regularly kept; but this seems to me an idle excuse, for it seems more troublesome to keep the loose sheet accounts than to go on with entries in regular books. The value of mercantile books is, that if truly kept they record the transactions occurring in the trade, and give a true history of the trader's operations, and enable the creditors to test the accuracy of his statements made to them. The moment they bear this character, when, as here, they are representatives of past transactions, made long after this occurrence, when bankruptcy may have been in view, they lose all their value, and can be only covers for frauds contemplated. So extraordinary a mode of book-keeping as was exhibited in this case, perhaps never was shown to the court, and it is hard to say that there is a true disclosure by accounts kept in such a way. But as connected with this accounting and mode of book-keeping, I think I may properly refer to the transactions with the Royal Bank. It appears that for some reason, not rationally explained, the bankrupt procured a statement of his affairs to be prepared for him. It is said he wanted to know how he stood, and accordingly he got this account prepared; but the primary item, namely, his profits, he himself states, he got the accountants, Brown and Craig, to adopt, without even testing its truth, and I am somewhat surprised that the name of Brown and Craig was procured to such a document as this, and a formal account like this, which *prima facie* imported that it was checked from the books of the trader, could be procured from them under the circumstances stated. Messrs. Brown and Craig disclaim all knowledge of the use that was afterwards made of that account, and I trust the disclaimer now made will prevent them again from authenticating a similar document. The use to which it was applied was, to make a full and fraudulent representation to the Royal Bank of the state of his affairs, and the Royal Bank now makes the charge against him that he used that fabricated statement to stay proceedings, and to procure (in which he failed) fresh credit. This case against him on the part of the bank is not denied, and I was asked to allow further accounting in order to show conclusively the real falsehood of the representation made; for of course he stands in this dilemma—if that account were true, he has not yet accounted for his assets; if false, he made a deliberate mis-statement, and perhaps some vague notion of a decision said to be made by the Court of Appeal (and it is a test of the propriety of such a rule), makes them prefer to take the latter alternative, in order to have the final examination passed. In this court *Re Keon*, 10 Ir. C. R. 111, I decided that, although I considered the party had fully accounted, yet that it was my bounden duty to adjourn the examination *sine die*, inasmuch as the conduct of the bankrupt showed fraudulent dealings and criminal acts, calculated to

[IRELAND.]

HUGHES V. MURRAY—MALCOLMSON V. O'DEA.

[H. OF L.]

disqualify from getting a certificate or going into trade again, and I purposely framed my order so as to have the question tried upon appeal, if the parties thought proper to do so. There was some decision in *Burke's* case not yet reported, and I cannot say what it is. Every case, no doubt, must be tested by its own merits, and the peculiar facts and circumstances connected with it; but I will never believe, unless coerced by a superior authority, that no matter what fraud or crimes a trader may commit, if he boldly comes into court and acknowledges them, he is bound to have his examination passed, get his certificate, and, after the lapse of a certain time, get into trade again. In my opinion such cannot be the law in this country; however, that question is not necessarily involved in the present case. As to the right of the court to adjourn the examination *sine die*, the power of the court is perfectly general, as given by the 140th section, and must be applicable to a case like this, or else this court would be put in the position of giving a false character and giving false testimony, in a manner prejudicial to the law and offensive to justice. In this case, however, I cannot certify that the bankrupt has fully accounted; he has not books to verify his transactions, and it is possible that there may be many transactions not now recorded, in books kept in the way in which they were kept. I am not satisfied with the accounting, because I have no certain basis to act upon in taking the accounts, and I do not see a reasonable ground for adopting the statements of the large losses. I see a heavy and expensive equity suit provoked and litigiously carried on by the bankrupt, to the ruin of himself and his former partner. I see deliberation in framing a false account, and procuring for it the false credit of the accountants' name thereto. I see this done fraudulently. I will enter my judgment as to this fraud on the minutes, and, considering all the circumstances of the case, I will adjourn this examination *sine die*.

CONSOLIDATED CHAMBER.

Reported by R. W. MILLER, Esq., LL.D., Barrister-at-Law.

Tuesday, March 10.

(Before MONAHAN, C. J.)

HUGHES V. MURRAY.

Attorney—Costs—Reference to taxation after twelve months—Special circumstances.

Where an action has been brought by an attorney for a sum of 68*l.*, balance of untaxed costs, more than twelve months after the delivery of the bill thereof; and it appeared that before action brought, the attorney had offered to take a sum of 40*l.* in full:

Held, that it was a proper case for a reference for taxation, and the special circumstances were sufficient, under the 12 & 13 Vict. c. 33, s. 2.

O'Driscoll, on behalf of the deft., moved that the proceedings in the action be stayed, and for a reference to taxation of the bill of costs, the subject of the action, the deft. offering to lodge the money. The costs were incurred, and the bill duly delivered, upwards of twelve months prior to the commencement of the action; but it appeared from the affidavit of the deft., that prior to the bringing of the action, the plt. had offered to take 40*l.* in full of the amount claimed, and had afterwards served his summons and plaint for the full balance, viz., 68*l.* The affidavit also relied on the ill-health of the deft., and his absence on that account from town; but this was contradicted by the plt.'s affidavit, but the offer to settle for the 40*l.* was not denied.

Learned, Q. C. (with him M'Kenna), submitted that no special circumstances were shown, sufficient to justify an order under the statute 12 & 13 Vict. c. 33.

Re Barnard, 2 De G. M. & G. 359;

Re Whicher, 13 M. & W. 549,

were cited. They also urged that, if the order should be made, it should provide that the plt. should have the costs of taxation and the costs of the motion, even though more than one-sixth should be taken off.

MONAHAN, C. J.—The mere circumstance of the attorney here offering, just before he brought his action, to take a sum of 40*l.* in full, of a sum of 68*l.* and then bringing his action for the latter sum, is, in my judgment, amply sufficient "special circumstance" to bring the case within the statute. Let further proceedings be stayed; the deft. to bring in and lodge the sum of 68*l.* within a week; refer the bill of costs to taxation; and reserve the costs of taxation and of the motion for the court.

House of Lords.

Reported by JAMES PATERSON, Esq., of the Middle Temple, Barrister-at-Law.

Tuesday, July 28.

MALCOLMSON V. O'DEA.

Fishery—Evidence—Ancient possession—Several fishery in navigable river—Evidence of title—Admissibility of old bill and answer in Chancery—Admissibility of ancient lease—Proof of title to ancient fishery.

M. brought an action against O. for breaking his several fishery in a public navigable river. At the trial, M., who was tenant of the corporation of L., gave in evidence a reconveyance by P., to the corporation of the fishery in question, dated 1684, and, in order to show there had been previously a pending suit between P. and the corporation, each claiming under conflicting grants from the Crown, M. gave in evidence a bill, filed by P. in the Court of Ch., against the corporation, with their answer, dated 1674. On exception to this evidence,

Held (reversing the judgment of the Irish Ex. Ch.), that such evidence was admissible as part of the history of the adverse claim of P., which ended in P.'s reconveyance to the corporation.

At the trial, in order to prove the ancient possession of the fishery, M. gave in evidence an assembly book of the corporation, containing entries showing that the fishery was then let for certain rents to a tenant.

On exception to this evidence,

Held (reversing the judgment of the Irish Ex. Ch.), that such book was admissible in evidence, for the rule is, that ancient documents, coming out of the proper custody, and purporting, upon the face of them, to exercise ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession.

Though *Magna Charta* made illegal all grants by the Crown, of a several fishery in a navigable river, which had not been in existence in the reign of Henry II., yet if evidence now be given of long enjoyment of a fishery there, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the reasonable presumption is that it became such in due course of law, and therefore must have been created before legal memory.

This was a proceeding in error from the judgment of the Court of Ex. Ch., in Ireland, sitting in error from the Court of Q. B., in Ireland, overruling the judgment given in that court in favour of the plt., on a bill of exceptions of the defts., by which they objected to the admissibility of certain documents given in evi-

dence by the plt., and that there was no evidence to go to the jury in support of the plt.'s claim to a several fishery in the Shannon, except in the Lax Weir, the plt.'s right to which is not in dispute.

This action was brought by the plt. in error, against the defts. in error, to recover damages for the defts. having fished in and carried away fish from the close, and several fisheries of the plt. in the River Shannon.

The plt., in the material paragraph of the plaint, charged the defts. "with having fished in a several fishery of the plt. in the River Shannon, called the "Fisher's Stent," extending from the weir called the Lax Weir in the east, to the River Meelick, on the west."

The Lax Weir is situated in the Shannon, and is about one mile and a half to the east of and above Thomond-bridge, in the county of the city of Limerick. The Island Point lies about half-way between the Lax Weir and Thomond-bridge. The river Meelick falls into the Shannon, near to Castle Donnell, and is within a circle of three miles round the old walls of the old city of Limerick. Castle Donnell is outside such circle, and is situate half-a-mile from the river Meelick, and is styled in the ordnance map Castle Donnell. The whole of the Shannon between the Lax Weir and river Meelick is within the county of the city of Limerick, and within the flux and reflux of the tide.

To the above plaint the defts. pleaded fourteen defences, the substance of which was, that the defts. denied the plt.'s property in the several fisheries and any trespass by fishing in any several fishery of the plt.; and they also alleged that the *locus in quo* was a common public fishery, and that it was an arm of the sea, or common public navigable river.

The plt., in answer to the 10th and 11th defences setting up a prescriptive right in the public to fish in the *locus in quo*, as part of an arm of the sea or public navigable river, replied in substance, that each of the several places and fisheries, and the part of the Shannon, and the part of the arm of the sea in which it is situated, was and is a several fishery and ancient possession of the Crown of England and Ireland, which subsequently became vested in the corporation of the City of Limerick in fee simple; and that, on the 31st January, 1834, the corporation demised such several fishery to Poole Gabbett for ninety-nine years; and that, on his death, Thomas Gabbett, his administrator, demised the same to the plt. for seventy-five years, whereby the plt. at the said several times when, &c., was possessed of, and entitled to, the said several fishery.

The issues came on to be tried on 23rd February, 1858, before Lord Chief Justice Lefroy and a special jury, when the jury found for the plt. on the issues joined as to a several fishery of the extent above described in the said third paragraph, and that the defts. had fished within the boundaries or extent of the said several fishery claimed by the plt. in the said third paragraph.

A bill of exceptions was tendered at the trial by the learned counsel on behalf of the defts. to the ruling of the Lord Chief Justice.

The bill contained eighteen exceptions, the first fifteen of which were taken to the admissibility of certain documents offered in evidence on the part of the plt. at the trial, which documents were admitted by the Lord Chief Justice; out of these fifteen, it was material to refer to the 9th and 10th exceptions, which were allowed by the Court of Ex. Ch. The remaining three exceptions, viz., the 16th, 17th and 18th, which were also allowed by the Court of Ex. Ch., in substance raised the question whether any evidence was given at the trial on the part of the plt., which warranted the Lord Chief Justice in leaving as a question to the jury the plt.'s right to a several fishery in the Shannon at the *locus in quo*.

The plt. deduced his title from the corporation of Limerick, and in support thereof produced in evidence, amongst others a lease, for ninety-nine years, bearing date 31st Jan. 1834, by the corporation to Poole Gabbett of the fishery by the following description, viz.:—

"All that and those the Great Weir, commonly called the Lax Weir, in the river Shannon, near Parteen, with the cribs, baskets, hurdles, and castle and the watch-house thereunto belonging, and adjoining and appurtenant, together with the fishings on the river Shannon, commonly called the Net Fishing, or Fisher's Stent, extending from the new Stent or new Extent, near the said Lax Weir, westward in the said river, according to the ancient custom, in as large and ample manner as the said Lax Weir and net fishing are now held and enjoyed by the corporation."

Also a certified copy of a bill in the Court of Chan. in Ireland, filed 16th Nov. 1674, by Sir George Preston, complaining of the interruption in the enjoyment by him of the fisheries granted to him by Chas. II., and a certified copy of the answer of the mayor, sheriffs, and citizens, and others.

The defts. objected to the admissibility of the bill in Chancery, on the ground that the bill and answer were not legal evidence, and that in the absence of proof of any decree determining the matters put in issue by the said bill and answer, the said bill and answer were immaterial and inadmissible in evidence. This formed the subject of the 9th exception.

The plt. also put in evidence a book, purporting to be the assembly book of the corporation of the city of Limerick, containing entries as to rent in arrear from tenants of the fishery. The defts. objected to it as not legal evidence, for that they appeared to have been made as private entries or memoranda of matters relating to the private business and affairs of the corporation of Limerick to which the public had no access. This formed the subject of the 10th exception.

16th exception.—And the counsel for the defts. at the close of the plt.'s case, called upon the learned Chief Justice, upon the evidence of the plt. to direct the jury on said evidence so read and given for the plt., that plt. was not entitled to a several fishery in the tidal part of said river Shannon, being a navigable river; and that there was not any evidence to take away or rebut the public right of fishing in said tidal and navigable part of the said river; but his Lordship refused so to direct the jury; and therefore the defts. excepted and pray that their exception may be placed on the record for the examination of the court above.

And the defts. produced and examined one Patrick Farrell, who deposed that he is a fisherman on the river Shannon; that he has fished in the river for the last fifty-one years, above Thomond-bridge and below Thomond-bridge; that above Thomond-bridge he has fished with a draft-net as far as the Island Point; that it is upwards of thirty yards above the Metal-bridge now built by the Limerick and Ennis Railway; that he fished above the Island Point, between the Metal-bridge and the Lax-weir, for the last twenty-six years; that at the highest part of the river where he fished he could not see the Lax-weir; below Thomond-bridge that he fished in the pool at both sides of the river; that he was convicted for fishing in the pool by Mr. Andrew James Watson, and fined 5*l.* and a month's imprisonment; that he never paid the fine or suffered a day's imprisonment; that he was also sentenced to a like penalty in the time of Mr. Poole Gabbett; that he knows other fishermen to have fished as he did; that some are short-net men; that he belongs to the long-net fishermen; he describes the mode of fishing and says he knows a great number of fishings. And the said witness, being cross-examined, deposed that he could not say when he was convicted at the suit of

Mr. Andrew James Watson; that it was upwards of thirty years ago; that he does not know whether the police hunted for him or not; that he does not recollect the exact year Mr. Gabbett prosecuted; that it was about seventeen years ago; he went to the court and heard himself convicted; that he has fished with long nets above Thomond-bridge for the last twenty-six years; that he was never convicted for fishing above Thomond-bridge; that it was for fishing at the pool, or about Barrington's-quay, he was convicted. And the said witness, on being re-examined, deposed that he did not wait for the police, nor did he avoid them, and that he continued to fish as usual.

And the said defts. also produced and examined John O'Dea, one of the said defts., who deposed that he is a fisherman living at Limerick, and in the place there called the Strand; that he has fished for salmon in the river Shannon, with a draft net, or long net, every season for the last thirty or forty years, and in all the places proper for net-fishing, from about a quarter of a mile below the salmon weir, down to and in the pool; that from his boyhood he has seen other men fishing in the same parts of the river, and with nets; that he never was summoned or convicted for so fishing; and that no action was brought against him for such fishing; that he has often fished eleven or twelve times a week, and in the daytime when the tide answered; that he used to fish from the salmon weir down the river as far as he pleased; and that the nearest point to the weir, whence he fished, was from below the castle; that he has often fished by day, and often took a good many salmon; that he knows the Island Point, and fished there, and about it, and above the place where the Metal Railway-bridge is built; that he has fished below Thomond-bridge, and has known of others to fish there; that he never heard of Castle Donnell until the law proceedings were commenced by plt. And the said witness being cross-examined, deposed that he never was prosecuted for fishing; that he knew people to have been prosecuted by Mr. Gabbett; that it was for fishing as far as Barrington's-quay, but never below it; that he never heard of the castle called Castle Donnell by that name, until the law was commenced; that the name the fishermen called it was Cromwell's Fort; that he never was prevented by Mr. Watson from fishing.

And the said defts. also produced and examined one James Tobin, who deposed that he is a fisherman, and lives near the Treaty Stone, Limerick; that he has been in the habit of fishing with a long net above and below Thomond-bridge, and up to within about 100 yards of the weir; that he knows the river or stream called Captain Keane's Creek on the north side; that he did not fish so far as that point on the south side; that he has been engaged fishing for the last thirty-eight years; that his father was a fisherman; that he was never stopped fishing except on one occasion; that Mr. Gabbett attempted to prevent him, and that he went on fishing notwithstanding; that he was prosecuted by Mr. Gabbett, and convicted; that he was fined 5*l.* and a month's imprisonment, but that he never paid the fine, nor was he imprisoned; that he caught salmon, and fished openly; that he was summoned three times, and sentenced three times by the mayor, Mr. Franklin (since dead), Alderman Watson, Mr. Cripps, and Mr. Gibson; that he never was brought before any other court; that he never paid any fine, nor was he imprisoned; that the place he generally fished was below Thomond-bridge. And the said witness, on being cross-examined, deposed that the boats and nets used by him in fishing were never taken from him; that he remembered Constable Joynt; that he never attacked Mr. Gabbett's men, nor was he one of the party that attacked them.

And the defts. also produced and examined one Michael Cahill, who deposed that he is a fisherman at

Limerick for the last forty-six years; that he was in the habit of fishing from the Island Point down to and below Thomond-bridge; that he often caught fish; that he was summoned about sixteen years since (after the trial, as he thinks) by Mr. Gabbett, for fishing; that the magistrates attending were Mr. Francis Spaight, Alderman Watson, Mr. Cripps and Mr. Vokes, of the police; that he was fined 5*l.*, but never paid it; that he fished on the next day in the day-time and by night; that he was never stopped by them (Gabbetts); that he fished in their sight openly. And the said witness, on being cross-examined, deposed that he never saw the police looking after him; that he heard of the bonfire made by Cripps; that he never was examined before this.

And the defts. also produced and examined one James Shanny, who deposed that he is a fisherman on the Shannon, with a snap net, and that it is about eighteen feet in length, and that it is used between two boats; that he was in the habit of fishing; that the night is the proper time for snap net fishing; that he would not catch any through the day; that he fished at Barrington's-quay, and all the way from that down; that he never was prevented there; that he never was prosecuted but once, in 1834, by Mr. Gabbett; that he was sentenced to two months' imprisonment, or a fine of 5*l.*; that he never was imprisoned or paid the fine; that he believed he had a right to fish, and told the magistrate so; that he knows a place below the weir called the Fisher's Stent; that it is a little below the Lax-weir; that this place was also called Poolbeg; that there was a stream running through it; that he remembers John Keane; could not fish there without three men. And the said witness, on being cross-examined, deposed that he never saw the Meelick river.

And the said defts. also produced and examined one James Hynes, who deposed that he is a snap net fisherman; that he fished and was in the habit of fishing from Parteen Creek down the river; that he could be seen from the Weir, and caught salmon there, and many of them; that he has fished for the last sixty years; that he did so since he was fifteen years of age; that he is now seventy-five years of age; that he never was stopped fishing, although attempts were made to do so; that when the party who wanted to prevent him fishing were stronger, he yielded, and when they were not he did not yield; that his boat or net was never seized, nor was he ever summoned for fishing; that there was a stone at the Limerick side of the river, called Armagh Stone, about forty yards below the Weir, and that it was the limit of the fishery of the Weir by Mr. Gabbett; that Poolbeg-hole was stopped by reason of the river being reversed at the Limerick side of the river.

And the said defts. then closed their case.

17th exception.—And thereupon the Lord Chief Justice summed up and charged the jury, and told them that, in his opinion, there was evidence to go to them in support of the plt.'s case; and at the conclusion of his Lordship's charge, and before the jury returned the verdict, counsel for the defts. called upon his Lordship to direct the jury, that upon the true and legal construction of the several grants of the Crown, and the other witnesses and documents given in evidence on the part of the plt., the public right of fishing in the tidal parts of the river Shannon, or in the place where the defts. fished, as proved in evidence, was not and has not been destroyed, taken away, or in any manner restrained; and the plt. had not at the times when and so forth, or any of them, a several fishery therein, as in summons and plaint alleged; and that the jury should find a verdict for the defts. upon all the issues except the tenth issue; but his Lordship refused so to direct the jury, and on the contrary informed them that there was evidence to go to them in support of the plt.'s case, on which they

might, if they so thought proper, find a verdict for the plt., and therefore the defts. except.

18th Exception. And counsel for the defts. called upon the learned Chief Justice to inform and direct the jury that there is no evidence of the plt.'s right to an exclusive or several fishery in the part of the river Shannon in which the fishing by the defts. took place, as proved in evidence, but his Lordship refused so to do; and on the contrary informed them, as aforesaid, that there was evidence to go to them in support of the plt.'s case, on which they might, if they so thought proper, find a verdict for the plt.; and therefore the defts. except; which several exceptions, and also the exceptions taken to the admissibility of documents read in evidence on the part of the plt., and on this dominical before stated, and also appearing on his Lordship's notes, the defts. pray may be placed on the record for the examination of the court above.

The learned Lord Chief Justice therefore overruled and refused to allow such exceptions, and to direct the jury, as prayed by the learned counsel on behalf of the defts.; whereupon the jury found a verdict for the plt., and they assessed his damages, besides his expenses and costs, to sixpence sterling, and for his expenses and costs to sixpence. The exceptions having been argued before the said Court of Q. B., Lefroy, C.J., Perrin, O'Brien, Hayes, J.J., the court (Perrin and O'Brien *dissentientibus*), on the 16th June 1859, overruled the said several exceptions, and gave judgment for the plt.

Such grounds of error were argued in the Court of Ex. Ch. of Ireland, when the six judges before whom the same were argued, *videlicet* Monahan, C. J., Keogh, Christian, J.J., Pigot, C. B., Fitzgerald, Hughes, BB., were unanimous in their judgment that the 9th exception should be allowed (Fitzgerald, B., *dissentiente*); that the 10th exception should be allowed; and as to the 16th, 17th and 18th exceptions, the judges were divided in opinion, the majority, *videlicet* Monahan, C. J., Christian, J., Pigot, C. B., and Hughes, B. (Fitzgerald, B., and Keogh, J., *dissentientibus*), being of opinion that those exceptions ought to have been allowed, and that there was no evidence to go to the jury in support of the right claimed by the plt., and thereupon judgment was given in the said Court of Ex. Ch. in favour of the defts., and that the judgment of the Court of Q. B. should, for the errors aforesaid, be reversed, and that the said 9th, 10th, 16th, 17th, and 18th exceptions should be allowed, and that the verdict so found as aforesaid for the plt. should be quashed, and that the said Court of Q. B. should command the sheriff to cause a jury to come anew to try the issues and assess damages anew, and that each party should abide their own costs.

Error having been brought to the H. of L., Cairns, Q.C., Mellish, Q.C. and Baylis, for the plt. in error.

Mainstay, Q.C. and Barry for the defts. in error.

At the conclusion of the arguments, the House put the following questions to the learned judges who attended, viz. Pollock, C. B., Williams and Willes, J.J. :—

1. Ought the 9th exception to have been allowed or disallowed?

2. Ought the 10th exception to have been allowed or disallowed?

3. Ought the 16th, 17th and 18th exceptions to have been allowed or disallowed?

After time taken to consider, the following unanimous opinion was delivered by

WILLES, J.—My Lords, in answer to the first question, we are of opinion that the 9th exception ought not to have been allowed. That exception was to the admission of a certified copy of a bill in the Irish Chancery of the 16th Nov. 1674, and of an answer thereto. The bill was filed by Sir George Preston,

against the corporation of Limerick and others, for the purpose of defending and quieting his alleged possession of a fishery substantially coextensive with that in dispute, and which he claimed under two grants of King Charles II. against aggressions of the corporation. It alleged difficulties in the way of an action at law, and prayed a discovery, account, and injunction. The answer was filed on the 10th Feb. in the same year, 1674-5, and after insisting that the matter was of common law cognizance, it proceeded amongst other things to allege that the corporation had been entitled to the fishery before the wars, and had never forfeited their right thereto. Now this bill and answer were read as evidence of the facts stated therein. They were admitted, as appears by the record, "for the purpose of showing a pending suit." Was it then legitimate evidence in the cause to show that in the year 1764-5 there was litigation between Sir George Preston and the corporation as to the right to the fishery under conflicting grants from the Crown? We are of opinion that it was, as part of the history of the adverse claim of Sir George Preston, which ended in the reconveyance of 1684. The weight which the existence of that litigation adds to the dealings between Sir George Preston and the corporation is not dependent upon the assertions made by either of the litigant parties in the bill and answer. If A. were to claim property of which B. was in possession as grantee of the Crown, under an adverse title, *e. g.*, a conveyance from the Crown as upon a forfeiture subsequent to B.'s grant, and were to take legal proceedings against B., and, upon B.'s answering, and setting up his own elder right, were then in order to quiet B.'s title to execute a deed purporting to convey or release to him the whole or part, that would surely be a piece of evidence to prove to posterity B.'s title, by way of showing an assertion of title on B.'s part, and submission upon that of his adversary having a *prima facie* interest, and a reasonable man might conclude that the force of the admission was greater, because it was accompanied by the abandonment of a litigation, by reason of which according to all probability the facts were more thoroughly ascertained and considered, and that under better advice than if the law had not been appealed to. We ought not to pass over a suggestion which has been made in the course of the case that Sir G. Preston's suit was, or may have been, collusive. If we were to adopt that suggestion, we should be begging a question not touched by the exception which we see no sufficient evidence to raise, and which, if there were, was one for the jury, not the court. We are of opinion, therefore, that the bill and answer were admissible for the purpose for which they were used at the trial, and that the 9th exception ought not to have been allowed. Your Lordships' next question to the judges is, whether the 10th exception ought to have been allowed? That exception was to the admission in evidence of "a certain book, purporting to be the assembly-book of the corporation of Limerick in the year of our Lord 1676," to wit, an entry of the 16th Oct. 1676, and also another entry of an account of rents in arrear. We cannot pass by this exception without noting that it treats the two entries as either both admissible or both inadmissible, and it might be a question whether it could be sustained, supposing either of the documents mentioned therein to be admissible. We need not, however, further criticise its language, because, construing it, not as one exception to the book, but as two distinct and separate exceptions, one to the entry of the 16th Oct. 1676, and another to the account of arrears, we are of opinion that each of such exceptions ought to have been overruled. As to the first entry, relating to the letting of the net fishing and fisher's stint to Carroll, we are dealing with something done nearly two centuries ago, and the great stress of the case bore upon the proof of the possession,

The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownerships of their personal knowledge, and resort must necessarily be had to written evidence. In some cases, written statements of title are admitted, even when they amount to mere assertion, as in the case of a right affecting the public generally; but the entry now under consideration is admissible according to a rule equally applicable to a fishery in a private pond as to one in a public navigable river. That rule is, that ancient documents coming out of proper custody, and purporting, upon the face of them to exercise ownership, such as a lease or a licence may be given in evidence, without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly in the case of properly allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be leases or licences ought to be of no avail. It may be a question, whether the absence of proof of enjoyment consistent with such a document goes to the admissibility or only to the weight of the evidence, probably the latter. This, however, is not material in the present case, where repeated payment and receipt of rent under leases was proved. The only question is, whether the entry is a mere statement that Carroll had become tenant to the corporation or a mere direction to prepare a lease to him, or whether it purports to be his warrant and licence for fishing in the river. In the former case it would be a mere written assertion by the corporation and its officers; in the latter it was an act of ownership, for it was a licence to another to use the fishery. Nor was it less a licence because for want of a seal it was revocable on the ground that a grant of an incorporeal hereditament for a time certain must be under seal, and that a corporation is incapable of passing an interest or giving an irrevocable licence without seal. Whether strong or weak, it was an act of ownership as much as if one gave another a licence of pleasure to fish in his river, which in its nature must be revocable. If Carroll had enjoyed the fishery under it, he would have been a licensee, not a trespasser, and the licence would have determined the amount he was to pay as such for the occupation: (*Wood v. Tate*, 2 N. R. 247; and *Mayor of Stafford v. Till*, 4 Bing. 74.) And, according to the rule already stated, the absence of proof that he did, is made up for by the evidence of ownership independent of the licence. The cases relied upon to the contrary, are cases where there was some mere assertion of title, or mere direction of an agent to prepare a document, which would have been, if executed, an act of ownership. We know of no case in which an ancient document, coming from the proper custody, and purporting to be an act of ownership, by way of lease or licence over the property, in company with other evidence showing enjoyment consistent with such ownership, has been rejected upon the ground that the enjoyment could not be referred to the particular document in question. It was suggested, indeed, that the reason why an ancient lease is admitted is because it is signed by the lessee as well as by the lessor, and so is an admission by a third person, and thus that an ancient lease, not signed by the lessee, is inadmissible. This, however, is contrary to our experience, and to the true reason for admitting such evidence, viz., because of its showing an act or acts of ownership. We are not disposed to narrow the bounds of the law of evidence with respect to ancient possessions, and we think the ruling

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of that accurate lawyer, Mr. Justice Heath, in *Rogers v. Allen*, 1 Campb. 309, is abundant authority for the admissibility of the entry in question. As to the other document included in the 10th exception, we think it admissible for reasons which may perhaps also apply to that which we have been considering. It is certainly not legitimate evidence of ownership, for it is a mere statement of a particular fact; but we think it admissible for another purpose, namely, to show by an authentic document of the time the meaning of the language used in the licence, and to be found in so many other places, viz., "the Fisher's Stent." The licence relates to the "Net Fishing and Fisher's Stent." The account of arrears speaks of what may be reasonably inferred to be the same property as the "Net Fishing." The amount and effect of the evidence may be small, but the evidence is distinct, so far as it goes, that "Fisher's Stent," and "Net Fishing" were in 1678 interchangeable terms. This is not irrelevant, merely because the defendants admit that the corporation are entitled, besides the the wear to some net fishing, which, however, they say cannot be defined, and is therefore lost. Having heard the argument in your Lordships' house upon the construction of the words in the charter of 25 Eliz., "*Les werres vocat lexwerres, Gurgites Fyssher's Stente*," we cannot say that this was not important evidence, nor wonder that the plaintiff preferred relying upon his own proofs, rather than upon the defendant's qualified admission. We may consult ancient authors to learn the meaning of "Gurgites," and why not learn of the governing body of Limerick, in 1678, whose genuine language is before us, what was meant by the "Fisher's Stent" in their days. The only remaining question is, whether the 16th, 17th and 18th exceptions ought to have been allowed. We think all those exceptions ought to have been disallowed. The 16th exception is in substance, that there was no evidence of a several fishery in the tidal part of the river Shannon, a navigable river, to take away or rebut the public right of fishing there. The 17th and 18th exceptions are in substance that there was no evidence of an exclusive or several right of fishery in the place where the defendant fished between the weir and Thomond-bridge. Upon this record no question properly arises with respect to the bed and soil of the river. If the finding as to that was entered by mistake (which, considering that a several fishery may include the soil, we do not say it was), it would have been amended by Lord Chief Justice Leffroy, and by him only, at chambers, from his notes. It is now quite immaterial as between these parties. No exception is founded upon it; and the argument of the learned counsel as to that extraneous matter cannot affect our opinion upon the true question raised by these three exceptions, which is, whether there be evidence of a fishery, as found by the jury, from the Lax Wear on the east to the river Meelick on the west, that being the extreme limit of the county of the city. That such a right may lawfully exist is clear. The soil of "navigable tidal rivers," like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for Magna Charta, the Crown could by its prerogative exclude the public from such *prima facie* right and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by act of the Crown not later than the reign of Henry II. If evidence be given of long enjoyment of a fishery to the exclusion of others of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is not that you say, this is a usurpation, for it is not traced back to the time of

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Henry II., but that you presume that the fishery being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory. Some discussion took place during the argument as to the proper name of such a fishery, whether it ought to have been called in the pleadings (following Blackstone) a "free" instead of a "several" fishery. This is more of the confusion which the ambiguous use of the word "free" has occasioned from as early as the Year-book of Hen. 7, p. 7, folio 13, down to the case of *Holford v. Bailey*, Q. B. 13, where it was clearly shown that the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free" (used as in free warren), and a right in common with others, usually called "common of fishery," sometimes "free" (used as in free port). The fishery as in this case is sufficiently described as a "several" fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil. Much argument also took place with respect to the meaning of the words "gurgites," "gors," and "wear." They appear all to be words of more ample meaning than was allowed to them in the argument against the right. Of course we are principally concerned with the mediæval use of the word "gurgies," though, inasmuch as the use of Latin in legal documents has been justified by its unchangeableness, we are at liberty to observe that classic authors applied the word "gurgies" to the open sea, to a lake, and to the course of a river, instances of which are collected in the dictionary (Faccioliati, London edition, 850, 851). As to the use of the word in later times, Lord Coke says: (Co. Lit., 5 b.) "Gurgies, a deep pit of water, a gore, or gulph consisted of water and land, and, therefore, by grant thereof, by that name the soil doth passe, and shall lay his esples in taking of fishes as beames and roaches." In Domesday it is called "gnort," "gort," and "gors," plurally, as, for example, "de 3 gors Mille Anguillæ." To the same effect is the argument in *Throckmorton v. Tracy*, 1 Plowden, 154, which shows that "gurgies" may stand for pool, and is of wider significance than "wear." Cowell, under the word "gort," finds fault with Lord Coke's statement, that "gurgies" and "gort" correspond, and he says that "gort" is old French for "wear." Cowell's criticism, however, is proved too narrow by reference to Kelham's Norman-French Dictionary, p. 116, where "gort," "gorse," or "gorts" is translated "a stream or pool, a watery place, a weir, a fish-pond, a ditch, a dam, a gorse." And with respect to the word "wear" itself, although its etymology be different, we find in the Anglo-Saxon dictionary that it had anciently a more extensive application than now. At p. 243 of Bosworth, the word "waer," or "wér," answering to our "wear," is translated: "1. An enclosure, a place enclosed; 2. A fish-pond, a place, or engine for catching and keeping fish, a wear; 3. The sea, a wave." The only reference which we have met with in the old book to the use of the word "wear," is the dictum in the year book of 14 H. & M. 2, from which it seems that a grant or exception of a wear includes the fishery. Therefore, especially when we bear in mind the consciousness of language used in ancient times we cannot doubt that any criticism founded upon a narrow construction of these words is deceptive. The word "gurgites," used in addition to "Lax Wear," instead of being restricted to imaginary, or possible scattered wears, the existence of which is unproved, and the nature of which is unknown appears to us more properly to apply to all the streams, pools and reaches of the river so far as the fishing extends. Probably it ought to be thus translated, and not as "wears" in the earlier documents. There is no improbability in the early appropriation of this always

valuable property, or even a more extensive fishery, either in the time of the Irish Princes or in that of the Ostmen, who in this and other parts displaced the ancient inhabitants, and who no doubt gave the name of Lax Wear (Leax Waer or Lachs Wehr) to the chief accessory of the fishery, or by Henry II. in his grant to the companion of Strongbow. There is nothing improbable in its having been granted over in later times to the ancient and loyal city of Limerick. It appears by the earlier documents, construed by the light of subsequent user, that the fisheries of the waters of Limerick, which means at least the fishery within the city bounds, were a distinct and separate property from before the time of legal memory, and that they included the Lax Wear and the Shannon so far as the city boundary extended. All that fishery appears to have been granted to the corporation at latest by the charter of Eliz. 25, under which rent has ever since been paid, and which granted "les Werrea," called "lex Werrea, Gurgites, Fysshers Stente," and reserved a rent "de et pro predictis gurgitibus in predictâ aquâ de Shenyn vocatis Fishers Stent," and no rent out of Lax Weir, whereof the corporation had had undisputed possession, showing as distinctly as language can, that the Fisher's Stent was something over and above the mere wear; and at least so early as that reign the fishing appears in terms by the Crown rent-rolls and otherwise (for instance, a passage dated A. D. 1577, "The said wear, commonly called the Fisher's Stent, near the city of Limerick, from the wear called the Lax Were on the east to the river near Castle Donel on the west") to have been substantially the same as it is now claimed by the plt. The subsequent dealings with the property do not show that the corporation ever lost any part of the right acquired under the charter to the whole fishery; but on the contrary, they show a long enjoyment of it to as great an extent as the corporation and their leasees seem to have thought it worth their while to enforce their rights, which were no doubt considerably interfered with from time to time by reason of the neighbourhood of a large city, and the great extent of the property, making it difficult to watch, especially at night, and by reason of the ample rights which the public are, notwithstanding the several fishery, entitled to exercise upon the river as a public highway and port; making it impossible to warn people off, unless detected in the very act of salmon fishing, but without, so far as we can see, any such acquiescence of the proprietors as to constitute an admission on their part that the property has by surrender or otherwise, been diminished since the reign of Elizabeth. In our opinion the evidence strongly preponderated in favour of the plt. We spare your Lordships any discussion of the evidence in detail, because, having examined it for ourselves, we may upon this principal part of the case express our concurrence in the masterly judgment of Baron Fitzgerald, a performance which we cannot hope to improve upon. We are thus of opinion that none of the exceptions to which the question relate ought to have been allowed.

Cur. adv. vult.

The LORD CHANCELLOR.—My Lords, the plt. in error was also the plt. in this court below, in an action brought by him against the defts. to recover damages for having fished and carried away fish from a fishery in the river Shannon claimed by the plt., the plt. being the lessee of the Corporation of Limerick, who claimed to be owners of that fishery. At the trial of the action, a bill of exceptions was tendered to the admissibility of documents in evidence, which bill of exceptions was duly received by the learned judge. On the question coming on to be argued in the Court of Q. B. in Ireland, the court disallowed some of these exceptions. From that judgment there was an appeal to the Court of Ex. Ch. in Ireland, and the Court of Ex. Ch., differing from the Court of Q. B., allowed

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the 9th, 10th, 16th, 17th and 18th of those exceptions. From that judgment of the Court of Ex. Ch. the present appeal is brought to your Lordships' House. The learned judges who attended your Lordships' House on the occasion of the arguments have delivered an unanimous and a very elaborate and learned judgment by Willes, J. The conclusion at which the learned judges arrived was in truth, if I am right, anticipated by your Lordships at the end of the arguments. Your Lordships were wholly prepared for the conclusion at which the learned judges arrived, and I think your Lordships will agree with the learned judges in their conclusion. I cannot forbear from expressing the feeling of admiration with which I have read that judgment, and also the very masterly judgment given by Fitzgerald, B. in the court below. I entirely concur in the reasons of the judges, and it is wholly unnecessary to repeat them now to your Lordships. I shall therefore move your Lordships that the judgment of the Court of Ex. Ch. be reversed, and the judgment of the Court of Q. B. be affirmed.

Lords CRANWORTH and CHELMSFORD concurred.

Judgment reversed.

Plt. in error's attorneys, Gregory, Rowcliffe and Skirrow.

Def't. in error's attorney, H. Cruise.

Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Tuesday, July 7.

(Present—The Right Hon. Lord KINGSDOWN, Sir E. RYAN, and Sir J. T. COLERIDGE.)

BULLEN v. A'BECKETT.

Executor—Real estate—Statute making land liable to just debts of deceased—Construction.

A statute of 1814 enacted that lands in New South Wales should be liable to and chargeable with the debts of deceased persons there, as lands in England were for specialty debts:

Held, that this statute did not pass real estate to the executor and enable creditors of the deceased to seize lands of the deceased in the executor's hands, as if they were personal estate.

This was an appeal from a judgment of the Supreme Court of Melbourne, in the colony of Victoria,

The resps. A'Beckett and others brought an action of ejectment against Mathewson and another to recover possession of a piece of land, and the apps. were let in to defend. The action was brought under these circumstances. John Mills, the crown grantee of the premises in fee simple, died in 1841, devising these premises to Peers and Witton, as trustees for his daughter Emma. The executors were Peers, Witton and the widow of the testator. In 1842 Hannah Mills, the widow, married Thomas G. W. J. Robinson, and by deed, in 1842, the trustees Peers and Witton conveyed the premises to Robinson on the trusts of the will. Peers died in 1850. By deed of 26th Sept. 1860, Robinson and Witton, under a decree of the court in its equitable jurisdiction, conveyed the premises comprised in the deed of Dec. 9th 1842, to the resps. A'Beckett and Weigall. The resps.' claim was founded upon the will and the two deeds above mentioned, so far as the subject-matter of this appeal was concerned.

The apps. derived their title in the following manner:—

On Nov. 30, 1843, judgment by default was signed in an action upon a covenant made by one Joseph Moore and the testator for the payment of 600l. The

action was brought by Hew Burn against Moore and the executrix and executors of the testator, Peers, Witton, and Hannah Robinson, with whom her then husband Robinson was joined as a def't.

By sect. 4 of 54 Geo. 3, c. 15, intituled "An Act for the more easy recovery of debts in His Majesty's colony of New South Wales," it was enacted,

"That from and after the 25th day of June 1814, the houses, lands, and other hereditaments and real estates, situate or being within the colony of New South Wales or its dependencies, belonging to any person indebted, shall be liable to, and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to His Majesty or any of his subjects, and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process in any court of law or equity in the said colony of New South Wales or its dependencies, for seizing, extending, selling, or disposing of any such houses, lands, and other hereditaments, and real estates towards the satisfaction of such debts, duties, and demands, and in like manner, as personal estates in the said colony are seized, extended, sold, or disposed of for the satisfaction of debts."

Under a writ of execution of the judgment in *Burns v. Moore and others*, the sheriff, on or about Jan. 27, 1844, sold a portion of the premises sought to be recovered to Burns, and another portion to the app. Richey. The bill of sale by the sheriff to Burns was dated July 25, 1844; that to Richey, March 14, 1846. Burns afterwards conveyed to Vaughan, and Vaughan to the app. Bullen.

By deed, dated May 26, 1852, and expressed to be for the more effectually establishing and confirming the title of Bullen, under the above-mentioned sale and conveyance, Witton, as the then surviving trustee, conveyed to Bullen the premises purchased by Burns from the sheriff. By sect. 11 of Act 5, Vic. No. 21, of the Governor and Council of the colony of Victoria, intituled, "An Act to amend the Act for the registration of deeds, and to provide for the establishing of a separate registry for Sydney and Port Philip respectively," it was enacted, "That after the passing of this Act, so much of the said recited Acts as enacts that no deed, conveyance, or other instrument in writing, conveying or affecting any lands, tenements, or hereditaments, shall be subject to lose any priority to which the same might otherwise be legally entitled, if the same be registered in conformity with that Act, within the times therein for that purpose limited, shall be, and the same is hereby repealed, and that all deeds and other instruments affecting any lands or hereditaments in New South Wales or its dependencies, which shall be executed or made after the passing of this Act, and which shall be duly registered under the provisions of this Act, shall have and take priority, not according to their respective dates, but according to the priority of registration thereof only, provided always that this section shall not extend to or affect any deed which shall be executed at any place in Europe, within twelve months, or at any other place elsewhere out of New South Wales, within six months, after the passing of this Act."

All the deeds in evidence in the action, and which have been above referred to, were, with the exception of that of Dec. 9, 1842, duly registered in accordance with the provisions of that section. The apps. also supported their case at the trial by the evidence of various persons, to the effect that Peers and Robinson were cognizant of and held themselves out as sanctioning the sales by the sheriff. No evidence was produced at the trial that any of the resps. had been in possession of the premises, or in receipt of the rents or

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profits thereof, for the space of a year next before the deed of Sept. 26, 1860.

The action was tried by a jury in May 1861, and resulted in a verdict for the resps., the plts. in the action, leave being reserved to the defts., the apps., to move to enter the verdict for them or either of them, if the court, from the exhibits and notes of evidence, should think them or either of them entitled thereto, the court having the same power as a jury to draw inferences of fact.

The Supreme Court, after rules were granted and arguments heard, discharged the rules; the present appeal was then brought.

Lush, Q.C., Mellish, Q.C., and Lord for the apps.

Cairns, Q.C., Terrell and Garth for the resps.

Cur. ado. vult.

Sir J. T. COLERIDGE.—This is an appeal against a judgment of the Supreme Court of Melbourne in an action of ejectment brought by the resps., in which a verdict passed for them with leave to move to enter it for the apps., and in deciding that question the court was to have the same power as a jury to draw inferences of fact. A rule was accordingly obtained, and, after argument, discharged by the unanimous opinion of the court, against which the present appeal has been brought. The resps. may be stated generally to claim the premises in question under the will of John Mills and two subsequent and successive conveyances; the first in 1842 by Peers and Witton, trustees under the will, to Robinson, who had married Hannah Mills, the widow and executrix of the will, with Peers and Witton executors; the second in 1860, by Robinson and Witton (Peers having died), under a decree of the Court of Ch. in the colony, to A'Beckett and Weigall, the two first resps. The apps. claim under sales by the sheriff in execution of a writ of *fi. fa.* issued upon a judgment by default in an action brought upon a covenant of the testator Mills. The action was brought by one Brown against one Moore, a co-covenantor with the testator Mills and his executrix and executors. Upon these facts, the first question, and the only one on which any serious argument was maintained, arose. The apps. maintain, that in an action against an executor to recover the debt of a testator, in which the plt. recovers a judgment, the sheriff may sell and convey to a purchaser the lands of the testator, which involves the proposition, not merely that the lands are by law liable for the debt, but that they pass to the executor as such, and are in his hands as legal assets, at least for that purpose. To support this the 54 Geo. 3, c. 15, s. 4, is relied on. That section, after enacting that lands and other hereditaments and real estates in New South Wales, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of bond or specialty debts, goes on as follows: "and shall be subject to the like remedies, proceedings, and process in any court of law or equity in the said colony or its dependencies, for seizing, extending, selling, or disposing of any such houses, lands, &c., towards the satisfaction of such debts, &c., and in like manner as personal estates in the said colony are seized, extended, sold, or disposed of for the satisfaction of debts." The apps. contend for a literal construction of these words. Lands, they say, are to be subject to the like remedies and process for seizing and disposing of them towards the satisfaction of debts, and in like manner as personal estates are seized or disposed of for the same purpose. As, therefore, the personal estate passes to the executor, and is liable to be levied on in his hands under a *fi. facias*, so the real estate must be considered as in his hands and liable to the same process. It is obvious that if this be the true

construction, the nature of the property, and the course of its legal devolution, must be changed. It is one thing that the heir, or the devisee as the case may be, should take the real estate subject to being charged in respect of debts, and that the whole property should be administered in a court of equity, with a due and equal respect to the rights of all parties claimants upon it; and another that it should be in the power of any single creditor to charge the executor to the extent of his debt and the value of the land, and for the executor to sell the land of which *de facto* he has not the possession, and of which another has who is not made a party to the creditor's proceeding. There are no words in the section that import any such change in the law, or any intention to make it, and there should have been the clearest to warrant such a construction. The object of the section clearly was to render real estate in New South Wales liable for debts of every kind, as it was in England for specialty debts, and the creditor is to proceed in respect of the real estate as he would in respect of the personal estate, but in both instances against the person in whom the property is. This object the words used seem to their Lordships, in their obvious construction, sufficiently to carry out; but they cannot be made, without doing them great violence, to import what the apps. contend for, nor indeed could this be held without leading to many most inconvenient consequences. And if the section does not import that the real estate is to pass to the executor, at least for the purposes of the act, then the apps. must contend that the executor is to be liable to the extent of its value, and be compelled to deal with it as legal assets, although in the hands of their heir or devisee, he himself having no control over it whatever. Every lawyer must see at once in how many ways and to what a serious extent injustice may very probably result, and in many cases from this. Nothing but an established course of practice, or some conclusive authority, would warrant their Lordships in adopting a construction open to such remarks; but it appears from the judgment of the court below that the opposite construction has always prevailed in the colony; and the cases cited in the argument for the apps. do not apply for the reasons stated in that judgment, in which their Lordships concur, and which it is unnecessary now to repeat. Another point which was made for the apps. arose upon the Colonial Registration Act, it appearing that the conveyance of Peers and Witton to Robinson in 1842, had not been registered, whereas a later conveyance from Witton to Bullen had been, which latter, therefore, it was urged, would have priority over the former. In order however, to the giving it this priority, it must have been indeed executed *bonâ fide* and for a valuable consideration. Whether this were so was a question of fact, and one upon which, therefore, the court were by consent to draw their inference. It appears that it distinctly refused to draw this inference in favour of the deed, and, as appears to their Lordships, for sufficient reason. By the earlier deed Witton had joined with Peers his co-trustee in conveying the property to Robinson upon the trusts of the will; it was in effect an exercise of the power of changing the trustees conferred by the will. By the later deed Witton, who had made this previous conveyance, conveys to Vaughan, who had been a purchaser under the sheriff, in order to confirm the title from the sheriff, for a nominal consideration only. Whatever may be thought of the *bonâ fides* of this, it was clearly not a deed for a valuable consideration. Their Lordships upon the whole, therefore, think that the grounds of appeal wholly fail. They will express that opinion to Her Majesty, and humbly advise that it be dismissed with costs.

Judgment affirmed.

Apps.' attorneys, Lawrance, Plews and Co.

Resps.' attorneys, Young, Jones and Fallings.

Monday, July 22.

(Present—The Right Hon. KNIGHT BRUCE, L. J.,
TURNER, L. J. and Sir J. T. COLERIDGE.)

Re HILLS' PATENT.

*Patent—Prolongation applied for—Petitioner's merit
and remuneration—Accounts required—Opposition
to prolongation—Costs—Practice.*

*On an application to the Privy Council for prolonging
a patent, the court will not try the validity of the
patent; and though it will not extend a patent which
is manifestly bad, it will not entertain questions
of doubtful validity.*

*The proper questions for the court to consider are the
degree of merit to be attributed to the petitioner in
respect both of the novelty and utility of his inven-
tion, and the amount of remuneration he has re-
ceived or secured. On the latter point the peti-
tioner must produce satisfactory accounts, so as to
show what profits were in a large sense attributable
to the patent; and he is not entitled to deduct from
profits any loss by foolish or imprudent bargains
or hasty compromises of litigation. And where he
manufactures his own invention, he is not entitled
to deduct two-thirds as manufacturer's profits and
count only the other third as the profit alone attri-
butable to the patent.*

This was an application for the prolongation of a
patent for making gas. The application was opposed
by various parties in the circumstances and on the
grounds set forth in the judgment of the court.

*Kelly, Q.C., Grove, Q.C. and Hindmarch, Q.C. for
the petitioner.*

*Cairns, Q.C., Bovill, Q.C., Denman, Q.C., Webster,
Dress, Honyman and White for opposing parties.*

Cur. adv. vult.

Sir J. T. COLERIDGE.—This was an application for the
prolongation of a patent granted on the 28th Nov.
1849, for an "Improved Mode of compressing Peat
for making Fuel or Gas, and of manufacturing Gas, or
of obtaining certain substances applicable for purifying
the same." It has been resisted by an unusual
number of opponents, and the several grounds of want
of novelty, and want of utility, and of the patentee
having had sufficient remuneration, are insisted on in
the several notices of objection put in by the several
opponents. Their Lordships, however, have not in
these cases been in the habit of trying the validity of
patents. They will not, of course, recommend the
extension of a patent which is manifestly bad; but,
as the other hand, they will not generally enter into
questions of doubtful validity. They lay aside, there-
fore, the questions of want of novelty and want of
utility, so far as they affect the validity of this patent.
Indeed, the learned counsel for the opponents dis-
claimed, and very properly, any intention of impeaching
its validity directly; but they contended that, both
with respect to the novelty and the utility of the
invention, the degree of merit to be attributed to the
petitioner ought to be taken into account, and in
their Lordships' judgment they are right in that
contention. There are two points, therefore,
of general application, material to be considered
in this case: the degree of merit to be attributed
to the petitioner in respect both of the novelty
and utility of his invention, and the amount
of remuneration received by him or secured by him.
To these points, which are of general application, must
be added a third, respecting a French patent, granted
to one Richard Laming, for fifteen years from the
22d Feb. 1849, earlier, therefore, than the petitioner's
patent, and having still some months to run; and if
this French patent be held to be for the same invention
as the petitioner's, the power of prolongation would
be, at all events, limited to so short a period that it
would be clearly improper to exercise it. It may be

convenient to say all which their Lordships deem it
necessary to say on this point before proceeding to
dispose of the other two. As the patent now under
consideration was granted before the passing of the
15 & 16 Vict. c. 83, and as the French patent has
not yet expired, this case does not fall strictly within
the operation of the 25th section of the Act; but the
policy which the Legislature there indicates must still
guide their Lordships in the exercise of their discretion.
That policy is clear to prevent, in the case of inventions
made and patented in any foreign country, the con-
tinuance of a monopoly in this country by virtue of
any patent subsequently granted here, beyond the
time when the discovery shall have become public pro-
perty in the foreign country. If, therefore, it were clear
that the discoveries of Hills and Laming were the same,
however independently made, and that of Laming were
about, within a few months, to become the property of
the public by efflux of time, their Lordships would
certainly think it wrong to recommend a prolongation of
the monopoly in this country. Upon a careful examina-
tion, however, of the two specifications, and a con-
sideration of the conflicting evidence upon the subject,
and recollecting how this question has been dealt with
in the courts of law and equity before which it has
come, their Lordships do not feel so free from doubt as
to warrant them in rejecting the petitioner's application
on this ground alone, more especially as they are not
satisfied that any previous knowledge of Laming's
experiments is brought home to the petitioner. It
cannot be doubted, however, that these two discoveries
approach very closely to each other; and although
their Lordships do not decide this case on the ground
of this objection alone, it is not to be understood that,
in another part of the inquiry, it has had no weight in
the conclusion at which they have arrived on the whole
case. Their Lordships now pass to the first of the two
questions stated above. It may be recollected from
what has been already said, that in determining
whether to recommend the prolongation of a patent or
not, even where the claim to the first discovery and the
beneficial nature of that discovery are both con-
ceded, it will be still proper to consider both
the degree of merit as inventor, and the amount
of the benefit to the public flowing directly
from the invention. A monopoly, limited to a certain
time, is properly the reward which the law assigns to
the patentee for the invention and disclosure to
the public of his mode of proceeding. Whether that
term shall be extended, in effect whether a second
patent shall be granted for the same consideration,
and the enjoyment by the public of its vested right be
postponed, is to depend on the exercise of a discretion,
judicial indeed, yet to be influenced by every such
circumstance as would properly weigh on a sensible
and considerate person in determining whether an
extraordinary privilege not of strict right, but rather of
equitable reward, should be conferred. Now, one may
be strictly an inventor within the legal meaning of the
term, no one before him may have made and disclosed
the discovery in all its terms as described in his
specification, but this may have been the successful
result of long and patient labour, and of great and
unaided ingenuity, without which, for all that appears,
the public would never have had the benefit of the
discovery; or it may have been but a happy accident,
or a fortunate guess; or it may have been very closely
led up to by earlier, and in a true sense more meri-
torious, but still incomplete experiments. Different de-
grees of merit must surely be attributed to an inventor
under these different circumstances. The moral claim
to an extension of time may in this way be indefinitely
varied according as the circumstances approach nearer
to the one or the other of the above suppositions.
The same principle will apply to the consideration of
benefit conferred upon the public. The extent of the

benefit conferred must vary in each case with the circumstances. The principal question always is, has the individual patentee under all the circumstances received what in equity and good sense may be considered a sufficient remuneration? On his own part, of course, there must have been no want of good faith or prudent exertion; and further, as the loss to the public may be important in the consideration, it may be necessary in some cases not to confine the inquiry to the state of things at the date of the patent, but to regard also the circumstances existing at the time when the application is made. These principles may be collected from the previous decisions, and it has been thought right here to restate them shortly as relevant to the present case, and as the points have often arisen and will probably arise again in further cases. Much evidence was laid before their Lordships to reduce their estimate of the patentee's merit in respect of originality. Some earlier patents were introduced, and the greatest reliance was placed on the claims made on behalf of Mr. Laming and Mr. Evans. These two persons were in some measure opposed to each other; but it appears to their Lordships that, for the present purpose at least, their mutual objections might be sufficiently reconciled. It is not easy for those who are not chemists to state in detail and with precision the exact effect of the evidence; but after the best consideration their Lordships feel the case of Mr. Laming to be of great weight in the sense in which it is now to be applied. In the interest of the public the objection put forward by Mr. Dawber is also material. He states himself to be the inventor of a mode of purifying gas by the use of a natural oxide of iron, and this has been contended to be within the terms of the claim made by Mr. Hills in his specification; but certainly the use of natural oxides does not appear to have been contemplated by him, and Mr. Dawber might very reasonably have supposed himself at liberty to use them, and to contract, as he states himself to have done, for the supply of them to third parties. His material is the ochre found in certain bogs in Ireland, procurable at a comparatively cheap rate; it contains a native oxide of iron, which answers very well the purpose of purifying the gas of its sulphureted hydrogen; possesses equally with Mr. Hills' material the quality of revivification on exposure to the air, and it also produces fine sulphur by a very simple process, when it has ceased to be useful as a purifier of gas. It is understood that Mr. Hills has insisted that this valuable discovery cannot be enjoyed by the public except under a licence from himself, so long as his patent exists. The result of the evidence offered on this head by the objectors, and especially in the two instances we have enlarged on, raises a considerable difficulty in the way of this petition. But a more serious difficulty arises upon the remaining question—the sufficiency, namely, of remuneration already received by, or secured to the patentee, the previous matters being borne in mind. After considerable variations in the accounts rendered, not quite satisfactorily explained, he finally states his net profits at 12,338*l.* 19*s.* 1*d.*, the gross profits being 41,151*l.* 15*s.* 11*d.* How this last sum was arrived at does not very distinctly appear; but the deductions appear to be open to various objections. The royalty receipts are given at 15,151*l.* 9*s.* 8*d.*, but from this a sum of 4250*l.* is deducted as having been paid to Owen and Co. for the surrender of a licence which the patentee had granted to those gentlemen for the exclusive right to use the invention throughout a large part of England. Now, the profits under that licence, as well as the sums paid for it, are of course profits earned by the patent, and ought to have been brought into the account as such. Whether they have been so or not does not appear, and it was the duty of the patentee to make that perfectly

clear to their Lordships. But, further, they do not agree that he is entitled to take credit for a disbursement the necessity for which he has himself occasioned. He had within his jurisdiction, so to say, the whole kingdom: it was either profitable or not to grant a licence for a part, and thereby to put it out of his own immediate power; but it was his own act to do so; and if after a while it appeared to be an unwise act, so as to make it desirable to undo it, even at a cost of 4250*l.*, this was either a loss which he brought on himself, or represents a profit which but for his own election he might himself have made, and which has been made by another party. There is also a deduction of 9020*l.* 12*s.* 8*d.* for law expenses. This is in general a fair head of deduction, nor is it now objectionable in the whole; but it appears that in some expensive cases of litigation settlements were come to under compromises on which Mr. Hills gave up claims to costs to which he had an apparent title from his adversaries. It may have been a prudent measure to make this sacrifice, but it does not follow that it is proper to deduct it in an unexplained lump. A more serious objection still remains on the ground of items withheld, which ought to have been introduced into the profits. Mr. Hills has turned his patent to account in two ways: first, as a manufacturer and vendor of the patented article; and, secondly, as a grantor of licences to third persons, who pay him royalties. No question has been raised on the second head; but as to the first, he deducts two-thirds as manufacturer's profits from the net profits received, and considers the remaining third as alone attributable to the patent, and therefore as alone to be brought into the present account, and this is objected to. Their Lordships find that this committee laid down expressly a contrary rule in the case of Mr. Muntz's patent (2 Webster's P. C. 121), and, as it seems to them, on clear grounds. It is to be remembered that the accounts which a patentee renders in support of such a petition as the present are not such as might be proper between two several claimants on the returns of a mercantile firm, but such as show what profits made by a firm or individual are in a large sense attributable to the possession of the patent right, those which, without the patent, would not have existed at all; not of course excluding all just deductions for labour, capital, &c. If but for the patent there would have been no manufactory, then the net profits of the manufacturer are in that large sense attributable to the patent. With it the manufacturer has a monopoly; in this case the monopoly of an article so beneficial as to have become almost a necessary to the gas companies in the large towns of the kingdom. The patent may be said to create his trade, at least it develops it to an extent which would be impossible without it; it cannot be reasonable then that, when called on to state what profits he owes to the patent, the patentee should withhold these which he estimates at two-thirds of his total profits from the account. Their Lordships cannot satisfactorily discharge their duty unless they have the whole case before them, they must know the whole remuneration, different considerations may be applicable to different parts of it; but if to any extent the patentee has received his remuneration by the making and selling the patented article, the profits on that sale must be disclosed and taken into account. Their Lordships do not say this principle is to be pushed to an unreasonable extreme, and they have said that they do not exclude all just deductions, if any; but this rule, and that for which the petitioner contended, differ in principle, and the rejection of the rule contended for by the petitioner will no doubt let in a considerable addition to the total which he has given. It has further appeared that the petitioner has entered into contracts with certain gas companies, by which, as is contended, the parties are for the considerations therein stated mutually bound

to the supply and purchase of the non-patented article for terms differing in the time they have to run, but all exceeding more or less considerably the duration of the patent, and independently of its extension. Their Lordships are not called on to decide on the legal effect of these contracts, nor to express any opinion as to their consisting with public policy; but they cannot consider them as merely waste paper. The prices agreed on must be taken to be remunerative. The presumption must be that the contracts will be performed, and the prices paid. Something therefore ought to have been set down for them in the accounts. Again, their Lordships are by no means satisfied with the provisions contained in these agreements against opposing the extension of the patent. Such provisions have, to say the least, a strong tendency to contravene the interest of the public. On all these grounds their Lordships think that the petitioner's application must be dismissed. The onus is upon him to satisfy them that, when all circumstances are considered, his remuneration has been less than he is equitably entitled to. No one but himself is in a condition to state the whole account, and it is important to have it distinctly understood that the most unreserved and clear statement is an indispensable condition to the success of such applications as the present. It might have been enough, and perhaps it would have been the safest and most convenient course, for their Lordships to have said merely that they had not in this case been brought to the conclusion that the petitioner's remuneration has been insufficient, but they have thought it best to comment on the above particulars, and, without stating any sum which they should have thought best, or any which would have appeared to them more than sufficient, their examination of those particulars has convinced them that the petitioner has, in fact, been sufficiently remunerated. There remains then, only the question of costs. The opposition has been necessarily very expensive. It has not been alleged, nor has it appeared, that any of the numerous opponents was without a sufficient interest to justify his appearance, and it would be unjust that the expense of a successful opposition should not be to some extent borne by the petitioner who has occasioned it. Their Lordships think that he should pay a sum of 1000*l.*, according to a distribution to be made by the registrar amongst the parties opposing, without the expense and delay of a formal taxation, unless the app. prefers a taxation, in which case the petition will be dismissed with costs generally, and their Lordships will advise Her Majesty accordingly.

Petition dismissed.

Wednesday, June 24.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L. J., TURNER, L. J. and Sir E. RYAN.)

FALKLAND ISLANDS COMPANY v. THE QUEEN.

Appeal in criminal cases—Colonial courts—Circumstances in which leave to appeal granted.

Though in strictness the Crown has authority by virtue of the prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless the Crown has parted with such authority, yet the inconvenience of entertaining an appeal in criminal cases is so great that it will not be allowed except in very peculiar circumstances. Thus where a colonial police court, from which no appeal lay to the civil court, had decided a criminal matter, which in substance was of a civil nature, and affected the rights of property generally in a colony, and could not easily be put in the form of a civil action, leave to appeal was allowed.

This was an application for leave to appeal a judgment of a police court in the Falkland Islands, which

was opposed on the ground that it was a judgment in a criminal cause, and not appealable.

Lord KINGSDOWN.—Their Lordships at the hearing of this petition entertained a strong opinion that the point which had been decided by the court below in convicting the petitioners of the offence alleged against them was one of sufficient difficulty and importance to make it desirable that it should be submitted to further consideration before a higher tribunal. But they were desirous of looking into the authorities on the subject, and of considering how far the principles which have been laid down in former cases with respect to appeals in criminal proceedings leave them at liberty to reach the merits of the particular case without infringing those rules which it is of the greatest importance to the public interests strictly to maintain. It may be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this board similar to the present have been attended with success. The whole subject was most fully investigated in the recent petition of Joykissen Mookerjee, who had been convicted of forgery by one of the courts in India. The Judicial Committee, by Dr. Lushington, expressed their opinion that there had been a miscarriage of justice in the case, and that supposing it to have been a civil and not a criminal case they would have had no hesitation whatever in recommending to Her Majesty to allow an appeal for the purpose of considering the proceedings complained of, and doing justice to the party complaining, and yet they refused to interfere. Dr. Lushington observed that, by granting an appeal in that case was meant an examination of the whole of the proceedings, including the evidence, and that in no instance whatever of any grievance, however great, had any such appeal been ever entertained, and that the consequences of entertaining it would be entirely destructive of the administration of all criminal jurisprudence, and that if injustice had been done the proper mode of remedying it was by application to the Crown in another shape, and by way of appeal. To these principles their Lordships entirely assent, and it is only on the ground of the great peculiarity of the circumstances of this case that their Lordships are disposed to advise Her Majesty to admit, under certain restrictions, an appeal against the order complained of. The main ground is this, that the proceedings, although in form of a criminal, are in substance rather of a civil nature, deciding a question of property, a question of great general importance, involving the rights both of the Crown and its grantees throughout these islands, and affecting most materially the value of all the lands in hands of the holders, on the one hand, and the claim of the Crown to the property in the wild cattle, on the other. It is obvious that this is a question of too great importance to make it fit that it should be finally concluded by a summary conviction in a police court. If the effect of their Lordships' determination in this petition were confined to the particular cases already decided, and to the retainer by the Crown, or its refunding to the parties, the amount of the penalties which it has received and not already remitted; or if the question decided by the conviction could be brought for trial in a civil action, and thus be carried regularly by appeal to Her Majesty, their Lordships are so impressed with the danger of appearing to relax the rules against entertaining appeals in criminal cases, that they would not advise Her Majesty to grant any

relief upon the present petition. But it seems by no means clear that this question can be raised in a civil court as regards what has already taken place, or that similar difficulties may not prevent the question from being tried in a civil court in cases of the same kind which are likely to recur, and their Lordships think that it is of equal importance to the Crown and to the colonists that a point so grave, with respect to which they do not of course intimate, and indeed have not formed, any opinion either one way or the other, should be the subject of decision in this country. Another circumstance by which their Lordships are much influenced is the analogy to the proceedings which would in similar circumstances have been competent to the deft. if the conviction had taken place in England. The conviction might have been brought before the Q. B. by writ of *certiorari*, and the justice of the decision subjected to review on the matters appearing on the record. But in this case, as far as appears, no means of review of any sort existed in the colony; for though the ordinance referred to gives an appeal to the police court from a conviction by a single magistrate, the conviction here has been pronounced by the court itself. For the reasons assigned, their Lordships will advise Her Majesty to receive the petitioner's appeal for the purpose of raising and determining the important question of law which arises in it; but the appeal must be confined to that point alone, and no objection of a merely technical character must be considered as open. Their Lordships understand that the real question to be determined appears upon the face of the record of the proceedings, the whole of which will be brought up. The costs of the petition must be reserved. The usual security for the costs of the resp. will be given to the amount of 300*l*.

Leave to appeal granted.

Monday, July 27.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L.J., and TURNER, L.J.)

LEISHMAN v. COCHRANE.

Company—Signing deed of copartnery by attorney—Power of attorney by deed—Admissibility of order of foreign court—Evidence.

A company was formed in India to carry on the business of insurance, and L., residing in the Mauritius, gave special verbal instructions to F., who was the agent for the company in India, to execute the partnership deed for L., which was done, and L.'s name appeared in the list of shareholders. Afterwards, on the insolvency of the company, L. set up the defence that he was not a shareholder, for no power by deed was given to F. to execute the deed in his name:

Held, that a partner might become liable in that character without having executed the partnership deed, if his name was put on the list of shareholders with his consent, so as to entitle him to share in the profits.

An order of a foreign court made ex parte on the shareholder of an insolvent company to contribute to the assets, is an order or other judicial proceeding within 14 & 15 Vict. c. 99, ss. 7, 11, and may be proved by a certified copy.

This was an appeal from a judgment and orders of the Supreme Court of Mauritius.

The app. resided in the Mauritius, and was alleged to be a shareholder of an insolvent company in Calcutta, and the court there made an order upon him to pay a contribution to the assets, which he resisted on the ground that the order could not be proved by a certified copy under the Evidence Act, 14 & 15 Vict. c. 99, ss. 7, 11.

Sect. 7. "All proclamations, treaties, and other acts of State, or of any British colony, and all judg-

ments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence must purport to be sealed with the seal of the foreign State or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, or order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original documents belong, or, in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy, that the court, whereof he is a judge, has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

Sect. 11. "Every document which by any law now in force, or hereafter to be in force, is, or shall be admissible evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal, or stamps or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies, by common consent of parties, authority to hear, receive and examine evidence, without proof of the seal, or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

The deft. also objected that he had not authorised his agent by deed to execute the deed of copartnery in the circumstances stated in the judgment.

The Court of Mauritius overruled both objections, whereupon the present appeal was brought.

Cairns, Q. C. and C. Parke for the app.

Bovill, Q.C. and Hansen for the resp.

Lord KINGSDOWN.—This is an appeal from an order subjecting the deft. to certain payments assessed upon the shareholders of a registered company in Calcutta, and from some preliminary orders in the suit. A company called the Asiatic Marine Insurance company was established in Calcutta in 1847 for five years, which expired on the 31st May 1852. In this company the deft. was a shareholder, and he was also agent for the company in the Mauritius. A gentleman named Ferguson was also a shareholder in this company, and agent for it in Calcutta. In 1850 the Legislative Act for the Regulation of Registered Joint Stock Companies in India was passed. In Nov. 1851 the following prospectus was issued for a renewed company to take the business of the old:—"No. 54. Asiatic Marine Insurance Office, Calcutta. Nov. 1851. The present term of the Asiatic Marine Insurance

Office 1847-52 will expire on the 31st May next, and it is proposed to renew the office on the following basis. 1. The office to be formed for a term of five years, and to consist of 100 shares of 1000 rupees each. 2. No dividend to be declared for three years, or until the capital has been increased to three times the original amount by the addition of profits. 3. The management, as far as regards accounts and the division of profits, to be in Calcutta, but each shareholder to have the right to give a proxy, so that he may be fully represented in all cases. 4. Business not to be commenced until sixty-six shares are taken. 5. The company to be registered in the Supreme Court of Calcutta under Act 43 of 1850, so that it can sue and be sued in the name of the registered officer, and shareholders have all the advantages of control, &c., provided by that Act. (Signed) W. F. FERGUSON, Secretary." This company was formed and registered. Ferguson was a shareholder in the new company, and secretary to it. The deft. was agent for it in the Mauritius. This is not disputed, and his name was entered in the list of shareholders; the deed being executed in his name by Ferguson as his attorney. The Legislative Act provides that on an application to the Supreme Court for registration of any company there shall be produced the deed of partnership, or a copy and a list of the directors and shareholders of the company verified by the affidavit of the secretary or manager. And that within a week before or after 1st Jan. and 1st July in each year a memorial shall be placed in the court in which the company is registered, setting forth in alphabetical order the names of all partners, with their several additions, places of abode, and the names of the directors. These memorials are to be signed by two or more of the directors and verified by the affidavits of one or more of them before the master of the Supreme Court, or a commissioner appointed by the court. The 13th section provides that an office copy of such registered deed, or copy thereof filed as aforesaid, or a memorial thereof, or of any part thereof, is to be received in evidence before all courts; and by the 16th section any persons are to be at liberty to inspect any such deed, copy, or memorial, and the officer of the court is to supply copies under the seal of the court to any persons applying for the same. Provisions are contained in the Act for the winding-up of companies in case of what is termed a forfeiture or declaration of insolvency. The assets are to be vested in the official assignee. The sums required for payment of the debts are to be assessed by him on the shareholders, and orders are to be made by the Supreme Court for payment of the sums so ordered, and the shareholders whose names are on the last general memorial are to be liable in the first instance to pay the debts of the company. It must be presumed that memorials were filed according to the Act, that is, two memorials in each year; the last of such memorials was filed on the 6th July 1855. This memorial was signed by two directors, and was verified by the affidavit of one of them, Manackjee Rustornjee, which stated that the paper writing annexed, marked A, contained a true and correct list, in alphabetical order, of the names of the partners in the Asiatic Marine Insurance Office, together with their several additions and places of abode, and also the number of shares belonging to each of the said partners, and also a true and correct list of the names of the directors of the said office and of the registered officer. This memorial was recorded by order of Sir C. M. Jackson, then one of the puisne judges of the Supreme Court of Calcutta. In the list of the shareholders contained in the paper referred to in the affidavit is found the name of the deft., therein described as of Mauritius, for two shares. On the 4th Aug. 1855, on the petition of Mr. Ferguson, it was adjudged by the Supreme Court (which is the court for relief of insol-

vent debtors) that the company had committed an act of forfeiture pursuant to the provisions of the Act. On the same 4th Aug. an order was made by Sir L. Peel, the Chief Justice of the Supreme Court, vesting all the property of the company in the official assignee for the time being of the court for the relief of insolvent debtors within the presidency of Fort William in Bengal, subject to the provisions of the Act of 1850 for the regulation of registered companies. On the 6th Oct. 1855, on reading a petition of John Cochrane, Esq., described in the order as the official assignee and assignee of the estate and effects of the Asiatic Marine Insurance Office, an order was made by the Supreme Court that the sum of 150,000 rupees be raised by contribution of the shareholders of the said Asiatic Marine Insurance Office for the satisfaction of the debts and other claims against the company. It appears that this sum was assessed by the official assignee on the several shareholders according to their shares, but that some of the shareholders failed to pay the sums so assessed; and on the 5th Jan. 1856 an order was made by the Supreme Court that the defaulting shareholders should pay the sums so assessed upon them, which were declared to be at the rate of 2000 rupees per share, at certain times specified in the order, the time varying according to the residence of the shareholders. Shareholders resident in Calcutta were to pay on or before the 1st March 1856; shareholders in Hong Kong and Bombay on or before the 3rd May 1856; shareholders resident in the Mauritius or Great Britain, and all other places not specified, on or before the 5th July 1856; and it was ordered that notice of the order be published in the Calcutta papers once every month till the 5th July, and in the *London Gazette* and the principal papers of Hong Kong and the Mauritius. On referring to the list of shareholders on the 6th July 1855, the only shareholder described as resident in Mauritius is the app. Several subsequent orders were made by the court, first confirming the assessment, and then ordering payment of further sums assessed on the shareholders to the same effect with those which we have already stated, the last order for payment in question in this suit being made on the 5th Dec. 1857, and the time for payment in the Mauritius fixed for the 15th July 1858. All these proceedings appear to have taken place regularly and in conformity with the provisions of the Act, except that there is not evidence, as far as we can find, of the earlier orders for payment having been advertised in the Mauritius; but there is evidence that two of such orders were advertised. The deft. having refused to pay the several sums assessed upon him, an action was commenced against him by Mr. Cochrane, the official assignee, on the 28th Aug. 1860, to recover the sums which had then become due. The summons and copy of the declaration were served on the deft. personally in the island on the same day. On the 14th Sept. 1860 an order was made by the court, on the application of the deft., that the plt. should give immediate copy of any deed, agreement, bill, or other written document, set out or referred to in his declaration. On the 5th Oct. copies of all the orders of the Insolvent Court at Calcutta, as well as of the affidavits and other documents on which the action was grounded, were served on the app.'s attorney. On the 9th Oct. 1860 the deft. put in the following defences:—1. That the plt. is without right, title, or capacity to sue deft. in the present action. 2. That the deft. never was indebted in manner and form as in the declaration alleged. 3. That the deft. at the time of the alleged adjudication in the declaration mentioned was not, nor is he, a shareholder in the said supposed Asiatic Marine Insurance Company. On the 11th Oct. 1860 a general replication was filed by the plt., and on the same day notice of trial was given to the deft. for the ensuing term. The cause, therefore, was at this time at issue, and the

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deft. had full notice of what it was necessary for him to prove at the trial; he was then in the island, and did not leave it for England till about the month of March or April 1861. The trial of the cause seems to have been postponed by mutual consent of the parties till the 21st Aug. 1861, when it came on for trial before the first and second puisne judges. The plt., the present resp., put in evidence certificated copies of all the orders and other proceedings in the Superior Court of Calcutta, to which we have referred. He also put in a notarial certificate by a notary at Calcutta, verifying an extract from the deed of association of the 1st June 1852 of the company in question (by which the app. appeared to have executed the deed by Mr. Ferguson, his attorney); a power of attorney executed by the app. at Calcutta, on the 8th Dec. 1851, by which he appointed Ferguson his attorney for certain purposes therein specified; and a solemn declaration made by Ferguson at Calcutta, on the 20th April 1860, that under the authority contained in the power of attorney annexed, and also under special verbal instructions from the app., he executed the copartnership deed of the 1st June 1852, in the name, and as the act and deed of the app., thereby making him a shareholder to the extent of two shares in the company. The deft. at this time entered into no evidence whatever; but he objected to the admissibility of the evidence offered by the plt., and insisted that, if admissible, it was insufficient to prove the plt.'s case. The objection seems to have rested mainly on the insufficiency of the certificated copies to prove the proceedings in the Supreme Court, and the insufficiency of the proceedings themselves, if proved, to establish the facts stated in them. No objection appears to have been made, or perhaps by the practice of the court could have been made with success, to receiving the notarial copy of the extract from the partnership deed, or to admitting the declaration of Ferguson, instead of his affidavit or examination *vidé voce*. The court after argument took time to consider its judgment, and on the 16th Oct. overruled the deft.'s objections (which it terms preliminary objections), and ordered the case to be proceeded with on the merits on the first day when the same two judges should be together on the bench. Before, however, this time arrived, two applications were made by the deft. to the court for leave to enter into evidence, but these applications were refused by the court by orders dated the 18th Dec. 1861 and 20th March 1862, and ultimately on the 27th March 1862 the cause was finally disposed of on the merits, and there was judgment for the plts. It is from this judgment and from the orders of the 16th Oct. and the 18th Dec. 1861 and the 20th March 1862 that this appeal is brought. With respect to the judgment of the 16th Oct. 1861 the main objection taken in the court below to the admissibility of the evidence, that the proceedings which had taken place in the Supreme Court of Calcutta could not be proved by certificated copies, has been very rightly abandoned at our bar, and it is unnecessary therefore to say anything on that point; nor do we think it necessary to come to any decision as to the orders of the 18th Dec. 1861 and the 20th March 1862. We prefer to dispose of this case upon the merits and upon the assumptions that the evidence which the deft. desired to introduce had been admitted. We have no doubt that there was abundant *prima facie* evidence to justify the court in holding that the several orders for payment by the shareholders of this company to which we have adverted, were made, and that the sums assessed upon and ordered to be paid by those shareholders were properly assessed and ordered to be paid by them as a class. But there was no order upon the deft. personally as a shareholder to pay, and the question, and the only question on the merits, is, whether there was *prima facie* evidence to show

that he was a shareholder, and, if so, whether the evidence which he afterwards offered to rebut that case was sufficient to rebut it. The evidence produced was, in their Lordships' opinion, sufficient to show that his name was on the last list of shareholders registered in the Supreme Court in July 1855. The doubt is whether there is proof from which the court might reasonably infer that it had been placed there with his consent. Now the statement of Mr. Ferguson is, that he executed the partnership deed in 1852 on behalf of the deft., and that he had special verbal instruction from the deft. to do so. It is said that a power to execute a deed can only be validly given by deed, and that a parol authority is not sufficient for the purpose. But a partner may become liable in that character without having executed the partnership deed, and if the court were satisfied by sufficient evidence that his name had been put upon the list of shareholders with his consent, so as to entitle him to participate in the profits of the concern, their Lordships would not think it necessary to inquire whether the parol authority would warrant the execution of the deed. It appears to their Lordships that there was evidence from which this inference might fairly be drawn. In considering whether it ought to be drawn or not, regard must be had to all the circumstances. There is the positive statement of Ferguson as to the instructions given to him, and their Lordships do not find that the deft. ever offered to pledge his own oath to the statement that he was not a shareholder. Possibly the rules of the court might not allow him to be examined as a witness on his own behalf; but their Lordships are at a loss to conceive why there was no affidavit, on the part of the deft., denying that he was a shareholder, if such was the fact, when the applications on his part were made to the court for leave to go into evidence. Such an affidavit could not surely be inadmissible, and could not be otherwise than important. Again, the inference is materially strengthened by the course which the deft. afterwards took. He did not propose, by cross-examining Ferguson, or by any other evidence, oral or documentary, to show that he had not given authority to any one to enter his name as a shareholder in this company, or that he was not perfectly aware, from first to last, that his name was on the list; but he proposed to give evidence to show that, before the new company, which began on 1st July 1852, there was the old company under the same title, which expired on the 30th June, and which had carried on the same business, and that the power of attorney to Ferguson might relate, and did relate, to that company. In support of that statement he tendered two letters, addressed to him by Ferguson, one dated the 14th Oct. 1852, signed by Ferguson as secretary of the new company, and addressed to the deft. as agent in the Mauritius for such new company, and the other dated the 7th April 1853, signed by Ferguson, as "Secretary, Asiatic Marine Insurance Company, 1847-1852," and addressed to the deft. as "agent, Asiatic Insurance Company, 1847-1852, Port Louis, Mauritius." Now the fact that the deft. was a shareholder in the old company, and agent for that company in the Mauritius, and that he continued agent for the new company, afforded no evidence whatever that he was not a shareholder in such new company, but rather made it probable that he would be a shareholder. Their Lordships are of opinion that the deft. has throughout attempted to get rid of this demand by mere technical objections, without offering any evidence tendering to show that the sum demanded from him is not really due. And though they think that the proceedings have not been conducted in a very satisfactory manner on either side, and that the truth might have been more clearly

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established, they are convinced upon the whole that the decision below is consistent with the justice of the case, and that they ought not to expose the resp. to the expense and delay which would attend a remit to the court in Mauritius. They have humbly advised Her Majesty to affirm the judgment complained of, but, as the case of the plt. in the action has not been proved as distinctly as it might have been, they will not give any costs of the appeal. *Order affirmed.*

App.'s solicitors, *Parke and Pollock.*
Resp.'s solicitors, *Graham and Lyde.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

June 23 and July 23.

(Before the LORDS JUSTICES.)

LODGE v. PRICHARD, AND OTHER CAUSES.

Bankruptcy—Partnership—Joint and separate estate—Deceased partner—Administration—Proof of debts.

The testator in this cause was a partner in a trading firm which, after his death, became bankrupt, paying a dividend only upon the partnership debts. The joint creditors proved in the bankruptcy, and then came in under the administration decree to prove for the balances due to them. The testator's estate was insufficient to pay all the debts:

*Held (affirming the order of Stuart, V. C.), that the joint creditors were not entitled to payment *pari passu* with the separate creditors, but could only assert a claim against the testator's estate after his separate creditors were satisfied in full.*

This was an appeal from a decision of Stuart, V. C.

The original suit of *Lodge v. Prichard* was instituted to administer the estate of Mr. Adam Lodge, who was formerly a merchant in Liverpool, and had died in 1837, and the facts were briefly as follows:—For some years before his death Mr. Lodge had carried on business with a gentleman named Graves and others, under the firm of Graves and Co., and this firm had become indebted in a considerable sum to its bankers, Messrs. Moss and Co., before Mr. Lodge's decease. Soon after he died the firm became bankrupt, and Messrs. Moss and Co. proved their debt under that bankruptcy, but after receipt by them of a dividend out of the estate a large balance still remained due. For this balance Messrs. Moss and Co. proved against Mr. Lodge's estate in the administration suit.

Numerous separate creditors of Mr. Lodge also established debts against that estate in the suits, or some of them, and it ultimately appeared that the estate of Mr. Lodge would be insufficient to pay all the separate and partnership debts, with interest and the costs of the creditors, and the general costs of the suit.

The question was then raised, whether the debt proved by the bankers, Messrs. Moss and Co., ought to be paid out of Mr. Adam Lodge's estate *pari passu* with the debts due to his own separate creditors, or whether the assets ought to be applied in the first instance in the payment of debts due to these latter persons, whilst Messrs. Moss and Co. should only be entitled to any surplus after payment of the separate debts in full.

Stuart, V. C. decided that the assets must be first applied in satisfaction of the debts due to the separate creditors: (see 8 L. T. Rep. N. S. 722.)

Before the V. C. a second question arose, as to the right in certain creditors to payment of their debts in

priority to the costs of the executors of the testator but their Lordships decided that the costs of all parties must be paid before any of the debts, and this question was therefore of no importance, and was arranged between all parties by consent.

Messrs. Moss and Co. appealed against his Honour's decision, and

Southgate, Q. C. and *Druce* supported the appeal, contending that their debt was joint and several, and that they must therefore be on the same footing with other creditors of the testator.

Bacon, Q. C. and *Kay*, for Mr. Prichard and Mr. Colborn, the two executors, contended that their costs must be provided for in the first instance.

Malins, Q. C. and *Woodrooff*, on behalf of Robert Morrall, a separate creditor, supported his Honour's decision.

The following authorities were cited:—

Cowell v. Sikes, 2 Russ. 191;
Sadler v. Jackson, 15 Ves. 52;
Wilkinson v. Henderson, 1 Myl. & K. 582;
Ex parte Kennedy, 2 De G. M. & G. 228;
Ex parte Kensington, 14 Ves. 447;
Devaynes v. Noble, 1 Mer. 529; s. c. on appeal, 2 Russ. & M. 495;
Ex parte Geller, 2 Madd. 262;
Ex parte Bauermann, 3 Dea. 476;
Ex parte Birley, 1 M. D. & De G. 387;
Ex parte Kendall, 17 Ves. 514;
Ex parte Clay, 1 Mont. Part. 223;
Ridgway v. Clare, 19 Beav. 111;
Gray v. Chiswell, 9 Ves. 118;
Larkins v. Parton, 2 Myl. & K. 320; and
Morrice v. The Bank of England, 3 Swanst. 573.

Druce having been heard in reply, their Lordships reserved judgment until the 23rd July, when

Lord Justice TURNER said:—The question upon which we reserved our judgment in this case relates to the rights of joint creditors against the separate estates of deceased partners. It arises thus: Adam Lodge, the testator in the cause, died in the year 1837. He was at the time of his death a partner in the firm of Graves and Co. Soon after his death, Graves, his only surviving partner, became bankrupt. The app. is the surviving partner of the firm of Moss and Co., who were the bankers of Graves and Co. Graves and Co. were largely indebted to Moss and Co. at the time of the testator's death. This debt was proved by Moss and Co. under the commission against Graves, and some dividends have been received by Moss and Co. upon this proof; but the dividends so received have not been sufficient to satisfy the debt. No further dividend is coming under the commission, and the balance of the debt due to Moss and Co., after deducting the dividends received, has been proved against the estate of Lodge under the decree in these suits. The separate creditors of Lodge have also proved their debts under the decree, and the question is whether the debt proved by Moss and Co. ought to be paid out of the estate of Lodge *pari passu* with the debts proved by his separate creditors; or whether his separate creditors ought first to be paid in full, and the debt of Moss and Co. to be paid only out of what may remain of the estate after such payment. The V. C. Sir John Stuart has decided this question in favour of the separate creditors, and we have now to dispose of it upon appeal from his decision. The question as to the rights of joint creditors against the estates of deceased partners has always been felt to be one of much difficulty, and I am not sorry, therefore, to find that the state of the authorities renders it unnecessary for us to consider the grounds on which the question, if untouched by the cases, ought to be decided. The question is, I think, covered by the authorities. It has long been settled in bankruptcy

that the joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other. This rule may, perhaps, proceed upon this ground—that the joint estate is clearly liable, both at law and in equity, for the joint debts; at law by reason of the survivorship, and in equity by virtue of the rights of the partners *inter se* to have it so applied, and that the separate estate is as clearly liable, both at law and in equity, for the separate debts, and that the carrying over the surplus of the one estate to the other, although it may not strictly work out the rights, may afford the best means of adjusting the complications which arise from the joint estates being liable to the separate debts only so far as the interest of the partners from whom the debts may be due may extend, and from the separate estates if taken for the joint debts having recourse over against the joint estates, and which arise also from the equities between the partners; but whether this rule is strictly correct it is not for us to say. It has undoubtedly been adopted and acted upon by successive Chancellors for a very great length of time, and we cannot now alter it. According to this rule, therefore, joint creditors cannot touch the separate estate until after payment in full of the separate debts. They take the surplus only after payment of those debts. Now, the jurisdiction in bankruptcy is equitable as well as legal. The rights of creditors therefore as settled in bankruptcy must be taken to be settled with reference to their equitable as well as to their legal rights, and this being so, these rules must, as it seems to me, be held to apply no less to cases in which estates fall to be administered in equity, than to cases in which they fall to be administered in bankruptcy. Accordingly, we find that in *Gray v. Chiswell* the joint creditors were only let in upon the separate estate, after payment in full of the separate debts; and that case has been constantly recognised and treated as having been well decided. It was so recognised and treated by Lord Eldon in *Ex parte Kendall*, 17 Ves. 519; by Sir Wm. Grant, in *Devaynes v. Noble*, Keech's case, 1 Mer. 566; and again in *Vulliamy v. Noble*, 3 Mer. 619; by Lord Brougham on the appeal in *Devaynes v. Noble*, 2 Russ. & M. 495; and by Sir John Leach in *Wilkinson v. Henderson*, 1 Myl. & K. 588. This view of the rights of joint creditors against the separate estates of deceased partners is also borne out by the form of the decrees of the court in such cases, of which *Fisher v. Farrington*, Seton on Decrees, 280, 2nd edit., is an instance, and it is strengthened also by this consideration, that if the joint creditors be permitted to resort to both the joint and separate estates, they are let in upon two funds, whilst the separate creditors are limited to one only. It was said, however, on the part of the app., that in the cases above referred to there was joint estate remaining to be administered, and the further rule in bankruptcy, that joint creditors may prove against the separate estate when there is no joint estate and no solvent partner, was relied on in support of the appeal, and contended to be applicable in this case; but in this case there was joint estate, and this rule can be applicable only if it can be made out that the joint creditors are entitled in bankruptcy, when the joint estate has been exhausted, to come upon the separate estate for so much of their debts as may not have been satisfied out of the joint estate. I do not think, however, that the rule in bankruptcy has ever been carried, or can be carried, to this length. If it was, I do not see how any dividend could be made upon the separate estate until the joint estate was wound-up, as it would depend upon the produce of that estate whether the joint creditors would come in upon the separate estate; and besides, if this effect be given to the rule, the consequence would be, as I have already pointed

out, that the joint creditors would have a double fund to resort to when the separate creditors could resort to one fund only, which would hardly be conformable to the ordinary rule of making a just and equal distribution. The cases cited on the part of the apps. in support of their contention on this point, do not seem to me to bear out their argument. In *Cowell v. Sikes* there was not, and never had been, any joint estate. *Ex parte Geller* was the case of a pledge. *Ex parte Bawman* goes no further than, that the right of the joint creditor to go against the separate estate, where there is no joint estate, is not destroyed by a partner, who has become insolvent, having been solvent for a limited time, and I see nothing in the case in *Re Birley* which can at all help the app. It was suggested on his part that the right of the joint creditor to be paid out of the separate estate, where there were no joint assets, arises from the debts being joint and several, and this may well be so; but the debt is several in equity only, and it does not follow that, because there is a several debt in equity, the court will give the same effect to it as if it was to all intents and purposes a separate debt. The doctrine of marshalling was also sought to be called in aid on the part of the app., but Lord Eldon seems to have disposed of that view in *Ex parte Kendal*, 17 Ves. Upon the whole case my opinion is that the V. C.'s conclusion upon this point is correct, and ought to be affirmed.

Lord Justice KNIGHT BRUCE said:—On this point as it stands in the present case my opinion has fluctuated, but I concur with the Lord Justice's view upon it.

Solicitors for the apps., *Norris and Allen*.

Solicitors for the executors, *Field, Roscos and Francis*.

Solicitors for Mr. Robert Morrall, *Robinson and Preston*.

June 25 and Aug. 4.

(Before the LORDS JUSTICES.)

Re THE WINDING-UP ACTS 1848 AND 1849, AND AMENDMENT ACTS 1857; AND

Re THE STATE FIRE INSURANCE COMPANY.

Winding-up—Insurance company—Policy-holders—General creditors—Priority.

The insurance company mentioned, now in course of winding-up, issued policies providing, in some instances, "that the capital stock and funds of the company should be subject and liable to pay" the amount insured; in others, "that the capital stock, or so much thereof as should for the time being have been subscribed, and other the stocks, funds, securities and property of the company unapplied at the time of any demand made, should alone be liable to answer," &c.; in others, "that the stock and funds of the company should alone be answerable under this guarantee;" and all the policies contained a proviso that no officer or shareholder of the company should be liable for any demand beyond the amount of his particular share or interest: Held (in affirmation of the decision of Wood, V. C., but hesitating Knight Bruce, L. J.), that these expressions and clauses did not create such a charge upon the stock and funds of the company as to give the policy-holders any claim upon its assets in preference to the general creditors of the company.

This was an appeal by certain persons, the holders of policies in the State Fire Insurance Company, now being wound-up in the chambers of Wood, V. C., against a decision of his Honour upon a summons adjourned into open court, that in the winding-up of a company, policy-holders have not, by virtue of their policies, any right against its assets in priority to the

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Re WINDING-UP ACTS, &c.; AND Re STATE FIRE INSURANCE COMPANY.

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general creditors. The case is reported 8 L. T. Rep. N. S. 497.

Daniel, Q. C. and *Westlake* supported the appeal, contending that the sums secured by the policies were, under the terms of the policies, a direct charge upon the funds of the company, entitling their clients to rank as judgment-creditors according to the dates of their policies.

Wilcock, Q. C. and *Roxburgh* and *H. Fox Bristow* for other policy-holders.

Rolt, Q. C. and *Drace*, for the official manager, argued that the clauses of the policies were inserted merely in order to protect the directors and shareholders, and not to give the policy-holders any preference. These latter could take only *pari passu* with other creditors.

Bagshawe appeared for the creditors' representative. It was further argued before the V. C. and the Court of Appeal, that the policy-holders, whose policies had become payable, were entitled to priority over those whose policies had not become payable, and the learned V. C. decided that they were not. As their Lordships decided against the whole body of policy-holders, the conflicting claims of these different classes were not gone into.

The following authorities were referred to:—

Re The English and Irish Church &c., Assurance Society, 8 L. T. Rep. N. S. 724;

Law v. The London Indisputable Company, 1 K. & J. 223; 24 L. T. Rep. 208;

Evans v. Coventry, 5 De G. M. & G. 911;

Ernest v. Nicholls, 6 H. of L. Cas. 401;

Re The Athenian Life Assurance Society, John. 633; 32 L. T. Rep. 195; and

Robson v. MacCreight, 25 Beav. 272; 31 L. T. Rep. 21.

Judgment was reserved until the 4th August, when Lord Justice TURNER said:—This is a motion on the part of the holders of several policies in the State Fire Insurance Company, whose claims were matured before the month of Sept. 1861, to discharge an order of Wood, V.C., made in the matter of the winding-up of the company, by which his Honour declared that the official manager ought to distribute the assets of the company in his hands rateably among all the creditors of the company, including policy-holders, without prejudice to any question as to marshalling. The principal question raised by this motion is, whether the apps. and the other holders of policies granted by this company are entitled to be paid the sums which are due on their policies in priority to the general creditors of the company; in effect, whether the policies held by the apps. and the other policy-holders create a lien or a charge on the stock and funds of the company, by virtue of which the policy-holders have a preferential claim on its assets. There is also a further question raised by this motion: whether, assuming a lien or a charge to be created on the assets of the company by the policies, there is any priority between the different policy-holders; but this question does not arise unless the policy-holders succeed upon the principal question. The policies granted by this company vary somewhat in the terms in which they are expressed. In some of them the terms are, "that the capital stock and funds of the company shall be subject and liable to pay." In others of them the terms are, "that the capital stock, or so much thereof as shall for the time being have been subscribed, and other the stocks, funds, securities and property of the company remaining at the time of any demand made unapplied and undisposed of in pursuance of the trusts, powers and authorities contained in the deed of settlement, shall alone be liable to answer." Others of them, again, are in the form of guarantees, and express "that the stock and funds of the company shall alone be answerable under this

guarantee, and all other policies." In all the policies there is a proviso or stipulation to this effect: "That the capital stock and funds of the company shall alone be answerable for such demand, and that no director or officer of the company, or proprietor of shares therein, shall be in any manner responsible or liable for any demand or claim on the company beyond the amount of his or her particular shares or interest in the capital stock of the company at the time when such claim may arise, anything contained in the policy of any law or statute to the contrary notwithstanding." In some cases, indeed, the proviso goes further, and to the extent of saying, "that no director or proprietor of the company shall be individually responsible." Such being the terms of the policy, the question is, whether they create a charge on the stock and funds of the company. If such a charge be created, it must be by force of the words "that the stock and funds of the company shall be subject and liable to pay," or by the corresponding words contained in the policies. Now those words do not seem to me necessarily to create a charge. They may well have been meant to import no more than that the property of the company should be liable to the payment of the sum assured, just as in the case of a contract with a creditor that the property and not the person of the debtor should be liable for the debt, or as in the case of a peer, it would be so according to law. In such cases it would not, as I apprehend, be said that a lien or charge on the property was created in equity. A court of equity, in which alone such a lien or charge could be asserted, would give effect to the legal contract, but would not go beyond. In considering the meaning of these words and the effect to be given to them, regard must be had, I think, to the state of law which led to their introduction. By the common law every shareholder, as a partner in the company, would be liable on all its contracts, and provisions of this nature were no doubt introduced for the purpose of limiting the legal liability, not for the purpose of creating a charge in equity. Again, it is to be observed that it was necessary that some words should be introduced into the operative parts of the policy, in order to create an express contract. If the case had been left on the proviso alone, there could have been nothing more than an implied contract. If instead of the words "stock and funds of the company" the words introduced had been "the company shall be subject and liable to pay," the very inconvenience which no doubt was intended to have been avoided would at once have been created. There was a sufficient reason, therefore, for the introduction of the words in question, without imputing any intention to create a charge in equity; and certainly, in considering the effect to be given to those words, the inconvenience which would result from the construction contended for by the apps. ought not, as I think, to be disregarded. It is obvious, for the reasons assigned in the course of the argument, that this construction would paralyse the company, to the prejudice, not merely of the shareholders, but of the policy-holders also, with the exception, perhaps, of the few among them on whose policies claims might first have been matured. The business of the company could not possibly have been carried on, and every claim on a policy might be made the foundation of a suit in equity. It is remarkable to find that, long as policies of this description have been in use, there is not, as far as I am aware, any instance of any claim upon them having been advanced in equity until very recent times. I do not think, therefore, that even independently of the provisions of the deed of settlement of this company, the policies in question would operate as a charge on the stock and funds of the company; but it is now settled, not only by *Ernest v. Nicholls*, 6 H. of L. Cas., but by *Balfour v. Ernest*, 5 C. B., that

persons dealing with such companies as these are bound to look to the terms of the deed of settlement; and looking to the terms of the deed of settlement of this company, I do not think it was in the power of the directors to appropriate the stock and funds of the company to the payment of the policies, so as to create a charge paramount to all the other claims on the company. I think, therefore, on this ground also the policy-holders are not entitled to the preference claimed by them. In the course of the argument in this case, the cases of *Law v. The London Indisputable Life Company*, *The Athenæum Life Assurance Society*, and *Evans v. Coventry* were much commented upon; and I do not hesitate to say, that in this case the word "charge" has been unguardedly used both by Wood, V. C. and by myself. But certainly, so far as I am concerned, I did not use the word in the sense which the appra. attributed to it, for, from the time when these cases have first been brought forward, the difficulty which has now arisen has been present in my mind. It struck me when the case of *Evans v. Coventry* first came before us upon a motion for a receiver, but it was not necessary then to consider it, there being a sufficient case for interference on the ground of breach of trust. Whether we afterwards went too far in the decree in that case, I am not prepared to say, but so far as my recollection serves me, our intention certainly was not to decide anything between the policy-holders and the general creditors, and I doubt, indeed, whether any such question was involved in the suit; but, however this may be, and whether the cases referred to were rightly or wrongly decided, though I desire to be understood as not meaning to cast any doubt on the right of a court of equity to interfere in such cases as the present, when there has been waste or breach of trust, I am satisfied that there is no lien or charge created by the policies in this case, and the order of the V. C. is therefore right, and the appeal must be dismissed. Under the circumstances of the case, however, I think that the costs of all the parties should be paid out of the funds.

LORD JUSTICE KNIGHT-BRUCE.—I acknowledge myself as not quite free from doubt in this case, a doubt hardly amounting, or not amounting, to dissent. The V. C. and the Lord Justice are, it is unnecessary to say, very probably right, and therefore the order of the court stands.

Costs of all parties to be paid out of the fund, except those whose costs had been refused by the V. C.

Solicitors for the appra., *Ashurst, Morris and Knight*.

Solicitors for the official manager, *Chilton, Burton and Yeates*.

Solicitors for the creditors' representative, *Sles and Robinson*.

Solicitors for the other parties, *Horn and Murray, and Tamplin and Tayler*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Wednesday, July 8.

ADSETTS v. HIVES.

Mortgagor and mortgagee—Same solicitor acting for both parties—Fraud of solicitor—Bill by equitable mortgagee to enforce his security—Blanks in mortgage-deed.

*A. advanced 650*l.* to H. on the faith of his executing a legal mortgage of certain freehold land. S. acted as the solicitor for both parties in the transaction; and obtained the title-deeds of the land from H. and gave them to A. as an equitable mortgage, until the*

*legal one was executed by H. Negotiations then took place for a further advance by A. to H. of 200*l.* on the same security. To that advance A. agreed; but it was arranged that S. should provide the 200*l.* for H. in the meantime; which he did, and was afterwards repaid that sum by A. S. then got back the title-deeds from A. in order (as S. alleged), to prepare the legal mortgage from H. He did procure a legal mortgage of the land from H.; but to himself, and not to A., telling H. that A. would not advance more than the 650*l.*; that he had provided the 200*l.*; and that he intended to pay off A. H. executed that mortgage without the authority of A. S. then forged a legal mortgage of the land from H. to A., and sent him that deed. S. afterwards duly transferred the legal mortgage, executed by H. to him, to the British Equitable Investment Company, for value, without notice of any prior charges, and misappropriated the money. The forgeries were afterwards discovered, and S. was committed and sentenced accordingly. A. then filed a bill against H., offering to redeem the company, and praying a declaration that he was entitled to a mortgage from H. for the 850*l.*, and to payment accordingly:*

Held, that A. was entitled to the relief for which he prayed by his bill.

Blanks left in a mortgage-deed for the insertion therein, after its execution, of the date thereof, of the day of redemption, and the names of the tenants, and filled up by the mortgagee after the execution of the deed, were

Held, not to vitiate the deed.

The bill in this suit was filed by the plt., an equitable mortgagee, to obtain a declaration that he was entitled to a mortgage for 850*l.* and interest, and for payment accordingly.

The facts of the case were these:

In 1858 the plt. John Adsetts agreed to lend the deft. Thomas Hives 650*l.*, upon the security of a legal mortgage of certain freehold land in the county of Derby. A solicitor at Derby, of the name of Shaw, then acted for both parties. On the 29th Sept. 1858 the plt. paid Shaw 150*l.* as the first instalment of the loan; and that sum was paid by Shaw to Hives. At the same time Shaw delivered to the plt. the title-deeds of the estate, by way of equitable security, until the execution by Hives of the legal mortgage. The remainder of the 650*l.* was afterwards paid to Shaw by the plt. in various instalments; and by him again paid over to Hives at intervals between the 1st Oct. 1858, and the 17th March 1859. Negotiation then took place between the parties for a further advance of 200*l.* by the plt. to Hives, on the same security. It was, however, ultimately arranged that the plt. would lend the 200*l.*; but that Shaw should find the money in the mean time. That was done accordingly.

On the 1st April 1859 Shaw applied to the plt. for the title deeds deposited with him, for the purpose (as Shaw alleged) of enabling him to prepare the legal mortgage from Hives to the plt. The plt. then gave the deeds to Shaw, and took from him a memorandum in writing of the receipt of them by him, with an undertaking on his part to return them as soon as possible. Shaw having thus obtained possession of the deeds, prepared a legal mortgage of the land from Hives to—not the plt., but Shaw himself—for securing 850*l.* and interest. Hives duly executed that deed; but when executed there were blanks left in it, to be afterwards filled up. Those blanks were for the day of the month and the month of the year (1859) when the deed was executed, for the day of payment in the proviso for redemption, and for the names of the tenants of the various parcels. Hives, without the authority of the plt., executed that deed on the 7th of April 1859, when the remaining in-

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payments of the 850*l.* were paid to him by Shaw. The existence of that mortgage was concealed by Shaw from the plt. Shaw, however, told Hives that he had prepared the mortgage in his own name, because the plt. would not advance more than 650*l.*, and that Shaw would, if possible, pay him off. Shaw afterwards filled up the blanks in the deed, and dated it the 8th April 1859. By a deed dated the 6th Aug. 1860 Shaw duly transferred the mortgage dated as of the 8th April 1859 without notice of any prior charges, to the British Equitable Investment Company for 750*l.*, and appropriated that money to his own use.

The plt. frequently applied to Shaw to procure for him the execution of the legal mortgage by Hives, and as frequently requested the return of the deeds which Shaw had obtained from him. In June 1859 Shaw handed to the plt. some documents, purporting to be the conveyance of the property to Hives, together with an abstract of title, and a legal mortgage of the property by Hives to the plt. Shaw then told the plt. that he required the remaining title deeds for the present, but that he would very shortly return them; and he induced the plt. (who had at that time advanced only the 650*l.*) to sign a memorandum, that 200*l.* of the 850*l.* belonged to Shaw, but the 200*l.* was afterwards paid to Shaw by the plt. The documents so handed by Shaw to the plt. were forgeries by Shaw. In 1862 the forgeries were discovered, and Shaw being prosecuted, was sentenced to fifteen years penal servitude.

There was some conflict of evidence as to how far Hives knew of, or sanctioned the arrangements between the plt. and Shaw. Hives swore that he dealt with Shaw exclusively, leaving him to arrange with the plt. as to who was finally to have the mortgage. It appeared, however, that Hives had received several visits from the plt. during the negotiations, at which visits there was some discussion as to the amount and particulars of the loan. Hives also stated that, upon several occasions prior to April 1859, Shaw had told him that he was making the payments partly out of his own money; that Hives never authorised the original deposit of the deeds with the plt.; and that, on the 8th Feb. 1859, he signed an agreement declaring that he had deposited them with Shaw as security for his advances. Under those circumstances, the plt. filed the bill in this suit, offering to redeem the British Equitable Investment Company, and praying the declaration already mentioned.

Southgate, Q.C. and *Jessel* appeared for the plt., and contended that, as between him and the deft. the British Equitable Investment Company, the deed dated by Shaw the 8th April 1859, was void at law, in consequence of his alterations in it after its execution by Hives. But whether the deed were good or bad, the plt. was clearly entitled to the benefit of his original security for the full amount claimed by him. Hives was the party who ought to suffer, for his negligence. They cited

Pigot's case, Co. Rep. Part xi. 26, 6; or vol. 6, p. 47, edit. 1826;

Davidson v. Cooper, 13 M. & W. 343;

Hudson v. Renett, 5 Bing. 368;

Mackintosh v. Haydon, Ry. & M. 362;

Hibbleskille v. M'Morine, 6 M. & W. 200.

Selwyn, Q.C. and *Shebbears* appeared for the company, but were not called upon.

Baggallay, Q.C. and *E. K. Karlake* appeared for the deft. These Hives, and admitted that it was only a question which of two innocent parties should suffer for the fraud of a third? When Shaw had obtained the mortgage from Hives, he was a trustee or agent of it, for the plt.; who therefore, and not Hives, ought to suffer from Shaw's misconduct; moreover Hives had had no hand or part in Shaw's malpractices; besides which the plt. had been himself guilty of

negligence in letting Shaw get possession of the deeds. Lastly, Hives had been told, and truly, that Shaw had advanced 200*l.* of the 850*l.* He therefore ought not to suffer.

The M. R. referred to *Doe dem. Lewis v. Bingham*, 4 B. & Ald. 672.

The MASTER of the ROLLS said:—I have no doubt that the deed of the 8th April 1859 is a perfectly good deed. I will not go into the very nice question which has been argued before me on behalf of the plt. as to the effect at law of alterations in deeds; for I will not be the first to hold that, where a mortgagor has left blanks in the deed for the period of redemption (which in general is six months from the date of the deed) and for the names of the tenants, and those blanks are afterwards filled up in accordance with the intention of the parties to the deed, such an act as that affects the legal validity of it. In *Doe dem. Lewis v. Bingham* material alterations were made after some of the parties to the deed had executed it, but the court there held that the deed was nevertheless a perfectly good deed. It frequently happens that the date of a deed cannot be filled up until after the execution of it, as something at the last moment prevents its intended execution; and the proviso for redemption must necessarily be filled in so as to correspond with the date of the deed. I am of opinion that this deed, notwithstanding the blanks were filled up by the mortgagee subsequently to the execution of it by the mortgagor, was a good deed at law, and the necessary results must ensue. With respect to the other parts of this case, I think that it certainly is a very painful one. The question really does come to this, which of two innocent parties is to suffer for the losses occasioned by the fraud of a third? I must own that upon the facts, as to which there is no dispute, I think that the plt. is entitled to a decree. The law applicable to the case is clear. The circumstances of the equitable mortgage to the plt., and the legal mortgage to Shaw, must be kept distinct. I consider it as proved that Hives knew at the time the plt. was making his advances that the money was to be raised by Shaw on the security of the deeds; that they were delivered by him to Shaw for the purpose; and that the plt. was advancing money, to the amount in the first instance, of 650*l.* I consider that when the deeds were deposited with the plt. by Shaw, as agent for Hives, a complete equitable mortgage was created. The plt. is now therefore entitled to enforce that security against Hives, on the condition that when Hives redeems him, he delivers up the deeds. That he can do after he has redeemed the company. Suppose that a mortgagor, after making an equitable mortgage, executed a legal mortgage to another mortgagee, if that legal mortgagee, when he takes his mortgage, has notice of the prior equitable charge, he is bound by it; otherwise the prior equitable mortgagee could only enforce his security by redeeming the second and subsequent mortgage. Here there was a good equitable mortgage to the plt. Then Shaw, as agent to both parties, wrote to Hives, saying that he was going to pay off the plt., and that the mortgage was therefore to be in his name. But how could that discharge the equitable mortgage? Or what was there to prevent the plt. from then filing a bill to enforce his security? Shaw was not justified in preparing a mortgage to himself, because he intended to pay off the plt. It was argued that the relation of trustee and *cestui que trust* was created by the mortgage to Shaw; but the trusteeship (if any) was only a constructive one. When a man pays another 100*l.*, to be given by him to A. B., the person who receives the money becomes a constructive trustee of it for A. B.; but he is in no other sense a trustee. Here Hives executed a mortgage to Shaw without any authority from the plt. Shaw

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raised money on that mortgage, having obtained the deeds by fraud from the plt. Hives, therefore, so far enabled Shaw to raise that money, and that money he must therefore repay. Still that does not discharge his mortgage to the plt. Hives entered into one contract to give the plt. an equitable mortgage, and into another to give to Shaw a legal mortgage; but he cannot by so doing deprive the plt. of the benefit of his prior mortgage. But that prior mortgage was an equitable one, of which the company (the subsequent legal mortgagees) had no notice. When, therefore, the plt. has redeemed them, and got back his title-deeds, he will be in a position to enforce his equitable mortgage. No doubt the case is a hard one upon Hives; but for all that I think the plt. is entitled to the declaration which he seeks, and to payment of the amount that is due to him.

Solicitors for the parties: *W. and H. P. Sharp*, for *J. Smith*; *H. Gower and Scott and Co.*, for *Hewish and Eddowes*.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-Inn, Barrister-at-Law.

June 2 and 3.

CROFT v. GRAHAM.

Document purporting to be a settled account—Opening of settled accounts.

A document purporting to be an account of advances made by the deft. to the plt., being only a list of bills, I O U's, promissory notes and other securities, and accompanied by a letter signed by the plt., which was an acknowledgment of a settled account, held not to be binding on the plt.

Where an account was settled between a plt. and deft. with a view to a mortgage, which was not carried out by reason of exorbitant charges of interest, and where the alleged confirmation of the account was accompanied by pecuniary pressure on the plt., the account was held not binding on the plt.

This bill was filed by Archer Bernard Cross, a young man, entitled in fee tail in remainder expectant on the death of his father, to estates in Berkshire, against Charles Graham, a money-lender and bill discounter.

In 1858 the plt. was an undergraduate at St. John's College, Oxford, and under age, and was then introduced to the deft., who made him advances. In Sept. 1859 he attained his majority, and shortly afterwards was introduced by the deft. to one Alfred Rogers, an attorney, who introduced him to a money-lender named Semple, from whom the plt. obtained a sum of 2000*l*. This was in Oct. 1859. Immediately afterwards, on the 26th Oct., the deft. obtained from the plt. the sum of 900*l*, being 662*l*. for sums alleged to be due to the defts., and 250*l*. by way of commission to Rogers for obtaining the loan. On that occasion the plt. gave to the deft. a receipt and a letter, both of which are stated and observed upon in his Honour's judgment below.

The plt.'s allegation with respect to this alleged settlement was, that the account and list of notes, bills, and other securities which the plt. was liable to pay, either as principal or surety for his fellow-students, were not true or correct, and that, amongst many other errors, they contained items which were merely renewals of former notes and bills.

Many subsequent transactions took place between the plt. and deft., and in Jan. 1861 the deft. told the plt. he must have a mortgage. Plt. accordingly handed the deft. certain documents, and thereupon the deft. instructed the solicitor to prepare the mortgage. Upon this occasion the plt. was referred to a Mr. Dalston, a solicitor in Piccadilly, and on the 15th June 1861 a statement of amount (*sic*), with particulars of bills,

&c., from A. B. Croft, Esq., to Charles Graham, was drawn out, showing a total of 3000*l*., and concluding thus: "The foregoing is the account settled between us, and referred to in the indenture of mortgage to be executed by me the said Archer Bernard Croft, in favour of the said Charles Graham." This document was signed by both parties and witnessed.

In June Mr. Dalston wrote a letter to the plt., which he handed to the deft., who set it out in his answer, showing that the 3000*l*. was made up of acceptances for sums amounting to 2267*l*. 10*s*.; advances to 115*l*. 10*s*.; charges for interest on the bills at various rates, one about 67 per cent., another about 27 per cent., another about 84½ per cent., another at the rate of 15½ per cent.; and for bonus 350*l*., with other minor charges. Mr. Dalston showed the plt. what the effect would be of his executing the draft mortgage-deed as proposed, and added that, under the circumstances, he had refrained from approving the draft until he again heard from the plt., and that he earnestly impressed upon the plt. his advice that he should at once state his position to his father, and ask his assistance to raise money to pay off these debts at a less ruinous sacrifice. On the 1st Aug. 1861 Mr. Dalston returned the draft to the deft.'s solicitors, with the following note at the foot:—"Assuming the recitals in this draft, of which I have no knowledge other than that supplied by this draft itself, and the copy of the cash account settled between Mr. A. B. Croft and Mr. C. Graham, to be correct, and subject to my alterations and observations thereon in blue ink, I do not object to this draft in point of form on behalf of Mr. A. B. Croft."

J. N. DALSTON.

The deed was thereupon engrossed, but on the 27th Sept. Mr. Dalston wrote to the deft.'s solicitors, saying that the plt. had called upon him that morning, and said that, upon further consideration, he had decided not to execute the deed, and that he (the plt.) would immediately see Mr. Graham, and make some other arrangement with him.

In Oct. 1861 the plt. again had an interview with the deft. (see the statement in his Honour's judgment), and on the 18th Sept. the plt. gave the deft. bills for 3335*l*. The plt. then went to Boulogne, and on the 21st Oct. wrote stating that he had drawn on the deft. for 25*l*., to pay a French creditor, who was threatening him with arrest, and his hotel bill, in order that he might return to England. He returned about the 24th, and finally on the 5th Nov. left with the deft. two bills of exchange for 100*l*. each to be discounted, and then agreed to execute a warrant of attorney as collateral security. On the 8th the plt. signed and left with the deft. a letter (set out in the judgment below), which was written on the deft.'s dictation; and on the same day the deft. having prepared a warrant of attorney, took the plt. to the office of Mr. Consedine, a solicitor in Pall-mall, who read over the warrant to the plt., and he signed the same. The warrant authorised the deft. to sign judgment against the plt. for 7100*l*., in case of default of payment of 3550*l*. on the 9th Dec. then next, and to issue execution for that amount and interest thereon at the rate of 5 per cent. *per calendar month*.

The deft. signed judgment and caused a writ of *elegit* to be issued, in execution of which the sheriff entered on the estates; and on the 14th Jan. a letter was written by the deft.'s solicitor to the plt.'s father (who thus received the first intimation of these transactions), in which he stated that he had indorsed the writ of *elegit* at only 5 per cent. *per annum*, but he found that the defeasance, which was not drawn by him, mentioned interest at 5 per cent. *per calendar month*, and that the deft. reserved his right to apply to amend the writ.

Under these circumstances, the deft. having refused

to compromise the matter by an offer of 1000*l*. from the plt.'s friends, the present bill was filed, not charging fraud, but praying for a declaration that the plt. was chargeable on the securities for such sums only as had been actually advanced with interest at 5 per cent. per annum.

The deft. relied upon the transactions of Oct. 1859 and June 1861, as stated and settled accounts, and insisted that the plt. was not entitled to reopen them. He also relied upon the letter of the 8th Nov., as being an equitable mortgage to him.

The plt., who was cross-examined in court, said he understood from Graham, that 5 per cent. per annum only was to be paid on the warrant of attorney.

Bacon, Q. C. and Freeman were for the plt.

Malmes, Q. C. and Cracknall, for the deft.—The rate of interest must depend upon the amount of risk. The plt. made no complaint of his having been overcharged, and he now came too late to set aside settled accounts, one of which had been followed by payment.

The VICE-CHANCELLOR.—The only question in this case is as to that part of the defence which alleges that the plt. is concluded by a settlement of accounts rendered by the deft. Two documents are produced and relied upon as accounts so stated and settled. The first document is dated in Oct. 1859. What the deft. says in his answer of that document, and what he undertakes to prove in regard to it, is this. After setting forth the document *verbatim*, he says: "An account of my said advances was in manner aforesaid on or about the 26th day of Oct. 1859 rendered by me to the plt., and the plt. on or about that day paid to me the whole of my claim in manner aforesaid, and I claim the benefit of the settlement of account so come to by and between the plt. and myself as aforesaid on the 26th day of Oct. 1859 as a stated, signed and settled account, in like manner as if I had formally pleaded the same, and I submit that the said settlement of account ought not to be and cannot be disturbed or opened." The deft. says "an account of my advances." It is not so. The document is a list of bills of exchange, I O U's, promissory notes, and warrants of attorney, all for a gross sum. There is no statement whatever of any advances made, or of how much money was advanced; instead of purporting to be a statement of account of advances, it begins in this way, "Received of Mr. Charles Graham, 8, Duke-street, St. James's, London, the following bills of exchange and promissory notes drawn or accepted for me by —, Esq., of St. John's College, Oxford, and for —, Esq., of Pembroke College, Oxford, and those drawn or accepted by me which have been discounted for my own accommodation and warrants of attorney executed by me to secure payment of the same." Then follows a list of the bills, I O U's, promissory notes, and four warrants of attorney. Then there is a letter from the plt., not part of the document, but another document of the same date; and it is in these terms. It is addressed to the deft. and begins, "Dear Sir,—I beg to say that everything is settled between us as regards all past monetary transactions and all liabilities whatsoever up to this date. Yours truly, A. BERNARD CROFT.—Oct. 26, 1859." That is an acknowledgment of a settled account. But the account to which this letter refers has never been proved or produced. Therefore it is impossible for me to say that the deft. has proved what he undertook to prove, namely, that in Oct. 1859 he rendered an account of advances. The second statement or settlement of account is alleged to have been made in June 1861, and to have been adopted or confirmed in Nov. 1861. The account given of it by the deft. is, that he desired his clerk to make out an account of what was due to him from the plt., that the clerk made out an account, that

the materials from which he made out the account were the bills of exchange, and so forth. That certainly has more the appearance of a settled account. It is set forth in the answer *verbatim* at pages 16 and 17. It is called, "Statement of amount, with particulars of bills, &c., from A. B. Croft, Esq., to Charles Graham," and contains a statement of acceptances and advances. Then there are exorbitant charges for interest, and a sum for bonus of 350*l*. It is needless, however, to comment upon these charges, because this account which ends with a statement of a sum of 3000*l*. as being due from the plt. to the deft. has been submitted to a solicitor of the name of Dalston, who undertook to examine it as the professional adviser of the plt., and who, in a letter which the deft. sets forth in his answer, stated objections in reference to the enormous rates of interest which varied from 84 to 27 per cent., and gave reasons for declining to sanction a proposed mortgage to secure that sum, for the preparation of which mortgage this account was stated. It is true there is a very deliberate statement which, under other circumstances, would rather go to admit that this was an account of a balance due, because the statement of account concludes thus: "The foregoing is the account settled between us, and referred to in the indenture of mortgage to be executed by me, the said Archer Bernard Croft, in favour of the said Charles Graham.—A. Bernard Croft, June 15, 1861; Charles Graham, June 15, 1861.—Witness, Walter Ottaway." Now that is a clear acknowledgment of an account stated with a view to a contemplated mortgage; and what is still stronger in favour of the deft.'s case is, that Mr. Dalston, after pointing out the rates of interest were 67 per cent., 27 per cent., and in another case 84½ per cent., in that letter says: "I have gone more minutely into the account settled between you and Mr. Graham;" and afterwards, in another letter, Mr. Dalston calls it a "settled account," and settled with a view to the execution, by the plt., of a mortgage, but which, on account of the exorbitant charges in such account, never was executed; therefore, what is stated here in reference to the transactions of June 1861 was an account settled with a view to other transactions, which, by reason of the nature of that account, were never carried out. If the court finds pressure under such circumstances, and finds such high charges of interest as 84½ per cent. per annum, it will be slow, being called upon to do justice between the parties, to consider that a man is bound, under such circumstances, by such an account as a settled account. But it is not upon what took place then that the deft. insists upon this as a settled account. No mortgage was executed; and what the deft. alleges took place in the month of November is given in these remarkable terms in the 9th paragraph of the answer. Mr. Dalston had washed his hands of the transaction, and would not sanction the mortgage; and the deft. says:—"On or about the 15th of Oct. 1861," about four months after the alleged settlement of account, "the plt. called upon me at my place of business, and stated that he must have some money to enable him to go abroad, as his other creditors were pressing him, and he was afraid of being arrested. I reminded him of his refusal to execute the mortgage for 3000*l*. as hereinafter mentioned, and under which the amount secured thereby would have become payable on the 18th day of Sept. 1861. The plt. then proposed that the execution of said mortgage should stand over for three months longer, and for which he agreed to pay 300*l*. interest, to which I consented, and accordingly, in pursuance of that agreement, he on that day gave me bills for 3325*l*., being for 3000*l*. the amount of the said proposed mortgage, and which had been settled and agreed as hereinafter mentioned, 300*l*. agreed interest thereon as aforesaid, and 25*l*. for an advance then

V.C. S.]

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[V.C. W.]

made by me (less discount), on his acceptance at two months' date." Plt. then went abroad, and being abroad, he drew on the deft. for 25*l*. to enable him to pay a pressing demand and return to England. He returned to England in Oct. 1861, and pressed the deft. almost daily for further advances. Deft. says: "On the 5th Nov. 1861, on my again repeating that I had no money to advance him, he proposed to leave with me two bills of exchange for 100*l*. each to get discounted, and as an inducement to me to do so, he agreed to execute a warrant of attorney as collateral security for the bills already given, and those then left for discount as aforesaid." Now that settlement of account in Nov. 1861, it is said, was a settlement of account with a view to a mortgage, which was afterwards adopted and sanctioned, and became binding on the plt. But it is a very confused account, and what was intended to be settled between the parties is rendered more confused by a letter which was signed by the plt., but drawn up by the deft., and left by the plt. in deft.'s possession. The statement in the 9th paragraph is that the plt. proposed that the execution of the mortgage should stand over. The letter is in the following terms:—"Mr. C. Graham, Dear Sir,—You will please hold over the payment of the mortgage for 3000*l*. on Greenham Lodge and lands, &c., in the county of Berks (as tenant in tail in reversion), due to be paid the 15th day of Sept. last 1861, with costs and interest, for three months; and in consideration of your so doing, and having advanced me a further sum of 10*l*., I have handed to you my acceptance for 300*l*., dated the 16th of Oct. 1861, at two months' date, for the interest as agreed, and acceptance for 25*l*., for which you have given me a cheque for 20*l*., dated Oct. the 29th, at two months' date, the balance being for discount and expenses as agreed, and my acceptance for 357*l*. 10*s*. for value received; and also my two acceptances for 100*l*. each, dated Nov. 5, 1861, at two months' date, and I pledge my word of honour as a gentleman that these several sums shall be duly paid, and I now give you a warrant of attorney to receive payment of the same." It is difficult to say how this can be considered as an adoption of a settled account, even if it had not been conducted under such circumstances as these, of pressure upon a needy man, or one in want of money and afraid to meet his creditors—of one who wanted to come home from abroad, and agrees to give any terms upon which he may obtain some advances. I cannot reconcile it to my mind that this was a settled account by which the plt. ought to be bound. This matter is very much complicated with other matters which are mixed up with the alleged settlement of account; for the deft. alleges that there were two acceptances of 100*l*. each, which he accounts for in a most extraordinary way. He says, after setting forth the documents which I have read, "the said two bills remain in my hands." The answer to that is that, if the bills remain in his hands, he has no claim against the plt. in respect of them. That, however, is not the deft.'s view of the transaction; for in his cross-examination he says, "I claim them now against the plt." It is impossible for me to say that upon such a statement the plt. is bound in any way by the settlement which is alleged to have taken place in November. In June the deft. was to have security given to him; but none was given. But, in Nov. 1861, that document, a warrant of attorney, which it is part of the object of the suit to be relieved against, was executed by the plt., and in respect of that, a professional man, who acted, or assumed to act, for the plt. upon the deft.'s instructions, and who was a total stranger to the plt. until he saw him with reference to that transaction, says he ran over the defence; but he does not say that he called the attention of the plt. to the fact that the defenceance

stipulated for 5 per cent. indeed, but 5 per cent. per calendar month instead of per annum. It is to his credit that he mentions the fact that he did not see those words. The plt. has sworn that he was told in reference to the warrant of attorney that it was to secure 5 per cent., meaning 5 per cent. annum; and in his cross-examination the deft. gives the same account as the plt.'s witnesses do, that 5 per cent. was named without mentioning "per calendar month." Now, where the question is, how the words of a warrant of attorney, conched in such terms, and executed under such circumstances, are to be dealt with, it seems to me that the warrant must stand only for the money fairly due. To that the plt. does not object. I have not therefore to decide the legal question as to whether the power of attorney was properly executed or not; nor the equitable one as to the doctrine of surprise or misrepresentation. The plt. consents to let it stand for what may be found due on taking the account. Being of opinion that the deft. has failed to prove anything in the shape of a settled account, the duty of the court is to order an account of all moneys advanced by the deft. to the plt. or by his order or direction either to himself or to his friends at his request, to be taken; that what is due to the plt. on the account be ascertained; and to direct that interest be charged on the advances at the rate of 5 per cent. per annum. There remains only the question of costs; and I am not disposed to say anything about them. The plt. has come to be relieved from the consequences of his own folly and extravagance of a reckless and vicious career. It is very true he has been dealing with a person who obtained benefits from that line of conduct. But I can see no merits on either side; and therefore I give no costs to either party, up to the hearing of the cause. Upon payment of the money found due by the chief clerk, the documents must be delivered up, and satisfaction of the judgment entered on the record.

Ordered accordingly.

Solicitors: For the plt. *Pawle and Lavery*; for the deft., *Meads*.

V. C. WOOD'S COURT.

Reported by W. H. BENNETT and EDWARD LLOYD, Esqrs.
Barristers-at-Law.

Friday, July 24.

FRAMPTON v. WEBB.

Practice—Costs—Lunatic deft.

After appearance, but before answer, one of the defts. became lunatic, and to enable the plt. to bring on his cause to a hearing, an order was obtained by him appointing the Solicitor to the Sailors' Fee Fund his solicitor. An answer was then put in for this deft. submitting his interests to the court. Before the hearing, the lunatic deft. became sane, but took no step to discharge the order above mentioned. At the hearing a question arose as to who was to pay the costs of the Solicitor to the Fee Fund:

Held, that the deft. was bound to pay these costs; and add them to his own costs of suit.

This cause came on on motion, and the following question arose as to costs. The dates of the proceedings are as follows:—

The bill having been filed in a foreclosure suit, one of the defts. appeared thereto, by his own solicitor, in Sept. 1862, and on the 3rd Oct. 1862 he applied for and obtained further time to answer. Shortly afterwards, however, he became insane, and was confined in the Gloucester County Asylum. The plt. not being able to bring his cause to a hearing, without this deft.'s answer, obtained an order, dated 24th Nov. 1862, whereby the Solicitor to the Sailors' Fee Fund was

[Ex.] CAWDRON v. THE GREAT NORTHERN RAILWAY—SNEAD AND ANOTHER v. WILLIAMS. [Ex.]

appointed the solicitor to the lunatic deft., who put in an answer for the deft. submitting the interest which he had in the subject-matter of the suit to the protection of the court.

On the 28th Feb. 1863 notice of motion for a decree was given by the plt. On the 15th March 1863 the deft. was discharged from the lunatic asylum as sane. On the 12th June 1863 the plt. was informed of this fact. No further step was, however, taken by either plt. or deft., and on the 10th July 1863 the cause came on for a hearing. It was then ordered to stand over, to allow the plt. to serve notice of hearing on this deft. personally. Immediately thereupon the deft. moved to discharge the order made, substituting the solicitor to the fee fund for his (the deft.'s) original solicitor who had appeared for him in the cause, and that he might file affidavits on his behalf as a defence to the suit, instead of the formal answer filed for him submitting his interests to the court. The motion was almost a matter of course, but the question arose as to who was to pay the costs of the solicitor to the fee fund to the present time.

Windle, in support of the motion, submitted that the plt. ought to pay these costs, he having obtained the order for substitution of solicitor. He cited

Es parte Loveday, 1 De G. M. & G. 276 ;

Harris v. Hamlyn, 3 De G. & Sm. 470 ;

Fraser v. Thompson, 4 De G. & J. 659 ;

Anon. lb. 103.

Willcock, Q.C. and *Faber*, for the plt., contended that the deft. ought to pay these costs. Although the order had been obtained by the plt., it was unavoidable, as he could not bring on his cause without an answer from the deft. The record would not otherwise have been complete.

J. H. Taylor, for Mr. Johnson, the solicitor to the fee fund, took no part in the discussion.

The VICE-CHANCELLOR said, that the deft. had neglected to apply to the court at the proper period. He should have done so immediately after his discharge from the asylum, and moved to have the order substituting Mr. Johnson for his own solicitor discharged. He, however, had allowed the cause to go on to a hearing, without any step at all being taken on his part. The case of an infant coming of age pending the suit was a case precisely analogous, where he did not adopt that which had been done for him during his infancy. The deft. must, under these circumstances, pay the costs of the solicitor to the fee fund, before he could discharge the order appointing him. He might add the amount to his own costs of suit, to abide the event as to the direction for payment of costs at the hearing.

Order accordingly. Costs of the motion costs in the cause.

Solicitors: *Boodle and Co.*; *Johnson and Co.*

COURT OF EXCHEQUER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law.

April 21 and July 6.

CAWDRON v. THE GREAT NORTHERN RAILWAY.

Trespass—New trial.

This was an action against the defts. for injury sustained by the plt. from a quantity of water overflowing, which plt. contended defts. were liable for, and that they had a positive duty cast upon them of properly keeping up the water safely to maintain the delph and uphold the bank. The defts. said that the bank in question was not constructed according to the particular Act of Parliament which authorised it, and also that the bank referred to was not part of the delph, and they denied their liability. The cause was

tried at Lincoln, before Erle, C.J., and a verdict found for the plt. A rule nisi was subsequently obtained to set it aside and enter it for the plt. on the grounds: first, that the mischief was caused by default of the general commissioners below Horsley-deeps, and that the Witham Company and defts. were not responsible for the works, &c., below Horsley-deeps, nor for the consequences of the wrongful acts or defaults of the general commissioners; secondly, that the Witham Company and the defts. were liable only to provide for the water coming from Sincil-dyke, and not for waters thrown back from other sources below Horsley-deeps, and flowing towards Sincil-dyke; thirdly, that the judge at the trial ought not to have ruled as he did, and should have ruled that defts. would not be liable to keep the bank of the delph in a state to hold the waters that flowed into and accumulated in the delphs from below Horsley-deeps, or for the consequences of those waters causing the bank to give way, and that if there was any doubt as to those points on the evidence, the questions should have been left to the jury.

Macaulay, Q.C. and *Field* showed cause.

Borill, Q.C., *Boden* and *Beasley* contra.

The special Acts of Parliament of the company, and the local Acts were referred to (52 Geo. 3, c. 108; 10 Geo. 4, c. 123; the Railway Companies Act, s. 136), and

The Great Western Railway Company of Canada v. Fawcett, 8 L. T. Rep. N. S. 31.

Cur. adv. vult.

July 6.—*BRAMWELL*, B.—All that is necessary to say in this case is, that we think the rule should be discharged. Speaking for my own part, I desire not to have it supposed that I discharge the rule because I am of opinion that the Great Northern Railway Company would have been liable if the banks were broken through water being pent back upon them improperly by persons below. As far as I am concerned, I think that if the banks were broken, not by water, which it was necessary for the defts. to make them strong enough to resist, but by water which ought not properly to have been there, in such case the defts. would not be liable to this action; but the rule is discharged upon the ground that we cannot collect from the summing up of the learned judge that he took a different view upon the trial. *Rule discharged.*

June 5 and July 6.

SNEAD AND ANOTHER (Executors) v. WILLIAMS.

Banking account—Entry by mistake—Evidence.

A payment made by a customer of a bank can be appropriated by the bank to a debt due to the banker and his former partner, instead of to a debt due to the banker alone; and where an entry is alleged to have been made by mistake in the wrong place in a customer's pass-book by the banker's clerk, but by the customer denied to be any mistake, the question is for the jury upon the evidence.

This was an action to recover money lent by a banker. The money had been lent before a dissolution of the partnership of the banking firm, and the present action was brought by the existing partners.

The cause was tried at Brecon, before Mellor, J., when a verdict was found for the plts. for 55*l.* A rule nisi had been obtained to set aside the verdict and enter a nonsuit, or for a new trial, on the ground that the verdict was against the evidence, and that the proper persons to sue upon an account were the executors of a surviving partner at the time the money was advanced, and not the existing firm; and, pursuant to leave reserved, to enter a verdict for the deft. upon the question whether a certain payment alleged to have been made by the deft. could be appropriated by the plt. to a debt due to him and a former partner, instead of a debt due to himself only.

Ex.]

In the Goods of BALLINGALL.

[Prob.]

Grove, Q. C. and T. Allen showed cause.—It is clear upon the authorities that the plt. was entitled to maintain this action in his own name :

Kell v. Mainby, 10 B. & C. 20 ;

Cox v. Hubbard, 4 C. B. 317 ;

Teed v. Elworthy, 14 East, 210 ;

Parsons v. Crosby, 5 Esp. 199, cited therein.

The only question that went to the jury in the present case, is, whether a sum of 40*l.* had been entered in the def't.'s pass-book on the wrong side by mistake. It had been entered by a clerk in the plt.'s bank to the credit side of the def't.'s account instead of the debit side. The mistake was discovered in three or four days afterwards, when the 40*l.* was struck out on the credit side and entered, as it ought first to have been entered, on the debit side of the def't.'s pass-book. There was evidence to go to the jury it was properly left to them, and unless the learned judge should express himself dissatisfied with the verdict, that verdict ought to remain.

Giffard contra.—As to the verdict being against the evidence, this transaction occurred in Nov. 1858, the other partner in the bank died in April 1862, and when he was gone who might have explained the whole account, then this action was brought in July 1862. As to the law, the money was paid by the def't. generally to the then banking firm, the members of the bank at that time. To the knowledge of the def't. there were no two accounts kept at any time, and the plt. were not the proper parties to have sued him. The learned judge, it is believed, was not quite satisfied with the verdict.

The COURT, before giving judgment, said they would consult the judge who tried the cause.

July 6.—*BRAMWELL*, B. delivered judgment.—This case was tried before my brother Mellor. We have consulted him, it being said he probably might be dissatisfied with the verdict. It was moved to enter the verdict by leave, upon the point, whether a certain payment made by the def't. could be appropriated by the plt. to a debt due to himself and former partner, instead of to a debt due to himself alone. We disposed of that in the course of the argument, because it appeared perfectly plain, according to the authorities and the reasoning, that it could be so. Then it was supposed that my brother Mellor might be dissatisfied with the verdict, on the ground that he had told the jury, if the def't. was not speaking the truth he must be guilty of perjury. I have spoken to my brother Mellor, and he says he did make that observation, and he adds, that it is extremely difficult to say that the banker's clerk, on the other hand, was not telling the truth and was guilty of perjury: it was as strong in the one case as in the other. Then there are all the probabilities of the case. It is not suggested that the money was stolen by the bankers or the bankers' clerk; and you are then called upon to suppose their balances are right on the very day when 40*l.* is paid in, and by some unaccountable circumstance that mistake is made. No doubt it might happen that they made their balances right when they ought to have made them wrong by 40*l.*—such a thing is possible, and it is possible they did not make an entry of the receipt of cash; but that the two things should happen upon the same day, namely, that 40*l.* should be paid in and not entered, and the balance should be right at night, is a coincidence which is almost beyond possibility. Therefore my brother Mellor says he is not at all dissatisfied with the verdict, and as we see no reason to be dissatisfied, the rule will be discharged.

Rule discharged.

COURT OF PROBATE.

Reported by Dr. SWABET, of Doctors'-commons.

Tuesday, April 28.

In the Goods of BALLINGALL (deceased).

Administration to attorney out of jurisdiction—Suresties out of jurisdiction—20 & 21 Vict. c. 77, s. 81.

The executors of a will, being resident abroad, appointed persons resident in Scotland as their attorneys to take out administration with the will annexed. The attorneys being unable to procure sureties to the bond resident in England, the court accepted sureties resident in Scotland.

William Ballingall died on the 18th July 1862, leaving a will, whereby he devised and bequeathed all his real and personal estate to his sister Eliza, wife of John Stuart, and to his brother George R. Ballingall, as tenants in common, and he appointed the said George R. Ballingall and the said John Stuart his executors. The executors were both resident abroad, the one in Bombay and the other in Melbourne, Australia. They had, by power of attorney, appointed J. Anderson and G. B. Anderson, of Blairgowrie, Perthshire, their attorneys, to obtain letters of administration, with the will annexed, for their use and benefit. Messrs. Anderson had applied for a grant of administration at the registry, and had offered as sureties to the bond L. Chapman, writer, and J. B. Chapman, solicitor, both resident at Blairgowrie. The registrar declined to accept the Messrs. Chapman as sureties, on the ground that neither they nor the Messrs. Anderson were resident within the jurisdiction of the Court of Probate. The Messrs. Anderson had filed an affidavit, stating that they were unable to procure sureties resident in England.

Dr. Tristram moved the court to decree that letters of administration of the effects of the deceased, with the will annexed, should be granted to Messrs. Anderson, notwithstanding the sureties to the bond were resident in Scotland. In the Prerogative Court, where a grant was made to an attorney who was not resident within the jurisdiction, the rule was that the sureties should be resident in the jurisdiction. But under the 81st section of 20 & 21 Vict. c. 77, the court has power to dispense with sureties altogether, and it would be reasonable, under the circumstances of the case, to accept the sureties offered upon two grounds. First, the rule of the Prerogative Court was a reasonable one when it was established, for then, if the bond were assigned for a breach of its conditions, the assignee of the bond could not serve sureties resident out of the jurisdiction with process. But now that under the C. L. P. A. 1852 (15 & 16 Vict. c. 76) a writ may be served on a person resident out of England, the reason for the rule no longer exists. Secondly, under the will one of the executors takes a moiety *jure mariti*, and the other executor a moiety in his own right. Therefore they do not require sureties to protect them against the acts of their own attorneys. Sureties can only be requisite to protect the interests of creditors of the deceased, and they would have remedies against the executors, their attorneys, and the sureties, for a *devastavit*.

Sir C. CRESSWELL.—I think there is some weight in the argument, that there is not now the same necessity as formerly for requiring that sureties to the bond should be resident within the jurisdiction of the court. The circumstances of the case are peculiar, and I think that the sureties proposed may be accepted.

Motion granted.

Prob.] In the Goods of OUCHTERLONY—In the Goods of RIPPON—BAKER v. BAKER.

[Div.]

Tuesday, June 30.

In the Goods of OUCHTERLONY (deceased).

Probate—Embodying papers referred to by will.

A will made in Nov. 1861 contained a clause: "I make no specific bequest to my brother's children, &c. Upon this subject I refer my wife to my annulled will, dated the 11th Feb. 1861." The annulled will contained no bequest to those children; but in it the testator stated that in the present aspect of affairs there was every prospect that they would be left well provided for; but that if any reverse should overtake them, he trusted and felt sure that his wife would share her all with them. Upon motion for probate of the will of Nov. 1861,

Held, that the annulled will did not raise any implied trust in favour of the said children, and that therefore it need not be embodied in the probate.

John Ouchterlony, a lieutenant-colonel in the Madras engineers, died in the East Indies, on the 29th April 1863. After his death there were found in an envelope, in the possession of his widow, then residing in England, two testamentary papers: a will, dated the 11th Feb. 1856, cancelled by the deceased, and another uncancelled will, dated Nov. 23, 1861.

By the will of 1861 the deceased devised and bequeathed all his property, real and personal, to or for the benefit of his wife and children, subject to some small pecuniary bequests, and to the payment of an annuity of 50*l.* to his mother for her life, and after her decease to his sister, and appointed his wife, his brother James and J. G. Johnston, his executors. The will contained the following clause: "I make no specific bequest to my brother's children, because at the time of my writing this it is difficult to say whether or not my wife and children will inherit from me much more than a bare adequate support. Upon this subject I refer my dear wife to my annulled will, dated the 11th Feb. 1856, feeling sure should any of them ever want, she will share her last crust with them." The cancelled will contained this clause: "Under the present aspect of affairs there is every prospect that my brother James will attain affluence, and that his family will be left well provided for; but, should any of those reverses which fortune sends to the most favoured overtake them, I trust and feel sure my wife will share her all with them and his. The same remark applies to my brother Thomas and his family; and I make no specific provision for these contingencies, both on account of their remoteness and because I feel sure my wife's heart will dictate what it needs, not my solemn injunction to insure. In the same spirit I have made no stipulation regarding any members of our own family who may need her aid, and who, I well know, will not seek it in vain where their circumstances warrant her rendering it without prejudice to the interest of her children, which I solemnly but with perfect confidence entrust to her keeping."

Upon application in the registry for probate of the will of Nov. 23, 1861, the question was raised whether the annulled will should not be incorporated in the probate, in consequence of the reference to it by the later will.

Dr. Spinks now moved the court to direct that probate of the will of 1861 should be granted without incorporating in it the annulled will. [Sir C. CRESSWELL.—Is there any authority showing that such a vague clause as that in the annulled will would in the Court of Ch. be considered to have raised a trust in favour of the deceased's brothers and their families?] Courts of equity frequently hold that an implied or constructive trust is created by mere recommendatory or precatory words of a testator, but I know of no case which would be an authority

for holding that such a trust was created in the present case.

Sir C. CRESSWELL.—In the absence of such an authority it seems to me that in the present case no implied trust would be created. Probate of the will of 1861 may therefore be granted without embodying it in the annulled will. *Motion granted.*

Tuesday, July 14.

In the Goods of RIPPON (deceased).

Probate—Testator, British subject dying abroad after 24 & 25 Vict. c. 114—Will executed in England in accordance with the law of England—Domicil.

When a British subject dies abroad, after the passing of the 24 & 25 Vict. c. 114, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicil.

John Abraham Rippon, formerly of Dulwich, in the county of Surrey, late of the borough of D'Urban, Port Natal, in South Africa, died on the 28th Feb. 1863, at D'Urban aforesaid.

On the 11th Oct. 1861 the deceased at the same time duly executed two testamentary papers, the one (A) conditional, i.e., to take effect only in case the vessel *Marrieta*, in which he and his family were about to sail to Port Natal should be wrecked and himself and family lost. The other (B) an absolute will, by which he gave all his property to his wife and appointed her sole executrix. On the 12th Oct. 1861 he and his family sailed for Port Natal, and arrived there in Jan. 1862.

Dr. Spinks now moved the court to grant letters of administration, with the paper writing (B) annexed, to R. O. Ripon, as the attorney of the deceased's widow, the sole executrix, for her use and benefit, until she should duly obtain probate of the said will. Paper B is solely entitled to probate; paper A, although executed at the same time, being conditional to take effect only upon an event which never happened.

Sir C. CRESSWELL.—24 & 25 Vict. c. 114, which was passed on the 6th Aug. 1861, has rendered it unnecessary to consider whether or not the testator had changed his domicil.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABBY, of Doctors'-commons.

Wednesday, March 18.

BAKER v. BAKER.

Evidence—Cross-examination of petitioner as to matters not in issue—Evidence in contradiction.

A resp., who, in his answer, simply denies the cruelty charged in a petition, may cross-examine the petitioner, if called, as to her general conduct, for the purpose of impeaching her credit, but her answer as to any matters not bearing upon the issue cannot be contradicted.

This was a suit, by a wife, for dissolution of marriage, on the ground of adultery, coupled with cruelty and desertion.

The resp. denied the cruelty and desertion, and alleged that the petitioner had been guilty of adultery.

Issue having been joined, the cause came on now for trial, before the Judge Ordinary, by a jury.

The *Queen's Advocate* (Sir R. Phillimore) and R. Pritchard for the petitioner.

Dr. Spinks, Sleigh and Searle, for the resp.

Dr. Spinks, in cross-examining the petitioner, who was examined in support of the charge of cruelty,

asked her if she had ever been guilty of violence towards the resp.?

The *Queen's Advocate* objected.—The question is inadmissible, as the resp. has not recriminated cruelty or provocation.

Dr. *Spinks*.—If the petitioner should admit that her conduct has been as violent as that of the resp., and has caused his violence, the plea denying the cruelty would be proved. If she denies that she has been violent, and I can show that she has, her credit will be impeached.

The JUDGE ORDINARY.—The petitioner may be cross-examined as to matters not in issue for the purpose of testing her credibility, but her answers to such questions will be conclusive, and you cannot call witnesses to contradict her.

The petitioner was then cross-examined as to transactions which were not charged in the petition. The Court refused to allow her statements with reference to them to be contradicted.

Tuesday, June 2.

NICHOLSON v. NICHOLSON AND RATCLIFFE.

Dissolution of marriage—Wife's costs—New trial on wife's application—Husband paying costs on both sides. Alimony pendente lite.

Where a new trial is granted on the application of the wife, the court cannot impose upon her the terms of payment of costs, if she has no means, but the husband must pay the costs of both parties.

Seemle, that alimony pendente lite in a suit by a husband continues payable after a decree nisi, and until it is made absolute.

This was the husband's petition for dissolution of marriage.

The co-resp. did not appear.

The resp. appeared and denied the adultery, and also charged the petitioner with cruelty.

On the 12th March these issues were tried by a jury, who found that the resp. had been guilty of adultery, and that the petitioner had been guilty of cruelty.

The JUDGE ORDINARY, after taking time to consider, on the 24th March granted the decree nisi. He said, that it appeared that the resp. with the assistance of others had plundered the petitioner to a considerable extent. The petitioner's violence had been caused by his wife's misconduct, and had not led to her adultery; he was therefore entitled to a decree.

Littler (C. Russell with him), on behalf of the resp., obtained a rule nisi for a new trial upon affidavits, against which

The *Queen's Advocate* and *Digby* showed cause.

The JUDGE ORDINARY, after taking time to consider, now made the rule for a new trial absolute.

Littler.—Will there be a new trial also as to the cruelty?

The JUDGE ORDINARY.—Yes; I was much dissatisfied with the verdict upon that issue.

Littler.—Will it be necessary to get another order for alimony? Alimony pendente lite has been allotted.

The JUDGE ORDINARY.—No. The order for payment of alimony pendente lite will still remain in force.

The *Queen's Advocate*.—Will the new trial be granted on the terms of payment of costs?

The JUDGE ORDINARY.—I cannot make the wife pay the costs of the first trial. The husband must pay the costs of both parties. The husband's liability for the wife's costs is a subject which has caused me much embarrassment and anxiety; but it would be a mere mockery to grant a new trial upon the terms of payment of costs by a wife who has no means.

The *Queen's Advocate*.—Will the husband be liable for costs to a greater amount than that for which he has given security?

The JUDGE ORDINARY.—At present he will not; but hereafter an application that he give security for a further amount may be made.

Tuesday, July 7.

SMITH v. SMITH.

Practice—Resp. cited by advertisement—Amendment of petition—Advertising amended petition.

Where a resp. is cited by advertisement, and leave to amend the petition is afterwards granted, the amended petition need not be advertised.

This was a suit, by a husband, for dissolution of marriage. Personal service on the resp. had been dispensed with, and petitioner had obtained leave to proceed without making a co-resp. The resp. had been cited by advertisement, but had not appeared. The petition was heard by the Judge Ordinary in Hilary Term 1863, but the hearing was adjourned for further evidence as to the adultery.

R. *Searle*, on behalf of the petitioner, moved for leave to amend the petition by inserting charges of adultery which had come to the knowledge of the petitioner since the petition had been filed.

The JUDGE ORDINARY granted the motion.

R. *Searle*.—I presume it will not be necessary to serve the petition or advertise it.

The JUDGE ORDINARY.—You cannot serve it, as you cannot find the resp. I think it is not necessary to advertise the amended petition, inasmuch as it is the practice to advertise the citation only, and not the petition, and the citation does not specify the charges of adultery.

Tuesday, July 14.

BROWN v. BROWN AND SIMPSON.

Alimony—Refusal to allot where husband's property small.

Where the husband had no income, and his only property was a legacy of 500L., not payable until eleven months after the application for alimony, the Court refused to allot alimony pendente lite.

R. *Pritchard*, on behalf of the wife, proved for allotment of alimony pendente lite. It appeared from the husband's answer that he had no income, being maintained by his father in return for his services in his father's business, but that under the will of a deceased uncle he was entitled to a legacy of 500L., payable twelve months after the death of his uncle, which took place on the 31st May 1863. The legacy has a marketable value, and alimony should therefore be allotted.

Dr. *Spinks*.—No alimony should be allotted. Supposing the husband could raise money upon the legacy, its present value would not, if invested at 5 per cent., bring in more than about 20L. a-year, and there would be difficulty in his raising money on it.

The JUDGE ORDINARY.—*De minimis non curat lex*. I think that I ought not to allot alimony upon the legacy.

DIGEST OF MARITIME LAW CASES (EXCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from p. 88.)

N.B.—The LAW TIMES REPORTS, N.B., will give all the Maritime Law Cases decided from Michaelmas Term 1858. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1859. A Digest of the Salvage Cases during the same period is appearing in the LAW TIMES.]

SHIP'S HUSBAND.

2095. One of the directors of a shipping company held not entitled to act as ship's husband and charge commission; (*Benson v. Heathorn*, Harrison's Digest Index, Year 1843; 1 Young and Collier, N. C. 326.)

2095 A. Ship's husband held entitled in a question with mortgagees to deduct cost of necessary repairs to ship and

outfit for the voyage from gross freight and earnings of ship. General principles as to rights of part owners with reference to earnings of ship and expense of repairs: (*The Thames v. Briggs*, V. Ch. C., April 12, 1848; 6 Hare, 395; 12 Jur. 326; 17 L. J. 323, Ch.; Harrison's Digest, 3379.)

2095. A shipbroker abroad, employed by the ship's husband in this country to charter a ship, has no right to make the freight per charter-party payable in advance for the purpose of his retaining it in payment of a debt due to him by the ship's husband: (*Walsh and Howlett v. Provan*, C. E., June 8, 1853; 1 C. L. R. 823.)

2097. A secret agreement for commission to be paid by charterer to ship's husband out of freight, held under special circumstances to constitute a fraudulent act, subjecting him to disclaim in terms of contract: (*The Phoebe v. Brown v. Brown*, V. Ch. C., Dec. 21, 1853, *Shipping Gazette*.)

2098. Part owner of ship having performed the duties of ship's husband without any agreement as to commission, held entitled to remuneration, more especially seeing that another part owner had previously acted as ship's husband, and been paid commission. The rate of commission so allowed was $\frac{3}{4}$ per cent. on the gross freight, and $\frac{1}{4}$ per cent. on the disbursements: (*The Delta v. Salter v. Adey*, V. Ch. C., Feb. 1, 1855, *Shipping Gazette*.)

2099. Liability of shipowners for goods ordered by ship's husband and not paid for. Before Platt, B. and a special jury: (*The Walter Morris v. Casenau v. Morris*, Home Circuit, *Shipping Gazette*, April 9, 1855.)

2099 a. "A ship's husband cannot pledge the credit of other part owners, not being their agent, for the purpose of borrowing money." But he is entitled to receive the freight, account for it at the end of the voyage, and deduct his disbursements from it. Motion to restrain him from receiving freight refused, there being no improper conduct to justify such restraint. Question as to insolvency and costs: (*Harris v. Reynolds*, V. Ch. C., Jan. 31, 1856; W. Rep. 278.)

2100. Power of managing owner to appoint himself as broker to ship in collecting and distributing freight: (*Smith v. Loy*, 3 Kay & J. 105; Harrison's Digested Index, 194, year 1857.)

2101. Claim for commission to ship's husband or managing owner, where there was no agreement with his co-owners. Evidence on both sides being adduced as to what would be a fair remuneration, held that the highest sum named ought to be awarded, and not an average rate of commission: (*The Tudor v. Smith v. Loy*, V. Ch. C., April 22, 1858, *Shipping Gazette*.)

SHIPMENT OF CARGO GENERALLY.

Liability of shipowner for damage. See No. 417 a. Also *See's Tentarden*, 259.

SHIPMENT OF COALS.

2102. In a case which had been tried before a County Court relative to demurrage under a charter-party to load coals and coke in the Tyne, a new trial was ordered, on the ground that the County Court should have admitted evidence as to what is understood in the Tyne by the words "regular turn of loading": (*The Triton v. Liedemann v. Schmitt*, C. P., Nov. 8, 1853; 1 C. L. R. 87; 23 L. J. 17, C. P.; *See's Tentarden*, 196.)

2103. Coals must be shipped within a reasonable time, if no specified time is mentioned in charter-party, but only "to load in regular turn as customary": (*The Atlas v. Dye v. Eggleston*, Northern Circuit, Newcastle, March 2, 1854.)

2103 a. On the same subject see *Inglis v. Calderon*, Northern Circuit, Liverpool, Aug. 26, 1854, *Shipping Gazette*.

SHIPOWNER.

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I. MISCELLANEOUS.

2104. A shipowner may insure as *Freight* the profit to be derived from carrying his own goods in his own ship: (180; *Devour v. Jamson*, C. P. 8th May 1839; 5 Bing. N. C. 519; 7 Scott, 507; 3 Jur. 678; Anon. 272; Phillips, 333. See Nos. 1200, 1267 and 1691.)

2105. A ship may in some instances continue liable to liens acquired prior to her sale, and there may be cases where innocent purchasers, not personally liable, might have their ship attached and sold for damages occasioned by collision before they purchased. Shipowners held not liable for damage done to a foreign vessel by the master of their steam-tug wilfully running her into the foreigner, on the ground that it is a principle that a master is not responsible for the wilful malicious acts of his servant. General observations as to the law regarding the liability of a principal for the acts of his agent. Sundry cases cited and discussed: (*The Druid*, A. C., April 25, 1842; 6 Jur. 441; 1 W. Rob. 399; Pritchard's Digest, 370, 415; MacLachlan on the Law of Merchant Shipping, 106.)

2106. Shipowner not responsible for costs in an action for salvage instituted without his authority: (*The Wilhelmine*, A. C., Nov. 22, 1842, *Shipping Gazette*.)

2107. Shipowner not exempt from liability, previous to legislative enactments on the subject, for damage through acts of a duly authorised pilot: (*The Eden*, A. C., March 4, 1846; 10 Jur. 297; 4 Notes of Cases, 460; Pritchard's Digest, 276.)

2108. Question as to a fisherman, owner of sundry fishing smacks, not being a trader within the meaning of the bankrupt law, as a shipowner or carrier: (*Re Thomas Forge*, Insolvent Debtors' Court, June 6, 1855; 2 B. & In. Rep. 144.)

2109. Held by a majority of the Judges, that if a seaman, in consideration of an advance note, is supplied partly with clothes and receives the balance in cash, the advance note may be enforced against the shipowner by the person so obtaining it: *Hart v. Nash*, and *Brown v. Byrne*, cited by Willes, J. In expressing his dissent: (*McKane v. Johnson*, C. P., May 22, 1853; W. Rep. 658; and see 5 C. B., N. S., 218; Law Digest for 1859, 963.)

II. PART OWNERS.

2110. The captain of a ship, being also part owner, held bound to give security to his co-owner for the safe return of the vessel, although the latter was indebted to him: (*The Maria Ross v. Thompson v. Adair*, A. C., Dublin, March 3, 1856, *Shipping Gazette*.)

2111. A part owner of a vessel found liable in damages to the other part owner in respect of a false and malicious petition to the Court of Bankruptcy: (*Laver v. Purnell*, Liverpool Court of Passage, April 11, 1856, *Shipping Gazette*.)

2112. Arrest of ship in Admiralty Court of Ireland by one part owner till security should be given by the master, who was the other part owner: (*The Sir William Stamer*, A. C., Dublin, Dec. 15, 1856, *Shipping Gazette*.)

III. LIABILITY FOR SUPPLIES OR ADVANCES OF MONEY TO MASTER, &c.

2113. Master not entitled to borrow without necessity, so as to make the owner, residing at Newport (Monmouthshire), liable for a debt contracted for expenses incurred at Newcastle-on-Tyne, her port of destination, for towage, and shipwright's wages: (*Beldon v. Campbell*, C. E., July 16, 1851; 6 Ex. 886; MacLachlan on the Law of Merchant Shipping, 131.)

2114. Held, that a shipowner was not liable for cash advanced to master, unless shown that the advance was necessary, and that there was no time to communicate with the owners: (*The Williams's Adventure v. Schenck v. Townsend*, C. S. C., June 9, 1854, *Shipping Gazette*.)

2115. Shipowner held not liable for maintenance on shore of seamen injured on board the vessel. Bramwell, Q.C. for plt.; Knowles, Q.C. for def.: (*The Lady Margaret v. Organ v. Brodie*, C. E., July 13, 1854, *Shipping Gazette*.)

2116. The master's power to borrow and pledge the shipowner's credit is now grounded on reasonable necessity. Rule for a new trial refused, it being inferred that the jury considered there was such reasonable necessity where the master of a ship, wind-bound, borrowed £1. to replenish provisions, although in two days he might have received an answer to a communication if made to the owners. It was the master's duty to be ready to sail at the earliest change of wind. Cases cited: *Beldon v. Campbell*, 6 Ex. 886; *Macintosh v. Mitcheon*, 4 Ex. 175; *The Oriental*, 7 E. & M. 476, &c.: (*Edwards v. Havill*, C. P., Nov. 4, 1854; 2 C. L. R. 1243.)

(To be continued.)

[BANK.]

Re EUGENE VACHER—*Ex parte* JACOB SAFRAN, re A. B. AND C. D.

[BANK.]

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Monday, Sept. 7.

(Before Mr. Commissioner FANE.)

Re EUGENE VACHER.

Application for release—Sect. 112, 12 & 13 Vict. c. 106
— Misdescription—Petition—Omission of name
under which bankrupt had traded.

This bankrupt applied for his release.

Hayden, for the detaining creditor, Mr. Catto, opposed the application, on the ground of misdescription. The bankrupt had omitted in his description the name of Philip Baker and Co., under which name he had traded in 1862.

The COMMISSIONER intimated that the bankrupt must amend his petition. The application for release must be refused, and the costs of the opposing creditor allowed.

Saturday, Sept. 26.

(Before Mr. Commissioner GOULBURN.)

Ex parte JACOB SAFRAN, re A. B. AND C. D.
 (arranging Debtors).

Trader-debtor summons—Description of debt—
Variance between particulars of demand and the
affidavit of summoning creditor fatal.

Where the demand was stated in the affidavit to be for work done and materials provided, and that no security had been received except a bill of exchange, and that an account in writing of the particulars of the demand was annexed to the affidavit of the summoning creditor, and it appeared from the particulars of demand that the debt was for the sum of fifty pounds due on a bill of exchange, the variance was

Held to be fatal, and the summons dismissed.

Ex parte Greenstock, *De Gez*, 230; 15 *L. J. Rep.*

N. S. 5, Bank., followed.

Trader-debtor summons issued under the Bankrupt Law Consolidation Act 1849, s. 78, which enacts—
 “That if any creditor of any such trader shall file an affidavit in the court in the district in which such trader shall reside, in the form specified in schedule (F) hereunto annexed, of the truth of his debt, and of the debtor, as he verily believes, being such trader, and of the delivery to such trader personally, or to some adult inmate at his usual or last known place of abode or business, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof, in the form specified in schedule (G) annexed to this Act, it shall be lawful for the court in which such affidavit shall be filed to issue a summons in writing in the form contained in schedule (H) annexed to this Act, calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon to appear as hereinafter provided: provided always, that if the demand of a creditor appear by such affidavit to be due from two or more persons carrying on trade in partnership, the delivery of such account and notice to any one of the partners personally, or to some adult inmate at his usual or last known place of abode or business, and also at the place of business of the firm, as aforesaid, shall be sufficient to authorise the court to issue such summons against any other of such partners, as well as against the partner served personally with such account and notice.”

A summons (schedule H) was taken out by one Jacob Safran, of Wellclose-square, and it required the debtor A. B. to appear before the court on the 26th Sept. 1863, to ascertain, in the manner prescribed by

the Act, whether or not he admitted his demand, the claim described being the sum of fifty pounds for a debt due. The affidavit of debt was as follows:—

“Schedule F.

“The Bankruptcy Law Consolidation Act 1849 and the Bankruptcy Act 1861.

“Jacob Safran, of 2, Wellclose-square, St. George's-in-the-East, in the county of Middlesex, cabinet-maker; and James Mills, of 13, Gresham-street, in the city of London, attorney's clerk, severally make oath and say: and first, this deponent Jacob Safran for himself saith, that Albert Assman and Anton Meade are justly and truly indebted to this deponent in the sum of 50*l.* for work done and materials for the same provided by this deponent for the said Albert Assman and Anton Meade, for which the said sum of 50*l.*, or any part thereof, this deponent hath not nor hath any person by his order, or to this deponent's knowledge or belief, for his use received any security or satisfaction except a bill of exchange dated the seventeenth day of August, one thousand eight hundred and sixty-three, drawn by the said deponent upon and accepted by the said Albert Assman and Anton Meade, and payable twenty-one days after date for the sum of 50*l.* And this deponent further saith, that the said Albert Assman and Anton Meade, as this deponent verily believes, are traders within the meaning of the law of bankruptcy, and reside at 95, Minories, in the city of London, and that an account in writing of the particulars of the demand of the said Jacob Safran, amounting to the said sum of 50*l.*, with a notice thereunder written in the form prescribed by the Bankrupt Law Consolidation Act 1849, requiring immediate payment of the said debt, is hereto annexed. And this deponent James Mills for himself saith, that he did on the 18th day of September instant, personally serve the said Albert Assman and Anton Meade with a true copy of the said account and notice.

“JACOB SAFRAN.

“JAMES MILLS.

“Sworn by the deponent Jacob Safran and James Mills, at the Court of Bankruptcy, Basinghall-street, in the city of London, this 21st day of September 1863, before me, “W. HASLITT, Registrar.”

The particulars of demand (schedule G) stated the claim to be “the sum of 50*l.* on a bill of exchange, dated ‘London, the 17th day of Aug. 1863,’ payable at twenty-one days’ date, for 50*l.*, drawn by the said Jacob Safran upon, and accepted by, the said A. B. and C. D., payable to the order of the said Jacob Safran. 50*l.*”

Chamberlain, on behalf of the debtors, called the attention of the commissioner to the fact that, in the affidavit of debt, the claim alleged was “the sum of 50*l.* for work done, and materials for the same provided,” for which he had received no security, except a bill of exchange, &c.; whereas, in the particulars of demand annexed, the debt was described to be “a sum of 50*l.* on a bill of exchange,” &c. That variance, he submitted, was fatal, inasmuch as these contradicted each other, and there was no sufficient compliance with the rule (70th G. O. Oct. 1862) which required the particulars of demand to be expressed with “convenient certainty.” He relied upon *Ex parte Greenstock*, *De G.* 230, where the demand was stated in the affidavit to be for goods sold and delivered; and it appeared, from the particulars of demand, that the greater portion of the debt was due on bills of exchange, which, as afterwards appeared, were given in respect of goods sold and delivered. This variance was held by Knight Bruce, L. J. to be fatal, and the whole proceeding was set aside as irregular and an insufficient foundation for an act of bankruptcy: (see *Doria & Mac. Bank. Practice*, 183-187.)

Lucas contra.

[BANK.]

Re HEMBERTY—*Ex parte* GREY, re A JUDGMENT-DEBTOR SUMMONS.

[BANK.]

Mr. Commissioner GOULBURN, after reading the case cited, intimated that he thought it was sufficient to show that this summons must be dismissed.

Summons dismissed, but without costs.

Saturday, Sept. 26.

(Before Mr. Commissioner GOULBURN.)

Re HEMBERTY.

Notice of application to the court—Practice.

Applications and motions to the court should be entered in the registrar's book, and made by previous appointment of that officer.

Chidley applied for an order of release under sect. 112 Bankruptcy Law Consolidation Act 1849. The bankrupt was in custody upon two detainers at the suit respectively of Thos. Angell and P. Gill, and two clear days' notice had been given of this application. One creditor did not appear, and the other, who was in court, offered no opposition.

Mr. Commissioner GOULBURN, finding the application not entered in the list of the business of the day, referred to rule 18, G. O. 19th Oct. 1852, which requires that every order to show cause shall be served upon the party or parties affected thereby four clear days at the least before the day appointed for showing cause, and inquired why that rule had not been complied with?

Chidley said that the practice had been for years to give only two clear days' notice of applications for the release of bankrupts in custody under the 112th section, and he supposed that practice was grounded upon rule 26, G. O. 1852.

Mr. Commissioner GOULBURN read rules, 26, 27 and 28, as follow:—"26. Except in cases of emergency, all motions shall be made and all petitions heard, before the commissioner acting in the particular bankruptcy to which the matter relates, or the commissioner acting for him in his absence, and in London, on the day on which he sits as commissioner of the day, and at the sitting of the court, and in the order set down in the registrar's diary, unless the commissioner shall otherwise direct." "27. Motions made by the bar shall be heard according to the right of precedence, and motions made by attorneys in the order in which they have been set down in the registrar's diary previous to the public sitting of the court." "28. A short note of every motion shall be delivered to the registrar previous to the public sitting of the court, specifying the bankruptcy or other matter to which the same relates, the name of the party on whose behalf the same is made, the name and residence of the attorney of such party (and of the counsel, if the same be made by counsel), the name of any party, and the name and residence of his attorney, on whom any notice of such motion has been served." The learned Commissioner observed that it appeared from these rules that all business for the day should be previously entered in the registrar's diary, and that a short note of every motion should be delivered to that officer previous to the public sitting of the court.

Chidley said this had been left in the office, and he apprehended the four clear days' notice required by rule 17 only applied to motions under sect. 12, and not to applications for release under the 112th section of the Act of 1849. These latter motions were not subject to entries in the registrar's diary, and were usually made at the sitting of the court without any notice to the registrar except the notice required by rule 28 to the registrar before the sitting of the court.

Mr. Commissioner GOULBURN applied to the registrar to certify the practice of the court.

Mr. Registrar WINSLOW said, there was so much irregularity and so many things overlooked, that it was impossible to say what was the practice of the court.

Mr. Commissioner GOULBURN thought it would be proper to lay down a rule that a note of all these motions should be made in the registrar's book, that there might be a record of the business of the day.

Mr. Registrar WINSLOW thought the rule ought to be, that no motion should be entertained without an appointment first made.

Mr. Commissioner GOULBURN thought that an appointment ought to be made and entered in the registrar's book, and directed that practice to be followed in future.

The detaining creditor offering no opposition, the application for the release of the bankrupt was granted.

Order accordingly.

Ex parte GREY, re A JUDGMENT-DEBTOR SUMMONS.

24 & 25 Vict. c. 134, ss. 76 and 90—*Judgment-debtor summons—Privilege of Parliament—Debt contracted or liability incurred after the passing of the Bankruptcy Act 1861.*

By sect. 90 of the Bankruptcy Act 1861 the judgment-debtor summons must be a summons in respect of a debt contracted or of a liability incurred after the passing of the Act; but,

Held, that arrears of interest accruing due after the passing of the Act, upon a debt secured by bond, is a liability incurred within the meaning of the Act, and upon which a judgment-summons may issue; also,

That the provisions of the 76th section do not extend to a judgment-debtor having privilege of Parliament.

Judgment-debtor summons.

The plt. in this case having recovered judgment in an action upon a bond given in the year 1844, against a member of Parliament, sued out a judgment-debtor summons, under the 76th section of the Bankruptcy Act 1861, requiring him to appear and be examined respecting his ability to satisfy the debt.

The following are the particulars of plt.'s claim:—655*l.* 1*s.*, being the amount due from the deft. to the plt. upon a judgment recovered in the Court of Q. B. in Ireland, in Trinity Term 1844, for 1000*l.* debt, and 2*l.* 1*s.* 11*d.* costs.

And the like sum on accounts stated.

The plt. also claims interest at the rate of 6 per cent. per annum on 655*l.* 1*s.*, the above sum, from the date of the writ until judgment.

By the 76th section, it is enacted that "every judgment-creditor who is or shall be entitled to sue out against a debtor a writ of *capias ad satisfaciendum*, or to charge the debtor in execution, in respect of any debt amounting to 50*l.* exclusive of costs, shall be entitled, at the end of one week from the signing of judgment, to sue out against the debtor, if a trader, or not being a trader, at the end of one calendar month, and whether he be in custody or not, a summons, to be called a judgment-debtor summons, requiring him to appear and be examined respecting his ability to satisfy the debt."

De Gez appeared for the creditor who had taken out the summons.

Chidley (solicitor), for the debtor, objected that the debt in respect of which this summons issued was contracted before the passing of the Bankruptcy Act 1861, and by the 90th section of that Act it was expressly enacted that a judgment-debtor summons must be a summons in respect of a debt contracted or a liability incurred after the passing of the Act, and he read the affidavit of the debtor setting forth the facts upon which he relied:—

"I, —, of —, Esq., make oath and say as follows:—That I have read the copy of a judgment-debtor summons, issued under the seal of this honourable court, requiring me personally to be and appear before the

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Re ALEXANDER HALL.

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commissioner, to be examined respecting my ability to satisfy a demand of 659l. 8s. 4d. claimed of me by Eliza Grey, upon and by virtue of a judgment of the Court of Common Pleas, recovered by the said Eliza Grey against me on the 11th day of July last, of which sum 656l. 0s. 4d. is sworn to be due by me to the said Eliza Grey, exclusive of costs, and 3l. 8s. for taxed costs. I say, that the judgment of the Court of Common Pleas mentioned in the said judgment-debtor summons, is a judgment in respect of a debt contracted by me to the said Eliza Grey in the year 1844, and not in any respect a judgment in respect of a debt contracted, or a liability incurred, at any time after the 5th day of Aug. 1861. I say, that such judgment was so recovered on the 11th day of July last, in an action brought against me by Eliza Grey in the Court of Common Pleas in England, upon a judgment previously recovered by her in the Court of Common Pleas in Ireland as of Trinity Term 1844. I say, that such action in the Court of Common Pleas in England was commenced by writ of summons issued against me from said court at the suit of Eliza Grey, and I have annexed to this my affidavit the copy of such writ of summons with which I was served which was then indorsed as it now appears, and I say that the writ of summons with which I was so served, is the writ of summons upon which the judgment mentioned in the said judgment-debtor summons was recovered on the 11th July by the said Eliza Grey. I say that, in the year 1844, I was indebted to the said Eliza Grey in the sum of 500l., and, in order to secure the same, I executed to her a bond for the said sum of 500l., with interest at the rate of 6 per cent., and also executed a warrant to confess judgment for 1000l., being the penal sum mentioned in such bond. I say that judgment was immediately entered on such bond and warrant in the Court of Common Pleas in Ireland as of Trinity Term 1844, and that such judgment is the judgment upon which the said action was brought in the Court of C. P. in England. I say that the debt 656l. 0s. 4d., claimed in the judgment-debtor summons as due to the said Eliza Grey, is entirely composed of the sum so secured by the judgment of the Irish Court of C. P. of the year 1844, and arrears of interest upon the principal sum of 500l., for which I so executed my bond and warrant of attorney in the year 1844, and I say that I am not now, and never was indebted to the said Eliza Grey in any other sum than the said sum of 500l. lent by her to me in the year 1844, and the interest which from time to time accrued upon same. I say that, with the exception of the said copy writ of summons hereto annexed, I have never been served with any writ of summons at the suit of the said Eliza Grey. I say that I am not indebted to the said Eliza Grey in any sum whatever on account of any debt contracted, or liability incurred, since the 5th Aug. 1861; nor has the said Eliza Grey recovered any judgment against me in respect of any debt contracted, or any liability incurred, at any time after that day."

Chidley contended that the judgment recovered in July last, upon the judgment entered up on the bond, did not change the nature and character of the debt, which was contracted in 1844, for money borrowed in that year. There was no appearance to the writ issued in England.

Mr. Commissioner GOULBURN said, that the declaration in the action in July last was in debt upon the judgment obtained in the Dublin court. That was a judgment obtained in an action of debt since the passing of the Act.

De Gez said, the 11th July 1863 was the date when this judgment-debt was contracted, and that included two years' interest, amounting to 60l., which constituted a debt accruing due since the passing of the Act.

Chidley contended that the entire liability was but

one original contract, and the interest flowed out of that contract.

Mr. Commissioner GOULBURN said, he had no doubt whatever upon this point. This was a judgment-debtor summons, issued under the 76th section of the Bankruptcy Act 1861. Now, the first question was, whether this was a judgment-creditor entitled to sue out against the debtor a writ of *capias ad satisfaciendum*, or to charge the debtor in execution in respect of a debt amounting to 50l.? Now, here was a judgment recovered against this debtor in July 1863, in respect of a judgment entered up in Ireland for the sum of 655l. 1s. Therefore the debtor is entitled to sue out a *ca. sa.* in respect of a debt above 50l. But, said Mr. Chidley, this creditor is not entitled to sue out a judgment-debtor summons, for by sect. 90 it can only be sued out in respect of a debt contracted after the passing of this Act. The question then is, whether this was a debt contracted or a liability incurred after the passing of this Act. Now it was perfectly clear to him that a man might bring his action on that judgment entered up in Ireland, and having done so the judgment becomes the debt. The form of declaration in such case states the debt to be contracted by the judgment. But he need not go to the strict legal construction of the Act on that point, for by the bond interest was to be paid half-yearly at the rate of 6 per cent. There may be in the declaration counts for debt upon interest, and as that might be and was sued for to the amount of 60l., it was a debt contracted after the passing of the Bankruptcy Act 1861, and therefore he overruled the objection, and decided that the summons was rightly issued.

Chidley next objected to the summons upon the ground that it was not competent to the court to issue it against a person having privilege of Parliament, inasmuch as a writ of *ca. sa.* could not be sued out against him.

Cassidy v. Stewart, 9 Dowl. 366; s. c. 2 Scott N. R. 432, 10 L. J., N. S., 1, C. B.;

Ex parte Gibbon, re A Judgment Debtor Summons, 8 L. T. Rep. N. S. 552;

Ex parte Nibbett, re —, M.P., 8 L. T. Rep. N. S. 212.

In the case of *Ex parte Gibbon* his Honour had adjourned the proceedings to give the debt, an opportunity to move the court to set aside the writ which had issued, and upon a motion subsequently made at judges' chambers, Wightman, J. had set aside the writ of *ca. sa.* for irregularity, and in consequence no further proceedings were taken on the judgment.

Mr. Commissioner GOULBURN intimated that he should follow the same course as he had done in *Ex parte Gibbon*, and adjourn the proceedings to give the debtor an opportunity to apply to a judge at chambers to set aside the writ of *ca. sa.*

The application was adjourned accordingly.

DUBLIN.

Reported by JOHN LEVY, Esq., Barrister-at-Law.

September 1863.

(Before LYNCH, J.)

Re ALEXANDER HALL.

Order and disposition—Bill given to bankrupt to replace a bill supposed to have been lost—Bill given as a guarantee for the solvency of a customer, or for safe custody—Bills passed to replace another bill. B., a customer of the bankrupt, gave him a bill for 200l. in the ordinary course of business, which bill was sent into the bank where the bankrupt kept an account, but, by mistake, it was not entered on the docket with other bills sent in at the same time, and was supposed to be lost, and B. gave another bill in lieu of it, which was also sent to the bank and

put to the bankrupt's credit. B. was compelled to pay both bills. B. gave another bill to the bankrupt, the acceptance of a third party, which was lodged as a guarantee for his solvency and for safe custody. B. also gave the bankrupt two bills as renewals for a previous bill partly accepted for the bankrupt's accommodation, but upon which some advances had been made. The proceeds of all the bills became part of the bankrupt's assets:

Held, that the proceeds of the two first bills did not pass to the assignees, and that B. was entitled to be repaid the amount out of the bankrupt's estate of the two first bills, but that the same rule did not apply to the claim on the foot of the third bill.

The bankrupt was an extensive wholesale woollen-draper in the city of Dublin, and had various transactions with Mr. Browne, merchant tailor, in the same city, who gave him three bills of exchange, under the following circumstances. The first was a bill for 300*l.*, which Mr. Browne passed to Mr. Hall, to be put to the credit of his account. This bill was supposed to be lost, and Hall applied for a new bill, which Browne gave him, and which Hall got discounted by the Bank of Ireland. The first bill was by mistake sent to the bank and put to the credit of the bankrupt, and Browne had in fact to pay both bills. The second was a bill accepted by Sir Compton Domville for Browne, and by him lodged with the bankrupt, not for the purpose of discount, but as a guarantee for Browne's solvency and for safe custody; this bill was also lodged by Hall in the Bank of Ireland, and put to the credit of his account. The third was a claim of 316*l.* on foot of two bills for 383*l.*, which were given by Browne to the bankrupt, upon foot of which some advances were made to Browne. The proceeds of the whole of these bills got amongst the assets of Hall.

Hernan, Q. C. and *Martin* contended that the money being in the order and disposition of the bankrupt at the time of his bankruptcy, it passed to his assignees.

Dowse, Q. C. and *Foley* contended that it did not pass to the assignees, and that Browne had a right to be refunded the amount out of the general estate. They cited

Ex parte Bond, re Foster, 2 M. D. & D. 10;

Ex parte Armstead, re Dilworth, 2 Gl. & J. 371.

LYNCH, J. said:—This case comes before me on a motion made by Mr. James Browne, claiming to be paid three sums of money. The cases appear to be quite distinct from each other, and I shall separately dispose of them. The first claim is for 300*l.*, the produce of a bill now sent by mistake to the Bank of Ireland. That bill was given to replace another bill supposed to have been lost, and by mere mistake both bills got into the bank, and Mr. James Browne has been thus compelled to pay 300*l.* twice over. Now, there may be, undoubtedly, some legal difficulties in the way, but there is so much of injustice in allowing the loss to fall on Mr. Browne, so much hardship in allowing a mere mistake and oversight to work so far to his prejudice, that I think I can, without overstraining the law, declare him to be entitled to be paid this sum in full out of the money lodged in court. This is altogether an exceptional case—there is very little danger of its establishing any dangerous precedent; I feel, therefore, that I can safely do individual justice without disturbing the general rules of equality established in bankrupt, which must sometimes work individual hardship. I regard it as a mere mistake or accident, which I now set right by ordering this payment to Mr. Browne. The next claim is for 428*l.* 16*s.* 9*d.*, the amount of the acceptance of Sir C. Domville, which was placed by Mr. Browne in the hands of Mr. Hall, with a view to let it remain as a guarantee for Mr. Browne's solvency. However, it was not received as such, but was held on the express trust not to be

discounted, but received merely for custody; and I am of opinion that no property in this bill ever passed. It is stronger than the case of short bills, in which necessarily a dominion passes, as they are to be turned into cash; here no such dominion was intended; to receive payment was the most ever intended, even if so much. That bill in violation of such agreement was discounted, and its proceeds in my opinion went directly to make up the sum which Mr. Hall was enabled to draw for, when he sought to have all his available cash assets sent to him, and which he lodged in this court. *Ex parte Bond, re Foster*, 2 M. D. & D. 10, seems to me quite as strong as this case; and the principle of *Ex parte Armstead, re Dilworth*, 2 Glyn. & J. 371, seems directly applicable. This was no trade transaction, it was a bill given merely for custody, and the general creditors have in my judgment no right to hold as part of the assets the sum that represents that bill. I therefore declare Mr. Browne entitled to this sum of 428*l.* 16*s.* 9*d.* The third claim is for the sum of 316*l.* 7*s.* 5*d.* out of the amount of two bills for 383*l.* 12*s.* 5*d.*, and this claim is founded on the circumstance that these two bills were given as renewals for a former bill for 316*l.* 7*s.* 5*d.* But it is material to remark that those bills also cover further advances made by Mr. Hall to Mr. Browne. By the course of trade between Mr. Hall and Mr. Browne, bills of shorter date than the period of trade credit were passed, and the period of trade credit was covered by renewals, and of course the renewal bill was always intended as a means to take up the former bill. Therefore it was rather a trade duty to take up the former bill, than any direct trust out of any particular funds to do so. No case that I could find comes up to the proposition here contended for. An accommodation bill might in many instances be put in the same class as this case, and the acceptor of it insist on being paid the amount in full; and with every wish (nay, with every anxiety) to aid Mr. Browne if I could, I feel it impossible to make this transaction exceptional, and to place him, as to this bill, in a position of favour beyond all the other creditors. I must say no rule as to this claim.

Ireland. (a)

COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

Tuesday, June 3, 1862.

REG. v. THE TOWN COUNCIL OF DUBLIN.

Certiorari—3 & 4 Vict. c. 108—*Right of a corporation to apply borough funds to oppose a bill which would affect their property.*

Application for certiorari against Corporation of Dublin, who had applied borough funds to oppose a bill before committees of the Lords. It was shown that the provisions of the Bill would have the effect of reducing the income of the corporation:

Held, that the certiorari should not issue, as the corporation were justified in opposing the bill, and applying the borough funds for that purpose.

This was a motion to make absolute a conditional order for a certiorari, directed to the town council and town clerk of the borough of Dublin, directing them to return into this court certain orders made by said counsel, whereby certain sums were ordered to be paid out of the funds of said borough for the purpose of defraying the expense of opposing a certain bill then being promoted in Parliament, said bill being for the purpose of providing and constructing a new cattle market, market-places, slaughter-houses, and all necessary approaches and conveniences in the city of Dublin, and all orders made by said council for

(a) From the *Irish Jurist*, by permission.

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any payment out of said fund for any purpose touching said bill, and for certain resolutions, reports of committee, &c., having reference thereto, in order that same, or such of them as are illegal, may be quashed, upon the ground that same are illegal and void, and affect and attempt a disposition and application of said borough fund not authorised or warranted by law. It appeared from the affidavits of the prosecutors, on which the conditional order had been obtained, that the bill was promoted in consequence of the insufficiency of the existing cattle market accommodation, the increasing requirements and the frequent complaints made on the subject; that the site proposed for the new cattle market was chosen by G. W. H., a civil engineer, at the request of influential persons, and for the public benefit alone. It was also alleged that the provisions of said bill did not injuriously affect the Smithfield market, or the interests of the corporation of Dublin, or of any persons therein, or in the property adjoining, nor the privileges of the lord mayor or corporation with reference thereto. That the present market at Smithfield was monopolised unjustly and illegally by salemasters, and was not an open market as it ought to be; that as a cattle market it is not under the control of the corporation, nor do they derive any revenue from it, but that they do receive tolls for hay and straw sold therein, and that the bill did not propose a new market for these commodities. It further appeared that said bill had been twice read, and was then referred to a committee of the House of Commons; that the proposed bill was referred to a municipal committee by the town council of Dublin, who recommended a petition against it; and said committee were authorised to draw to the extent of 500*l.* on said borough fund for the furtherance of said petition, which was laid before the select committee of the House of Commons, who, nevertheless, declared the preamble proved; that subsequent to the proving of said bill a special meeting of said corporation was held for the purpose of authorising the application of the borough funds to the purpose of opposing said bill; and though notice of the illegality of such application of said fund was served on them, they passed a resolution authorising the city treasurer to pay a further sum of 500*l.* for that purpose; that said borough fund consists of the moneys specified in 3 & 4 Vict. c. 108, sect. 126, whereof provides that said fund is only to be applied to the purposes specified in the Act, said purposes being set out in the 131st section; and that the orders complained of are unauthorised by said 3 & 4 Vict. or by any other statute. The town clerk being absent made no affidavit; but that of the solicitor to the corporation contained the facts relied upon as cause. They were, that the city estates called "antient revenue," (including lands and tenements in the neighbourhood of Smithfield) were, in 1809, conveyed by the corporation to trustees for certain trusts, the first being "to take the rents and profits thereof upon trust, to pay thereout all costs which may at any time be necessarily incurred for the purpose of recovering and protecting the said estates or any of them, and all other charges connected with the due execution of said trusts," &c.; and that the rents of these estates are portion of the borough fund under the 3 & 4 Vict. c. 108. That the preamble of the bill and the 134th section provided for the erection of a new market, and that the market company shall be empowered to levy tolls and sell shires thereat, the corporation having incurred considerable expense in fitting up a "green hide crane," and keeping it in repair, though it was a free and open market. Under certain circumstances the Recorder of Dublin was to have the power of making rules and regulations for the management of the new market instead of the lord mayor, who at present had that privilege. Certain houses

and premises in the neighbourhood of Smithfield, the leases of which would fall in 1863 and 1881, would produce then an increased rental to the corporation as a portion of the "antient revenue" of about 500*l.* per annum in case the proposed bill was not passed; that the bill came before the select committee on the 18th March; the evidence given against it on behalf of the corporation was produced, the promoters having concluded theirs, and the corporation now relied on an opposition before the Lords. That the majority of the corporation believed the proposed bill to be detrimental to the interests of the ratepayers, and of the property held by the corporation in trust for the citizens, subversive of their own statutable rights; and that a public nuisance would be created by the passage of cattle through the city if it should pass. And further, that G. W. H. was engineer to the Great Southern and Western Railway Company, whose traffic would be much increased by the establishment of the proposed market; that the relators were unconnected with the cattle trade, and that the present market was sufficiently commodious; or if any alteration were needed in it, that the corporation would carry them out according to plans already prepared by their engineer for that purpose.

Armstrong, Serjt. (with him *Malley* and *O'Driscoll*), moved to make absolute the order.—By the 131st section of the 3 & 4 Vict. c. 108, any surplus funds that may remain in the hands of the corporation after defraying all necessary expenses, are to be applied to the improvement of the city. This enactment is explicit and peremptory; and it is no matter with reference thereto whether the revenue of the corporation is likely to be lessened, or any inconvenience occasioned to others by reason of the passing of the bill. The real and only question before the court is can the corporation travel out of the words of the Act? Counsel relied on

Rothwell v. The Borough of Dublin, 12 Ir. L. Rep. 206.

Lawson, Q. C., Solicitor-General and *C. Barry, Q. C. contra*.—The corporation in this case are only opposing a bill which, if it pass, will reduce their revenues considerably: and in so doing they are only protecting their property. They are acting just as they might in case they proceeded by ejectment against anyone who held possession illegally of their property, and they are obliged to preserve the property entrusted to them:

Reg. v. The Commissioners of Sewers for Norfolk, 15 Q. B. 549;

The Attorney-General v. Eastlake, 11 Har. 205;

The Attorney-General v. The Mayor of Norwich, 2 Myl. and Craig;

The Attorney-General v. Andrews, 2 M'N. & G. 225.

LEFROY, C. J.—We are all of opinion that we should not make absolute the conditional order. The corporation have voted money to oppose a bill which was being promoted in Parliament. It appears they, or a majority of them, believe it to be detrimental to their interests that it should become law, and we must be satisfied that the orders they have made with reference to it are invalid before we can issue the *certiorari*. There was no deceit in these orders, and there was nothing on the face of them to render them invalid as orders to oppose a bill brought into Parliament. The gist of the bill was to obtain a new cattle market, and a new crane for the sale and weighing of hides; with respect to the market, they were, by the course they took, only exercising their common law right. It was their duty to oppose the bill, as it was attended with prejudice to the interests of the citizens of Dublin, inasmuch as the property of the corporation itself would be seriously injured; and is

it to be said that, under these circumstances, they were to be precluded from appearing before Parliament to oppose the bill? What could be more fair and just than that they should appear before the House of Lords? The dread of injury to their property appears to me a fair ground for their raising a sum of money to protect it. This is not a job of the solicitor; there is nothing suspicious on the face of it. With respect to the crane, the bill goes to the length of abolishing it; the corporation derived a revenue under it, and they would have been deprived of this as well as of a considerable part of their property. If the reversion in expectancy which the corporation were entitled to were not to fall in for a great number of years, the opposition to the bill prejudicing such reversion might be considered a speculation; but that is not the case here. Some of the leases will fall in next year, and there is a sufficient and substantial ground for justifying the corporation in taking measures to resist this bill in passing through Parliament. On the whole there appears, in my opinion, sufficient reason for refusing to make absolute the conditional order.

O'BRIEN, J.—I am also clearly of opinion that the order should be refused. The 3 & 4 Vict., under the authority of which the corporation disposed of the rents and profits of their property, provides that the parties to whom the property of the corporation are entrusted as trustees, shall refund themselves all expenses they incur in protecting such property; and I think we should be slow in putting a construction on the Act which has not yet been put on it. The decision in the case quoted does not affect this case. Where it is not a speculative opposition, but that a serious injury is apprehended from a bill passing through Parliament, the opposition given to it by the corporation is a legitimate exercise of their powers. It is sufficient, for this purpose, to show that it was the interest of the people of Dublin that they should resist the bill. The question is with respect to the protection of the Smithfield property, and is not a speculative one; not that the property is to become theirs in 1881, but the result of the opposition will affect their property next year. If this bill passed, the Recorder might take the place of the Lord Mayor, who now makes rules and regulations for the carrying on of all the markets in Dublin. Is it not consistent with the provisions of the Act of Parliament that they should protect the property left to them?

HAYES, J.—The decision of this court is not final; but the Act gives us the authority to decide the question here at issue; and all that we have to do is, to see whether in administering the rights bestowed on the corporation, this may be a proper application of the funds placed at their disposal. Many reasons have been given why it should be considered so, but I hold by their right to protect their property. Where a public body gets property for public purposes, they have a right to protect and defend that property; and if it were shown that that property was likely to be injured by any measure this would be sufficient indication to them that they should, by opposing it, protect and defend that property. Some of the corporation property will fall out of lease next year, and more of it in nineteen years; and, on the principle of universal benevolence, I hold that it should be preserved. If this court does not give satisfaction to the relations, they can go elsewhere.

FITZGERALD, J.—We are satisfied that the intended bill was likely to injure the property of the corporation, and that they opposed it in the legitimate exercise of their privileges.

Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Wednesday, July 22.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L. J. and TURNER, L. J.)

HUTCHINGS v. NUNES.

Sale—Stoppage in transitu—Agent stopping goods—Authority of agent sent off, but not received before goods arrived—Rescission of contract—Implied consent to rescind.

R., residing at Jamaica, had written to P. for a cargo of goods, which P. shipped from Baltimore on 28th March. On 29th March R., finding his insolvency imminent, wrote to N., of Jamaica (who was a general agent of P. in the island), authorising N. to take charge of the cargo on arrival for the benefit of P., and wrote P. as to what he had done, and offering to rescind the contract. On 31st March R. was declared bankrupt. On 16th April P. received the notice from R., and sent a power of attorney to N. to act fully for P. On the cargo arriving on 21st April, N. took possession of the cargo. The official assignee of R. then demanded it on behalf of the estate. On 6th May N. received the power of attorney sent by P.

In an action by the official assignee against N. for the cargo:

Held, that as P., the unpaid vendor, could on 21st April have stopped the cargo in transitu, N., as his agent, effectually did so in P.'s name, and that the letter from P. to N. sent on 16th April, though not received till 6th May, was a sufficient warrant to establish N.'s agency to represent P. in the circumstances.

Semble, even though there had been no stoppage in transitu, the offer of R. to rescind the contract before his insolvency may be taken to have been impliedly assented to by P., and therefore the contract being rescinded, the goods belonged to P.

This was an appeal from the judgment of the Supreme Court of Jamaica in a suit commenced in that court in the month of June 1861, by the plt. (the now app.) against the defts. (the now resp.), to recover the value of certain goods claimed by the app. on behalf of the creditors of Moses Ramos, an insolvent debtor.

Moses Ramos, before and at the time of his insolvency, carried on business as a merchant at Kingston in Jamaica, under the style of "M. Ramos and Co.," and the resp. also carried on business as merchants at the same place under the style of "Nunes Brothers."

The form of action was trover, and the pleadings were to the following effect:—The first count of the declaration stated that Moses Ramos before he became insolvent, was the owner of the goods in question, and that before the insolvency the defts. wrongfully converted them to their own use.

The second was a similar count, stating the property in the goods at the time of the wrongful conversion to be in the plt. as official assignee.

The defts. merely pleaded "not guilty," which plea, according to the laws then in force in the island of Jamaica, put in issue both the wrongful conversion and also the title to the goods.

The cause came on to be tried on the 4th July 1861, before the Chief Justice of the Supreme Court.

The material facts of the case were as follows:—

On the 29th Feb. 1860 Moses Ramos ordered from Messrs. Pearce and Gray, who were merchants at Baltimore and had dealt with him previously in the same way of business, a quantity of goods, consisting

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principally of dry provisions, to be shipped to him, at his risk and expense, from Baltimore to Kingston.

On the 28th March following this cargo was duly shipped, and sent from Baltimore to Kingston in the brig *Condor*, accompanied by a letter with a bill of lading and an invoice of the goods in the usual form, the invoice being made out to M. Ramos and Co., and the goods being deliverable by the terms of the bill of lading at the port of Kingston to Messrs. M. Ramos and Co., or his assigns, he or they paying freight thereupon.

The shipment took place upon such terms and under such circumstances as clearly to pass the property in the said cargo to M. Ramos, subject only to any right stoppage *in transitu* which might arise in favour of Messrs. Pearce and Gray.

On the 31st March 1860, and whilst the *Condor* was on her voyage to Kingston, a fiat of insolvency issued against M. Ramos, and the plt. was then duly appointed the official assignee of all his property, real and personal.

By the 25th section of the Act of Assembly of Jamaica, 11 Vict. c. 28, the whole of the property of an insolvent debtor, real and personal, is vested in his official assignee immediately upon the fiat of insolvency being duly issued.

Meanwhile, on the 28th March, a firm of merchants in Kingston, who acted there as general agents of Messrs. Pearce and Gray, sent a letter to them of that date, announcing the failure of M. Ramos and Co., and offering to do everything in their power to protect their interests on the arrival of the *Condor*.

A similar letter was also sent to Messrs. Pearce and Gray by the resps., who had transacted some little business with them previously to the month of Feb. 1860. In that month Mr. Gray was staying for a few days at Kingston, and being well acquainted with Mr. Ralph Nunes, one of the partners in the resps. firm, he made some inquiries of him with reference to the insolvency of M. Ramos and Co., and requested him to keep Messrs. Pearce and Gray generally informed about the state of the parties in Jamaica, which Mr. Nunes promised to do.

On the 29th March, Ramos himself wrote a letter to Messrs. Pearce and Gray, informing them of his failure, and stating that he thought the most fair and honourable way of acting towards them was by handing the cargo which he had ordered to the resps., as agents for Messrs. Pearce and Gray, and that he had accordingly given them (the resps.) a letter to that effect.

This letter to the resps. was dated the 29th March 1860, and was in the following terms:—

"Gentlemen,—We hereby agree and authorise you to take charge of (on arrival here) our expected cargo of breadstuffs, &c., &c., from Baltimore, put up by Messrs. Pearce and Gray, of that place, and to dispose of the same to the best advantage for their benefit, after which to remit the proceeds thereof to them.—We are, your obedient servants,

"M. RAMOS and Co."

By the 67th section of the above-mentioned colonial statute it is enacted, "That if any person, in contemplation of his becoming insolvent, or, being in insolvent circumstances, shall convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, policy of assurance, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed fraudulent and void as against the official assignee of such person."

Messrs. Pearce and Gray on 16th April wrote to Messrs. Nunes as follows:—

"To Messrs. Nunes Brothers, Kingston, Jamaica.

"Dear Sirs,—Asking your attention to the accompanying press copy of our respects, April 11, we have now to own receipt of your esteemed favours 26th and 20th ultimo, with particulars relating to the failure of Messrs. M. Ramos and Co., which we sincerely regret. We are glad, however, to learn that his course has been an open and honest one. His yielding up everything speaks well for his principles and views of commercial integrity, and doubtlessly will materially assist him in recommencing business. The course he pursued in reference to the cargo sent out by us was such as we anticipated his doing, and for your very prompt and friendly action in the matter we shall ever entertain a grateful appreciation of the valuable service rendered. The fact of all the shipping documents being dated after the failure precludes the possibility of its coming into the assets, as the assets of this cargo did not really exist at the time M. R. and Co. failed. Everything is so clear, in our opinion, that we do not deem it necessary to enter into further argument touching the matter, leaving all to your good management. By this conveyance we send you power of attorney to use in the matter in case of necessity; in disposing of the cargo use your own judgment. We should, however, like to have it realised and remitted for in colonial bank bills as soon as practicable."

In reference to this letter the evidence of Mr. Gray was as follows, being in the form of interrogatories, and his answers thereto:—

7. Whilst in Kingston, in Feb. 1860, had you any conversation with the defts., or with either of them, and which of them, in relation to said Ramos? If you please, state the same. Ans. I had a conversation with the defts. Ralph Nunes, with whom I was intimate and in friendly relations, and requested him to keep us posted about parties in Kingston. This was about the time of the writing of my letter to Mr. Pearce, of which an extract is already filed with the commissioner.

9. When did you first hear from Mr. Ramos, or from any person in his name, that he had failed? And if you have any letter announcing such failure, please produce it. Ans. We received on the 20th April 1860 a communication from Ramos and Co., per R. de Leon, dated 29th March 1860, and which is now handed to the commissioner.

10. Had you previously received information from any other person or persons; and if yes, when and from whom? Ans. On the 16th April 1860 we received a communication from E. Lyons and Son, dated the 28th March 1860, which is now handed to the commissioner, and on the same day, by the same mail, we received a communication from Messrs. Nunes Brothers, dated 26th March, 1860, and which is now handed to the commissioner.

11. Please say whether, on the receipt of said letter from Messrs Nunes Brothers, your firm took any and what action thereon; and if by letter, please to produce, if you can, a copy thereof, and state, if known to you, when said letter was dispatched. Ans. Our firm took immediate action by addressing Messrs. Nunes Brothers, on the same day, the 16th April 1860, a letter inclosing a power of attorney, and which was dispatched on the same day by the *Henry Payson*. We are unable to supply a copy of the power of attorney, but I hand herewith a copy of our letter which inclosed said power. We intended to confirm fully their acts as our agents, and to confirm any verbal authority derived from myself when I was in the island in Feb. 1860.

12. When you received the letter from Messrs. Nunes Brothers, already filed by you with the commissioner, were you surprised that they had intervened in your behalf as your agents to exercise the right of stoppage *in transitu*, or that they were willing to accept

an abandonment of the cargo from Mr. Ramos on you? Ans. No, I was not surprised that they had done so.

Plt.'s 1st interrogatory.—You speak of Messrs. Nunes Brothers as your agents; please state what was the nature and extent of their agency for you. Ans. Previous to my arrival at the island of which I have spoken in my examination in chief, our house had had limited business relations with them, but expected them to be of extensive character. While there, my presence led to further business relations with Nunes Brothers, such as their chartering a vessel, loading and sending her to our consignment, said vessel being returned to them by us with a full cargo.

2. Was that the extent of their agency for you which induced you, in your examination in chief, to speak of them as your agents? Ans. They had no specific power to act for us in any other case, not anticipating such necessity. We considered the agency mutual at both ends. We should have felt authorised to act for them in any similar emergency, and expected them to do the same for us.

3. What kind of agency did you consider mutual at both ends, and why did you so consider it? Ans. In matters pertaining to business, because there was mutual confidence reposed by each in the other.

4. Did you repose in each other any other confidence than that which was necessary for attention to particular business entrusted by the one to the other? Ans. I did, I think. I can say we did, growing out of the fact of our intimate relations there. Mr. Ralph Nunes and I carried on a private correspondence.

5. Did you, before leaving the island, give Messrs. Nunes Brothers, or either of them, any authority to do more for you than to keep you informed of the condition of parties there during your absence; or did you request either of them to do more? If you answer in the affirmative, please state what further you authorised or requested. Ans. There was no specific authority given to either party for any purpose. My memory does not serve me sufficiently to give the extent of any verbal communication bearing upon authority.

On the 21st April the *Cowdor* arrived in Kingston harbour with the cargo on board. Immediately on her arrival, Mr. Ralph Nunes went on board and demanded from the captain a package of the cargo, in the name of the whole, on behalf of the shippers Pearce and Gray. The captain acceded to the demand, and gave him a keg of lard, which he accordingly marked and appropriated with the concurrence of the captain and mate.

Mr. Nunes then returned and ordered the vessel up to Kingston, and the cargo was placed by the captain at the disposal of the resps.

Shortly after this, a notice of the app.'s claim to the goods was given to the Custom-house authorities, and the resps. were obliged to give to the Custom-house authorities a bond of indemnity before they were allowed to take possession of them.

On the 21st April, and subsequently on the 9th May, whilst the goods were in the resps.' possession, a demand of them was made on behalf of the app., but the resps. declined to give them up; and they subsequently (on the 14th May) sold them for the sum of 1701*l.* 14*s.*

The letters of Messrs. Lyons and Co., and of the resps. dated the 28th March, reached Messrs. Pearce and Gray on the 16th April; and on the same day the latter executed and sent the power of attorney to Mr. Ralph Nunes above alluded to.

This power of attorney arrived at Kingston, and was received by the resp. on the 5th May.

The letter of M. Ramos and Co., dated the 29th March, reached Messrs. Pearce and Gray on the 20th April.

The main contention at the trial, on the part of the

defts., was that the property in the goods never passed to the plt., inasmuch as the defts. had a right to stop the goods *in transitu*, or otherwise to retake possession of them in the name of Messrs. Pearce and Gray the consignors.

The jury found a verdict for the plt., for 1701*l.* 14*s.*, leave being reserved for the defts. to move to set aside that verdict upon several grounds: first, the action was misconceived, and there was no conversion; secondly, that at the time of the demand the goods were not in possession of defts., so as to be by them delivered to the party demanding; thirdly, that there was no evidence that the terms of the agreement were ever complied with; fourthly, that no property in the goods ever passed to the official assignee under the circumstances proved: or for a new trial, because the verdict was contrary to law, contrary to evidence and against the weight of evidence.

CARGILL, J. gave the following opinion:—The two main points insisted on were, first, that there was a stoppage *in transitu*; and secondly, if not, there was a valid rescission of the contract by Ramos. With regard to the stoppage *in transitu*, the case of *Bird v. Brown*, 4 Ex. 786, so closely resembles this, that I am unable to distinguish between them. In that case, as in this, there was a stoppage by an authorised agent in both cases; there was a subsequent ratification by the principal. In deciding that case, Pollock, C. J. observes, "the doctrine (*omnis ratihabitio retrohabetur et mandato equiparatur*)" must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies. As in that case, so in this, the ratification did not take place till after the right to enforce it had ceased. This ground I think fails. As to the rescission of the contract by Ramos before his insolvency, I feel much greater difficulty, but I think, being guided by the decision in *Atkins v. Barwick*, 1 Str. 165, and the cases subsequently decided upon it, that Ramos never came into possession of the goods before his insolvency, and that his refusal to receive them prevented the official assignee from having any right over them. In *Harman v. Fisher* Lord Mansfield is reported to have said that the judgment in *Atkins v. Barwick* was right, though the reasons as reported by Strange were wrong, that the true ground was that the trader very honestly refused to accept the goods, and returned them. In *Salte v. Field*, 5 T. R. 402, the assent to the vendor's countermand was not received till after the goods had been attached, and yet it was considered sufficient. In *Smith v. Field* the decision was different, because it was gathered from an act of the vendors that (though afterwards desirous to do so) they had refused at first to renounce the contract. In *Mills v. Bull*, 2 B. & P. 457, the bankrupt before returning the goods had been in possession of them for some time, which makes a distinction between that and the present case. In *Hennekey v. Earle* the bankrupt, though apparently desirous of returning the goods, had in fact never done so, but had by the advice of his solicitor kept them. In fact *Atkins v. Barwick*, though questioned, has never been overruled, but always acted on; and I cannot see any distinction between the present case and *Atkins v. Barwick* to justify my now coming to a contrary decision. I think, therefore, that although the shipping the goods with the bill of lading on the 27th or 29th of March was sufficient to vest the property in the goods in Ramos, his letter of the 29th renouncing the goods was sufficient to prevent the property passing to the official assignee, as stated in the fourth ground of nonsuit, and as the circumstances came out fully in Ramos' evidence and letter as part of the plt.'s case, the rule for a nonsuit must be absolute.

KER, J., as to the point of rescission, gave the

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following opinion:—In reference to this inquiry it is to be observed that the question seems wholly to depend upon whether *Atkins v. Barwick* and *Salle v. Field* are to be taken as subsisting authorities. For if they are, there appears no further room for discussion. Referring to the cases in question, Chambre, J. remarks, in *Richardson v. Goss*, the question whether the contract was rescinded is the principal question to be considered. It may be observed that the case of *Atkins v. Barwick* has stood very near a century, and though it has been much commented on yet its authority has in the main been preserved. It is true that there are some very peculiar circumstances in that case: seventeen days intervened after the goods had been sent out of the possession of the consignees before any notice was given to the consignors of their intention not to accept them, and it does not appear that the person to whom they were sent had any connection with the consignors. Perhaps, therefore, if a case precisely similar to *Atkins v. Barwick* were now to arise it would not receive the same decision. Since the time when that decision took place a new distinction has arisen respecting preference given to one creditor over the rest in contemplation of bankruptcy, and perhaps that distinction would have been sufficient to set aside the transactions in that case; but the objections do not rest here, for when the consignees had sent away the goods the bankruptcy had taken place. Under these circumstances it might be difficult now to support the case as it was then decided; and it is remarkable that when this case has been mentioned on various occasions it has constantly been found fault with, and yet the judges have never particularly stated the parts with which they quarrelled, but have always confirmed the case upon the whole, and holden the decision to have been right. One main point was this, that the court would presume an assent on the part of the consignors; and in that case it was necessary that they should do so, for the consignors had no opportunity of expressing their assent until nineteen days after the goods were sent away, and two days after the act of bankruptcy had taken place. In the same case the following was the language of Lord Alvanley: "It is singular that the case of *Atkins v. Barwick* should have been so often cited with disapprobation and never overturned, but that different judges should have supposed it to proceed on different grounds. The true ground, however, seems to be that mentioned by Lord Mansfield and Lord Kenyon, that the goods had never been accepted by the trader. Had the packer in the case of *Salle v. Field* set up a lien for his general balance, that would have been precisely this case. But in that case the vendee had previous to the receipt by the packer countermanded the goods, to which countermand the vendor assented, after an attachment had issued, though the goods were in fact deposited with the packer, which ought not to have been so deposited; and the only question was, whether the property reverted to the vendor so as to avoid the intermediate attachment of the creditors." Of *Atkins v. Barwick*, Lord Kenyon, assuredly no mean authority, observes, in the case of *Ball v. Neate*, reported in the second volume of East: "The verdict is now moved to be set aside on the authority of *Atkins v. Barwick*, which is contended to be in point for the debtors. Certainly the cases do approach each other a little; but of that case I must observe, that I never heard it quoted without some comment upon the law of it. Each gentleman at the bar finds fault with it in his turn. In my opinion Lord Mansfield has extracted the true ground on which that judgment, if it did not proceed, ought to have proceeded, namely, that the trader finding himself in a failing condition very honestly did not accept the goods, but returned them; and if the goods were not accepted that judgment was right." In

the case of *Bartram v. Farebrother*, Best, C. J. says: "I do not go the whole length of the positions laid down in *Atkins v. Barwick*. It is sufficient, however, if we should have decided in the same way, though not entirely for the same reasons. That was a case of bankruptcy, and it should be said for Pratt, C. J. that the doctrine touching matters done in contemplation of bankruptcy was subsequently introduced into Westminster-hall. The case, however, was confirmed by *Salle v. Field*, where the property of goods bought by an agent for the vendee, and delivered by him to the vendor's packer, in whose hands they were attached by the vendor's creditors, was held to revert in the vendor so as to avoid the attachment, by the vendee's having countermanded the purchase by letter to his agent, dated before such delivery, though not received till afterwards, the vendor assenting to take back the goods." Upon these extracts, and the reasoning therein, I cannot come to any other conclusion than that the case of *Atkins v. Barwick* must be considered as still a valid authority. What remains, therefore, is to apply it with the confirmatory case of *Salle v. Field* to the transaction before us. That Ramos and Co., by their letter of the 29th March, offered to rescind the contract, and that while it was still in their power to do so, I have already stated to be my opinion. That the consent of the consignors may, if necessary, be presumed under the circumstances, is, I think, also no more than the authorities warrant. But it is not necessary to presume consent, for consent was actually given, and that within a period which the decisions hold to be sufficient for that purpose. By their power of attorney to the debtors, Pearce and Gray consented to take back the goods, and though that consent was not given, and of course did not arrive in this island, till after the demand by the plt., yet the case of *Salle v. Field* is an authority that this is not too late. I would remark, in conclusion, that we are not here concerned with that class of cases of which *Ball v. Neate* may be taken as a sample, where the goods have been received and kept by the vendee for a considerable time, and in relation to which a different rule of law undeniably applies. Ramos and Co. never received the goods, and in presence of their insolvency at once determined to renounce the contract. Being, therefore, of opinion that this contract was rescinded, I think that the plt. was not entitled to recover in this case.

From that judgment the present appeal was brought.

Lush, Q.C. and *Garth*, for the app., contended that the property in the goods having since passed to Ramos, he had no right or power to rescind the contract with Pearce and Gray without their consent. The property in the goods remained in Ramos up to his insolvency, and then passed to the plt. as his official assignee. Even supposing the transaction between Ramos and the debtors, or the letter from Ramos to Pearce and Gray, to be a retransfer of the goods, such retransfer would be void under the 67th section of the statute.

Collier, Q.C. and *Maclean*, for the resps., contended that Ramos refused to accept the goods before his insolvency, and thus there was a valid rescission of the contract. The resps. had sufficient authority from Pearce and Gray to take back the goods and rescind the contract. At all events the agency of the resps. was complete before the stoppage *in transitu*, and Pearce and Gray validly stopped the goods *in transitu*.
Cur. adv. vult.

LORD KINGSDOWN.—This appeal is from a judgment of nonsuit directed by the Supreme Court of Jamaica to be entered in an action of trover after a verdict for the plt., evidence on each side having been adduced before the jury, and leave having been by the learned judge who tried the cause

reserved to the depts. to move for a nonsuit. It appears to their Lordships clear upon the evidence that on the 21st April 1860, in the circumstances in which Ramos, the purchaser from Pearce and Gray, the unpaid vendors of the goods in question, then stood, Messrs. Pearce and Gray had a right to stop those goods *in transitu*, and that if the step which on that day Mr. Ralph Nunes took, as stated by him in his testimony (testimony which their Lordships believe), ought to be considered to have been taken by him on the part of Messrs. Pearce and Gray, as effectually for all purposes now material as if Messrs. Pearce and Gray had then themselves taken those steps personally, there was a rightful and sufficient stoppage *in transitu* available against Mr. Ramos equally and the present app., and the appeal must fail. Ought then those steps to be considered as having been so taken? Their Lordships are of opinion that this question must be answered in the affirmative. Together with, if not independently of, the evidence of general agency given by Mr. Ralph Nunes and by Mr. Gray, their Lordships think that the letter of Messrs. Pearce and Gray, of the 16th April 1860, though not received in Jamaica until the early part of May 1860, was sufficient to warrant for all purposes what was done there as on behalf of Messrs. Pearce and Gray on the 21st April 1860. Upon the whole of the materials before their Lordships, they are of opinion that a rightful, a valid and an effectual stoppage *in transitu* by Messrs. Pearce and Gray, through their agent, was proved in the action to have taken place on the 21st April 1860, and that the action consequently was wholly groundless. We may add expressly with regard to stoppage *in transitu*, as distinguished from rescission of the contract of purchase, that, in our opinion, the language of the power of attorney, accompanying, as it did, the letter of 16th April, did not prevent Mr. Nunes from acting, or lessen his power of acting, for Messrs. Pearce and Gray, by stopping *in transitu*. The expressions "to stop the goods *in transitu*," and "to stop the cargo *in transitu*," are used in Mr. Nunes's evidence, and we are of opinion that he meant to stop, and did stop, the goods *in transitu*. It was said, that the rights of the resps., or their grounds of defence, ought to be considered as restricted by the finding of the jury; but their Lordships do not see any foundation for that contention, or for any allegation that the views of the evidence which we have stated ourselves to take, are not open here, or were not open to the court whose decision is under appeal. Much stress was laid, in the argument on the app.'s part, upon the case of *Bird v. Brown*, 4 Ex. By what, however, is proved to have taken place in the present instance previously to the stoppage, and particularly by the letter of 16th April, despatched, as already mentioned, earlier than the 21st April (the day of the stoppage), this case, in their Lordships' opinion, is rendered materially different from that of *Bird v. Brown*, and prevented from being affected by it. With respect to the reasons so ably given in the judgments delivered by Cargill and Ker, JJ., their Lordships think it right to say that, if stoppage *in transitu*, properly so called, there had been none, they are not convinced that the conclusion of those learned judges against the app. ought not to be maintained. Their Lordships' humble advice to Her Majesty will be, that the appeal should be dismissed with costs.

Judgment affirmed.

App.'s attorneys, W. E. and F. E. Oliver.
Resps.' attorneys, Purrier and Son.

Wednesday, July 22.

(Present—The Right Hon. Lord KINGSDOWN, Sir E. RYAN, Sir J. T. COLERIDGE, Sir L. PEEL, and Sir J. W. COLVILLE.)

SINGH v. SINGH.

Practice—Chancery—Sale under decree of court—Non-compliance with formalities—Objections to title of purchaser.

Where for any reason the execution of a final decree of court in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is not discontinued thereby, nor are the further proceedings for the same purpose considered as taken in a new suit.

After an estate has been sold by auction under a decree of court, the purchaser's title is not to be attacked merely on the ground that the holder of the decree had not complied with all the statutory formalities for the conduct of such sale; as, for example, the want of due notice of sale; and the burden of proof of such compliance is not on the purchaser.

In selling by auction under a decree of the court, is a person bid for others, and his bidding be refused on account of his not giving a deposit or any satisfactory references, the sale cannot be afterwards impugned on the ground that the estate was sold under its value.

This was an appeal from a decree of the Sudder Dewanny Adawlut, at Agra, in India.

The suit was to recover possession of an estate from the resps. as purchasers of the same, and incidentally to obtain a cancellation of a public sale of the same. The app. contended that the sale was illegal and invalid for non-compliance with various rules laid down by statute.

The material objections urged, and the circumstances belonging to them, are sufficiently noticed in the following judgment delivered by

LORD KINGSDOWN.—This was an appeal from a decree of the Sudder Dewanny Adawlut at Agra, which reversed a decree of the Civil Court of Zillah, Jounpore, in favour of the app. The suits in which the decrees were made respectively on the 23rd Feb. 1855 and the 10th May 1856, were brought by the app. to recover back possession of an estate, called the Talooka Bazar Rajah, Pergunnah Gudwarra, which had been the property of his father, Rajah Surnam Sing, and which had been sold in execution of a decree obtained by one Petumber Mookerjee in May 1830, in a suit first instituted by him in 1822 for the recovery of a debt. One Barwise, in 1837, had become by purchase the holder of this decree; and the resps. claimed by purchase for a valuable consideration, and through mesne conveyance from his representatives, who had been purchasers at the sale held in execution of the decree. The claim in the present suit was rested, not upon any supposed miscarriage in the determination of the original suit, nor any defect in the title of Barwise to the benefit of the decree, but on certain alleged informalities and defects in the course of executing that decree, and the sale under it. In order to understand the questions now raised, a short statement of the material facts will be necessary. It will be observed that the litigation commenced in 1822, and that the decree in favour of the original plt. was obtained in 1830; seven years were then passed in fruitless attempts by him to carry it into effect; his hopes, or his means, becoming exhausted, he was induced, for a valuable consideration, to make over this decree to an Englishman of the name of Barwise, who being in the service of the Government, it was supposed, probably by both parties, might be more successful in defeating the

various devices by which its execution had been up to that time prevented. It is immaterial to the decision of this case whether he purchased on too favourable terms, or succeeded in obtaining too great advantages. It may have been so—on that we pronounce no opinion. It was not, however, until the 6th June 1845, and after he had been murdered as alleged by the app., that his representatives obtained the order from the Zillah Court of Jounpore, on which the sale actually took place, the validity of which is questioned in the present appeal. We purpose now to examine the objections to this sale, advertising only, as we proceed, to the previous circumstances, so far as may be necessary for the understanding and disposing of these objections. The order for this sale was as follows, dated June 6th, 1845:—"This case was brought up this day. It was found from the report of the moonshee of execution of decrees, that 48,522r. 0a. 1p., the total estimated value of the claim, composed of 46,856r. 14a., entered in the report of the 22nd Nov. 1844, and 1664r. 11a. on account of present interest up to the 22nd May 1845, and 8a. for costs, is quite correct. As it appears from the accounts to be right and proper, that Talooka Bazar Rajah, embracing sixty-three original and dependent villages, be sold to realise the amount above specified, it is therefore ordered that a copy of this proceeding be sent to the collector of this zillah to apprise him of the above-mentioned facts, in order that the said collector, after the issue of the second notification, may put up to sale the aforesaid estate, the property of the deft. the debtor, for the sum claimed as above, and afterwards inform this court of the result." It will be observed that this order dealt directly with the collector of the zillah, and is silent as to the Board of Revenue. This it is said is in breach of the regulations on this matter then in force, of 1795, regulation 20 of which directs that when any court of civil judicature shall have occasion to sell lands in satisfaction of a decree, it shall transmit a copy thereof to the Board of Revenue, which is, with all practicable dispatch, to cause the lands to be disposed of at the Presidency, or in the district in which the lands are situated, as they may deem most advantageous to the proprietors. The objection founded on the apparent non-compliance with this regulation was taken both in the Zillah and Sudder Courts in this action, and overruled by both, and their Lordships think quite properly. It appears that when a former order for sale had been made by the same court in 1843, this regulation had been fully complied with; that the commissioners had authorised the sale of the whole talooka; that as many as four sales had taken place ineffectual and nominal only, because the bidders on each occasion were men of straw, who had, no doubt, been put forward for the very purpose of rendering the decree abortive. It is said that the order directing these former sales must be considered as having been made in a different suit from that in which the order now in question was made, for that the proceedings had been taken off the file, and the lands to be sold and the sums to be recovered were different in the two orders. There is no foundation for either of these assertions. It would be contrary to general principles, and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit. Nor is it true in any material sense, that either the properties to be sold, or the sums to be recovered, were different; in both the same whole talooka rendering to the Government the same jumma, was directed to be sold, and for the same principal

sum, but the number of villages comprised in it, owing to some inaccuracy, was differently stated, and the total sum was increased in the later order by adding the interest which had accrued due in the interval between the two, with a few annas for the costs. The principal object of the regulation in question was the security of the public revenue, as appears not merely from its own preamble, but the modifications which were made in it by regulation 7 of 1825, tit. ii., and this object had been fully answered by the communication to the commissioner in 1843, and the proceedings which were taken by him upon it. If this, therefore, had been a question between the original parties to the suit, and if the objection had been made promptly after the sale had taken place, their Lordships would still have been of opinion that it had received its proper answer in the court below; but it must never be forgotten that they are now called upon to give effect to it as against a purchaser for a valuable consideration, and, so far as appears, entirely without notice, in a suit commenced in July 1854, the disputed sale having taken place in July 1845. What safety could there be, except by the Statute of Limitations, for any man's title, where a judicial sale had taken place, if he were bound to satisfy himself of the decree-holder's compliance with every one of the many formalities prescribed by the law for the conduct of it. This is a remark which their Lordships must bear in mind in considering objections to which they now pass. The next objection to be noticed is the alleged want of due notification of the time and place of sale. At the time when this sale was to take place, this matter was regulated by regulation 20, sect. 12, of 1795, which requires notice to be affixed, one month before the day of sale, in the court-room of the dewanny, or zillah, the collector's office in the principal town or village, and in the office of the Secretary of the Revenue. Now, if it be taken that the burden of proof in respect of these notices can be properly cast on the resp., it certainly does not appear to their Lordships that, in respect of all of them, it is clearly made out that they were duly given; but they are of opinion that it cannot be so cast, considering how he claims, at what distance of time the objection is made, and the extreme difficulty, if not impossibility, of satisfactorily proving a fact of this nature under such circumstances as are before them. In this country it is, in many cases, required by statute that notices should be affixed on the walls or doors of courts, or in any other specified places, and for certain specified times, in order to give jurisdiction to magistrates to do certain acts which are speedily to follow. In such cases there is no injustice in calling upon the party who moves the magistrates to exercise their statutory jurisdiction to prove that these requirements have been complied with. But it would be monstrous to make the title to land in a purchaser depend, years after it has accrued, and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing, all traces of the evidence may be expected, as to some of the particulars, to perish in a short time; in others, where the document ought in strictness to be filed, it is but too common for the officer whose duty it would be to file it to be neglectful. Their Lordships are of opinion therefore that the onus lay upon the app., and that he has not discharged himself of it. It was said, in regard of another objection, and might be said in regard of this, that at the time in question he was in prison on the charge of murder, and that was so; but it is clear that he at least knew of the time fixed for the sale and was able to apply to the court, because he presented a petition on the 14th July 1845 to the Zillah Court for its postponement for two months, which was heard and rejected by the Sudder Ameen of that court. The remaining objection is to the manner in which the sale was conducted. It will

be remembered that on several preceding occasions, when sales were attempted, the highest bidders had turned out to be unable or unwilling to complete them, and so they had been rendered illusory; the collector therefore had been very properly cautioned to satisfy himself of the trustworthiness of a bidder before he concluded the sale in his favour. On the present occasion, after the representatives of Mr. Barwise had bid a sum of 48,000 rupees, being a little below the amount of the decree, one Thurnooman Pershad bid 49,000. The collector asked if he was prepared with the deposit-money. He was not. He was asked who and what he was. He said he was a servant, and was bidding for Ramdas, of Sultanpore. He was asked whether he held a mooktarnama from Ramdas, and he said he did not. On this he was rejected as a bidder. Thereupon one Shunker Loll bid 50,000 rupees, and he was questioned as Thurnooman Pershad had been. It does not appear whether he answered that he was prepared with the deposit or not, but he stated that he was bidding for one Sheo Loll, a banker, of Dootpore. Like the former bidder, he had no mooktarnama. The collector rejected both their biddings, and there being no other bidder, knocked the estate down to the representatives of Barwise for 48,000 rupees. Both Nurain Sing and these two persons, but not either Ramdas or Sheo Loll, petitioned the court against this proceeding of the collector. It was urged that a production of the deposit-money ought not to have been insisted on before the estate had been knocked down, and that the effect of the proceeding was to deter bidders, and so diminish the amount for which the estate was sold. Certainly the payment of the deposit could not be required before the acceptance of the bidding and the knocking down of the estate; but the collector was bound, in their Lordships' opinion, to satisfy himself reasonably that these persons were what they professed to be, real bidders, and that the course which he took for that purpose was perfectly justifiable; and so it was held in the court below, their Lordships think quite correctly. They see not the least reason for believing that it was calculated to deter persons really wishing to buy from offering their biddings, or in any way to damp the sale. It might be unusual, but the circumstances were unusual; as practices had been suffered before in this case which had made the sales under the order of the court mere mockeries, available only for the purpose of defeating the course of justice, the collector, forewarned, was bound to take care this sale should be a reality, which it could not be unless care was taken to distinguish between real and sham biddings. The result shows that his conclusions were correct. If there were such persons as Ramdas or Sheo Loll, or if either of them had, however irregularly, deputed Thurnooman Pershad or Shunker Loll to bid for them, we may be quite certain that claims would have been made on their behalf by way of petition to the court. It is said that the estate was sold for less than its value. It may have been. It was certainly sold some time afterwards at a great advance by the purchaser. But considering the character of the previous attempts to sell, and all the previous circumstances of the litigation, this is not to be wondered at. As a fact in itself, it is immaterial to the decision of the case. It is enough that the sale was real and conducted justly and regularly.

Decree affirmed.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

Thursday, Dec. 18.

(Before the LORDS JUSTICES.)

GLOVER v. DAUBENY.

Rehearing—Additional evidence—Same witness—Bill of review.

The court will in no case allow additional evidence to be adduced on a rehearing, where the persons to supply such evidence have been witnesses at the original hearing of the cause.

The bill in this suit was filed by Mr. Glover, to set aside (as having been made without authority from him) a contract which the deft. Daubeny had entered into with his co-deft. Brown, for the sale to the last-mentioned of certain leasehold property which belonged to the plt., but of which the deft. Mr. Daubeny was mortgagee. His Honour the M. R. at the hearing dismissed the bill as against the deft. Brown, but made a decree with costs against Daubeny. At the hearing a person named Dent had been one of the witnesses, and the decree proceeded principally upon his depositions. It afterwards appeared that this witness had, either from reluctance to do so, or from negligence or forgetfulness, omitted in his affidavits to state conversations which he had had with the plt., and which, as it was alleged, would materially affect the character of the evidence he had already given. He had therefore, after the hearing of the cause, come forward and expressed his desire to correct his evidence, and to repair the injustice which had been thereby done to the deft. Daubeny, and certain affidavits were thereupon prepared and sworn to by him.

The object of the present motion was, that leave might be granted to the deft. Daubeny, upon the hearing of his appeal in the cause, to read and make use of those affidavits, stated to have been sworn and filed since the hearing of the case at the Rolls.

Baggallay, Q. C. and *Elderton* supported the application on the ground that where new evidence was discovered it was not necessary to put a party desiring to vary a decree to the expense of a bill of review, and they relied on *Williams v. Goodchild*, 2 Rus. 91, in support of that proposition. It was necessary to show that the new evidence was material, and in this respect the practice of this court was analogous to that at common law, as shown by

Thurtell v. Beaumont, 1 Bing. 339.

Schwyn, Q. C. and *W. J. Bovill*, for the plt., argued that new evidence of this character could be introduced only by a bill of review, though exhibits and other documentary evidence not originally before the court were allowed in proper cases to be introduced. They referred to

Daniell's Ch. Prac. (2nd edit.) 1353.

Baggallay, Q. C. having been heard in reply, Lord Justice KNIGHT BRUCE said that, in his opinion, the present application must be refused. The only question which, in his judgment, remained to be determined when the applicant's opening was concluded, was, whether the motion ought to be at once refused, or whether it should be reserved till the hearing of the appeal. The argument on the part of the resp. had, however, removed all doubt upon the subject from his Lordship's mind, and he was satisfied that the motion ought to be refused at once, and of course with costs.

Lord Justice TURNER said, that in the observations he was about to make, he must not be understood as saying that there were no cases in which evidence that had not been produced before the court where a cause

CHAN.] REED v. DOM PEDRO NORTH DEL REY GOLD MINING COMPANY—GIBBONS v. SNAPE. [CHAN.]

had been originally heard, might not be given on the rehearing; but the circumstances must be of a very special character. The case which had been relied upon by the defts., the applicant in the present instance, to support his motion, namely *Williams v. Goodchild*, was one in which additional documentary evidence only was sought to be introduced; evidence of that nature of course could not have been tampered with since the hearing, and it was therefore a case in which the additional evidence might fairly be allowed to be used. But the present case was certainly not of that class. If the present motion were to be allowed, it would be by no means easy to suggest any case in which it could ever become necessary to file a bill of review for the purpose of introducing new evidence, and thus all the restrictions and precautions which were necessary in the case of a bill of review would be entirely evaded. In addition to this consideration, the witness whose evidence it was the object of this motion to introduce was a witness in the cause itself, and it would be most mischievous and dangerous to allow a party, after he has discovered, by a decree being pronounced against him, the weak points in his case, to adduce new evidence for the purpose of bolstering it up. He entirely agreed that the motion ought to be refused with costs.

Friday, July 10.

(Before the LORDS JUSTICES.)

REED v. THE DOM PEDRO NORTH DEL REY GOLD MINING COMPANY (LIMITED).

Practice—Specific performance—Reference as to title—Motion by deft.—Consolidated order 20.

A deft. to a vendor's suit for specific performance cannot move for a reference as to title.

But where notice had been given to rescind the contract, on the ground that the vendor had not made out a good title in time, the court will make no reference as to title until it has decided upon the validity of that notice.

This was an appeal by the defts. from a decision of Stuart, V. C., who had refused a motion made on their behalf: (see the report 8 L. T. Rep. N. S. 601.) The circumstances were briefly these:—

The bill was filed by Mr. Reed to compel specific performance by the defts. of a contract to purchase of him certain mines and mining property in Brazil.

The defts. resisted specific performance upon two grounds: first, that the plt. could not make a good title at all; and secondly, that even if he then could do so, he had failed to do so within the appointed time, and that under the circumstances of the present case time was from the first, or if not, that it had eventually become, of the essence of the contract.

The plt., by amendment of his bill, replied that any delay in making out a good title, or in the performance of the contract, was occasioned solely by the wrongful acts of the defts., or was attributable to their negligence.

The defts. accordingly moved before the learned V. C. for an order directing an inquiry in chambers whether the plt. could make a good title to the property in question, having regard to the agreement entered into between the parties, and when it was first shown by the plt. that such title could be made by him, and that the reference should be without prejudice to any question in the cause.

His Honour refused the motion, as being contrary to the practice of the court; but, having regard to the case of *Foxlowe v. Amcoats*, 3 Beav. 496, in which Lord Langdale, M. R. decided that a reference might be ordered, even although a substantial question should remain to be argued at the hearing, without costs. The company now appealed.

Bacon, Q. C. and Archibald Smith supported the appeal, and referred to

Moss v. Matthews, 3 Ves. 279;

Foxlowe v. Amcoats, *ubi supra*;

Lord St. Leonards V. & P. 351, 14th edit;

Gompertz v. —, 12 Ves. 17;

Blyth v. Elmshirst, 1 Ves. & Bea. 1;

Boehm v. Wood, 1 Jac. & W. 419;

Withy v. Cottle, 1 Sim. & St. 174; s. c. T. & R. 78; and

Consol. Gen. Ord. 20.

Malins, Q. C. and Fry, for the resp., were not called on.

Lord Justice TURNER.—An order for preliminary inquiries on the motion of a deft. could not be made either under the General Consolidated Order 20, or, in his opinion, under the general practice of the court. A deft. to a vendor's suit for specific performance was, by the fact of his moving for such an inquiry, endeavouring to take upon himself the conduct of plt.'s suit—a course for which there was no precedent, and which might occasion great inconvenience. But whether such an order could ever be made upon the motion of a deft., or not, it was quite clear that the order which was the object of the present motion could not be made. In the present case the defts. had set up as a second defence to the suit a notice given by them to rescind the contract on the ground that the plt. had not made out a good title within due time; and until the court had decided upon the reasonableness of that notice, which could not be done upon this motion, it was impossible to say what inquiry as to title it would be proper to direct. There was no authority for dividing or splitting up a case in the manner proposed, and to make such an order as that now sought would possibly involve great and unnecessary expense. The motion must be refused with costs.

Lord Justice KNIGHT BRUCE was of the same opinion.

Solicitors for the different parties: *Beavan and Whiting*, and *Kimberley and Pope*.

June 30 and July 1 and 28.

(Before the LORDS JUSTICES.)

GIBBONS v. SNAPE.

Fines and Recoveries Act—Estate tail in copyholds—Dientailing assurance—Enrolment.

The provisions of the Fines and Recoveries Act as to the enrolment, within six months of their execution, of deeds to bar equitable estates tail are applicable to copyholds; and unless such a deed affecting copyhold hereditaments be entered upon the court-rolls of the manor within six months after its execution, it is absolutely void.

This was an appeal by the deft. Isaac Snape against a decision of the M. R. under the following circumstances:—

Thomas Coningham, of Limehouse, timber merchant, deceased, was at the date of his will and of his death seised of a certain messuage and premises according to the custom of the manor of Stepney, and duly surrendered the same to the use of his will, which was dated on the 27th Feb. 1783, and he thereby gave and devised the same and certain other freehold and copyhold hereditaments to Thomas Vine and James Hogg, their heirs and assigns, upon trust to permit his son Thomas Coningham to receive the rents and profits for his life, and after his decease upon trust for the benefit of all and every the child and children of his said son, if more than one, as tenants in common, and the heirs of their, his, or her bodies or body respectively. And the testator directed that in case there should be a failure of issue of any one or more of such children, the part or share of those so dying both in the freeholds and

copyholds should be upon trust for the survivors of them, if more than one, as tenants in common, and the heirs of their respective bodies, or for an only surviving child and the heirs of his or her body; and for default or failure of such issue for the benefit of such persons and for such estates as in the will were particularly mentioned.

The testator died in March of the same year, leaving his said son and the trustees appointed by his will surviving him; Mr. Hogg survived Mr. Vine, and died in 1825 intestate as to trust-estates, and the legal estate in the devised hereditaments thereupon became vested in his brother and customary heir Thomas Hogg.

Thomas Coningham, the son, died in Jan. 1826. He had seven children and no more, namely, Thomas George Coningham, Anne Eliza Gibbons, the wife of John Gibbons, and Elizabeth Adam, the wife of James Adam; and also four other children, who all died in their father's lifetime under the age of twenty-one years. The bill alleged that, upon the death of Thomas Coningham the son, the three persons last named became equitably entitled in possession as tenants in common in tail, in equal shares, to the copyhold messuage and premises devised by the testator.

On the 9th Feb. 1825 Thomas George Coningham took the benefit of the Acts then in force for the relief of insolvent debtors, and later in Dec. 1831 he was adjudged bankrupt, and one South Morse was appointed creditors' assignee.

In Nov. 1830 John Gibbons and Anne Eliza his wife, and James Adam and Elizabeth his wife, filed their bill against Thomas Hogg and Thomas George Coningham, and the pls. thereby prayed an account of rents and profits and payment of their respective shares thereof. On the 18th March 1831 a decree for an account, &c. was made in the cause.

By an indenture dated the 12th Feb. 1834, made between the said John Gibbons and Anne Eliza his wife of the first part, James Adam and Elizabeth his wife of the second part, and South Morse of the third part, after reciting the various facts hereinbefore mentioned, it was witnessed, that the said John Gibbons and Anne Eliza his wife, as to the share of the said Anne Eliza Gibbons, and the said James Adam and Elizabeth his wife, as to the share of the said Elizabeth Adam, granted, assigned and confirmed to the said South Morse, his heirs, executors and administrators, the said two undivided third parts or shares under the will of Thomas Coningham, the testator, in the said freehold and copyhold messuages and premises, and all the rents and profits accrued in respect thereof since the death of the testator.

The plt. then alleged that, if this indenture was ever really made and executed, it was not entered on the court-rolls of the manor of Stepney until the 10th Feb. 1860; that the conveying parties were entirely unacquainted with law, and did not employ any solicitor of their own in the transaction, but were advised only by the solicitors of the said South Morse; and further, that the consideration was wholly inadequate.

Thomas Hogg died in 1834, leaving James Lewis Hogg his son and customary heir, in whom the legal estate then became vested.

The bill stated that the deft. Isaac Snape alleged that by some instrument the copyhold messuage and premises were assigned and conveyed to the said South Morse according to the custom of the said manor, and that the purchaser alleged that in 1849, by some instrument of which the plt. required discovery, the same were assigned and conveyed to him the said deft., and that on the 24th Oct. 1849 he, the said Isaac Snape, was admitted to the same on the surrender of the said James Lewis Hogg, and that thereby the legal estate became and was vested in him Isaac Snape. Further, that the indenture dated the 12th Feb. 1834

was not entered in the court-roll of the manor at the date when it was made, and that it was not enrolled in Chancery until the 19th Aug. 1834, being more than six months after its date, and that Isaac Snape had actual and constructive notice of both of these facts at the date of the conveyance to him.

The plt. alleged that Isaac Snape was entitled to one-third only of the copyholds, being the share of the bankrupt Thomas George Coningham, which upon the bankruptcy had vested in the assignee South Morse, and had been subsequently conveyed by him to the deft. Snape.

Mrs. Anna Eliza Gibbons died on the 21st May 1854, and she left two sons, namely, John Gibbons, born in 1807, and the plt. in the present suit Thomas Frederick Gibbons, born in 1821. The elder son died on the 9th May 1861, leaving the plt. his customary heir, and he now claimed to be entitled to the whole of the share of his mother.

Mrs. Elizabeth Adam survived her husband, and died on the 2nd Feb. 1852, leaving three sons, the defts., Robert, James and David Adam, each of whom was entitled to one-third of their mother's third part.

The bill prayed that the shares of all parties might be ascertained and declared, and that a partition might be made, and that the deft. Isaac Snape might be ordered to account for the rents and profits received by him, and that he might be charged with an occupation rent, as the premises had since 1849 been in his possession.

The case of the deft. Isaac Snape was, that as to two-thirds of the premises, they were duly conveyed and surrendered to South Morse by Mr. and Mrs. Gibbons and Mr. and Mrs. Adams, and that the remaining third vested in him as assignee under the bankruptcy of Thomas George Coningham; and that in 1849 the said South Morse duly conveyed and surrendered the whole three thirds to him. It was not disputed that the instrument dated the 12th Feb. 1834 was not entered on the court-rolls before 1860, and that it was not enrolled in this court until after six months from its date had elapsed.

The M. R., in conformity with his previous decision in *Honeywood v. Foster*, 30 Beav. 1; 4 L. T. Rep. N. S. 785, made a decree in favour of the plt., being of opinion that the deed of Feb. 1834 was void as not having been entered on the court-rolls of the manor within six months after its execution, and the deft. Isaac Snape appealed against his Honour's decree.

Southgate, Q.C. and *C. T. Swanston* supported the decision in behalf of the plt., contending that, as the Act did not specify any time for the entry of a deed affecting copyholds in the court-rolls, the analogy as to freeholds must be taken to prevail, namely six calendar months.

Villiers, for David Adam, and

C. T. Swanston, for Robert Adam, took the same view.

James Adam was out of the jurisdiction of the court.

Hobhouse, Q.C. and *W. H. Townsend* supported the appeal on behalf of the deft. Isaac Snape, and argued that, as the Act fixed no time for the entry, it must be taken that no time was intended to be fixed, and therefore the entry which had been made was perfectly good.

Honeywood v. Foster, already mentioned, was the only authority cited.

Southgate, Q.C. having been heard in reply, the court reserved judgment until the 28th July, when

Lord Justice KNIGHT BRUCE said that the construction which with regard to copyhold property the M. R. in the case of *Honeywood v. Foster* (sup.), and in the case now before the court, had put upon the Act 3 & 4 Will. 4, c. 74, which Act had been passed some months before the execution of the

deed in question in this cause dated Feb. 1834, did not appear to him ungrammatical, nor opposed to the rules and idioms of the English language; and therefore, unless there was clearly to be collected from the whole of the statute taken together, or from any portion of it, a different intention, or unless such an interpretation was likely to be productive of mischief or general inconvenience, his Honour's construction of it ought to be supported. In his Lordship's opinion there was not to be collected either from the whole of the statute taken together, or from any part of it, a different intention, and his Honour's interpretation was in his judgment less likely to cause general inconvenience than that which the app. had contended for. For this reason he adhered to the opinion of the M.R., and considered that the contention of the plt. was well founded.

Lord Justice TURNER said that the principal question before the court was, whether under the provisions of the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, it was necessary, in order to bar an equitable estate tail in copyhold lands, that the deed executed for barring that estate should be entered upon the court-rolls of the manor within six months after the execution thereof, if circumstances would admit of that being done. His Honour the M. R. had been of opinion that, in order to bar such an estate tail, the deed barring it must, under the circumstances of the present case, be entered upon the court-rolls within the period he had mentioned, and he so decided, and from that decision the present appeal was brought before their Lordships. The determination of the question depended of course upon the terms of the statute itself, and the first section which had a bearing on the question was the 41st. His Lordship then read that and the 50th, 53rd, 54th and 59th sections of the Act, and then proceeded to say that the words of the 50th, 53rd and 54th sections were large enough to render the provisions for enrolment of deeds, which the 41st section contained, applicable to copyhold property, and the disentailing deeds of such property by equitable tenants in tail; this could not be doubted, nor, in his opinion, was there in the 53rd section any distinction between the lands themselves and the deeds disposing of the lands. Considering then that the words of the 53rd section were sufficiently large for the purpose he had mentioned, full effect must be given to them, unless they were limited or controlled by the context; but the context not only did not control those words, but appeared to have a contrary tendency. The 54th section appeared to show that where a distinction was intended to be made between freehold and copyhold lands, that distinction was clearly expressed. Indeed, the 53rd section would appear to have been very carefully drawn in order to meet by express enactment the cases in which difficulties were likely to arise in the application of the earlier clauses of the Act, and it thus left the general enactment, that "all the previous clauses should apply, &c." to take effect in all cases in which no such difficulties could arise. An argument in favour of the app.'s case was attempted to be drawn from the proviso at the end of the 53rd section, which gave priority to subsequent assurances if duly entered upon the court-rolls; but it was obvious that that proviso might well apply to assurances duly entered during the six months allowed for enrolment, and consequently no weight could be allowed to that argument. The app. had also relied upon the terms of the 59th section; but even on the hypothesis that the 50th section did not overrule the 59th (upon which point it was unnecessary to express any opinion), there were conditions which applied to the case provided for by the latter section which were quite enough to prevent any inferences being deduced from it which should favour the app.'s case.

He therefore concurred in opinion with the M. R., and thought that the appeal must be dismissed with costs. Solicitor for the app., J. G. Waugh.

July 24, 25, and Aug. 4.

(Before the LORDS JUSTICES.)

FERGUSON v. THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

Railway company — Compulsory purchase — Lands Clauses Consolidation Act, 1845, s. 92 — "House."

The plt. was, under one and the same instrument, lessee of a house and garden, and also of a piece of meadow land separated from it by a road originally made for the convenience of himself and the lessees of the adjoining houses, but afterwards thrown open to the public. Each of the other lessees had also a strip of land on the other side of the road, and these strips were all thrown into one piece, and were used by the lessees in common as cricket and pleasure ground. It was let by them to a butcher for grazing purposes. The railway company required this piece of land for their line; but the plt. insisted that they must take his house and garden as well, and on the company's refusing to do so, filed his bill for an injunction:

Held, by Turner, L. J. (agreeing with the M. R., but dissentiente Knight Bruce, L. J.), that this strip of land was not included in the word "house" as used in the 92nd section of the Lands Clauses Consolidation Act, inasmuch as it was of pleasure only, and not of necessity to the enjoyment and occupation of the plt.'s residence, and the injunction was refused.

This was an appeal from an order of the M. R. refusing the plt.'s interlocutory motion for an injunction, reported 8 L. T. Rep. N.S. 718. The principal facts and circumstances will appear from that report and from the judgment of Turner, L. J., and it will be sufficient to state here that in 1840 a piece of land called Champion-park, between Grove-lane and Denmark-hill, was laid out for building, and a private road, called the Champion-park-road, was made through it, running from east to west. On the 31st March 1843 Sir Claude de Crespigny, the freeholder, leased to the plt. one of the houses built on the ground, with garden thereto on the south side of the road, and a strip or piece of the land on the other or north side of the road. Each of the lessees of the other houses had also a demise of a similar piece of land, and it appeared that all these pieces of land were thrown into one by the lessees and formed a paddock, which was let to a butcher in the neighbourhood, but which was also used by the lessees in common as a cricket-ground, and otherwise for the recreation of themselves and their families.

The covenants contained in the leases under which these houses and gardens and the opposite strips of land were demised to the plt. and the other lessees are stated by Turner, L. J., and the arguments of both parties also appear from the judgment.

The railway company required the whole paddock for the construction of their line, and gave the usual notices. They then entered upon it, but the plt. alleged that the portion thereof which had been leased to him constituted part of his "house" within the 92nd section of the Lands Clauses Act 1845, which enacts that "no party shall at any time be required to sell or convey to the company a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole." He therefore required the company to take the whole of the property demised to him, and on their refusing filed this bill to restrain them from taking part unless they took the whole, which he stated that he was able and willing to sell. An injunction was moved for before the M. R. and not granted; hence the present appeal.

CHAN.]

FERGUSSON v. LONDON, BRIGHTON, & C. RAILWAY COMPANY.

[CHAN.]

Selwyn, Q.C. and *Marten* appeared for the plt., and referred to

Lord R. Grosvenor v. The Hampstead Junction Railway Company, 1 De G. & Jon. 448; 29 L. T. Rep. 319;

Co. Litt. 5 b., 56 b;

Sheppard's Touchstone, 93;

Doe v. Collins, 2 T. R. 498;

Hibon v. Hibon, 11 W. R. 435;

Sparrow v. The Oxford, Worcester and Wolverhampton Railway Company, 2 De G. M. & G. 94;

Cole v. The West London and Crystal Palace Railway Company, 27 Beav. 242;

King v. The Wycombe Railway Company, 28 Beav. 104; 2 L. T. Rep. N. S. 107;

Hewson v. The London and South-Western Railway Company, 2 L. T. Rep. N. S. 369;

Barker v. The North Staffordshire Railway Company, 2 De G. & Sm. 55.

Roll, Q.C. and *J. H. Taylor* supported his Honour's order, citing

Cruise's Digest, tit. "Deed," 21, 32, 40;

Smith v. Marten, 2 Wms. Saund. 400;

Chambers v. The London, Chatham and Dover Railway Company, 8 L. T. Rep. N. S. 255.

Selwyn, Q.C. having replied, their Lordships reserved judgment until the 4th Aug., when

Lord Justice TURNER said:—The question in this case arises under the 92nd section of the Lands Clauses Act. The facts of the case appear to be these:—The plt. is the lessee of a house and land at Champion-hill. The premises demised consist of a long strip of land of about 85 feet wide, extending southward from a road which was formerly private, but which is now a public road, and of a house on this slip of land, and of a corresponding slip of land on the opposite, the north side, of the road, on which there are some trees. The demise is in two parts: a demise of, first, all that piece or parcel of ground situate in the parish of St. Giles, in the county of Surrey, on the south side of the new road, called Champion-park-road, bounded on the north by the New-road, and then setting out other boundaries; "and also all that messuage or tenement, together with all other the erections and buildings recently erected and built" on that plot of land. And then, secondly, all that piece or parcel of ground situate in the same parish, on the north side of the New-road, having a frontage thereto of 80 feet, and an average depth of 205 feet, with the boundaries of that piece of land. Then there are covenants in the lease: first, a covenant on the part of the lessee not to erect or build on any part of the said piece of land secondly thereby demised (the piece, that is, on the north side) any messuage or building, coach-house, stable, cowhouse, or other building whatsoever, save and except a greenhouse or hothouse, or pleasure or summerhouse. And then there is a covenant on the part of the landlord not to build upon the ground or paddock on the east and west sides of the plot of ground, any messuage or dwelling-house, coach-house, or stable, or other erections, save and except summer-houses or pleasure-houses, unless also a church or chapel at the east extremity of the said ground or paddock, which ground or paddock was delineated on a plan. Now, there were corresponding demises of other strips of land, on both sides of the road, to other persons; and it appears that the strips demised to the plt. and to some others on the north side of the road have been thrown together so as to form one plot. The plt. in his affidavit says that, at the time of making the lease, and until the commencement of the company's works, no part of the said land shown on the plan, and therein coloured green (that is, the land to the north), was built upon, and the said trees continued standing and growing thereon, and the whole of the same was

covered with grass and turf, and formed a paddock or close, and was used as a meadow or pasture land, and was inclosed by low railings, or a hedge, with locked gates, and with the said trees thereon formed a highly ornamental frontage to the buildings of the plt. and the other lessees, and that those parts of the said pieces of land which were let to the plt. and the other lessees were from time to time used by the plt. and the other lessees and their families for a cricket-ground and generally for their recreation. That part of the said piece of land which is comprised in the said indenture of lease was only taken by the plt. on lease, as aforesaid, as part of the land of the plt.'s house, and for the purposes thereof. From the date of the lease in 1843 up to the present time, the piece of land not comprised in the same indenture (that is, the south side of the road) had been occupied and used by the plt. as and being the site of the actual buildings of his house, with a back and front garden. This was met by an affidavit on the part of the defts. that this land on the north side of the road has been let to a butcher for the last six years, as a yearly tenant, who has used the same for the purpose of grazing his cattle thereon. The plt., in reply to that affidavit, does not deny the fact of the land having been let to a butcher, but says that with regard to the alleged underletting to John Green, the butcher, the plt. had allowed him from time to time to have the grazing of that part of his premises which is comprised in the field on the north side of Champion-park-road, but that John Green had never had the exclusive possession of the said paddock or field, or used the same for any other purpose than for grazing; and that the tenants of the other houses in Champion-park had used the same field for recreation, notwithstanding the use thereof by John Green; that the said field was fitted to be used as pasture, and that the beauty thereof, as seen from the plt.'s houses, was increased by the presence of sheep or cows. The defts., the company, acquired this land on the north side of the road, for the purpose of making their railway. The plt. contended that if the company took the land on the north side of the road they must also take the whole of the property, including the land on the south side and the house; and he has filed the present bill for the purpose of restraining the company from taking the land on the north side without at the same time taking the land on the south side of the house. The M. R. was of opinion that the company were not bound to take the whole of the premises, and he therefore refused an injunction. The plt. has appealed from the order refusing an injunction, and asks that it may now be granted. The 92nd section of the Lands Clauses Act is in these terms: "And be it enacted, that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole thereof." The question, therefore, for us, whether the slip on the north of the Champion-park-road is or is not to be considered as part of the plt.'s "house." I regret to say that my learned brother and myself differ upon this question. The M. R. has been of opinion that this land to the north is not part of the "house," and I agree with him in that opinion. The principle which governs cases of this description was settled in the case of *Lord Robert Grosvenor v. The Hampstead Junction Railway Company* (*ubi supra*), referred to in the argument; and the question to be determined is, what would pass under a conveyance of the "house?" I am of opinion that the slip on the north of the road would not pass under such conveyance. There are many cases on the subject—many more than were cited in the argument; and I have looked into them. Most of the early

authorities are referred to in *Hill v. Grainger*, in Plowden, collected in a side-note to that case. They fully settle that the garden and the curtilage pass by the conveyance of the "house." It appears, indeed, never to have been disputed that the curtilage would pass. The early cases seem to have differed on the question whether the garden would pass; ultimately, however, they decided that it would. It is important, I think, to consider the principle on which this was so settled, and I take it to have been this—that the garden was matter of necessity, and not of pleasure, to the house. It was so held in the case of *Carden v. Tuck*, in Cro. Eliz. 89. There was there a demise of a messuage to which a garden and curtilage belonged; the whole were joined together and inclosed within one wall. The garden and curtilage were held to pass, for, as was said, the curtilage is as parcel of the house, and will pass by a feoffment. It appears, in Roll's Abridgment, that the feoffment of the curtilage, and the curtilage only, will pass the house. Reverting, however, to *Carden v. Tuck*, the court, while disposing of the question on the curtilage, doubted whether the garden would pass, because it was said it was a place of pleasure. Ultimately, however, the court decided that the garden would pass, because, as it was said, it was of necessity as well as of pleasure. We have here, therefore, as I think, the principle upon which a garden passes by the conveyance of a house. When I speak of the conveyance of a house, I do not say a word upon the cases as to the conveyance of a house with the appurtenances. It is the conveyance of a house merely of which I speak; and the principle as referred to in that case upon which the garden passes is this, that the garden is of necessity and not of pleasure merely. That principle appears to my mind to be no less applicable to the question whether more than the garden can pass by a conveyance of a "house." It is impossible, I think, in the present case to say that this strip to the north is of necessity, or anything more than of pleasure, to the house. I therefore agree in the conclusion of the M. R., and I think his order in refusing the injunction was right. I need hardly add that I am fortified in that opinion by the position of this strip of land and the use to which it has been applied, and the fact of its having been thrown together with other strips into one, and let in the manner represented by the evidence. As I am of the same opinion as the M. R., this motion must be refused; but I think it right that the costs should be costs in the cause.

Lord Justice KNIGHT BRUCE said:—I am unwilling to attribute to the Legislature the intention of passing a law which should be subject to the interpretation which (I need not say, with probable correctness) the M. R. and my learned brother have considered themselves bound to put upon it. I repeat, that I myself do not so interpret the provisions of the Act of Parliament in question; but I am of opinion, on the contrary, that the plt. is entitled to this injunction. But as his Honour and my learned brother are of a different opinion, of course no injunction can be granted.

Solicitor for the plt., *G. D. Ashby*.

Solicitors for the railway company, *Faithfull, Sons and Coode*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

May 22 and 23.

THE ATTORNEY-GENERAL v. CLIFTON.

Church of England general educational charity—Trustees—Schoolmaster—Dissenters—Pupils.

Where a foundation deed of a charity is silent as to the question of the religious qualification on the part of the trustees of it, but the court sees clearly that the charity is a Church of England one, it will

appoint as the trustees, members of that Church; and it does so in order to prevent, so far as it can, any possible perversion of the objects of the charity. At the same time the court, in so doing, endeavours to ensure to persons who are not members of the Church of England, any advantages of the charity to which they may be entitled.

It does not, however, necessarily follow that the schoolmaster in a Church of England general educational charity must be a member of that Church: ceteris he ought to be; but the trustees of such a charity paribus, would not commit a breach of trust if, for a proper and sufficient cause, and under proper circumstances, they appointed as schoolmaster a person who was not a member of the Church of England.

The Court decided that, under the circumstances of this case, neither Dissenters nor non-inhabitants of the parish were proper trustees of a Church of England general educational charity, and that a Dissenter could not act as a schoolmaster in it; but that persons of all religious denominations were entitled to be instructed by the charity.

This was an information praying the settlement by the Court of Ch. of a scheme for the management of an educational charity at Broughton; a declaration that the trustees of the charity, or such of them as were not duly qualified to act as trustees of it, might be removed from their office; that new trustees might be appointed, and an injunction to restrain an intended appointment of a new schoolmaster.

The facts of the case were shortly these:—

By an indenture, dated the 24th April 1601, and made between Thomas Dowse of the one part, and eight persons, "inhabitants of the town of Broughton," of the other part, reciting that there were very many people dwelling within the town and manor of Broughton and Bassington, and many children and youth did there daily increase, which, for want of teaching and instruction, were bred up in rudeness and ignorance, it was witnessed, that for the maintenance and continuance for ever thereafter of a schoolmaster for the instruction and teaching of the children and youth of the inhabitants within the said parish to read, write, and cast accounts, to the intent thereby that they might be the better enabled to know and serve Almighty God, and to obey their Sovereign Prince and parents, and might be more apt and readily prepared either for schools of higher learning, or otherwise to serve and be bound as apprentice in some laudable trade and science, or else be employed in husbandry or other good labour and course of life for getting their living, the said Thomas Dowse granted certain lands to the trustees, upon trust "to receive the profits thereof for the maintenance and continuance of such a meet and fit schoolmaster as the trustees for the time should limit or appoint, to be resident and abiding within the town of Broughton, for the teaching and instructing of the children of such as should inhabit within the town of Broughton, to read, write, and cast accounts." The deed then directed, that when the said trustees should "grow old or few in number," that then, and before the same lands should come or happen to survive to one sole person, new trustees should be appointed, "of good credit, trust, and honesty, of the said parish of Broughton." The founder further directed, that one part of the deed, which was to be executed in duplicate, should be committed to the custody and safe keeping of the churchwardens for the time of the parish of Broughton, to be there entered and remain for memory in the book of the said parish, commonly called "the book of christenings and burials;" and the other part was to be in the possession of the trustees. The deed provided, that if the trustees should fail to appoint a schoolmaster upon any occasion, and due notice thereof

should be given in the parish church after divine service, then, after the expiration of one month, the heirs of the founder should enter on the lands, and receive the rents thereof, until a schoolmaster was duly appointed. The deed also contained various references, in other parts of it, to the Church of England.

The present trustees of the charity were only six in number, and were the defendants in this suit. It appeared from the evidence that one of them was a Dissenter; that another never had been an inhabitant of Broughton, and was now residing nine miles from the parish church, and that three others resided out of the parish, at distances varying from two to twelve miles from it. Thirty-eight years ago the trustees appointed a schoolmaster who was a Dissenter. He made a rule that no boy should be admitted to the school who could not read, the enforcing of which rule had reduced the school to one-third of the number of pupils who were in it when he was originally appointed. He died in 1862, and there was now a vacancy in the mastership. It further appeared that, with respect to the discharge by the trustees of their other duties, they had regularly attended the meetings for the management of the charity and its property, the value of which was about 80*l.* a-year. There were never fewer than three trustees at a meeting, generally four, and sometimes five.

The parish of Broughton contained about 900 inhabitants, of whom about one-half were Dissenters.

The questions to be decided by the court were the following:—

1. Whether the charity was a Church of England charity?

2. Whether the benefits of it were to be confined to members of the Church of England?

3. Whether the trustees of it must be members of the Church of England; or whether Dissenters might act as such?

4. Whether the schoolmaster must be a member of the Church of England; or, whether a Dissenter might be appointed to that duty? and

5. Whether, under the circumstances above stated, the defendants were fit and proper trustees of the charity, duly qualified in all respects to act as such, and whether they had so acted?

Cole, Q.C. and *Kay* appeared in support of the information.

Selwyn, Q.C. and *Townsend* for the trustees.

Cole, Q.C. in reply.

The following authorities were cited in the arguments:—

Attorney-General v. Calvert, 23 Beav. 248;

Re Ilminster School, 2 De G. & J. 535; on app. 8 H. of L. Cas. 495; s. c. 2 L. T. Rep. N. S. 701;

Attorney-General v. Lord Stamford, 1 Phil. 737;

Re Chelmsford Grammar School, 1 K. & J. 543;

Attorney-General v. Governors of Sherborne Grammar School, 18 Beav. 256;

Re Stafford Charities, 25 Beav. 28;

Attorney-General v. Cullam, 1 Y. & C. C. 411.

THE MASTER OF THE ROLLS.—I have carefully read the deed of endowment of the charity in question in this case, and I am satisfied that it was, and is, properly a Church of England charity. The founder was clearly a member of that Church, and intended to promote, by his foundation, the cause of education. He intended, however, to do that generally. I deduce that conclusion from the consideration of the time when the deed was executed by him, viz., in 1601; a time at which, in consequence of the enforcement of the Act of Uniformity which had then recently been passed, there was probably but little dissent in Broughton; and from the fact, that the deed makes frequent mention of the Church of England. In the case of the

Attorney-General v. Calvert, I drew a distinction between religious charities, educational charities and eleemosynary charities, so far as regarded the attention which the court pays to the religious opinions of the founders. To that distinction I still adhere. In every educational charity there are three persons, or classes of persons, to be considered: the trustees, the instructors and the instructed. The charity now in question before me is an educational one. I have said that it is a Church of England charity, and I am also of opinion that the benefits of it are not to be confined merely to members of that Church. I think that persons of all religious denominations should be at liberty to reap the advantage of the instruction afforded by it. Different considerations, however, exist with respect to the appointment of the trustees of it. Where the court sees that a charity is a Church of England charity, it appoints as trustees of it members of that Church, and it does so to prevent, so far as it can, any possible perversion of the objects of the charity; at the same time the court, in so doing, endeavours to ensure to persons who are not members of the Church of England, any advantages of the charity to which they may be entitled. I am therefore of opinion that the trustees of this charity ought to be members of the Church of England. At the same time, however, I am also of opinion that the scholars or pupils who attend the school need not be members of the Church of England; and provision must be made in the scheme to be framed for the management of the charity for affording religious instruction in such a manner as not to exclude persons who are not members of the Church of England. With respect to the master, it does not necessarily follow, although it would *prima facie* appear to do so, that he should be a member of that Church. Still I think that, *ceteris paribus*, he ought to be a member of the Church of England; but the trustees would not commit a breach of trust if, for a proper and sufficient cause, and under proper circumstances, they appointed as schoolmaster a person who was not a member of the Church of England. The circumstances, however, must be peculiar to justify such an appointment. That is all I need say upon that subject. With regard to the trustees, there is a great distinction between appointing improper persons to be trustees in the first instance, and removing them when appointed. Lord Cottenham drew that distinction very strongly in the case of *The Attorney-General v. Stamford* (the Manchester School), and I intend to follow his ruling in that respect upon the present occasion. I think that one of these gentlemen, who is a Dissenter, ought not to have been appointed. I also think that another of these gentlemen, who was not at the time an inhabitant of the parish, ought not to have been appointed, as the deed expressly provides that they shall be inhabitants of the parish. If the other trustees, who were originally inhabitants of the parish, have removed to such a distance as to be unable to attend the meetings of the trustees, I should consider that they have brought themselves within the provision for filling up vacancies, and should construe the words "grow old" as equivalent to "incompetent properly to attend." But, upon looking at the evidence, I cannot see that there has been any want of proper attendance. The trustees appear to me to have duly attended to the charity, for I find from the books, that there are never less than three present at the meetings, usually four, and occasionally five. I see no reason, therefore, for saying that they have not to the best of their ability performed the trust conferred upon them, with the exception that they were certainly very neglectful with respect to the schoolmaster. They appear, some thirty-seven or thirty-eight years ago, to have appointed a schoolmaster who was an improper person. They appointed him apparently because his

father had been schoolmaster before him, and they allowed him to make rules for his own convenience, contrary to the express directions of the founder; for, although the object of the foundation was to teach boys to read and write, he laid down a rule that no boy should be admitted into the school who could not already read. The result of that improper conduct was to reduce the number of scholars to one-third of what it was at the time when he took the school. He is dead, and no new schoolmaster has been appointed. I do not think, however, that upon that ground alone it would be proper to remove the debt from the trusteeship. I propose to fill up the original number of trustees, and I shall direct that, in filling up the number, regard shall be paid to the deed of endowment, which provides (as I take it) that they shall be members of the Church of England, and also resident within the parish. I shall also direct a reference to chambers to settle a scheme for the future government of the charity, having regard to the instrument of foundation, and to the state and population of the parish, and any other existing means of instruction in the parish. I shall give the costs of all persons to this information out of the funds of the charity; as I see no reason for making the debts pay the costs. I shall direct the costs to be taxed at once, but not to be paid till I see how the parties conduct themselves with respect to the further proceedings for the settlement of the proposed scheme.

July 27 and 31.

THOMPSON v. CARTWRIGHT.

The Annuity Act, 53 Geo. 3, c. 141, s. 10—Increasing annuity—Concealment of prior charge from grantee of annuity deed—Enrolment.

*In 1826 C. mortgaged his interest (200*l.* per annum in certain land) to M., his solicitor, to secure 1000*l.* and interest at 5 per cent. In 1828 C., as a surety, joined in the grant of, and charged the same land with, an annuity increasing from 139*l.* to 139*l.* after five years, in favour of D., and covenanted that the land was free from incumbrances. M. on that occasion acted as the solicitor of D. The annuity deed was never enrolled. The annuity to the smaller amount was regularly paid till 1863. C. died, and D. proceeded to prove against his estate for the value of the annuity. T., a creditor of C., opposed this proof, on the ground that the annuity deed had not been duly enrolled:*

Held, first, that the annuity, being an increasing one, must in this case be considered as of the largest amount specified in the deed; secondly, that C. must be taken to have been "a grantor" of the annuity within the meaning of that word in the 53 Geo. 3, c. 141, s. 10; thirdly, that M. in 1828 fraudulently concealed from D. the existence of the mortgage executed in 1826; and, fourthly, that the annuity deed was within the exception contained in the 10th section of the 53 Geo. 3, c. 141, and therefore did not require enrolment.

The question in this case was, whether an annuity deed ought to have been enrolled under the provisions to that effect contained in the Annuity Act, 53 Geo. 3, c. 141, or whether the deed fell within the exceptions in the 10th section of the Act?

By the 10th section, it was enacted that that statute should not "extend to Scotland or Ireland, or to any annuity or rentcharge given by will or by marriage-settlement, or for the advancement of a child, nor to any annuity or rentcharge secured upon freehold or copyhold or customary lands in Great Britain or Ireland, or in any of His Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity over and above any other annuity, and the interest of any principal sum charged or secured

thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee-simple or fee-tail in possession, or the fee-simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity, nor to any voluntary annuity or rentcharge granted without regard to pecuniary consideration, or money's worth; nor to any annuity or rentcharge granted by any body corporate, or under any authority or trust created by Act of Parliament."

The facts of the case were shortly these:—

In 1826 Thomas Cartwright was entitled to a moiety of certain freehold land, which moiety was of the value of 200*l.* By a deed, dated the 6th Feb. in that year, Thomas Cartwright mortgaged his moiety of the land to a Mr. William Montrieux, to secure 1000*l.* and interest at 5 per cent. By an indenture, dated the 11th March 1828, and made between Francis Cartwright of the first part; the said Thomas Cartwright of the second part; Arthur Downes of the third part, and John Howell of the fourth part, after reciting the fact of Thomas Cartwright's title to the aforesaid moiety, and an agreement for the sale by Francis Cartwright to Arthur Downes of an annuity for a term of years, determinable on lives, which was to commence at 139*l.*, to increase after five years to 139*l.*, and to be further secured on the freehold property; Francis Cartwright granted the annuity to Downes, and for further securing the annuity, Thomas Cartwright appointed, granted, and covenanted to and with Arthur Downes, his heirs, executors and administrators, that it should be issuing out of and charged upon Thomas Cartwright's aforesaid moiety, with powers of distress and entry; and Thomas Cartwright (at the request of his brother) also granted the moiety to Howell, for a term of years upon trusts for better securing the payment of the annuity. The annuity was made redeemable by Francis Cartwright and Thomas Cartwright, or either of them, on notice being given by him to that effect; and the deed contained a covenant by Thomas Cartwright that his moiety was free from incumbrances. The annuity was now vested in John Downes, as representative of Arthur Downes. The sum of 139*l.* had been regularly paid by Francis Cartwright, or his representatives, down to the present year, as the grantee had agreed to accept that sum instead of the larger amount.

Francis Cartwright was now dead, and this suit was instituted for the administration of his estate. John Downes proceeded to prove against the estate of Francis Cartwright for the value of the annuity; but the plt., who was a creditor of the testator, resisted the proof on the ground that the annuity deed of 1828 had not been enrolled pursuant to the provisions of the above-mentioned Act. It appeared that Mr. William Montrieux was solicitor of, and had acted as such for, Thomas Cartwright on the occasion of the mortgage of the 6th Feb. 1826, and for Arthur Downes on that of the annuity deed.

J. Pearson appeared for John Downes, and contended that the annuity deed of the 11th March 1828 was within the exception contained in the above stated 10th section of the Act, and required no enrolment. He cited

The Annuity Act, ut supra;

Jones v. Smith, 1 Phill. 244;

Eppin v. Pemberton, 3 De G. & J. 547.

Hetherington, for the plt., contra, cited

Darwin v. Lincoln, 5 B. & Ald. 444.

F. Bacon appeared for the executors of the testator.

J. Pearson in reply.

The MASTER of the ROLLS referred to

Kennedy v. Green, 3 M. & K. 699.

The nature of the arguments will sufficiently appear from his Honour's judgment.

July 31.—The MASTER of the ROLLS.—The question which I have to decide in this case, is, whether an annuity deed, executed on the 11th March 1828, is exempted from the necessity of enrolment by falling within the exceptions contained in the 10th section of the Annuity Act, the 53 Geo. 3, c. 141? [His Honour then stated the facts of the case, as above and continued:] It was argued that, as the moiety of Thomas Cartwright was worth 200*l.* per annum, the annual income of the property exceeded the amount of the annuity charged on it. If Thomas Cartwright's moiety had, when the annuity was granted, been in fact free from incumbrances, there could have been no doubt that the deed fell within the exceptions. But that was not the true state of the case; for the moiety was mortgaged in 1826 to secure 1000*l.* with interest at 5 per cent. The income therefore of the moiety, after deducting the interest on the charge then existing upon it, was only 150*l.* Now, although that sum was more than the annuity of 139*l.*, it was less than that of 199*l.* The questions now to be decided therefore are: first, whether the annuity is to be considered as one for 139*l.* or for 199*l.*; secondly, whether Thomas Cartwright was the grantor of it within the 10th section of the Act; and thirdly, whether Arthur Downes had notice of the mortgage of 1826 when the annuity was granted to him? Upon the first question, I am of opinion that the annuity must be considered to be one of the larger amount; for otherwise the provisions of the Act might be easily evaded. I do not say that, if an annuity be one gradually increasing in amount, the court will always treat it as being of the largest increased amount. The court must deal with each case on its own merits. It might, perhaps, in some cases, take the average of the annuity; but in the present one it must hold the annuity to be of the larger amount. Upon the second question, I think that the case of *Darwin v. Lincoln* is conclusive, and that Thomas Cartwright was one of the grantors of the annuity. Then the only remaining question is, whether it must be presumed that Montrion concealed the fact of the mortgage of 1826 from Mr. Arthur Downes, when the deed of 1828 was executed? No doubt, as a general rule, where a solicitor is acting for a client, the client must be taken to have notice of all facts known to his solicitor which are material to the matters in hand. The burden of proof is then thrown on the client to show that the solicitor did not communicate the particular fact to him. But the case of *Kennedy v. Green* establishes this important principle, that, if the solicitor is the actual perpetrator of a fraud when acting for a client, it is reasonably certain that he will not communicate that fraud to his client. How, then, do those considerations apply to Mr. Arthur Downes? Has Mr. John Downes fulfilled the duty of showing that Mr. Arthur Downes had no notice of the mortgage? [His Honour then referred to the evidence on this point, and continued:] I think that, upon the whole, he has fulfilled that duty. Mr. Montrion prepared a deed containing a covenant against incumbrances. He procured the execution of that deed by the grantors, and caused them deliberately to put their hands and seals to an assertion which was false. That amounted to a solemn statement that there was not, when the annuity was granted, any charge on the property. It was said in the course of the argument, that Mr. Montrion might have been compelled, under those circumstances, to postpone his charge to that of Mr. Arthur Downes, on the ground that this court compels a person to abide by his own representations when another party has acted upon them in the faith of their being true. I am of opinion that I must treat this case as one in which it is proved that Montrion deliberately and purposely con-

cealed the fact of the mortgage when the annuity deed was executed. The case therefore falls within the exceptions in the 10th section of the Annuity Act; and I must hold that the deed did not require to be enrolled.

Solicitors for the parties: *Bridges and Son*; *Roy and Cartwright*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs., Barristers-at-Law.

June 4, 5 and 8.

THE ATTORNEY-GENERAL at the instance of THE CONSERVATORS OF THE RIVER LEA v. THE METROPOLITAN BOARD OF WORKS.

Metropolitan Board of Works—Nuisance—Injunction—Pollution of river—18 & 19 Vict. c. 120, c. 135—21 & 22 Vict. c. 104, s. 31.

The Act incorporating the Metropolitan Board of Works does not empower them to create a nuisance. Nor does it take away the right of any person to prosecute them for a nuisance created in the execution of the works authorised by their Act, but gives an easier remedy to persons unwilling to prosecute at their own expense, by applying to a Secretary of State to direct proceedings to be taken.

Where a nuisance is only temporary, the court will hesitate to grant a mandatory injunction on an interlocutory application before the hearing.

General remarks upon the proceedings of public bodies, in communicating and dealing with parties whose interests are affected by the execution of their legislative powers.

This was an information and bill filed by the Attorney-General at the instance of the Conservators of the river Lea near London, against the Metropolitan Board of Works, to restrain them from causing or permitting any sewage to pass or flow down through or from the high-level sewer and middle-level sewer, or either of them, into the river Lea; that they might be ordered to take out from that river between the Old Ford locks and the entrance into Limehouse-cut and the branches and reservoirs, all the solid sewage, filth and mud deposited or accumulated in said river, between the points aforesaid by the effect of their works; and for compensation for the damage done.

By several Acts of Parliament, the first passed in the reign of Queen Elizabeth, and the last "The Navigation Improvement Act 1850," the relators were constituted trustees of the river Lea.

The defts. were incorporated by the Act of the 18 & 19 Vict. c. 120, "For the better local management of the metropolis."

The 135th section of this Act was the one upon which the main question turned, and it may be stated generally to have vested in the defts. all the sewers of the metropolis, with their appurtenances, and to have empowered them to make other sewers and works, as they should see fit, for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames. [The clause is fully set out and commented upon in the judgment of the V. C.]

By 21 & 22 Vict. c. 104, to amend that Act, the board were empowered to commence and prosecute works for the improvement of the main drainage of the metropolis, and for preventing as far as might be practicable the sewage of the metropolis from passing into the river Thames within the metropolis.

The 24th section enacted that the Metropolitan Board should cause all works to be executed under said Act to be constructed and kept so as not to be a nuisance, and should, in deodorising any sewage and

disposing of any sewage or refuse from sewers, act in such manner as not to create a nuisance.

The 31st section enacted that it should be lawful for one of Her Majesty's principal Secretaries of State, at his discretion, on representation or complaint made to him of any nuisance committed in execution of any works, or in deodorising any sewage, or in disposing of any sewage or refuse from sewers, or in any other manner under the Act, to cause inquiry to be made into the matter represented or complained of to him, and to direct such prosecution or prosecutions, or to take such other proceedings, as he might think fit in order to ensure the prevention or abatement of such nuisance as aforesaid.

The 32nd section puts a construction on the word "deodorise."

According to the plans, &c., it appeared that the metropolitan north of Oxford-street was intended to be drained by two large sewers called the Northern or High Level Sewer and the Middle Level Sewer. These were to unite at a place called "the Sluice-house," which stands about 450 yards from the right bank of the river Lea, near Old Ford.

From that point it was intended to convey the sewage brought by these two sewers from the Sluice-house in two culverts across the river Lea, and over the Plaistow marshes, to a point in the river Thames at Barking-reach.

The high-level sewer, which passed through Hampstead, Holloway, Stamford-hill, Dalston and Hackney had been completed as far as the Sluice-house (about eight miles), but the lower level sewer for a distance of three miles only from the Sluice-house. The defts. had also made two large drains from the Sluice-house underground, entering into the river through the pier of the intended bridge for carrying the culverts over the river Lea. These drains were to carry off the "storm water" which, after heavy rains, descended from the high grounds, and so to relieve the main sewers. The contract to complete the works called the "northern outfall," being that portion from the Sluice-house to Barking-reach, was to expire in the month of Feb. 1863, but in consequence of the failure of one of the sub-contractors for portions of iron work, the contractor had been unable to complete the whole according to the contract.

In March 1863 the board, without having required the acquiescence of the conservators of the river Lea, had connected with the middle-level sewer an old drain called the Hoxton sewer, the contents of which had formerly fallen into the river Thames, and commenced discharging the sewage from it through the storm water outlets into the river Lea. The Hackney-brook sewer, which had always fallen into the river Lea, they had also previously diverted into the high level sewer, and discharged the sewage from it through the storm water outlets into the Lea in like manner.

Immediately on the opening of the middle-level sewer the plts. complained, and some correspondence ensued, the general effect of which is stated in the judgment, but without any offer on the defts.' part to check the nuisance or remove the additional obstructions to the navigation of the Lea caused by the middle-level sewer having brought down the fresh sewage matter.

The other facts and the evidence are fully stated in the V. C.'s judgment.

The plts. now moved for an injunction in the terms of the information and bill.

The defts. offered to continue certain dredging operations which they had commenced to remove the obstructions caused by the opening of the high-level sewer, and to deodorise the sewage of the middle-level sewer.

Giffard, Q.C. and J. Pearson, for the complainants, contended that a nuisance having been created by the

defts., which they were not authorised to do by their Act of Parliament, the plts. were entitled to their injunction. Such injunctions had been frequently granted by the court before the hearing of the cause where the damage was immediate. The plts. had come to the court at the earliest possible period, for, although portions of the works had been completed, they had had no knowledge of what the effect would be. They referred to

Rankin v. Huskisson, 4 Sim. 13;

Lane v. Newdegate, 10 Ves. 192;

Robinson v. Lord Byron, 1 Bro. C. C. 588;

Manchester, &c. Railway Company v. Workop Board of Health, 23 Beav. 198;

Attorney-General v. Borough of Birmingham, 4 K. & J. 528.

Roll, Q.C., Sir H. Cairns, Q.C., and Chas. Hall, for the board of works.—What the defts. had done they had fairly done, and in the exercise of great public duties reposed in them by the Legislature. They had not exceeded the powers of their Act of Parliament, and could have had no possible improper motive in constructing their works. The works had been completed: and the discretion vested in the Secretary of State by the 31st section of the 21 & 22 Vict. as to nuisances, had not been put in motion. Although what the board had done might amount at common law to what constituted a nuisance, still they were compelled by their Act to do what they had done, which was precisely the case in the *Attorney-General v. Borough of Birmingham*, quoted on the other side.

The VICE-CHANCELLOR.—In that case a pier was to be erected, which might be a nuisance. The power to erect such involved the power of creating that which was a nuisance.

Chas. Hall.—It was not possible for the defts. to exercise the powers under the 135th section of their Act without doing so. There was no instance of the court granting a mandatory injunction on an interlocutory application in a cause of such magnitude and importance as the present. He cited

Attorney-General v. Borough of Birmingham (ubi supra);

Attorney-General v. Sheffield Gas Consumers Company, 3 De G. M. & G. 304;

North London Railway Company v. Metropolitan Board of Works, John. 405;

Attorney-General v. Conservators of the River Thames, 8 L. T. Rep. N. S. 9;

Biddulph v. Vestry of St. George's, 8 L. T. Rep. N. S. 44 and 558.

Giffard, Q.C. in reply.

June 5.—The VICE-CHANCELLOR said:—I cannot help saying it is much to be regretted that the Metropolitan Board of Works should have exercised their office as it has been exercised in the present instance. I quite agree with all the observations made by their counsel in the opening of his address, that the court should give great weight and consideration to the circumstance that these are gentlemen intrusted with very important public duties in carrying into effect works of great magnitude, of extreme difficulty, and of very great public import, and that every consideration should be paid to the circumstance that it is not a speculation which they are carrying on for their own benefit; that no advantage is to be derived by them from any particular course of conduct they may pursue; and therefore that it must be presumed that they would only do that which at all events in their own judgment is a right and proper course, and for the public benefit. But there is also this observation—and I have had occasion to make it more than once since I have been sitting here—that there is frequently a disposition in public boards to exercise their jurisdiction in a manner which is not conciliatory, which does not evince a due regard for

the interests of those who may be affected by their acts; in fact, to assume a sort of judgment and an exercise of power which they would think an impertinence on the part of others, and therefore they do not adopt that reasonable course of conciliation, and free and frank communication, which it appears to me gentlemen who are entrusted to exercise these public duties ought, beyond all others, to adopt. Now certainly in this case, before referring to the construction of this Act of Parliament, I think these gentlemen must have been advised that it was extremely doubtful whether they could do such an act as they have done in the present case; namely, whether they could turn the whole of the sewage of a district, which had never yet found its way into the river Lea, into that river, of their own free will and pleasure, without any communication with the persons interested as conservators of the river. I think they could hardly have been advised that that was so clear and indispensable a right that they would be justified in exercising it, I must say clandestinely, without any previous communication with those who were interested in the preservation of the river Lea. I say "clandestinely," for this reason, that it is quite clear to my mind on the evidence that the outfalls (as they are called) were never intended to pass any sewage through them into the river Lea. They were intended to be storm outfalls, which I understand to mean outfalls which would on an emergency let off those large floods of water which have on a former occasion broken up the crown of the sewer, and done considerable damage; that it was intended that there should be a mode of relief found by which, on such extraordinary occasions, those floods of water might come into the river Lea. When those who were interested in the navigation of the river Lea in Aug. 1860 noticed the sewage works then in course of erection by the defendants, intended to cross the navigation of the river Lea at Old Ford, a communication is made to Mr. Bazalgette on the subject, and Mr. Bazalgette's statement is clear on this point. His representation was this: "Our storm outfalls (for that is what they are) provide for an emergency of storm water, and storm water is not like emptying a drain into your river; it will come down, and be poured into your river on those emergencies; it is not like sewage, and therefore you need not be alarmed at what is taking place." That is evidently the nature of the representation made, because Mr. Bazalgette meets a statement to that effect made by Mr. Beardmore by saying, "I did not assure him, or guarantee to him, that storm water would contain no sewage matter." Of course Mr. Bazalgette could not say so, because, when there is a grand confusion in the sewers, and a mass of water is mixed up together with the sewage, it will come out in a large mass, and will be comparatively innocuous, and will not be a thing of which reasonable men (as the trustees of the river Lea seem to have conducted themselves generally throughout) would be inclined to complain. After that, the first thing that takes place is a connection with the high level sewer, which originally included the drainage of the Hackney-brook, and which certainly in itself might not be a thing to be complained of, although it might also be used as a storm outfall. The River Lea Trustees could scarcely complain of Hackney-brook being brought to them, because it always had brought the sewage there, and they did not seek to prohibit its going into the high-level sewer; and although it was found by experience that some great degree of additional sewage was coming in—as experience had shown that the shoals began to rise in the river where they had not existed before—still, having made a communication to the Metropolitan Board of Works on that subject, the board did

what was right and reasonable. They said they would undertake to remove, and would pay the expense of removing, the deposit by dredging, and they made preparations for any future inconvenience that might arise from the same source. Having, from all this, clear knowledge that the trustees of the river Lea strongly objected to anything in the shape of additional sewage coming into their river, and the Metropolitan Board having, as I must consider from their mode of doing it, doubts whether they would be justified in aggravating the evil, they clandestinely (for they certainly had no communication whatever on the subject with the river Lea trustees), in the month of March 1863, opened an entirely new district—a district of about thirty miles of sewerage—known as the "Hoxton sewer," into the middle-level sewer which they are making, and poured that into the river Lea which had never before found its way there. But the case, I am sorry to say, does not quite rest there; for, upon the evidence before me, it is quite clear and admitted that there was a communication in February on the part of Mr. Beardmore with the engineer and other officers of the Metropolitan Board of Works, in which Mr. Beardmore's statement is, that he was distinctly assured no further connection should be made at all with the middle-level sewer, and that there was no intention to do anything of the kind. The answer to that is, "There was no talk about the Hoxton sewer, and the only thing that we were thinking about was any new sewers of our own which we might be making, and we did not consider the matter to have reference to any old sewer which we might pass in the course of our work, and might therefore find necessary to introduce into the middle-level sewer." I am quite willing to take it on their evidence that the defendants might have got some strange notion that such was the exact question put to them; but on the slightest reflection they must have seen it was a matter of pure indifference to the inquirer, who was endeavouring to shield the river Lea from any nuisance or pollution; they must have seen it was a matter of pure indifference to him whether the nuisance was occasioned by new drains or by an old drain of great magnitude being turned into the river, which had never been turned into it before. If anything, the large and old drain must be the greater evil of the two, and having had that previous communication with regard to what was done by the board, and by which the river Lea trustees considered that the additional quantity of sewage thrown in by the previous operation would create a great evil, and should then, without any communication whatever with the parties so deeply interested as the trustees of the river Lea were, turn this large body of sewage in the Hoxton sewer into the middle-level sewer. I do not think it was their original intention to do this, because it appears to me clear, on the evidence, that they intended to bring the high-level and middle-level sewers down to the Sluice-house, and to do the whole thing in a workman-like manner in the way Mr. Bidder has described. I should not presume to set my opinion against that of Mr. Bazalgette in a matter of this kind, but it was the way that Mr. Bazalgette himself proposed to have that work completed, for it is clear upon the contractor's evidence that he intended to have the work completed in two years from the time notice was given to him, and the notice was so given that the two years would have expired in February of this year, and if the work had not been stopped in consequence of the failure of some persons who had the contract for the iron, the thing might have been done, and this nuisance which has resulted from turning the Hoxton sewer into the middle-level sewer would not have happened in March, because in February the whole thing would have been completed. As to any difficulty about the matter, I must say that,

supposing the Metropolitan Board Works not to have the power of doing this act, what they have done is in the highest degree unjustifiable, not merely from the mode in which it has been done, but that it is manifest to me upon the evidence that it is nothing but a question of expense. When they talk of difficulty and so on, one knows what engineers mean by difficulty—they mean want of money. They say now it can be done in two months. They should have waited, if it was necessary, and not have constructed their middle sewer at all, rather than injure their neighbour's property. They seem to have said: "Here is a neighbour's river. It will be very handy to throw all our rubbish into that; it will be cheaper for us to do so than to carry on the works in the usual way." Of course that could not be justified in this court; and if the court had been applied to earlier, my impression is, there would have been quite sufficient upon the Act of Parliament to say, "You have no authority to do this;" and if it were shown you were about to do it, to say, "It shall be stopped." I come now to the Act of Parliament, and to consider the meaning of the 135th section. It contemplates two things: it vests in this new board all the existing sewers of the metropolis, and then says the new board shall within a given time "make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis (which is defined afterwards), and shall cause such sewers and works to be completed on or before the 31st Dec. 1860," which has since been extended to the end of the present year by a subsequent Act. Then there is a second part of the clause, which says, "And shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewage and drainage of the metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this Act as they may deem necessary, and such board shall from time to time repair and maintain the sewers so vested in them." That second clause seems to me, as at present advised, to be a general clause, for all time authorising them to make alterations in sewers from time to time, and among other things to divert them, and that seems to be the strongest clause that could be adduced in their favour for doing what they have now done. It has been argued that, under those words, the board might have diverted the Hoxton sewer for ever into the Hackney sewer, and have thrown for ever the whole of the Hoxton sewage into the river Lea, because the Hackney brook has always run into the river Lea, and if they had been minded in the exercise of their duty to make a diversion of the sewage, they could have done it in that way, and therefore they had a right to do the particular act in question. A good deal might be said for that view, if it was not governed and limited and expounded in fact by the Legislature by what follows, for they explain what are the powers for this purpose. You have powers to divert sewers, but it goes on and says, "For the purposes aforesaid such board shall have full power and authority to carry any such sewers or works" (those purposes aforesaid being all the purposes there mentioned, both those limited to time and those which are permanent) "they shall have full power and authority to carry any such sewers or works through, across, or under any turnpike-road, or any street or place, or street laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriage-way or pavement of any street, and into, through, or under any lands whatsoever, within or

beyond the said limits, making compensation for any damage done thereby as hereinafter provided." Now, that appears to me to point out the powers they have for the purpose of carrying into effect the particular works that are to be done, and there is no power which in any way seems to point to turning the sewage into any navigable river, or canal, or watercourse, or stream. They may carry their works into or through lands, not for the purpose of emptying them into the river Lea, but for the purpose of constructing them, that is obviously what is here provided; and then they are to make compensation for any damage, as therein-after provided. Now, unless the powers include the power of turning this sewage into the river Lea, the clause for compensation as to any subsequent damage would not apply, and you would have them, under the general power of making diversions, able to do that act without any obligation as to compensation for damage being so done. It is true that the Lands Clauses Act is incorporated in this Act, and it is just possible that the general clause, the 85th (which is called "the injuriously affected clause"), which provides that any person injuriously affected by the operation might have an action for damages, might be put forward as something that would give a remedy. I think, however, the better construction is, that it was intended by the Legislature to point out by these particular words what was the exact class of things to be done, and which the Metropolitan Board of Works were authorised to do, and for which they were to give compensation, and that nothing so vast as the destruction of the river was intended; for I must observe that, upon their construction of the Act, it would be destruction to the river, for they might pour the whole sewage of the metropolis into the river Lea, and create an absolute destruction of that river. Nothing of that kind could have been contemplated by the Act. It is then said, that this, after all, is only a nuisance; and if you are to say that in the execution of these works the Metropolitan Board may not commit a nuisance, you stop the works altogether, and there was cited the conclusion I came to in the *River Thames* case, where there being an Act expressly creating a power of putting piers in the river Thames, and the damage complained of was the damage done by the piers, I held that the necessary power was given to the conservators in that particular case of putting out a pier, which must be a nuisance. Now every pier, at common law, projecting into a navigable river, is a nuisance to that navigable river, and therefore I must hold that if the Legislature gave the power of erecting a pier, they had given in the present case the power of creating a nuisance. But that is not a necessary result (and it appears to me that, so far from being a necessary result, it was only an accident, that in consequence of the contractor for the iron having failed, this sewage should be turned in the river Lea), or that the nuisance complained of is covered or authorised by anything in the Act of Parliament before me. Certainly I do not think that subsequent clause in the 21 & 22 Vict. to be read with this Act, which enables the Secretary of State, on remonstrance being made to him, to direct actions to be brought in case it is represented to him that any nuisance has been occasioned, can be held as authorising a nuisance. It appears to me it would have the directly contrary effect. It is to be represented to him that a nuisance has been occasioned. If so, persons may be in a condition in which they do not wish to prosecute at their own expense, and in order to assist persons who are so situated, a power is given by the Legislature to the Secretary of State to undertake the prosecution at the public expense if he thinks fit. But what is he to do? He is not to pronounce it a nuisance. It would be an important argument for the defendants if the Secretary of State were to say whether it

was a nuisance or not; but he is only to authorise a procreation—the law must deal with it, and must say whether it is a nuisance or not. It seems to imply this, that nuisances might arise in the course of the execution of the Act, and that nuisance not authorised by the Act would be likely to arise in the course of the execution of the works, and if so, there shall be an easier remedy than that which the present plts. have taken upon themselves at their own instance as relators, setting in motion the Attorney-General; that is all that can be raised on that clause, and if so, it is rather adverse to the contention of the Metropolitan Board of Works than favourable to them. I think, therefore, upon these grounds, that this is an act that cannot be authorised, and although this is an interlocutory application, if it had been to stop a work about to be done, I should have arrested that work until the hearing of the cause, and should have said that the work ought not to be done. But the court is put in some difficulty in a work of considerable magnitude such as is here in hand, by reason of the circumstances of this work being actually done, although, as I hold, most improperly done, and done in a way against which the promoters of the present proceeding, the trustees of the river Lea, could not take any steps towards remedying at any earlier period than they have done. In truth, they did not know of it until it was done; therefore the objection of delay scarcely arises under such circumstances. They complain of it the moment they find it is done; their complaint is not listened to for a fortnight—a course of proceeding which I hope will not be pursued in future. Courtesy, if nothing more, required an earlier reply in such an aggravated case as this. The new trustees do not get an answer for a fortnight, a general correspondence then goes on, and it ends by no admission of the right at all on the part of the plts. to make a complaint, simply stating that they are sorry the thing is done, and that they do not know how to help it. In that state of circumstances I cannot doubt the propriety and justice of the bill being filed, and even if I had not the statement that the defts. are quite willing to undertake that it shall go no further, and that no further connection shall be made with these sewers, either the high-level or middle-level sewer, till the hearing, I should have thought myself in a condition, after what has been done, to grant an injunction to restrain any such further connection being made. The question then is, whether I ought to issue an injunction which would in effect be mandatory, and which would compel the restoration of the Hoxton sewer, which is the one that is principally complained of, or whether things should remain as they are at the present time, the motion standing over with liberty to apply? Now here the defts. are in the position, not unreasonably of appealing to the discretion of the court, and this is a case which requires that the discretion of the court should be exercised with considerable latitude. I am not at all pressed with this, that any very great difficulty would arise in putting things exactly as they were; I do not think there would be any very great difficulty about that—it is more a question of time than anything else. I think there might be some expense, and I think there would be some risk of damage to the existing work, to this large drain which has been formed, and which damage of course would have to be repaired, and some delay and inconvenience and expense would be incurred in the whole proceeding. As to the time necessary for doing that work, the plts.' witnesses say it can be done in a certain time and at a certain expense. All that can be matter of arrangement. Then again there is this to be considered on the balance of convenience and inconvenience. Undoubtedly wrong as I have held the defts. to have been throughout the whole of their proceeding, there is an additional grievance

not occasioned wholly by the defts., and which had existed from the end of last year, namely, the state of this Hackney-brook pouring into the river Lea. [His Honour then commented on the accidental increase of the nuisance by reason of the draught.] When I have to consider a case of that kind, it does become a consideration whether or not this was a new nuisance altogether, and as being altogether occasioned by this particular act, or whether they were the parties subject to them before, and are only going to have them in an aggravated degree for five or six weeks longer. I must also consider the expense I should occasion by any mandatory order for the stoppage of the sewage, and that I could not possibly force it on the defts. to be done in a less time than some six or eight weeks at least, with liberty even then to apply in the meantime, and I have it positively sworn that in double that time the whole thing will be completed, and that when the works are really done the river Lea will be in a far better condition than the conservators themselves have ever known it, because then the Hackney-brook and Ratcliffe sewers will be carried out into the Thames at Barking-creek, and that it would occasion additional delay in the completion of the work at the very outfall; taking all this into consideration, although objecting as I do to all that has been done, and the mode in which it has been done by the defts., yet I think, for the benefit of the plts. themselves, justice will be secured if I make an order of the description which I am now about to dictate.

Minute:—Restrain the defts. from making any further connection of any drain with either the middle level or the high-level sewers until the hearing of the cause of further order, defts. undertaking by dredging or other proper means to keep the river Lea free from all obstacles to the navigation caused by any increase of sewage matter arising from the connection since the month of February last, of the middle-level and high-level sewers with the river Lea. Let the rest of the motion stand over, with liberty to apply, especially with reference to any unhealthy effluvia of any sewage matter brought down the middle-level sewer.

Solicitors: *Marchant and Pead* for complainants; *W. W. Smith*, for Board of Works.

Tuesday, June 30.

HUGHES v. JONES.

Will—Construction—After-acquired property—Wills—Act, sect. 24—Separate estate—Savings.

By a marriage-settlement, dated in 1838, real estate was conveyed to such uses as M. B. N. (the intended wife) should by deed or will appoint, and in default of appointment to certain uses for the benefit of the children of the marriage, with an ultimate remainder to the use of M. B. N. in fee; and it was provided that all property which during the coverture should come to or vest in the husband in right of said M. B. N., or in the said M. B. N. by descent, devise, limitation, gift, or otherwise, should be settled to the same uses, trusts and intents, &c. as were thereinbefore expressed concerning the hereditaments thereby granted and released.

M. B. N. by her will, made shortly after the settlement, devised and bequeathed all the residue of her property (except such real and personal estate as might remain subject to the trusts of her marriage-settlement by reason of no specific disposition thereof having been made by her under the power for that purpose therein contained, and of which that general devise and bequest was not to be taken as in execution) for the benefit of her children. If no children, then over. In 1854 M. B. N. purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those de-

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clared by the settlement of 1838, omitting only the uses in favour of children:

Held, that the exception in the will referred only to the property subject to the trusts of the marriage-settlement at the date of the will, and that the real estate subsequently purchased by M. B. N. passed under her will:

Held, also, that a covenant to settle after-acquired property would not affect property purchased by a married woman out of the savings of her separate estate.

Quære, whether sect. 24 of the Wills Act applied to an exception out of a devise.

By indenture of settlement dated the 17th April 1838, made on the marriage of Margaretta Bowen Davies with David Fryer Nichol, certain freehold and leasehold property was settled subject to a term of ninety-nine years to such uses as M. B. Davies should by deed or will appoint, and until or in default of appointment to the use of trustees during the life of M. B. Davies upon trusts to pay the rents and profits to her separate use, and from and after her decease, and subject to a term of 500 years for raising portions for younger children, to the use of the first and other sons of the intended marriage successively in tail male, with remainder to the use of all and every the daughter or daughters as tenants in common in tail, with cross-remainders, with ultimate remainder to the use of M. B. Davies, her heirs, &c.; and the settlement contained a proviso that in case at any time during the intended coverture any real estates or other property, whether real or personal, should come to or vest in the said D. F. Nichol in right of his said intended wife, or in her the said M. B. Davies, by descent, devise, limitation, gift, or otherwise, then the same should be conveyed and assured unto and to the use of trustees to the same uses, trusts, intents and purposes as were thereinbefore declared and expressed concerning the hereditaments thereby settled.

The marriage was solemnised on the 9th May 1838, and on the 18th Aug. 1838 Mrs. Nichol made a will, and thereby, after various bequests, appointments and devises, she gave, devised and bequeathed the residue of her real and personal estate whatsoever and wheresoever (except such real and personal estate as might remain subject to the trusts of her said marriage-settlement by reason of no specific disposition of any part thereof having been made by her under the power for that purpose therein contained, and of which that general devise and bequest was not to be taken as an execution) for the benefit of her own children, and in case she should have no child who should survive her, then to other persons.

In 1854 Mrs. Nichol, being more than sixty years of age, and having no children, purchased certain hereditaments with the savings of her separate property, and by an indenture dated the 29th Dec. 1854 such last-mentioned hereditaments were conveyed to trustees to uses and trusts expressed in the same words as to the uses and trusts declared by the settlement of the 17th April 1838, except that the uses and trusts for the benefit of the children of the marriage were omitted.

Mrs. Nichol died on the 17th Oct. 1858, without issue.

A bill was thereupon filed by the heiress-at-law of Mrs. Nichol against the devisees under her will, praying that it might be declared that the residuary gift contained in the will of Mrs. Nichol did not operate as an exercise of the power of appointment vested in her by her marriage-settlement, or the indenture of the 29th Dec. 1854, but that inheritable estates vested in her at the time of her death had descended to her heir-at-law.

Sir Hugh Cairns, Q.C., *Hobhouse* and T. C. Swanston, for the heiress-at-law, contended that the property

purchased by Mrs. Nichol in 1854 did not pass under the residuary devise in her will. The will must be construed as if made immediately before her death. The limitations in the deed of 1854 were practically the same as the limitations contained in the settlement, and the estate so purchased by Mrs. Nichol was bound by the covenant to settle after-acquired property.

The *Solicitor-General* (Palmer), *Giffard*, Q.C. and *W. Pearson*, for the devisees, contended that there was nothing in the 24th section of the Wills Act to alter the plain meaning of the words. The words used by the testator clearly referred to the time at which the will was made. Although in form the trusts in the deed were the same as the settlement, they were not so in fact, as the estate had not been purchased at the time of the settlement. They cited

Cole v. Scott, 1 M. & G. 518; 17 L. J., N. S., 423, Ch.;

Walker v. Armstrong, 21 Beav. 284.

Hobhouse in reply.

The VICE-CHANCELLOR said that sect. 24 was introduced into the Wills Act in order that a residuary gift should include all the property of a testator not otherwise disposed of at the time of his death, unless a contrary intention should be expressed in the will. In the present case a contrary intention was expressed; the testatrix had clearly pointed out in her will what she intended to except, and the ambiguity had been introduced by the force of external circumstances. He would not express an opinion on the question whether or not, in a will framed like this, the 24th section of the Wills Act applied to the exception; it would be a nice point, but was not now before him. He should read the will as if written on the night before the testatrix died. She had excepted from the operation of her will all the property which might remain subject to the trusts of her marriage-settlement by reason of no disposition thereof having been made by her under the power for that purpose "therein contained." These words must refer to a specific instrument, and to the power contained in that instrument. After the date of the settlement the testatrix purchased the property and settled it to uses similar to those declared by the settlement, and it was argued that therefore this property must be included in the exception. But he could not hold that the testatrix intended to exclude from the residuary devise property which was not hers at the date of the will, and was not included in the settlement. There might be a lurking suspicion of a reason why the testatrix should intend this property to descend to her heir-at-law, but that was not sufficient; the intention must be apparent on the will, which was not the case here. He must therefore hold that the property purchased by the testatrix in 1854 passed under the residuary devise contained in her will. It was not necessary to decide the question, but his Honour thought that property purchased by a married woman out of the savings of her separate estate could not be affected by such a covenant.

Decree accordingly.

Solicitors: Chilton and Co.; Loftus and Young.

Thursday, July 23.

BINGLEY v. MARSHALL.

Practice—Injunction—Motion to assess damages.

Where a *plt.* has, upon obtaining an injunction, given the ordinary undertaking as to damages, and upon the hearing of the cause his bill is dismissed, but without costs; the court will refuse a motion for assessment of damages on the ground that any damage which the *deflt.* might have incurred would arise out of the institution of a suit which itself has pronounced to have been rightly instituted.

This was a suit commenced in Aug. 1861; arising

out of an agreement on the part of the plt. to take a lease of, and of the deft. to build and let to him certain premises which it was proposed to erect on the site of the Old Gloucester Coffee-house, Piccadilly, and which were to be used as an hotel. In the course of the erection it was found expedient to enlarge the plan of the building, and to increase the sum to be expended on it, and this was done at the expense of deft. under the direction of the plt. Shortly before the completion of the building a dispute arose between the parties as to whether or not the deft. was entitled to an alteration of the terms, as to rental, of the agreement, on account of the additional sum so expended by her, and on the refusal of the plt. to accept any of the proposals made to him, she took steps to procure another tenant. The plt. succeeded in obtaining an order for an injunction on the 23rd Aug. 1861 to restrain the deft. from letting or parting with the possession of the hotel and premises without his consent, he undertaking to abide by any order as to damages in case it should afterwards appear that the deft. should have sustained any by reason of the injunction.

No motion was made to dissolve the injunction, and the hotel, though completed, remained unoccupied, while negotiations continued to be carried on between the parties with a view to effect an equitable settlement. The cause ultimately came on for hearing, and by a decree made on the 25th July 1862, it was declared that the agreement ought not to be specifically performed, except upon the terms of plt. allowing in the computation of rent the additional sums expended in the erection of the hotel and certain other sums specified in the order: and the deft. offering to perform the agreement upon these terms, and the plt. refusing to accept performance, his bill was dismissed without costs, and the deft. was ordered to repay the sum of 2000*l.* deposit on the execution of the agreement, if the plt. should, before the 25th Dec. then next, deliver up to her the agreement to be cancelled. One day only before that date the agreement was accordingly delivered up, and the deposit in due course repaid. The deft. now moved for an order for the assessment in chambers of the damages which she had sustained by reason of the injunction obtained by the plt.

Holt, Q. C. and *Karslake*, in support of the motion, maintained that, owing to the delay of the plt. in electing to deliver up the agreement until the latest period fixed by the decree, the deft. had been prejudiced in her endeavours to obtain another tenant. The deft. had offered the only fair alternative, either a termination of the contract, or a modification of its terms; the plt. had insisted on specific performance, and that the decree had settled he was not entitled to. *Sir H. Cairns*, Q. C., *E. B. Lovell* and *J. M. Howard* (of the common law bar), for the plt., were not called on.

The VICE-CHANCELLOR said that there were two cases in which the court in granting an injunction required an undertaking as to damages: when an order was made on an *ex parte* motion; and when upon argument of the case the balance of evidence appeared to be in favour of restraining the commission of the acts complained of, and giving compensation for the restraint, if the right of the deft. should be completely established. He could not see from the evidence on the present motion that the deft. had suffered any damage from the injunction. She had, after the decree, attempted to obtain another tenant, the agreement being still subsisting, and the reason she had failed was clearly because of the condition of the property—that it was then the subject of a suit in this court. Now where there was a *probabilis causa litigandi* it would not be fair to put a plt. to any additional expense on account of an undertaking of this sort;

that there was such a probable cause in this case, the court had shown to be its opinion by giving no costs against the plt. It would be absurd, therefore, to saddle him with other expenses, which equally arose from the mere institution of the suit. This motion must be refused with costs.

Solicitor for plt., *H. Mazon*; for deft., *F. W. Dolman*.

Common Law Courts.

EXCHEQUER CHAMBER.

Reported by F. BAILEY, Esq., Barrister-at-Law.

ERROR FROM THE EXCHEQUER.

Friday, May 15.

(Before COCKBURN, C.J., CROMPTON, WILLES, BYLES, KEATING, BLACKBURN and MELLOR, JJ.)

YOUNG v. DAVIS AND ANOTHER.

Highway—Surveyor's liability for accident caused by non-repair—Stat. 5 & 6 Will. 4, c. 50.

A surveyor of highways appointed under the 5 & 6 Will. 4, c. 50, is not liable to an action for damages in consequence of an accident caused by his neglect to repair the highway.

This was an action against surveyors of highways, appointed under the 5 & 6 Will. 4, c. 50, for damages resulting from an accident caused by the non-repair of the highway.

The declaration stated that before and at the time of the happening and committing of the grievance therein mentioned, the defts. were the joint surveyors of highways of (and for the parish of Alkerton, in the county of Oxford (a parish maintaining and liable and bound to repair and keep in repair its own highways) duly appointed in that behalf; nevertheless, the defts., not regarding their duty in that behalf as such surveyors, conducted themselves so negligently, improperly and wrongfully in that behalf, that by and through their (the defts.) said negligence, improper and wrongful conduct as such surveyors in that behalf, a certain common and public highway, called and known as Alkerton-hill, of and in the parish aforesaid, in the county aforesaid, which the said parish was then liable and bound to repair and keep in repair, and whereof the defts. then had, as such surveyors, the survey, care and superintendence, and which it was then their duty as such surveyors to repair and keep in repair, was negligently and wrongfully suffered and permitted by the defts., before and upon the 19th Nov. 1860, to be and become, and continue, and the said highway did then become, and then was, and continued out of repair and foundered, and in a state and condition dangerous for foot passengers passing along the said highway and the footpath thereof, and a certain hole dangerous to foot passengers was then negligently and wrongfully suffered and permitted by the defts., as such surveyors, to be, and the same then was, in the said highway, and uninclosed and open at the end of the footpath of the said highway, so that the said footpath terminated abruptly and dangerously to foot passengers at the said hole, and the said hole was then negligently and wrongfully suffered and permitted by the defts., as such surveyors, to be, and the same then was, left after daylight had ceased without any light or other means whatsoever, although means were necessary, to warn passengers along the said footpath of the said hole, and without any inclosure of the said hole, or any other means whatsoever, although means were then requisite and necessary, to prevent passengers from stepping, slipping, or falling from off the said footpath into the said hole, by reason and in consequence whereof the plt. on the said 19th

Nov. 1860, whilst lawfully walking upon and along the said highway and the said footpath thereof, after daylight had ceased, and without any want of due care on his part, stepped and slipped from off the end of the said footpath into the said hole, and fell into the same and broke his leg, and was otherwise greatly injured, whereby the plt. sustained damage, &c.

Pleas:—1. Not guilty (by statute 5 & 6 Will. 4, c. 50, s. 109). 2. That the defts. were not the joint surveyors of highways of and for the parish of Alkerton, as alleged.

Issues thereon.

The cause came on for trial before Keating, J., at the Oxford summer assizes 1861, when evidence was given of the appointment of defts. as surveyors of highways for the parish of Alkerton; that at a place called Alkerton-hill, which was a public highway, and which the parish was bound to keep in repair, there was a hole in a part of the footpath, which had been caused by a flow of water from the adjoining hills, and in consequence of unusually heavy rains just before the accident, the hole had become much enlarged. Notice to the defts. of the existence of the hole, some time before the accident happened, was proved. The plt., while walking along the footpath, fell into the hole and broke his leg. The jury found a verdict for the plt., with 150*l.* damages, leave being reserved to the defts. to move to set aside the verdict if the court should be of opinion that the action would not lie against the defts.

In the following Michaelmas Term a rule nisi was obtained calling on the plt. to show cause why the verdict should not be set aside and a verdict or a nonsuit entered for the defts., or why judgment should not be arrested for the insufficiency of the declaration, upon the ground that no action could be maintained against surveyors of highways for omitting to repair a highway, whereby the plt. had been injured. It was afterwards argued, and the Court of Ex. held, that a surveyor of highways appointed under the 5 & 6 Will. 4, c. 50, was not liable to an action for damages resulting from an accident caused by the non-repair of the highway, as was substantially decided in *M'Kinnon v. Penson*, 8 Ex. 319, and in error, 9 Ex. 609.

This was an appeal by the plt. from that decision.

Dowdeswell (Bowen with him) for the plt.—The first question is, are the defts. liable, as surveyors of the highway, for an omission of the duty imposed upon them by the Act of Parliament? The plt. contends they are, and that this action is maintainable. Many of the sections of the Act are mandatory. Sect. 6 enacts that the surveyor "shall repair, and keep in repair," &c.; sect. 7 gives the qualification; sect. 8 imposes a penalty on surveyors for not acting when chosen; by sect. 9 surveyors may be appointed with a salary. [COCKBURN, C. J.—Not sufficient to cover damages, &c., in an action for personal injury like this. How can you distinguish this case from *M'Kinnon v. Penson*?] It is distinguishable, as, under the Act in that case, no penalties were imposed. Wherever a statute imposes duties, as this Act does, the person on whom such duties are cast is liable in a civil action for damages for the neglect of those duties, notwithstanding penalties are given for neglect of duty: (*Couch v. Steel*, 3 E. & B. 402.) [BYLES, J.—Has the surveyor any funds? It is not so alleged in the declaration, nor was it shown by the evidence produced at the trial.] Sect. 27 gives them full power to make rates whereby they could obtain funds; and sect. 90 enacts that the quarter sessions may award costs in certain cases there mentioned. Proceeding by presentment is now taken away by sect. 99. [COCKBURN, C. J.—Where a duty is imposed by Act of Parliament the party neglecting it may be indicted, may he not? Surveyors have no means in that capacity of paying damages. No action lies against the

inhabitants of a parish. Surveyors are the servants of the parish, and although the inhabitants are not liable, yet you must contend their servants are; they are bound under penalties by sect. 8 to accept the office, and you say they are to be made liable for damages when they who appoint them are not liable.] Surveyors are not merely the servants of a parish; when appointed, the surveyors become superior and independent of the parish—they have a control over the rates: (sect. 27, &c.) An action lies for private injury resulting from their negligence. Com. Dig. "Action on Case for Negligence," A 1, A 2: "Whenever a duty is imposed by Act of Parliament an action lies for damages sustained by its omission; there is no distinction in law between commission and omission." [COCKBURN, C. J.—Where is a surveyor to get funds to defend these actions?] Sect. 27 provides for getting ample funds; but, if not, they should get them—where a sheriff of a county gets them—out of his own pocket. It is true the sheriff receives fees; but he gets them, not by the common law, but by statutes. [CROMPTON, J.—According to your argument, the parish and the surveyors are liable. You must show that it clearly exists.]

Keighley's case, 10 Co. 139 b;

Henley v. Mayor of Lyme Regis, 3 B. & Ad. 77, 92;

Sutton v. Johnstone, 1 T. R. 493;

Lacon v. Hooper, 6 T. R. 224;

Schinotti v. Bumpsted, 6 T. R. 648;

Ashby v. White, 1 Sm. Lead. Cas. 185;

Barry v. Armaud, 10 A. & E. 646.

[WILLES, J.—Is there any case against trustees of a turnpike-road for non-repair?] No; because their duties are specially pointed out by the Act of Parliament, and are upon a different principle. *The Lancaster Canal Company v. Furnaby*, 11 A. & E. 230, is very like this case in principle, and *Mercsey Dock v. Parhallow*, 7 H. & N. 329, still more so.

Gibbs v. The Liverpool Dock, 6 Ex. 164;

Ruck v. Williams, 3 H. & N. 308;

Whitehouse v. Fellows, 10 C. B., N. S., 765;

Carwell v. Worth, 5 E. & B. 885;

Nicholl v. Allen, 1 Best & Sm. 929,

are authorities in favour of the plt. An omission to obey a duty imposed by statute is as actionable for a private injury as an act of commission. Secondly, the rule should not have been made absolute in the court below to enter a nonsuit, but at most only to arrest the judgment, as even supposing the declaration to have been held bad in law if it had been demurred to, yet the allegations in it were clearly proved at the trial, and the learned judge was correct in leaving it to the jury. [WILLES, J.—Probably as to that the defts. would consent to a *stet processus* being entered, if the court should be of opinion upon the first point, that the defts. are entitled to judgment.]

This was assented to by the plt. and the defts.

Mellish, Q.C. (*Pigott*, Serjt. with him), for defts., was not called upon.

WILLES, J.—We are clearly of opinion, and it is the opinion of the Lord Chief Justice and my brother Crompton—who are not at this moment in court—that the judgment of the court below was correct, and ought to be affirmed. It was admitted, on the part of the plt., that before the passing of the 5 & 6 Will. c. 50, there was no legal remedy for a personal injury occasioned by the non-repair of a highway. Mr. Dowdeswell has to establish his proposition, that the concluding words of sect. 6 of that Act create a liability in the surveyor to such an action; but I do not think, after looking at its whole provisions, that it is the proper construction of the statute. The 6th, or any other section, should not be read alone. It is not the proper mode of construing a statute to take one section, or part of it, in order to ascertain the real meaning, but the

general scope and object should be looked at, and the words of the 6th section should be read by the light of the whole Act. It was not the object of the Act to create a new liability on an individual and to remove it from the parish, but to provide, by the appointment of a surveyor, the machinery by which the obligations of the parish should be discharged. It is the duty of the surveyor to fulfil the enactments of the statute, and the Legislature has provided certain penalties for omission and neglect by him. There is nothing in the Act to show that such an officer is to be made liable for the duty of his masters, particularly where no such liability exists upon the masters themselves. We are of opinion that the decision of the Court of Ex. upon this point was a sound and reasonable one, and the judgment of that court ought to be affirmed.

Judgment affirmed.

Attorneys for the plt., Messrs. Parker, Rooke and Parkes, 17, Bedford-row, London.

Attorney for the defts., J. L. Wright, 7, South-square, Gray's-inn.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABET, of Doctors'-commons.

May 20 and June 3.

FORSTER v. FORSTER AND BERRIDGE.

Entry of appearance—Effect of an absolute appearance—Plea to jurisdiction of court—Practice.

A resp. in a suit for dissolution of marriage having entered an absolute appearance, cannot afterwards plead to the jurisdiction of the court, nor can she raise such objection by act on petition.

Scilicet, however, that at the hearing she may, notwithstanding, object to the jurisdiction. If a resp. intends to plead to the jurisdiction of the court, she should appear under protest.

This was a petition filed by Major Forster, of Her Majesty's Indian Army, for dissolution of his marriage with his wife, on the ground of adultery committed with the co-resp. in London, while the petitioner was engaged on military duty in India. It was alleged in the petition that the parties were married in India in 1839; that since their marriage they had generally cohabited in India, and that the petitioner had come from India to England for the express purpose of instituting this suit. The resp. and co-resp. had appeared absolutely by their attorneys to the citation, and on the 16th April, before the time for putting in an answer to the petition had elapsed, the resp. took out a summons before the Judge Ordinary in chambers, calling on the petitioner to show cause why she should not be at liberty to amend the appearance entered for her, and make an appearance under protest. The co-resp. took out a similar summons. At the hearing of the summons, H. F. Gibbons appeared for the petitioner, and W. G. Harrison for the resp., and Dr. Spiers for the co-resp. An affidavit was filed on behalf of the resp., by which it was argued that she was not aware of her position until after the absolute appearance was entered, and that as since the appearance was entered she had been advised that, the petitioner and herself having been born in India, the court had no jurisdiction to dissolve the marriage solemnised in India, she sought to be allowed to appear under protest, so as to raise the question of the jurisdiction of the court to entertain the suit. An affidavit was also filed by the co-resp. and his solicitor, from which it appeared that when the appearance was entered on his behalf, neither of them was aware that the marriage was celebrated in India, and that both the parties had been born and had been always domiciled in India. The Judge Ordinary,

however, dismissed both summonses. Afterwards the co-resp. put in his answer denying the adultery. On the 2nd May, time having been granted for the purpose, the resp. put in the following answer:—"The resp. Mary Owen Forster answers to the petition and citation of the said William Robert Forster as follows; that is to say, the resp. in her own proper person comes and says that the court hath no jurisdiction in the matter of this suit, and ought not to have or take further cognisance thereof, because she says that before and at the time of the alleged occurring of the several matters in the petition and hereinafter mentioned, the petitioner was, and still is, domiciled in India, and not within the realm of England, or within the jurisdiction of this court. That his domicile of origin was India. That he was born at a certain place beyond the seas, that is to say, in India aforesaid, and was the son of parents neither of whom was a natural-born subject of our Lady the Queen, or any of her predecessors, Sovereigns of this realm, or domiciled in England, both of whom at the time of his said birth, and from thence hitherto, were domiciled in India aforesaid. That the petitioner has never abandoned his said domicile of origin or acquired any domicile elsewhere; but, on the contrary, he became and was an officer of the military forces of the East India Company, bound and liable to serve as such officer within certain territorial limits beyond the seas, that is to say, in India aforesaid, and that he continued so to be such officer up to and until the passing of a certain Act of Parliament, made and passed in the session of Parliament held in the twenty-first and twenty-second years of the reign of the now Queen, entitled 'An Act for the better Government of India,' and that he then and from thence hitherto continued to be and still is an officer of the said forces, that is to say, a local major in the 14th Regiment of the Native Infantry of Her Majesty's Indian Army, otherwise the Schewattie Brigade, otherwise the Schewattie Battalion, now stationed at Goruckpore, in India aforesaid, and that at the commencement of this suit he was and now is absent from the said regiment on furlough; that the said marriage was celebrated in India aforesaid, according to the laws and customs thereof, and not within this jurisdiction; that the resp.'s domicile of origin is in India aforesaid, where she was born, and was the daughter of parents neither of whom was a natural-born subject of our Lady the Queen, or of any of her predecessors, Sovereigns of this realm, or domiciled in England, and both of whom were at the time of her said birth, and from thence hitherto, domiciled in India aforesaid, and that she hath never abandoned her said domicile of origin, nor hath she ever been, nor is she domiciled in England, or within the jurisdiction aforesaid, and that her said husband had never cohabited with her in England, or within the jurisdiction aforesaid; wherefore the resp. humbly prays judgment whether there is anything in the said petition which she ought to be compelled to answer; and whether this court hath any jurisdiction in the matter of this suit, or can, or will, or ought to take any further cognisance thereof.

(Signed) MARY OWEN FORSTER."

H. F. Gibbons moved the court to order that the plea should be struck out.

W. G. Harrison, contra, cited

The Ida, 1 Lush. Ad. Rep. 6.

Cur. adv. vult.

May 20.—CRESSWELL, J. O.—In this case a petition was filed by a husband for dissolution of marriage. The resp. appeared absolutely by attorney, and not in person, and under protest. There are cases in the common law courts in which objections may be taken to the jurisdiction under the general issue or by a special plea. I say nothing as to the possibility of the resp.'s raising the question of jurisdiction, but she certainly cannot by a plea in this form. If

[Div.]

FORSTER v. FORSTER AND BERRIDGE (Graham intervening).

[Div.]

I were to admit the plea, and ultimately should hold that it was not proved, the result of a trial, which might be long and expensive, would be that the resp. would have to do what I think she is now bound to do, viz. file an answer. The case cited from the Admiralty Reports is not in favour of the resp. In *The Ida* there was an absolute appearance; the plt. proceeded by act on petition, and in it set out to facts which raised a question of jurisdiction. The learned judge of the Admiralty Court, treating that as equivalent to a voluntary declaration, allowed objection to be taken to the jurisdiction. That decision has no bearing on the present question. Here a dilatory plea has been pleaded in person, by the resp., who is not before the court in person but by attorney. Such a proceeding is quite irregular in all respects, and the plea must therefore be struck out.

Plea struck out.

On the 26th May the resp. filed an act on petition, which was as follows:—

"William Francis Low, solicitor for Mary Owen Forster, says that on the 20th June 1839 she was married to William Robert Forster, at Bareilly, in India, and that before and at the time of the said marriage the said William Robert Forster was, and from thence hitherto hath been, and still is, domiciled in India aforesaid, and not in the realm of England, or within the jurisdiction of this court. That his domicile of origin was Indian. That he was born in India aforesaid, and was the son of parents neither of whom was a natural-born subject of our Lady the Queen, or of any of her predecessors, Sovereigns of this realm, or domiciled in England, and both of whom at the time of his said birth, and from thence hitherto, were domiciled in India aforesaid. That the father of the said William Robert Forster was born in India, and afterwards entered the military service of the East India Company, and the mother of the father of the said William Robert Forster was a Mohammedan lady. Secondly, that the said William Forster has never abandoned his said domicile of origin or acquired any domicile elsewhere, but, on the contrary, he became and was an officer of the military forces of the East India Company, bound and liable to serve as such officer within certain territorial limits beyond the seas, that is to say, in India aforesaid, and that he so continued to be such officer up to and until the passing of the Act of Parliament, 21 & 22 Vict. c. 106, entitled 'An Act for the better government of India,' and that he then and from thence hitherto hath continued to be, and still is, an officer of the said forces, that is to say, a local major in the fourteenth regiment of the native infantry of Her Majesty's Indian army, otherwise the Schewattie brigade, otherwise the Schewattie battalion, now stationed at Goruckpore, in India aforesaid, and that on the 21st day of March, in the year of our Lord 1862, he was, and from thence hitherto hath been, and now is, absent from his said regiment on furlough. Thirdly, that the domicile of origin of the said Mary Owen Forster is in India aforesaid, where she was born and bred, being the daughter of parents neither of whom was a natural born subject of our Lady the Queen, or of any of her predecessors, Sovereigns of this realm, or domiciled in England, and both of whom were at the time of her said birth, and from thence unto their respective deaths, domiciled in India. That the said Mary Owen Forster has never abandoned her domicile of origin, nor has she ever been, nor is she, domiciled in England, or within the jurisdiction of this court. Fourthly, that on the 21st day of March, in the year of our Lord 1862, a citation was issued out of this court at the suit of the said William Robert Forster, and a petition filed by him praying for a dissolution of his marriage of the said Mary Owen Forster by reason of adultery, which said citation and copy of the said petition was

served upon the said Mary Owen Forster on or about the 24th of March, in the year of our Lord 1862: Wherefore the said William Francis Low prays that it may be declared by this honourable court that at the time of the issuing and service of the said citation and petition, both the said William Robert Forster and the said Mary Owen Forster were domiciled in India, and that the courts in India were the competent and exclusive authority to deal with the matters of the said petition, and to determine the conjugal rights of the said Mary Owen Forster, and the respective claims of herself and of her said husband, and that this honourable court had no jurisdiction in respect of the matter aforesaid. And that this honourable court might make such further and other order in the matter as it might seem fit.

(Signed) "WILLIAM FRANCIS LOW."

May 27.—*H. F. Gibbons* moved for directions as to mode of trial.

Dr. Phillimore, Q. C. (W. G. Harrison with him).—The resp. has filed an act on petition for the purpose of raising the question of jurisdiction.

CRESSWELL, J. O.—In the Ecclesiastical Court, did not a party by appearing absolutely waive any objection to the jurisdiction in the first instance?

Dr. Phillimore.—Yes. Can the resp. raise the question at the hearing?

CRESSWELL, J. O.—As at present advised, I think she may; but she has not filed an answer.

Dr. Phillimore then asked leave to file an answer.

CRESSWELL, J. O. granted the application.

June 3.—*H. F. Gibbons* moved that the act on petition should be struck out.

Dr. Phillimore, Q. C. and W. G. Harrison for the resp.

CRESSWELL, J. O.—Let it be struck out.

H. F. Gibbons.—I also ask that the costs of these motions may not be taxed against the husband.

CRESSWELL, J. O.—Certainly not. The costs of such interlocutory motions, if the wife is unsuccessful, are not taxed against the husband.

The resp. afterwards filed an answer, and the case was set down for trial.

Wednesday, May 22.

FORSTER v. FORSTER AND BERRIDGE (Graham intervening).

Intervention—Material facts put upon the record, but not proved at the trial—23 & 24 Vict. c. 144, s. 7.

Where an appearance had been entered by a friend of the co-*resp.* against whom 5000*l.* damages had been awarded, for the purpose of showing cause against a decree nisi being made absolute, on the ground that there were material facts in the case which were not brought to the notice of the court, and most of the material facts had been put on record by the parties, and were not established at the trial, and the intervener had not established by affidavit a single fact of importance:

The Court declined to suspend its decree, and condemned the intervener in the costs occasioned by the intervention.

This case was heard before the Judge Ordinary and a special jury on the 19th and 20th Dec. 1862. The petitioner, Major Forster, an officer in the Indian army, instituted a suit for the dissolution of his marriage with the resp. and for damages, on the ground of her adultery with the co-*resp.* (see *ante*.) The resp. and co-*resp.* having appeared absolutely in the suit, applied on summons to be allowed to appear under protest to the jurisdiction of the court; but their application having been rejected, they subsequently filed answers, in which they respectively denied the adultery, and brought counter charges of adultery and misconduct conducing to adultery, against the petitioner.

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The resp. and co-resp. appeared by counsel at the trial, when the adultery was proved, and after some evidence had been given on behalf of the resp. on some of the counter charges, her counsel (The *Queen's Advocate*) abandoned his opposition to the petitioner's suit.

The counsel for the co-resp. (*Montague Smith, Q.C.*) then having addressed the jury in mitigation of damages, which were assessed at 5000*l.*, a decree nisi for the dissolution of the marriage was thereupon pronounced, and since the decree nisi Mr. William Graham had entered an appearance as an intervener, under sect. 7 of 23 & 24 Vict. c. 144, for the purpose of showing cause against the decree nisi being made absolute. He had within the time allowed filed an affidavit, deposing that he had received information which he believed to be true: (1.) That the petitioner and resp. were both born in India of Indian parents, who were always domiciled in India; that they were married in India, and that from the time of their respective births up to the date of the decree nisi, they had been always domiciled in India. (2.) That the petitioner had, during the years 1854 and 1855, committed adultery with a native woman in India, whom he had kept as his concubine. (3.) That he had without any reasonable grounds refused to cohabit with his wife for some years prior to the adultery, and had also been guilty of neglect and misconduct towards her conducing to the adultery. (4.) That if the court would allow time for further inquiries, he would procure evidence to establish the domicile, adultery and misconduct of the petitioner towards his wife. The intervener also filed affidavits made by Mr. Melton, the co-resp.'s solicitor, and others, showing that two discharged servants of the co-resp., who had given evidence against him at the trial, which had prejudiced the case, had sworn falsely in answer to questions put to them on cross-examination, denying that they had committed or been taken in custody for feloniously stealing some of the co-resp.'s property.

Burton, the petitioner's solicitor, in answer to these affidavits, filed an affidavit, not denying the domicile of the petitioner and resp., but alleging that the questions raised by the intervener's affidavit were or might have been investigated at the trial, and that he had reason to believe that the intervener was a personal friend of the co-resp.'s, and had intervened at his instance.

CRESSWELL, J.O., on the motion of the petitioner's counsel, directed the questions raised by those affidavits to be argued before the court on the first day of Trinity Term 1863.

May 22.—The case came on for argument, when *Muddell* and *Gibbons* appeared for the petitioner, and *Coleridge, Q.C.*, and Dr. *Tristram*, for the intervener.

Coleridge, in showing cause against the rule, said he thought it right to inform the court that the *Queen's Proctor* had been asked to intervene and had declined, and that Mr. Graham, the intervener, was a personal friend of the co-resp., Mr. Berridge.

CRESSWELL, J.O.—Does he intervene at the instance of Mr. Berridge?

Coleridge.—No.

CRESSWELL, J.O.—Does he swear that? I am rather curious to know how the fact is, although it is immaterial.

Coleridge said there was no statement on the subject in the affidavits, but no doubt Mr. Berridge was willing that Mr. Graham should intervene, and was anxious that he should succeed. But the fact that Mr. Graham's motive for intervening was his personal friendship for Mr. Berridge could not affect the decision of the court upon the question whether there were good grounds for his intervention. Some motive must be acting upon the mind of every person not the

public officer, who intervened under this statute, and Mr. Graham's motive was not a discreditable one.

CRESSWELL, J.O.—It was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the court which the parties themselves had wilfully withheld.

Coleridge said that any person interested in the public morals and the well-being of society would be justified in intervening. The first ground of the intervention was, that the court had no jurisdiction over the parties to the suit.

CRESSWELL, J.O. said he had already held that a co-resp. and a resp. had no right to raise that question after they had appeared absolutely. It was not likely that he would act upon an objection raised by a third person which the parties had not been allowed to plead.

Coleridge submitted that the question of jurisdiction could be raised at any stage of the suit. The petitioner in this case had never been domiciled in England; he always had been, and he now continued, domiciled in India. He was married in India to a lady who also had an Indian domicile, the cohabitation was in India, and the children were born there.

CRESSWELL, J.O.—I should have been very glad indeed if the Legislature had said that the court had no jurisdiction except over persons domiciled in England. When Lord Campbell was Lord Chancellor, I asked him to bring in a Bill to settle the question and to define my jurisdiction; but he said, "I cannot do it. Whenever that question is raised it must be decided upon legal principles. It cannot be defined."

Coleridge referred to the cases which have been decided in this court upon the question of jurisdiction, for the purpose of showing that the court had no jurisdiction, and ought, therefore, to rescind its decree, and dismiss the petition:

Ratcliff v. Ratcliff and Anderson, 1 Swab. & Tris. 467;

Yelverton v. Yelverton, 1 Swab. & Tris. 574;

Deck v. Deck, 2 Swab. & Tris. 90;

Bond v. Bond, 2 Swab. & Tris. 93;

Brodie v. Brodie, 2 Swab. & Tris. 93.

There were two other grounds for the intervention of Mr. Graham—first, that he had good ground for believing that Major Forster had been guilty of repeated acts of adultery in India; and, secondly, that Major Forster had, in a great measure, contributed to his own dishonour by his wilful neglect and misconduct. Mr. Graham deposed that he had reason to believe that since 1847 Major Forster had treated his wife with indignity, insult and neglect; that he had also reason to believe that during 1854, 1855 and 1856, Major Forster had lived with a woman in India as his concubine; and that he had every reason to believe that, if the court would suspend making its decree absolute, he should be able to procure evidence that Major Forster had been guilty of habitual adultery. Other affidavits had been filed by Mr. Graham with regard to some evidence which had been produced at the trial bearing rather hardly upon Mr. Berridge.

CRESSWELL, J.O.—It is hardly within the province of an intervener to move for a new trial upon affidavits. I have endured a good deal of Mr. Graham's proceedings, but that is really too bad.

Dr. *Tristram* followed on the same side.—The Act did not direct the court to inquire into, or to be influenced by, the motives of an intervener in making the intervention. It simply stated (sect. 7), "that any party might intervene and show cause why the decree should not be made absolute by reason of material facts not brought before the court." If Mr. Graham established facts showing that the petitioner and resp. were never subject to the jurisdiction of the court; or that the petitioner had committed adultery

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in India; or that he had been guilty of misconduct conducing to the adultery of the resp., these would be clearly material facts which ought to be brought to the notice and consideration of the court. Mr. Graham swore that he had reason to believe that if the court ordered further inquiry, he would be able to establish these facts. He submitted therefore that there were good grounds for the court to order such an inquiry to be made within a reasonable time and at Mr. Graham's risk.

Mundell supported the decrees. He pointed out that Mr. Graham did not depose to any material fact, but merely to his belief in certain facts, and he did not even state from whom he had received his information. He also submitted that it was not competent to an intervener to raise the question of jurisdiction, as that was not a fact material to the issue.

CRESWELL, J. O., said it was unnecessary to carry the argument any further. Soon after the court was established it was suspected that attempts had been made to procure a dissolution of marriage by means of collusion, and there had been other instances in which both the party suing and the party sued were equally anxious to obtain a divorce, and without collusion the party sued abstained from setting up matter which might be set up in answer to the petition. It was in order to check these practices that the statute was passed, and not at all for the purpose of enabling persons to raise questions as to the jurisdiction of the court. The question of jurisdiction might, for aught he knew, be raised elsewhere, and he should be very glad if any authority would point out to him that he had not jurisdiction in the case. With regard to the point that material facts had not been brought before the court, it would be affectation to pretend that he was not satisfied that this was really an application made by Mr. Berridge in the name of a third person. Mr. Graham took a strange interest in the proceedings of this court. It was very kind of him, a wine merchant at Stockton, to give himself so much trouble in the matter. But what a state the court would be in if any man in the empire could come before it and ask it to rescind its decision in a suit because it had made some mistake! It was, however, in truth, an application by Mr. Berridge for a re-trial, or, at any rate, for postponement of the execution for the damages until the petitioner returned from India, and could be put into the box and cross-examined. The ground of it was, that material facts had not been brought before the court. But the material facts had been put on the record by the parties; they had made charges against the petitioner in the pleadings, and he had put himself on his trial with reference to those charges. Some evidence was given in support of one of those charges, but the learned counsel for the resp. felt bound to abandon them, and he had most properly abandoned them. Mr. Graham having lent himself to these proceedings, and not having condescended to tell from whom he received his information, and not having substantiated a single fact of importance, he must pay the costs occasioned by the intervention, and the court would not suspend its decree.

An application was subsequently made by Mr. Berridge, the co-*resp.*, to the Queen's Bench for a prohibition against the Judge Ordinary, making the decree *nisi* absolute, on the ground of want of jurisdiction. The Court of Queen's Bench granted a rule *nisi*, and a motion was made by *Mundell* for the decree *nisi* to be made absolute; the Judge Ordinary said he had been served with a copy of the rule *nisi* obtained in the Queen's Bench, and that he must decline making the decree absolute until the Queen's Bench had decided the question of jurisdiction. Cause was subsequently shown against the rule *nisi* obtained in the Queen's Bench by *Lush*, Q. C. and *Gibbons* for Major Forster; when *Dr. Deane*, Q. C. appeared for the Judge Ordinary, and

Coteridge, Q. C., *Mellish*, Q. C., *Dr. Tristram* and *Willoughby*, in support of the rule; and the court discharged the rule *nisi* with costs, on the ground that Mr. Berridge had not such an interest in the suit as to entitle him, as a matter of right, to a prohibition, and had not made out such a case as would justify the court in the exercise of its discretion to grant one.

June 16 and 23.

FORSTER V. FORSTER AND BERRIDGE.

Decree absolute—Directions as to the disposition of damages.

*The Court directed the 5000*l.* damages awarded in this case to be paid to the petitioner's solicitor; 1000*l.* to be paid by him to the petitioner; out of the residue an annuity of 120*l.* to be purchased for the resp.' life, to be paid to her "dum casta vixerit," with remainder to two of her daughters; and the remainder to be invested in an annuity for these two daughters.*

The court, on the motion of *Mundell*, now made the decree *nisi* absolute.

Mundell then moved for directions as to the application of the 5000*l.* damages assessed against the co-*resp.* He proposed that 1000*l.* should be paid to the petitioner, to be applied by him in defraying the extra costs incurred by himself in the case, and in paying certain costs incurred by the husband of a lady with whom the petitioner had been charged on the record with adultery, who, to protect his wife's honour, had instructed counsel to watch the case on her behalf.

CRESWELL, J. O.—The husband of the lady referred to was at liberty, if he chose, to instruct counsel to watch the case, but I have no authority to make an order for the payment of his costs.

Mundell proposed that the remainder of the 5000*l.* should be invested for the benefit of the resp. and two of her daughters, who persisted in living with her against the wish of Major Forster.

Cur. adv. vult.

June 23.—CRESWELL, J. O.—This was an application to the court to make an order directing how the 5000*l.*, assessed by the jury as the damages to be paid by the co-*resp.*, should be disposed of. The authority I am called upon to exercise in this matter is given by the 23rd section of the Divorce Act. I think that the money should be paid to the petitioner's solicitor, to be applied by him as follows: 1000*l.* to be paid over to the petitioner, as he has been put to extra costs which he cannot recover against the co-*resp.*; out of the residue of the damages I direct an annuity of 120*l.* to be purchased for the life of the resp., to be paid to her *dum casta vixerit*, and in the event of her forfeiting it, by the breach of this condition, to be paid over to the two daughters, who are living with her; the rest of the residue I direct to be invested in the purchase of annuities payable to these two daughters during their joint lives, with benefit of survivorship. The money to be invested in the name of a trustee; and there should be a clause in the deed against anticipation.

The order made by the Court was in the following terms:—"The Judge Ordinary having taken time to deliberate, directed that the sum of 5000*l.*, being the damages assessed in this cause, be paid to the petitioner's solicitor, to be by him applied in the following manner: that 1000*l.* be paid to the petitioner for his own use; that an annuity for 120*l.* a-year be bought, in the names of two trustees, on the life of the resp., and that such annuity be paid by the trustees to the resp. so long as she shall lead a moral and respectable life; but should the resp. not lead a respectable and moral life, then that her interest in the annuity should be forfeited, and that the trustees should pay such

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sums to the two daughters of the marriage, in equal portions, or to the survivor of them; and that the residue of the said sum should be invested in the purchase of equal annuities for the use of the two daughters of the marriage on their own lives, and that a deed should be prepared and settled by one of the concurring counsel of the Court of Ch., whereby this order should be effectually carried out through the intervention of trustees, and anticipation of the annuities could be prevented."

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Tuesday, Oct. 6.

(Before Mr. Commissioner GOULBURN.)

Re R. W. (an Insolvent Debtor).

Protection—Insolvency—Transfer of jurisdiction to the Court of Bankruptcy—Sect. 230 Bankruptcy Act 1861.

The Court of Bankruptcy now exercises all the jurisdiction, powers and authorities possessed by the Court for Relief of Insolvent Debtors in England in respect of any proceeding pending at the passing of the Bankruptcy Act 1861, or any right that has arisen or may arise, or any penalty incurred or that may be incurred, in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of the Bankruptcy Act 1861, under or by virtue of any of the Acts or parts of Acts repealed.

This was an application for a final order under the Protection Insolvency Act, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. The insolvent had filed his petition in the Court for Relief of Insolvent Debtors, in the year 1859, and on the day named for the final order a proposal was made by the insolvent, and accepted by the creditors, to set aside 75*l.* per annum for the liquidation of his debts. The final order was then adjourned with protection, which protection was renewed periodically as the payments under the proposal were received by the official assignee.

Serjeant now applied that a day might be named for granting a final order, and a sitting appointed for that purpose.

Mr. Commissioner GOULBURN named the 5th Nov. for granting the final order, subject to all usual notices to creditors and by advertisement.

Re ANONYMOUS.

Allowance to bankrupt for his support.

The Court has no power, on the day for the last examination and discharge, to direct an allowance to be paid to the bankrupt where the creditors have refused or omitted to order it on the day for the first examination.

Lawrence applied for an allowance of 5*l.* to the bankrupt, under the 194th section of the Bankrupt Law Consolidation Act 1849, which provides that it shall be lawful for the court, if it thinks fit, from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family.

Mr. Commissioner GOULBURN intimated that the 109th section of the Bankruptcy Act 1861 had substantially repealed that section by enacting that at the first meeting of creditors a majority in value of creditors present shall determine whether any and what allowance for support shall be made to the bankrupt up to the time of passing his last examination. Had any creditors attended the first meeting?

Lawrence replied in the affirmative, but they had omitted to grant an allowance.

Mr. Commissioner GOULBURN thought that, as no

precedent could be found for directing an allowance, under these circumstances he must decline to make any order.

Application refused.

Ireland. (a)

COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

Nov. 12 and Dec. 13, 1862.

(Before O'BRIEN, HAYES and FITZGERALD, JJ.) (b)

REG. at the Prosecution of JOSEPH CREA v. THE MIDLAND COUNTIES AND SHANNON JUNCTION RAILWAY COMPANY.

Mandamus—Transfer of shares to pauper for purpose of getting rid of liability—Consideration.

A conditional order for a mandamus to register a transfer of shares in a railway company made absolute, although it appeared that the transfer, which, however, was a transfer out and out, not subject to any secret trust for the transferor, was made to a pauper, in order to enable the transferor to get rid of liability, and that the consideration money stated in the deed was a mere fiction (dubitante, Fitzgerald, J.)

This was a motion on behalf of the Midland Counties and Shannon Junction Railway Company to show cause against a conditional order for a *mandamus*, bearing date the 17th Jan. 1862, whereby it was ordered that a writ of *mandamus* should issue, directed to the Midland Counties and Shannon Junction Railway Company, directing them by their secretary to enter in the register of transfers of said company a memorial of the transfer to the said Joseph Crea by one George Barton, as a shareholder in the said company, of the shares of him the said George Barton, in the said company, by deed duly executed in that behalf by the said George Barton, bearing date the 30th Oct. 1861, and to indorse such entry on the deed of transfer aforesaid, pursuant to the requisition of the said Joseph Crea, and the requirement of the statutory enactments in that behalf, unless cause shown. The affidavit of Joseph Crea, the prosecutor, stated that he had been informed by George Barton, and believed, that some time at the end of the year 1860, or early in the year 1861, he, said George Barton, at the earnest solicitation of certain gentlemen then interested in an undertaking for constructing a railway for communication between Banagher and Meelick in the King's County, and the Great Southern and Western Railway at the town of Clara in the said county, was induced to subscribe for ten shares in the said undertaking, the capital of which was to consist of 12,000 shares of 10*l.* each, the company to be called "The Midland Counties and Shannon Junction Railway Company;" that deponent had also been informed, and believed, that the provisional directors of the said undertaking procured an Act of Parliament to be obtained and passed on the 6th Aug. 1861, being c. 246 of the 24 & 25 Vict., and shortly described as "The Midland Counties and Shannon Junction Railway Act 1861," whereby the subscribers therein named were united into a company for the purpose of said undertaking under the name and title aforesaid, and were by that name constituted a body corporate, with perpetual succession and a common seal; and the Companies Clauses Consolidation Act 1845, and other statutes, were incorporated with the

(a) From the *Irish Jurist*, by permission.

(b) The Lord Chief Justice was present during the arguments in this and the following case, but took no part in the judgments.

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said Act; that after the incorporation of the company the directors made the first call of 2*l.* per share, payable on or before the 1st Nov. 1861, and no further call had since been made; that Mr. Barton, on the requirement of certain of the said directors, on the 22nd Oct. 1861, paid into the Bank of Ireland, to the credit of the said company, the sum of 20*l.*, being the amount of the said call of 2*l.* per share on his said shares, and thereupon received a written receipt therefor, signed by Christopher Dolier, on behalf of the Governor and Company of the Bank of Ireland; that the said Barton, having afterwards agreed with the prosecutor for a transfer to him of the said ten shares of him the said Barton, he, the said Barton, did execute under his hand and seal, pursuant to the provisions of the Companies Clauses Consolidation Act 1845, a deed of transfer of the said ten shares to deponent, and that deponent, who thereupon, under his hand and seal, subscribed and affixed to the said deed of transfer, accepted the said transfer, and the said deed was executed and bore date the 30th Oct. 1861; that on the 4th Nov. 1861 the first half-yearly meeting of the shareholders of the said company was held at the office of their solicitor, at Upper Ormond-quay, in the city of Dublin, and pursuant to a resolution passed at the said meeting, the common seal of the company was affixed to the register of shareholders; that on the 1st Nov. 1861 a gentleman named Joseph Kent, on behalf of deponent and others, wrote a letter to Mr. Robert Hacket, of Firbane, in the King's County, secretary of the company, and therewith inclosed to him, amongst others, the said deed of transfer, for the purpose of the same being registered, and required him, as such secretary, to let him, the said Kent, have the certificate of the registry of such transfer at his earliest convenience; that, in reply to this, Mr. Hacket, on the 2nd Nov. 1861, wrote to Mr. Kent a letter merely returning the transfers; that Mr. Kent then wrote to Mr. Hacket asking for his reasons for not registering the transfers, to which Mr. Hacket replied on the 8th Nov. 1861, referring Mr. Kent to Mr. Meldon, the solicitor for the company, and adding: "I may, however, tell you that we look upon the matter as a fraudulent transaction towards the above company, and I have in my possession a letter from one of your acceptors of the transfers declining to have anything further to do with it, and requesting his signature to the so-called transfer cancelled: I suppose he does not fancy a term of imprisonment;" that after deponent had accepted the transfer from George Barton, and after same had been sent to be registered, a person called on deponent at his place of business in Clara, and told him that Mr. Hacket had sent for him, and that he was waiting for him at the Clara railway-station, and that deponent forthwith went to the said railway-station and there saw Mr. Greer, with whom deponent was acquainted, who then introduced him to the said Hacket, saying to the said Hacket, "This is one of the young men who has accepted the transfers," or words to that effect; whereupon the said Hacket addressed deponent, asking him did he know the danger he incurred by accepting said transfers, and the said Hacket, after holding out various threats to him, finally stated that he would be imprisoned for life if he had anything to do with the said transfers, and he, the said Hacket, strongly recommended and urged him, in order (as he stated) that deponent should save himself from such imprisonment, that he should withdraw from the matter, and that the only way he could do so would be by writing a letter to the solicitor of the company that he would have nothing to do with the transfer, and also requesting him not to register same; and that deponent being greatly frightened and alarmed, wrote such letter to the solicitor. The affidavit also referred to language

used at the half-yearly meeting, which was, deponent believed, calculated and designed to intimidate unduly and unreasonably any parties who should contemplate to accept, or might have accepted, transfers of any shares in the company: and, finally, stated that deponent was now ready and willing to abide by the shares transferred to the deponent, and that the application for a *mandamus* was made with the knowledge and full concurrence of George Barton. The deed of transfer of the shares, which bore date the 30th Oct. 1861, purported to be made in consideration of the sum of 15*l.* sterling paid to Barton by Joseph Crea. There was an affidavit by Mr. Hacket, in which that gentleman stated it to be positively untrue that he, after holding out various threats to the prosecutor, finally stated that the said prosecutor would be imprisoned for life if he had anything to do with the transfers. The account which Mr. Hacket gave of the transaction was as follows:— That it was perfectly true that he did send for said Joseph Crea as stated, and asked him if he were really going to buy Mr. Barton's shares; that Crea replied that he was; that deponent then asked him if he were really going to take them and to pay up the calls on them; and Joseph Crea then said he knew nothing about them, that Mr. Barton asked him to sign the paper, meaning the transfers, and that he did so, but that he had no money or intention to pay anything on them; that deponent then told him that by signing that paper he placed himself in Barton's shoes, and that deponent knew very well the railway company would look to him for the payment of the shares and press the matter by law, and that he should either pay the amount or go to gaol, and that from what deponent learned of the law of such a case that he would not come out under the Insolvent Act, and most likely would have to be in gaol for life, as it was evidently a fraudulent transaction; that said Joseph Crea then expressed a wish to have nothing more to do with it, on which deponent advised him not to be guided by anything deponent had said, that he should consult with a lawyer on the subject and take the best advice as to how he should act; that deponent also gave him Mr. Meldon's address, and deponent positively said that to the best of his recollection the foregoing was all the conversation that passed between him and the said Joseph Crea, and that it was not his intention to use any intimidation whatever, his object being merely to explain to Crea the liability he incurred by accepting a transfer of the shares, that he was acting entirely on his own responsibility in sending for and speaking to said Crea, and that he had received no instructions to do so, either from any of the directors or from the solicitor for the company. The affidavit further stated that Joseph Crea was a shopman or apprentice to said George Barton, and was entirely dependent on him, and was a person without any means of paying up the calls on the said shares: it also stated the belief of deponent that the sum of 15*l.* mentioned in the deed of transfer as the consideration money for said transfer never was paid or intended to be paid by the said Joseph Crea to said George Barton, but that the sole object of said transfer was to rid said George Barton, who was a solvent and respectable man, from his liability on foot of said shares by transferring them to a pauper. The affidavit of Mr. Meldon, after shortly referring to the formation of the company, went on to state that the fifth paragraph of the subscription contract provided that a deposit of 1*l.* per share should be paid by each subscriber at the time of, or previous to, signing the deed; that said deed was duly executed by George Barton; that on the 25th Jan. 1861 the provisional directors made a call of 10*s.* per share, being a portion of 1*l.* per share provided by said contract to be raised, and that deponent immediately after, and before the

Act was passed, applied to said Barton for payment of the amount; that the provisional directors met on the 23rd July 1861, and previous to the Act obtaining the Royal assent, a resolution was passed calling for payment of 10s. per share, being the balance of the deposit of 1l. per share; that the Act of incorporation received the Royal assent on the 6th Aug. 1861, and a call of 2l. per share was soon after made; that the said George Barton referred to in prosecutor's affidavit had duly executed the subscription contract, but had never paid up any portion of the 1l. per share provided to be paid by it; that about the 4th Nov. 1861, deponent received from the prosecutor a letter of which the following was a copy:—

"Clara, Nov. 3, 1861.

"J. D. Meldon, Esq.

"Sir,—I have signed my hand to a form accepting of ten shares in the Shannon Junction Railway, transferred to me by George Barton, of Clara, not then knowing the liabilities under which I was bringing myself, and since that I have ascertained information letting me know the dangers to which I exposed myself, and as I am unable to pay any sum of money which may be called for, I will decline it, if it may please you to do so. Hoping that you will proceed no further, and that you will have my name crossed off, I am, Sir, your most obedient humble servant,

JOSEPH CREA."

Deponent then, on behalf of the company, submitted that the conditional order should be discharged for, amongst others, the following reasons: first, that the deposit of 1l. per share required by the subscription contract was never paid by Barton; secondly, that the transfer was colourable only, and fraudulent for the purpose of evading liability, and that the consideration of 15l., stated in the deed to have been paid, never was, in fact, paid by the prosecutor out of his own money, if paid at all.

Heron, Q.C. (with him *Barry, Q.C.* and *Finch White*) for the company.—We resist the application for a *mandamus* on the ground that the 1l. per share was not paid, and also on the ground that the transfer is colourable, and that neither transferor nor transferee has complied with the express provisions of the Act of Parliament, by which it is required that in transfers the consideration for the transfer shall be truly stated in the deed. The statement in the deed is, that the consideration was 15l. We say that nothing was paid, and that is not denied. This is not the case of a *bona fide* transfer: (*Costello's case*, 2 De G. F. & J. 302.) [O'BRIEN, J.—What do you look upon as the test of *bona fides* in an assignment?] A *bona fide* intention on the one part to take, and on the other to part with the shares. That does not exist here, because Crea himself, after taking time to consider, deliberately calls the transaction a form. Then the consideration is untruly stated: (st. 8 & 9 Vict. c. 16, s. 14.) [O'BRIEN, J.—The consideration, it is true, is directed by the Act to be truly stated, but is that so mandatory that a deed of assignment which states the consideration untruly is not to be registered? As a matter of fact there is scarcely a deed of transfer which states the consideration truly as between the transferor and transferee. There are generally several assignments, and the last is the one for which the consideration is stated.] The words in reference to that are as mandatory as any in any of the sections relating to the transfer of shares. [O'BRIEN, J.—The consideration might be required to be stated for the purpose of the stamp laws.] A shareholder has not an absolute right to transfer his shares; his right to do so is, by the 14th section of the Act 8 & 9 Vict. c. 16, subject to the regulations of the company." [HAYES, J.—Does your case go to this, that even if there was a registry of the transfer, the transfer would be bad because the consi-

deration was not truly stated?] No, because the company would have accepted the shareholder, and could have waived its right to insist upon the want of consideration. *Ex parte Budd*, 31 L. J., N. S., 4, Ch., is an important case upon the statement of consideration. The question in this case is not so much as to Barton's liability as whether this is a case where the court, having a discretion, ought to exercise that discretion by granting a *mandamus*. The party has power, under the C. L. P. A. 1856, to issue a summons and plaint claiming a *mandamus*, and he ought to be left to that remedy.

Sullivan, Serjt. and *Phillips* for the prosecutor.—The only meaning of the section as to stating the consideration is, that a less sum shall not be stated to have been paid than has actually been paid, and that is for the purposes of the stamp laws. *Cheale v. Kenward*, 3 De G. & J. 27, shows that the fact of nothing having been paid on the shares will not invalidate an arrangement to accept a transfer of them. *Ex parte Budd*, and the other cases cited on the other side, were all cases under the Winding-up Acts, and the question in them was, whether there was not some secret trust in existence. There is no case of the kind made here. The transfer here was intended to be a transfer out and out. The payment of the deposit is not a condition precedent to the party being entitled to be looked upon as a shareholder. The only condition precedent to a transfer imposed by the 16th section of the Act of Parliament is, that all calls shall have been paid; a deposit is a different thing from a call. Mr. Barton never was asked to pay anything but the 10s. If the transfer was made for the *bona fide* purpose of passing an interest, we are entitled to be put on the register of shareholders, no matter whether the intention was to get rid of a liability or not: (*De Pass's case*, 4 De G. & J. 544.) The test is, does the assignor retain any interest, or is it intended that he should part entirely with the shares? If the company have a claim under the subscribers' contract, let them sue on it, but the transfer should not be vitiated.

Barry, Q.C. replied.—There is no answer to our charge of the transaction being colourable only. The prerogative writ of *mandamus* should not be granted to give effect to such a transaction. The case has been argued on the other side as if it was the case of a defence to an action for calls, and not of an application for a prerogative writ. Suppose a bill had been filed in equity by a pauper transferee to compel specific performance of an agreement to transfer under the circumstances of the present case, and the company was made a party, can any case be produced to show that the court would decree specific performance? The argument that it is only for fiscal purposes that the consideration for a transfer must be truly stated, is fatal, for then we have a deed here which is admittedly insufficiently stamped. The stamp upon a deed of gift would be 1l. 15s., on a deed for a consideration of 15l. only two shillings and sixpence (stat. 13 & 14 Vict. c. 97). He referred to

The Esgair Mwyn Mining Company, 3 L. T. Rep. N. S. 883.

Dec. 13.—O'BRIEN, J.—With respect to this case we are of opinion that the conditional order should be made absolute. The application here is made by Mr. Crea, the transferee of the shares. There is no principle better settled than this, that the fact of an assignment of this sort being executed for the purpose of getting rid of a liability to calls, even if executed to a perfect pauper, is a valid transaction provided there be not any secret trust, arrangement, or understanding, whereby an interest in the shares would be preserved and retained by the alleged transferor. Now I believe that principle is well settled, and with respect to a transaction of the kind being an unfair

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dealing towards the rest of the shareholders, I can only say that the Act of Parliament gives the right of transfer, and every one who enters into these companies must know that he puts himself into the position, though he started with solvent fellow-shareholders, of being left with insolvent fellow shareholders. Well, it was then suggested during the argument, that there was something in the circumstances under which this company was created that rendered it a breach of faith on the part of Mr. Barton to assign his shares. I was at a loss to come to that conclusion; besides another argument against it is that the application is made on behalf of the transferee Crea. Besides, I see no ground for supposing that there was in the original contract here any understanding or agreement between Mr. Barton and his copartners that would render it a breach of faith on his part to abandon the concern when he found that it was likely to be a prosperous one. It is then said that the nonpayment of the deposit of 12. per share by Mr. Barton is a ground against granting the *mandamus*. I can only say as to that, that it is now too late to raise that objection. The company have registered Mr. Barton, and required him to pay two calls subsequently. If they are right they should not have put him on the list of shareholders. It was open to them, under the subscription-deed, to have insisted on the payment of the 12. deposit before he signed the deed. They have not done so; and it is therefore now too late for them to raise the point. But the real question is, is this a transfer for the purpose of getting rid of a liability? Is it one that we can enforce upon that ground? It is suggested that we are to assume that there is an understanding whereby the transfer is not really an absolute one. I cannot find any sufficient ground for coming to that conclusion. I have read the affidavits, and though they use the words "fraudulent" and "colourable," they do so in connection with the words that it was executed to a pauper, and executed for the purpose of getting rid of liability to payment. I do not think either of these circumstances would be sufficient to render the transaction colourable or fraudulent if the transfer was executed *bond fide*, and the shares were absolutely parted with. The party making the suggestion has not made it in terms which render it necessary for the other party to come here with an affidavit stating matters showing positively that the transfer was an absolute one. Then it is said that the writ of *mandamus* is discretionary. It is certainly so to a certain extent. I take it that where there is a discretion vested in the court, that discretion must be guided and regulated according to established rules, and if there is no other ground for not exercising it than that it enables a party to get rid of future calls, I do not think that a sufficient reason for refusing to do so; if we do not come to the conclusion that the transaction is saddled with any secret trust or arrangement, then it is urged that the party has another remedy, namely, by action. I do not think that that either is a sufficient reason for our refusing the *mandamus*. Mr. Crea, the applicant, would, by the transfer being registered, be put in a condition of assigning over the shares for value, if they are of any value, or of getting rid of his liability by assigning them to some other party if he thought it right to do so. I do not see why, if we are of opinion that otherwise there is no sufficient cause for refusing the application, the fact of there being a right of action is such a sufficient ground. We have been referred to several cases. It is not my intention to go through them all. Suffice it to say that in all of them I find circumstances which do not exist in the present case. I find instances where the transferor after the transfer exercised acts of ownership in respect to the shares. In one case, *Budd's case*, upon looking through the report in the *Law Journal*, I

will be found that the transferee stated he could do nothing without consulting the transferor. In the mining case, the *Esgair Mwyn* case, Wood, V. C., in his judgment, refers to the fact that the certificates of transfer were there retained by the transferee, who remained the owner of the shares, and to the fact that both the transferor and the transferee refused to be examined as to the nature of the transaction. It was there alleged that the transfer was not an actual one, but that the arrangement was that the transferor had retained an interest in the shares so as to be able to avail himself of them in the event of the company turning out prosperous. With respect to the point relating to the stamp, I do not think that is so clear that the provisions of the Stamp Act as to the 12. 15s. stamp would apply here. It may be that that provision was intended to meet a variety of cases where shares were assigned in trust. The point was made at the close of the case. It was open to the parties, but I am not so clear that in this case, there being a sale, the deed is to be considered as one of gift; and I do not find that the point is at all noticed in the case of the *Esgair Mwyn Mining Company*, though it was said that the consideration of 97l. 10s. there was a fiction. It may be that the parties were of opinion that some consideration should be stated. They may be wrong, but I do not think that a ground on which we should refuse the motion.

HAYES, J.—I agree that the *mandamus* ought to issue. If on its issuing the party thinks he has good grounds for meeting it, he can do so on its return, but as the case now stands I think the order ought to be made absolute. The party seeking for the *mandamus* relies on the deed of assignment to him. In opposition to that it is alleged that the deed is colourable, and made for the purpose of avoiding liability, and that that is sufficient to put the other party to state all the facts. I do not follow that argument. All it could do was to make the party say that it was not colourable. However, in the course of this case, it was relied on by Mr. Heron that the consideration money was not paid. That is a circumstance deserving of consideration, but it is explicable in several ways, and we ought not to presume that there was a fraud to such an extent as that the parties did not intend to pass the property in the shares by the deed. But there was a point suggested by Mr. Barry, to which I listened with great attention, as I thought it was of great importance as regulating our proceedings as to this prerogative writ, and that was, that by granting the writ we would be lending ourselves to a fraud; and the statement was that the company was got up by gentlemen of the country, not for the purpose of dealing with the shares, but that a few gentlemen got up the company for the purpose of benefiting their territorial interests, if I may call them so; that Mr. Barton was one of those gentlemen, but that after he got his partners well shipped in this transaction, he abandoned them, and let them put to sea without him; that that was a gross fraud on his part, and that this being a prerogative writ for the purpose of preventing defects of justice, we would be forgetting the great purpose for which the prerogative was intrusted to us, if we allowed it to be used for the purpose of protecting frauds, and therefore I was anxious to find out the facts by which he made out the frauds which he said we should be protecting, and how he brought them home to Mr. Crea. But I do not think either that a case of fraud was made out, or that it was brought home either to Mr. Barton or to Mr. Crea; and therefore I think the case stood as before, a simple case of a person to whom shares were transferred, being an avowed pauper, seeking to have the shares transferred, and having given nothing for them, and being done to avoid liability. I think there is nothing to lead me to believe there is any fraudulent

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arrangement by which this transfer is only colourable, or that Mr. Barton is still to be deemed the owner of the shares. I see nothing of that, and as I think the whole property in the shares is intended to be passed by the deed, I am of opinion that the *mandamus* ought to issue.

FITZGERALD, J.—I should prefer leaving the party to any remedy he may have. He may have a remedy under the Act of 1856; because I entertain grave doubt whether we exercise a wise discretion in making absolute the conditional order for a *mandamus* to compel the railway company to act on a deed false on the face of it in a material particular, namely, the consideration and the receipt for it; and it cannot be considered otherwise than as a false statement. I say further, that where we are asked to enforce a transaction of this kind, a suspicious one, one between a principal and his clerk, when the principal passes property of this kind, we ought to look with considerable strictness on it, and have it explained; and I would wish some further explanation describing what the transaction was. Upon that ground, I admit, I entertain great doubt as to the propriety of the rule we are making. As to the letter of Nov. 3, I would not bind Crea by a letter which was not properly obtained. The secretary of the company had no right to go about threatening this man, but we cannot shut our eyes to his statement, "I have signed my hand to a form;" that shows that he looked on the transaction as a mere form. It is upon these grounds that I entertain the doubt which I have mentioned. *Order made absolute, without costs.*

Nov. 11 and Dec. 13.

REG. at the Prosecution of JOHN BLACKBORN v. THE MIDLAND COUNTIES AND SHANNON JUNCTION RAILWAY COMPANY.

Mandamus—Transfer of shares—Infancy.

A mandamus to compel the registry of a transfer of shares in a railway company to an infant, refused.

This was an application on behalf of the Midland Counties and Shannon Junction Railway Company to show cause against a conditional order, bearing date the 17th Jan. 1862, whereby, on motion on behalf of John Blackburn, it was ordered that a writ of *mandamus* should issue directed to the said company, commanding them, by their secretary, to enter in the register of transfers of the said company, a memorial of the transfer to one Leonard Fuller, by the said John Blackburn, as a shareholder in the said company, of the shares of him, the said John Blackburn, in the said company, by deed duly executed in that behalf by the said John Blackburn, bearing date the 30th Oct. 1861, and to indorse such entry on the deed of transfer aforesaid, pursuant to the requisition of the said John Blackburn and the requirements of the statutory enactments in that behalf, unless cause shown. The affidavit of the prosecutor, who was the holder of ten shares, stated the facts relative to the constitution of the company and to the call of 2*l.* per share, payable on or before the 1st Nov. 1861, which have been already given in the last case; and stated further, that he had paid the said call of 2*l.* on the 24th Oct. 1861; that deponent afterwards, having agreed with one Leonard Fuller, of Killoosey, Clara, in the King's County, land steward, for a transfer to him of the said ten shares of deponent, did execute, under his hand and seal, pursuant to the provisions of the Companies Clauses Consolidation Act 1845, a deed of transfer of the said ten shares to the said Leonard Fuller, who thereupon, under his hand and seal, subscribed and affixed to the said deed of transfer, accepted the said transfer, and the said deed was executed and bore date the 30th Oct. 1861. On the 1st Nov. 1861 the said deed of transfer was forwarded to the secretary

of the company for the purpose of being registered and of having a certificate of the registry. The secretary declined to register the transfer and returned the deed. After stating certain other matters, to which it is unnecessary for the purposes of this report to refer, the affidavit stated that the said Leonard Fuller was ready and willing to take the shares of the deponent so transferred, and that the application for a *mandamus* was made with the knowledge and had the full concurrence of the said Leonard Fuller. The consideration stated in the deed of transfer was the sum of 15*l.* The case made by the affidavits on behalf of the company was, shortly, that the sum of 15*l.* stated as the consideration for the transfer was entirely fictitious and had never been paid; that Leonard Fuller, the transferee, was a labouring boy in the employment of and living with the prosecutor, at trifling wages, if any; that he was the nephew of the prosecutor and under the age of twenty-one years, having been born in the month of July 1843; that the transfer was colourable only, and fraudulent for the purpose of evading prosecutor's liability to the company; that the fifth paragraph of the subscription contract which had been signed by the prosecutor provided that a deposit of 1*l.* per share should be paid by each subscriber at the time of or previous to the signing of the deed, and that although the resolutions had been passed by the provisional directors in Jan. and July 1851, previous to the Act incorporating the company receiving the Royal assent, calling for payment of this 1*l.* per share, the prosecutor had never paid the amount. The case turned, however, almost entirely upon the point of the minority of Leonard Fuller, the transferee.

Heron, Q.C. (with him Barry, Q.C. and Finch White) for the railway company.—The court will not compel the company to register a transfer to an infant who may repudiate the transfer and get rid of his liability to future calls:

Newry and Enniskillen Railway v. Coombe, 3 Ex. 565;

The Birkenhead, &c., Railway Company v. Pilcher, 5 Ex. 24;

Reid's case, 24 Beav. 318;

Stikeman v. Dawson, 4 Rail. Cas. 585.

The court will not give effect to a transaction which on the face of it is merely colourable. The party having broken his contract, the writ ought not to be granted to him for the purpose of assisting him further in committing a fraud.

Sullivan, Serjt. and Phillips for Mr. Blackburn.—It is the right of every shareholder to transfer his shares, even to a pauper, for the purpose of getting rid of his liability. The only limit is that the transfer must not be merely colourable, and that the shareholder must not retain an interest in the shares: (*The Huddersfield Canal Company v. Buckley*, 7 T. R. 36.) The fact of a person being an infant at the date of the transfer to him does not destroy his liability to calls:

Cork and Brandon Railway Company v. Casemore, 10 Q. B. 935;

The Midland Great Western Railway Company v. Quinn, 1 Ir. C. L. Rep. 383.

There is nothing to show that this transfer is merely colourable, or that Mr. Blackburn retains any interest in the shares, or that there is any secret trust for his benefit: (*Hyam's case*, 1 De G. F. & J. 75.) Sect. 14 of the Companies Clauses Act, 8 & 9 Vict. c. 16, is express that every shareholder may sell and transfer his shares.

Barry, Q.C. in reply.—If it was necessary we might argue that the applicant has no right to appear here at all, as he is not the transferee. There is a consideration mentioned in the transfer-deed, which we say has never been paid, and that is not denied on the other side:

Reg. v. Newcastle, &c. Railway Company, 21 L. J. 234, Q. B.;

Ex parte Budd, 10 W. R. 51.

He referred on the question of infancy to

The Dublin and Wicklow Railway Company v. Black, 8 Ex. 181 ;

Addison on Contracts, 941, last edit.

Dec. 13.—O'BRIEN, J.—In this case we have all come to the conclusion that the conditional order should be discharged. I shall state the reasons, perhaps not adopted by all the members of the court, on which I, at least, have come to that conclusion. The circumstances of this case are materially different from the other in this respect, that the transferee here was, at the date of the transfer, an infant, and still continues so, and also in this, that the application to compel the registry of the assignment was made, not on his behalf, but on behalf of the transferor. The application was resisted on the ground which was strongly relied upon, that no assignment to an infant was one that the company could be called on to register at all, no matter how *bond fide* it was. The other objection was, that it was not a *bond fide* transfer for the purpose of getting rid of a liability and parting with all the interest in the shares, but that this infant being a nephew of Mr. Blackburn, the assignment was executed to him for the purpose of Mr. Blackburn's getting rid of his liability if he could, whereas it would be in his power afterwards to get back the shares. Now the fact of infancy is relied on in two ways: first, as being a positive ground for not compelling the company to register the transfer at all, and also as a ground for presuming that the assignment was only colourable [in the sense I have stated]. With regard to the former ground, I am inclined to think that the fact of the assignment being made to an infant, is a circumstance that should prevent us from interfering to compel the company to register the transfer. It was contended that infants may be shareholders: so they may in a certain sense. But in what position would our granting the order place the company? We would relieve the original shareholder from all liability, and would not give the company a shareholder whom they could hold. If they brought an action against the infant for future calls, it would be open to him during his infancy to plead his infancy; if the action was brought against him after he had attained his full age, it would be open to him to plead, if the facts were so, that he had repudiated this transfer after coming of age. It is impossible to hold that we, consistently with the laws which govern the courts as to contracts by infants, should hold the infant conclusively bound by such a transaction as this. The cases which have been cited do not appear to me to bear out the proposition for which the prosecutor contends. One of them is the case of *The Birkenhead, &c. Railway Company v. Pilcher*, 5 Ex. 114. That was an action for calls, and the deft. pleaded that at the time the shares were allotted to him, and at the time the calls were made, he was an infant. It was held that the plea was bad for want of an averment that the deft. had repudiated the contract, or continued a minor; but it is well settled that in a contract of this sort it is perfectly open to an infant after he has come of age to say: "The transfer was executed to me when I was a minor; I never accepted it since I came of age, and I now repudiate it." If he did that in a reasonable time, the decisions establish that that would be a good defence. In those cases the deft. continued to be a shareholder after he came of age, and did no act to repudiate. It was held that the plea was bad for want of an averment of repudiation. The law is laid down by Parke, B., in his judgment, who says, that when "there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser, who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the

infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient;" and he goes, afterwards, on to state that, to make the plea good, it ought to appear that the party had disclaimed the transaction after he had reached his full age, or that he still continued an infant. Another case is that of *The Newry and Enniskillen Railway Company v. Coombe*, 3 Ex. 565. The plea there was that the deft. became the holder of the shares by reason of his having contracted and subscribed for them, and not otherwise; and that at the time of his so contracting and subscribing, and also at the time of making the calls, he was an infant; that while he was an infant he repudiated the contract and subscription, and gave notice to the plts. that he held the shares at their disposal. That plea was held good. So here, the court held that a repudiation by the holder of shares, even during minority, was a full answer to an action of the company, and that if the company relied on a subsequent abandonment of the repudiation, they should have stated it; in other words, that it would be open to the party, in this case, if an action was brought against him, to repudiate the contract on his coming of age, and to plead that repudiation as a bar to the action. We do not think that an assignment which may be attended with such consequences is one that we should compel the company to register; nor do we think it one that the Act of Parliament ever contemplated, that the company should be compelled to register. That is my opinion; and I have the authority of the Lord Chief Justice to say that, without stating any opinion as to the liability of an infant, or the effect of a transfer to an infant, it is a most material element to test the *bona fides* of the transfer, if an infant was selected on whom to cast the liability, for the purpose of enabling the transferor, if he thought fit, at a future time, to assert his title to the shares.

HAYES, J.—I agree that the *mandamus* ought to be refused; and I think that to grant it would be an indiscreet and unjust exercise of the prerogative. I say an indiscreet exercise of it, because I think there is, on the face of this transaction, which Mr. Blackburn calls on us to confirm, a number of facts leading me to the conclusion that it never was the intention of Mr. Blackburn absolutely to get rid of the property in the shares; and I think that he thought that by transferring his shares to this infant he was, as it were, putting them in a safe place where he could easily get them again if times improved. That is not such a transaction as we ought to assist, and I say, therefore, that it would be an indiscreet exercise of our power to grant the writ. I say, also, that it would be an unjust exercise of our power, for in all these cases of registry of transfers, we must not forget that while the parties have rights, there are also certain rights secured to the company. The rights of the company are these: they have a right to compel the shareholders to pay all calls; they have a right, if the shares are not paid, to get rid of the party's ownership by declaring the shares forfeited. In this case there are difficulties as to both points. We have heard the difficulty which exists in enforcing the calls against infants; but there is, besides, an unexplored region of doubt and difficulty about the forfeiting of the shares of infants if the calls are not paid; and, therefore, I think it would be unjust for us to take the shares out of the hands of a man, and, at his call, to put them into the hands of a person who is not *sui juris*.

FITZGERALD, J.—I concur, only desiring to observe that this is an application on the part of Mr. Blackburn, and that the infant transferee does not intervene.

Cause shown allowed, with costs.

House of Lords.

Reported by JAMES PATERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Thursday, July 23.

**EDINBURGH AND GLASGOW RAILWAY COMPANY
v. CAMPBELL.**

Railway company—Contract with landowner—Restrictions as to making bridge over private road—Right to vary size of bridge—Amalgamation of company.

The E. Railway Company obtained a conveyance for the purposes of their railway of certain land from C., and in the conveyance the company bound themselves to erect and maintain a bridge over the road leading to C.'s property, which was to be according to the plans thirty-five feet wide, and leaving a road under it of fifteen feet wide. Afterwards this bridge was made, but the E. Company some years later amalgamated with the H. Company, and the latter company's Act authorised a junction with the E. railway at a point near this bridge. The two companies then agreed as to the mode of effecting the junction, and part of the plan was to widen the arch or bridge over C.'s road so as to extend the bridge from thirty-five feet to fifty-five feet wide, thereby darkening the road beneath. C. applied for an injunction to restrain the companies from carrying out this plan:

Held, that the E. Company having in the first instance obtained the conveyance from C. on certain conditions as to the width of the bridge were bound not to depart from those conditions, and the H. Company were equally bound as claiming under the E. Company, for it was part of the consideration to maintain the bridge of the height and width originally fixed.

This was an appeal from certain orders of the Court of Session in Scotland, granting an injunction to restrain the Edinburgh and Glasgow Railway Company from altering a railway bridge.

The facts are fully stated in the judgments.

The *Solicitor-General* (Palmer) and *Cairns*, Q.C., for the apps., contended that the resp. had merely a right of way under the arch in question, but could not prevent the company from altering the bridge if they found it expedient, and as they had obtained a statute to authorise a junction with the Helensburgh Company, this gave them power to do all that was necessary to carry out such junction.

Roll, Q.C. and *Mure* for the resp.

The *LORD CHANCELLOR*.—My Lords, the present appeal is brought against certain orders which had granted a perpetual injunction against the erection of a particular bridge over a road, to the right of using which road the resp. is entitled. The case has been one attended with considerable argument, but it appears to me, with deference, to be governed by a very short and simple consideration. It is necessary, in the first place, to recollect that the compulsory powers of purchase given to one of the resp. companies, called the Helensburgh Railway Company, expired in the month of Aug. 1857. Now the proposed extension of the bridge is to be made and constructed upon lands belonging to the other resp. company, the Edinburgh and Glasgow Railway Company, and it follows, therefore, that whether it be done by one company or by the other company, nothing can be done inconsistent with that contract with the resp., the original relator, by virtue of which contract the Edinburgh and Glasgow Company obtained the ownership of the lands upon which the additional bridge is now proposed to be constructed. It is immaterial, therefore, in my view of the case, whether the one company is proceeding to construct the bridge or the other

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company, whether it be the Edinburgh and Glasgow Railway Company, or whether it be the Helensburgh Railway Company, inasmuch as the bridge to be constructed must be built upon the land acquired by the Edinburgh and Glasgow Railway Company from the relator. That bridge cannot be built either by the one company or by the other, if the grantees, the Edinburgh and Glasgow company, are forbidden to make that extension of the bridge by the terms of the conveyance, by virtue of which they acquire this land from the complainant. The question, therefore, to be determined really depends upon the extent and effect of the contract contained in that conveyance, for I am by no means of opinion, and I trust your Lordships will concur in that view of the case that, under the 25th section of the Helensburgh Railway Company's Act, any conveyance can be made by the Edinburgh and Glasgow Railway Company, of any portion of their land, except such a conveyance, as without that section the Edinburgh and Glasgow Railway Company would be enabled to make. That section does not appear to me to confer either upon the Helensburgh Railway Company any power of demanding, or upon the Edinburgh and Glasgow Railway Company any power of granting the land, beyond that power which the Edinburgh and Glasgow Railway Company might have exercised by virtue of the conveyance, independently of that section. The question, therefore, is reduced entirely to the effect of the conveyance made by the complainant to the Edinburgh and Glasgow Railway Company. That conveyance is dated 29th Oct. 1841, and the contract appears to be of this nature. The complainant sold and conveyed certain pieces of land lying on either side of the road leading from his estate to a place called Possil. There was a contract between him and the Edinburgh and Glasgow Railway Company, that the railway should be carried over that road by a bridge of certain limited and restrained dimensions, and accordingly the conveyance recites that the plan, together with the elevations and sections, and the drawings of the intended bridge, had been exhibited to the complainant, and that the railway was to be carried over the bridge at this particular spot, in conformity with the plans so exhibited. That appears to me to be the effect of the contract as expressed in the conveyance. But there is another part of the contract contained in that conveyance, and it is this—that the road should be of certain width, save in a particular place in which it passes under the span of the bridge. And I consider that it is the true effect of the disposition and contract by the Edinburgh and Glasgow Railway Company to make the bridge of this restricted extent, and also to maintain the road as part of the consideration given by them to the complainant, and in respect of which the complainant parted with his land. Now, what the company propose to do is, to make another bridge by the side of and in continuation of the existing bridge, making an addition, as is admitted by themselves, of about 23 feet to the width of the bridge. The bridge at present is of the width of 35 feet; accordingly, the proposed addition to the bridge will make the whole width of the bridge 58 feet, and the consequence is, that the road under the bridge will, to the extent of 35 feet, be a continuous arch amounting to a small tunnel, and extending to the width of 58 feet. There are, therefore, two things to be done by the proposed works—the one, a departure from the contract with regard to the extent of the bridge, and the other a violation with regard to the width of the road—and I think that both the one and the other are inconsistent with the terms of the disposition and the engagement therein contained. As I have already taken the liberty of submitting to you, I regard these works as being done (if they can be done at all) by virtue of the ownership acquired by the Edinburgh and Glasgow

Railway Company under this conveyance. And then the simple question is, whether these works are consistent with the limited nature of that ownership and the engagements by which it was bounded. I think you will concur with the majority of the judges in the court below that it is indisputable, for it does not appear to be seriously contended to the contrary, that the conveyance of the 29th Oct. 1841 was intended to have, and in law has, the limited effect which I have ascribed to it on the proposed works of the Edinburgh and Glasgow Railway Company, or of either company, for it is immaterial whether they be the works of one or of the other; but if they are the works of the Edinburgh and Glasgow Railway Company, these works must be such as are consistent with this contract; and if they are the works of the Helensburgh Railway Company, the works must equally be such only as are consistent with the contract; for the Helensburgh Railway Company can be regarded as nothing in the world more than a scion of the Edinburgh and Glasgow Railway Company in respect of these works. The question then resolves itself merely into the effect of the contract contained in this conveyance; and I think it is perfectly clear that the works are inconsistent with the true intent and purport of that conveyance, and that therefore they have been justly and properly perpetually restrained by the injunction contained in the orders which are the subject of this appeal. I shall therefore submit to your Lordships that these orders ought to be affirmed, and the appeal dismissed with costs.

Lord CHELMSFORD.—My Lords, I agree with my noble and learned friend, that the orders appealed from ought to be affirmed, though not exactly for the reasons which were given by the majority of the judges of the Court of Session. The questions upon the appeal turn principally upon the effect of the conveyance by Col. Campbell in favour of the Edinburgh and Glasgow Railway Company, and the provisions of the Act for making the Helensburgh railway. By the conveyance of the 29th Oct. 1841 Col. Campbell, for the sum of 1450*l.*, granted and conveyed the whole of the *locus in quo* to the company, reserving metals and minerals in and under the lands, and in respect of his grantees having agreed to form the road in question twenty-one feet wide, along the west side of the field marked 25 on the plan annexed, and to erect, with others, a bridge at the road leading to Possil, thereby discharged his grantees of all claim for any other access or communications over, under, or on the surface of the said railway, from any one part of the said lands to any other part, and accepted the said communication in lieu and full satisfaction of every claim which he might be entitled to make for crossing bridges or access under the Company's Act of incorporation. Under this conveyance the whole right to the soil of the ground over which the road was formed, with the exceptions of the mines and minerals, passed to the company, and Col. Campbell became entitled, as against them, to the exclusive right of way over a road of the stipulated dimensions, with which the company could not at any future time interfere. These were the respective rights and interests of the parties when the Helensburgh Railway Act passed. The two companies are closely connected by the Act of incorporation of the Helensburgh Company. The railway was to be formed by a junction with the Edinburgh and Glasgow Railway. The Edinburgh and Glasgow Company are always to hold 8000 shares, or one-third of the capital of the Helensburgh Company; they are to work the whole of the traffic of the line, and to appoint all the officers, clerks and servants of that company. By the 26th section of this Act powers are conferred on the Helensburgh Company, the attempt to exercise which has given rise to the proceedings which are the subject

of this appeal. Before considering this section it is necessary to observe that the compulsory purchasing powers of the Helensburgh Company expired on the 15th Aug. 1857; but the time for the completion of the works, not until the 15th Aug. 1860. These circumstances must be borne in mind in examining the provisions of the 25th section. The railway was to commence by a junction with the Edinburgh and Glasgow Railway. This junction could not be formed without at least entering upon, and perhaps also without its being necessary to purchase and take, some land of the Edinburgh and Glasgow Company. It would of course be inconsistent, after giving power to make the junction, to qualify it with a provision for the previous consent of the company. The section, therefore, provides that, except for the purpose (by which I understand the mere purpose) of making and maintaining the junction, it shall not be lawful for the Helensburgh Company to take any land of the Edinburgh and Glasgow Company, or to interfere with their line and levels without their consent, which they are required to give, subject to the decision of the Board of Trade. These powers to enter upon and take lands, and to interfere with lines and levels, must of course be subject to the limitation clause as to the compulsory powers. If the Edinburgh and Glasgow Company, therefore, had been hostile to the Helensburgh Company, they might effectually have withheld their consent, and prevented their lands being taken, or their line being interfered with after the 15th Aug. 1857. But even before that time, if the Helensburgh Company had wanted lands of the Edinburgh and Glasgow Company for any other purpose than that of forming the junction, and the Edinburgh and Glasgow Company had refused to part with their lands because the purposes for which they were required would have abridged Mr. Campbell's right of road secured to him by the disposition, it can hardly be supposed that the Board of Trade, whatever opinion they might have formed as to the nature or necessity of the works, would have compelled the company to give their consent. The part of the 25th section requiring the Helensburgh Company to construct and maintain sidings, and other works and conveniences necessary or convenient, in connection with the junction, and for preventing any danger, interruption, or inconvenience to the traffic of the Edinburgh and Glasgow Company, seems to have been introduced for the benefit of the latter company. This is apparent from the provision, that if any difference should arise as to the nature or necessity of any such works it shall be referred, not, as in the former case of the Edinburgh and Glasgow Company withholding their consent, to the decision of the Board of Trade, but either to their decision or to arbitration at the option of the Edinburgh and Glasgow Company. It is contended on the part of the Edinburgh and Glasgow Company that they were entitled to exercise the rights of the Helensburgh Company under this section, although for their own benefit, even to the destruction of the rights of roads belonging to Mr. Campbell, with which it is admitted they were bound by the conveyance of the 29th Oct. 1841 not to interfere. I say the destruction of the road, because there is no argument that can be used to justify its diminution, which would not equally apply to the old road if it had been within the limits of the deviation. That the work to be done was for the sole benefit of the Edinburgh and Glasgow Company seems to be very clearly established. The part which the Helensburgh Company had principally to perform had been accomplished. The junction had been made at a point of seven or eight yards distant from the bridge in question, and the line had been regularly opened for traffic. As the compulsory powers

of purchase had expired at this time, the point of junction must be considered to have been then definitively fixed. It was open, however, to the Edinburgh and Glasgow Company, until the time for the completion of the works had expired, to require the Helensburgh Company to construct such sidings and other works as might be necessary or convenient in connection with the junction. As these were to be made at the sole costs and charges of the Helensburgh Company, it was not probable that anything of this kind would be done without the requisition of the Edinburgh and Glasgow Company. Accordingly the Helensburgh Company appear to have entertained no idea of making any sidings until they were required to do so by the Edinburgh and Glasgow Company. There is no doubt that the siding originally proposed, and probably that upon which the two companies ultimately agreed as to the expense and mode of performance of the works, was different from that which was begun to be executed, and which led to Mr. Campbell's interference for the protection of his road. It is unnecessary to consider the negotiations between the companies which resulted in an agreement that the Edinburgh and Glasgow Railway Company should accept 250*l.* from the Helensburgh Company, and should construct the necessary siding at their own expense. When the objection of Mr. Campbell to the prosecution of the work was urged upon the Edinburgh and Glasgow Railway Company, their agents answered that the works had been contracted for in the names of the Edinburgh and Glasgow Company, but that that was mere matter of arrangement; that the powers of the Helensburgh Company were undoubted, and the expiry of their compulsory powers did not prevent the voluntary cession of the land to them. When the threat of an application for suspension and interdict was made, the Edinburgh and Glasgow Company suggested that the Helensburgh Company should take back their money and do the work themselves. The Helensburgh Company agreed to proceed with the works, and to defend any suit that might be brought by Mr. Campbell, upon the express understanding that they should be relieved of the whole costs of the works, and of the whole liabilities and costs connected with the threatened actions at law. And the Edinburgh and Glasgow Company agreed to give them this ample indemnity. There can be no doubt, therefore, that the proposed work was to be executed at the instigation, for the benefit and at the sole expense and hazard of the Edinburgh and Glasgow Company. The question is, can the Edinburgh and Glasgow Company, for their own purposes, avail themselves of the powers of the Helensburgh Company, and by the exercise of them injuriously interfere with a right which they had created, and which they themselves could not lawfully impair? It has been contended that even if they could do so, they ought to have proceeded in the usual way to obtain possession of Mr. Campbell's road, or the part which they required, by giving the requisite notices under the Lands Clauses Act. As to the latter question, I have no difficulty in saying that if the Edinburgh and Glasgow Company were not prevented by their contract with Col. Campbell from making the siding, or permitting it to be made, they might effectually have brought the powers of the Helensburgh Company into action without the necessity of any previous notice of their intention to interfere with the road. There would have been nothing to prevent the two companies co-operating in the work by mutual consent. No previous notice to Mr. Campbell would in my judgment have been necessary, because, although his right of road might be a tenement or a heritage, it does not seem to be such an interest as could have been meant by those words, in the interpretation of the word "lands" in the Lands Clauses Act. All the clauses of that Act with respect to the purchase of

lands apply to subjects which can be transferred to and used by the promoters of an undertaking, and are wholly inapplicable to a right of way, which is not to be conveyed, but to be extinguished. The mode of dealing with the rights of parties in private roads is prescribed by the Railway Clauses Act, which provides, not for their acquisition, but for the substitution of another road, where they were interfered with pending the operations, and for the restoration of the old road when the works are completed. And in that Act no provision is made for any notice to be given to the owner of the private road before interference with it. The necessity of a previous notice seems to be assumed by the Lord President as a means of invoking the interposition of the Board of Trade for protection of Mr. Campbell's rights. But the time for compelling the consent of the Edinburgh and Glasgow Company having passed, if they had refused their consent, an appeal to the Board of Trade would have been incompetent, as there would have been no jurisdiction to entertain it; and this circumstance brings the case to the only point between the parties. It is admitted that the Edinburgh and Glasgow Company could not have derogated from their contract in respect of the road by the exercise of any powers of their own, and might, by withholding their consent to the Helensburgh Company's obtaining any portion of their land, have prevented all interference with it. Their consent alone enabled the work to be done; and therefore, without entering into the question whether it was performed by the Edinburgh and Glasgow Company for themselves, or as agents for the Helensburgh Company, or whether the siding was made in good faith, or under the pretence of being for the Helensburgh Company, though intended solely to serve the interests of the Edinburgh and Glasgow Company—on the short ground that the Edinburgh and Glasgow Company were bound by their contract not to injure or disturb the road in question, that the protection of it in its integrity was entirely within their power, and that the interference with it was with their sanction and co-operation, I am clearly of opinion that the companies ought to be restrained from proceeding with their intended works, and that the interlocutors continuing the injunction should be affirmed.

Orders affirmed.

Thursday, July 30.

HUNTER v. MILLER.

Landlord and tenant—Rotation of crops—Custom of county—Leaving turnip or fallow breaks for incoming tenant—Construction.

In a lease of a farm of 600 acres the tenant bound himself by a covenant never to have more than one half of the arable land in white crop during the same season, nor to take two white crops off the same field without a green or black crop intervening, and to take only one black crop, i.e., beans, peas, potatoes, &c., between grass and grass; further, at the end of the lease, to leave the turnip or fallow breaks once ploughed for the incoming tenant:

Held, that the words "turnip or fallow break" meant the land which would, in the natural course of good husbandry, be ploughed and left fallow for the purpose of being planted with turnips, and that the tenant was entitled, over and above the way-going cereal crop on the moiety of the lands, to have a waygoing black crop in respect of 100 acres more.

This was an appeal from a judgment of the Court of Session in Scotland as to the construction of a lease. The app., in 1838, let a farm to the resp., consisting of 600 acres, to hold for twenty-one years, i.e. until the separation of the crop in 1859.

The lease contained the following clause:—

"With regard to the cropping and managemen:

of the said farm, the said George Miller binds and obliges himself and foressaids to farm, labour, and manure the same according to the rules of good husbandry established and practised in the county, and not to scourge or deteriorate the same by undue cropping, and in particular never to have more than one-half of the arable land in white crop in the same season, nor to take two white crops off the same field without a green or a black crop intervening, and to take only one black crop such as hay, beans, peas, potatoes and the like, between grass and grass: further, to leave at the end of the lease the turnip or fallow breaks once ploughed for the incoming tenant, and to sow the breaks that fall to be in grass with eight pounds of red clover, eight pounds of white clover, and one flint of rye grass for each Scots acre, all of the best quality, and that a fourth part of the said breaks shall not be pastured, but be left for a crop of hay to the incoming tenant, he paying for the seed only; and the said George Miller and his foressaids shall also be bound to allow the said James Hunter and his foressaids, or the incoming tenant, to sow grass seeds along with his last crop in such fields as they shall think proper, and to harrow in the same without any allowance therefor: and moreover, the said George Miller binds himself and his foressaids, to consume the whole straw that shall grow yearly on the said farms of Springfield and Oldhamstocks upon the same, and to apply the dung thereof or to be made thereupon for manuring the said lands alienary: and the said George Miller binds himself and his foressaids to leave the whole straw, chaff and chaffings of the whole lands hereby let of his last or outgoing crop in steelbow, and the dung of the said farms of the last crop but one to be one-half steelbow and the other half paid for by arbitration at the expiry of this lease, or his removal from the said lands, for the use of the said James Hunter or the incoming tenant, and to thrash out and prepare the same in a regular and timeous manner for their accommodation."

The tenant at the end of his lease contended that he was entitled to have at least one-sixth part of his farm in black crop over and above the half of the land under cereal crops. The landlord, on the other hand, contended that the tenant was not entitled to more than a waygoing crop on half of the land. The landlord applied for an injunction accordingly, which was refused. The Court held that the true construction of the lease was what was contended for by the tenant. The Court however made a reference to an arbitrator of the question whether it was according to the rules of good husbandry in the county for the tenant to do as he proposed, and the arbitrator found that the tenant was so entitled. The Court thereupon gave judgment for the tenant, and the landlord appealed to the H. of L.

The *Solicitor-General* (Palmer) and *Anderson*, Q.C. for the app.

Rolt, Q.C. and *H. Smith*, for the resp., were not called upon.

The LORD CHANCELLOR.—My Lords, I trust that your Lordships will be of opinion with me that this is a case upon which none, or at all events, if any, very little, reasonable doubt can be ascertained; or, if there can be any difficulty in coming to that conclusion, I think your Lordships will come with me to the conclusion that we ought not to reverse this judgment unless we are satisfied that it is wrong, and I think your Lordships will agree with me that the app. has by no means shown that there is any error whatever in this judgment. The first question arises upon the construction to be given to the lease, under which 600 acres of land were held by the resp. in the county of Haddington, in Scotland. And the second question that arises is this, that if the matter cannot be determined by the construction of the lease, the question then is, what the course of husbandry, as

recognised in the county of Haddington, will require; the second inquiry being perfectly legitimate, because the obligation of the tenant is expressed as being "to farm according to the rules of good husbandry established and practised in the county." Now, the farm consists of 600 acres, and on the face of the lease there is a clear right conceded to the tenant to keep one-half of the farm always in cereal or corn crops; and as to the rest of the farm, there is no definite rule given with respect to the keeping of any quantity in certain crops. There is a rule given with respect to the rotation of crops; but with respect to the crops that may be put upon the farm as to the remaining moiety, the lease leaves a wide range, comprehending black crops and grass, or, what we call in England, seeds and turnips. Then, if that be so, it would follow, according to the usual course of husbandry, that undoubtedly an equal part of the residue, or remaining moiety of the farm, might be put, following the order of rotation every year, part in black crops, part in seeds or grass, and part in turnips. There is nothing, therefore, I think, upon the face of the lease to prohibit the tenant dividing the remaining moiety of the 600 acres into crops of those three several descriptions. It is admitted at the bar by the counsel for the app. that this might be done during every one of the twenty-one years of the lease except the last or outgoing year, and it is therefore incumbent upon the app. to show clearly that, from the terms of the lease, that which might lawfully have been done during every year of the term but the last is clearly prohibited during the last year. Now the language that is relied upon for the purpose of arriving at that conclusion is this, that the obligation is thrown upon the tenant to leave at the end of the lease a turnip or fallow break once ploughed for the incoming tenant. And the mode in which we are desired to construe those words is, to reject the words "turnips or," and to give this construction to "fallow break," that every portion of the remaining 300 acres of land ploughed during the year for the purpose of receiving any crops comes under the denomination of the "fallow break." Why it is quite plain to any person acquainted with the subject-matter (and some knowledge of the subject-matter is requisite in order to understand the meaning of these terms and definitions) that, inasmuch as the end of the lease is at Whit-Sunday in the year, a certain portion of the land would, according to the rules of good husbandry, naturally at that period be in fallow; that is, it would have been ploughed, and be without crops at that period of the year, in order to receive the turnip crop, which is universally sown somewhat later than Whit-Sunday. And accordingly the meaning of the word "fallow" is to be interpreted by the word "turnip," in connection with which it is found that the two words are put equally the one for the other, "turnips or fallow breaks." It would be rather incorrect to call them "turnip break," they not having been actually sown with turnips, and accordingly the word is interpreted "turnip," that is to say, "fallow breaks," meaning the portion of the land ploughed and left in fallow for the purpose of being planted with turnips. But the proposition of the app. would exclude entirely the right of dedicating any portion of the land whatever to black crop during the last year of the lease, and it would make the prohibition contained in those words, "turnips or fallow breaks," extend to the whole remaining moiety of land. I think it is impossible to come to the conclusion that that prohibition is warranted by the language of the lease. But then supposing those words in the lease to be ambiguous, if we go to the other obligation for the purpose of interpreting an indefinite, or imperfect, or ambiguous clause, namely, to see what is the course of husbandry according to the custom of

the county, we find that that has been ascertained beyond all controversy. Certainly, it was perfectly competent to the Lord Ordinary and to the judges below to remit an inquiry to a gentleman conversant with the matter, in order to ascertain what the course of good husbandry requires. I have had often occasion to observe that there is sometimes not so much skill shown in drawing up orders in the courts in Scotland as there might be. The order made in this case certainly is drawn up in a form that would appear to refer to Mr. Hope not only the question as to what was required by the course of good husbandry as practised in the county (which was the proper subject of inquiry), but also to refer to him the question of the construction of the lease. But I think that that particular part of the reference may be discharged, as if the reference were made to an expert for the purpose only of ascertaining what the course of good husbandry in Haddingtonshire required. The finding of the gentleman to whom this reference was made was, that the rules of good husbandry, as established in the county of Haddington, would admit of 100 acres, that is, one-sixth part of the land in question, being devoted by the tenant to black crop during the last year of the term. Therefore, upon both of the points which arise in this case, namely, the special one as to the construction to be put upon the words of the lease, and the general one as to what is required by the course of good husbandry in the county, my view of the obligation of the tenant is in perfect conformity with the interpretation of the court below, which warranted the tenant in devoting 100 acres and black crop during the last year of his tenancy. The interlocutor of the Court of Session has declared that under those words of the lease which form the basis of the argument of the app., namely, "turnip or fallow breaks," the tenant was under no obligation to leave for the incoming tenant more than 100 acres once ploughed for turnips or fallow break; and that therefore that is the extent of the relief to which the app. is entitled in his process of suspension. And I submit to your Lordships that this judgment ought to be affirmed, and that this appeal should be dismissed with costs.

Lord BROUGHAM.—My Lords, I entirely take the same view of the case as my noble and learned friend. I had some little doubt at first, arising from the course of proceeding with reference to Mr. Hope, whether some confusion has not arisen from referring the point of law as to the construction of the lease to that farmer. But, upon examining it fully, I find that the substantial reference was as to a matter which the court had a right to refer. And although Mr. Hope gives an award upon the whole matter, including the construction of the lease, I think that should be taken as substantially only a report upon the custom of good farming in that county. I very much doubt whether there was any necessity for looking further than to the terms of the lease. The mere construction of the lease is, I really think, sufficient. I therefore entirely concur with my noble and learned friend that this judgment ought to be affirmed and the appeal dismissed.

Lord CHELMSFORD.—My Lords, the question to be decided in this case is an extremely narrow one. It is, whether the resp., the tenant, is entitled, in addition to the cereal crops on one moiety of the farm, to take also a waygoing black crop in respect of 100 acres. Now it is admitted that there is nothing in the lease which prevents the tenant adopting the six-course shift, and that under the six-course shift he would be entitled to have another one-sixth part of the land under a black crop. But it is insisted that during the last year of the tenancy he is excluded by the terms of the lease from having such black crop, and consequently from carrying it away as a waygoing crop, the terms of the lease being, the tenant "to leave at the end of the lease the turnip or fallow

breaks once ploughed for the incoming tenant, and to sow the breaks that fall to be in grass" with a certain quantity of seed. Now, it is said on the part of the app. that this means that all the lands which are not devoted to white crop, namely, the moiety of the lands, must be either fallow or grass. But unquestionably there is nothing in the terms of this clause in the lease which renders that at all essential. The words are capable of the interpretation which was suggested in the course of the argument, and which appears to me to have been the clear meaning of the parties, namely, that such portions of the lands as in the regular course of rotation should be in fallow should be ploughed once for the incoming tenant, and that such portions of the land which fall to be in grass according to the rotation should be sown with seed in a particular manner. I think the case is perfectly clear, and I agree entirely with my noble and learned friends in their opinion that this judgment ought to be affirmed.

Judgment affirmed.

Equity Courts.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Saturday, Feb. 21.

BUSH v. COWAN.

Appointment of fund by will—Lapse—Residuary bequest.

A residuary gift of all a testator's property includes everything not otherwise disposed of, whether such undisposed of property falls within that gift, by reason of the will containing a prior disposition, which was either invalid when made, or which becomes so in consequence of subsequent acts or events. Where, therefore, the donee of a power of appointment by will of a fund duly appointed the fund to A.B., who died in the appointor's lifetime; and he subsequently by a codicil bequeathed all his personal estate and effects to C. D., it was Held, that C. D. was entitled to the fund.

This was a petition praying the transfer out of court of a sum of stock to the widow of a son of the testator in the suit. The facts were shortly these:—

James Lomax, the testator, by his will dated the 13th April 1848, bequeathed a sum of 1300*l.* to his executors, upon trust for the benefit of his son Marsden William Lomax for life, with remainder as to 1000*l.*, part thereof, to such persons as the said Marsden William Lomax should by will appoint; and the testator then bequeathed the residue of the said sum of 1300*l.*, and the said sum of 1000*l.* in default of appointment, to or for the benefit of other parties. The testator died soon after the date of his will. The executors then invested the sum of 1300*l.* in the purchase of a sum of 1300*l.* Consols, and transferred that fund into court in this suit.

Marsden William Lomax, by his will, dated the 7th Nov. 1857, after reciting the above-stated power of appointment, appointed that the said sum of 1000*l.* should be paid to a Mr. John Pearce; and he nominated him, or his personal representative, to be the executor of that his will. Mr. John Pearce died in Aug. 1858. Marsden William Lomax, by a codicil dated in Aug. 1860, gave to his wife all his personal estate and effects whatsoever and wheresoever, subject to the payment of his debts, and also any interest or dividends that might be due on his decease from the Bank of England on the 1300*l.* Consols then under the control of the Court of Ch.

Marsden William Lomax died in 1861. This petition was presented by his widow and the executor of Mr. Pearce, praying a transfer to the widow of so much

of the 1300*l.* in court as represented the 1000*l.* originally bequeathed. The question was, whether the codicil operated as a valid exercise of the power of appointment given by the testator to Marsden Wm. Lomax?

Lewis appeared for the widow and cited

Spooner's Trust, 2 Sim. N. S. 129.

Nash appeared for the executor of Mr. Pearce.

Selwyn, Q. C. and C. M. *Roupeil*, for the parties entitled to the fund in default of appointment, argued that the will of Marsden William Lomax must be read with the codicil as one instrument; that the will clearly showed an intention to give the 1000*l.* to Mr. Pearce; that was to say, a contrary intention to that of the claim made by the widow under the codicil. The former document purported to have been made in exercise of the original power; and therefore the latter could not be said to appoint the 1000*l.* to the widow. They cited 7 Will. 4, c. 26, s. 27;

Moss v. Harter, 2 Sm. & G. 458.

THE MASTER OF THE ROLL.—I am of opinion that Mrs. Marsden William Lomax is entitled to the relief prayed for by the petition. There is a distinction between this case and that of *Moss v. Harter*. In that case the donee of a power of appointment of a fund by a deed or instrument in writing to be legally executed, appointed part of the fund by deed; leaving the other part subject to the trusts of the deed creating the power. He then made a will in general terms, bequeathing his property "not otherwise effectually disposed of." The court held that the will did not operate as an interference with, or a revocation of, the trusts originally attaching on the appointed property. But in this case the will and the codicil of Marsden William Lomax must be treated as one instrument. By the will, the donee of the power appointed the 1000*l.* to Mr. Pearce, who, however, died in the lifetime of the appointor. By the codicil the appointor bequeathed all his personal estate and effects, whatsoever and wheresoever, to his wife. That includes everything which did not pass under the appointment by the will. The circumstance of the appointment and the residuary gift being contained, either in the same document, as in *Spooner's Trusts*, or in a will and a codicil to it, as in the present case, does not, I think, affect the question. I cannot assent to the argument that, because the will, in this instance, showed an intention to appoint the fund to some one who was not the legatee under the codicil, therefore the bequest in the codicil did not carry the fund to that legatee. Suppose a donee of a power of appointment over property to exercise that power in such a way as to render the appointment obnoxious to the Statutes of Mortmain, but at the same time to make a residuary gift of all his property to another party, say, to A. B.; in that case A. B. would take all the property, though it is plain that there was originally an intention that the improperly appointed portion of it should go to some one else. It is a rule of this court that a residuary gift of all a testator's property includes everything not otherwise disposed of, whether such undisposed-of property falls within that gift by reason of the will containing a prior disposition which was either invalid when made, or which becomes so in consequence of subsequent acts or events. But, in truth, I think that in this case I see an express intention on the part of the appointor to deal in some way with this fund for the benefit of his widow; for the bequest of the interest and dividends on it in the codicil seems to me to have been made because there might have been a doubt whether the appointment of the 1000*l.* Consols in the will affected more than the capital. Upon the whole, I am of opinion that the widow is entitled to the fund in question.

Solicitors, *White and Son*.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn, Barrister-at-Law.

June 23 and 24.

DAVIES v. DAVIES.

Parental influence—Gift by a child to a father set aside.

Where a young lady, twenty-two years of age, made a gift of about a third of her property to her father, and the father admitted that he was then, with her consent, acting as the guardian of her affairs, and that she looked up to him with implicit confidence as the only relative capable of protecting and assisting her in her management; although he denied that he exercised any influence or control over her, the gift was set aside.

In April 1859 the plt. Jane Davies, wife of the deft. Joseph Davies, being then a single woman about twenty-two years of age, became entitled, as residuary legatee under the will of Sarah Davies, to property consisting of about 210*l.* in cash, 400*l.* standing to the account of Sarah Davies in the National Provincial Bank at Aberystwith, and two sums of 305*l.* and 375*l.* standing in the name of Sarah Davies, or of her late husband.

Shortly after Sarah Davies's death, 200*l.*, part of the 210*l.* cash, was invested in the purchase of a leasehold house in which Thomas Davies was then living, which was assigned to Thomas Davies, and of which he remained in possession from the date of the purchase in Nov. 1859 until Nov. 1861, without paying any rent to the plt.

On the 30th May 1859, the sum of 400*l.* stock was transferred to the account of Thomas Davies. The circumstances under which this took place were alleged by the plt. to be as follows:—Shortly after the above transaction her father suggested to her that it would be expedient for her to transfer the money and stock bequeathed to her into his name as a trustee. The plt. declined, but a few days afterwards, she having been advised to leave Aberystwith for the benefit of her health, her father told her that before leaving she had better go to the National and Provincial Bank to draw some money for her travelling expenses, and having done so he left the house, and shortly afterwards returned saying, "Mr. Jones (the cashier of the bank who had received the dividends on the stock) will be in the bank at two o'clock, and you must go up and sign some papers at that time to change the stock from the name of Sarah Davies before he can get the interest for you." By these representations the plt. was induced to go with her father to the bank for the purpose, as she believed, of executing documents to enable Mr. Jones to receive and pay to her the dividends on the stock. At the bank Mr. Jones endeavoured to prevail on her to transfer the moneys into the name of her father, but the plt. positively refused to divest herself of her property in the manner proposed. Mr. Jones afterwards informed the plt. that she must, in order to transfer the said moneys into her own name, sign some eight or ten documents which were placed before her by him for, as she believed, that purpose. The plt., who was on the point of leaving Aberystwith by the steamer, had not time to read all, but she read the first three or four papers which were placed before her, and which purported to be transfers of stock into her own name, and concluding that the others were to the same effect, she signed them all without having the purport or effect of them explained to her. After the documents were all signed Mr. Jones took up one of them and said, "By this paper you have signed the 400*l.* that is in the

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bank for your father," and he delivered over the paper to Thos. Davies.

In Sept. 1859, previous to the plt.'s marriage with the deft. Joseph Davies, articles of settlement were executed, the effect of which was to give an estate in the plt.'s property to her husband and herself during their joint lives, and after the decease of either to the children of the marriage. This the plt. alleged was contrary to her instructions, inasmuch as the income of her property was placed entirely under the control of her husband during their joint lives, and no provision whatever was made for her in the event of her surviving her husband. She asked to have the settlement reformed accordingly. Joseph, her husband, had compounded with his creditors, and the trustees to whom he had assigned all his property for their benefit were by amendment made parties to the suit.

The plt. by her bill, filed in Jan. 1862, sought to set aside the two first-mentioned transactions, and prayed a declaration that she was entitled to have the house and premises bought with the 200*l.*, and also the above-named sum of 400*l.*, assured, or certain houses which had been purchased by Thomas Davies with the same sum of 400*l.*, assigned, in conformity with the settlement as reformed.

The deft., Thomas Davies, by his answer, alleged that Sarah Davies had, shortly before her death, informed his wife of her having the sum of 210*l.* in the house, and had desired her to take it after her death as an acknowledgment of her attention. He therefore considered this sum as his wife's, and for that reason thought himself entitled to the house and cottage purchased with it. He admitted, however, that his daughter had never acquiesced in this view, and that she always considered the money as hers. The plt.'s name had at first been inserted as purchaser in the assignment of the leaseholds, but it was afterwards changed for her father's, by his direction, but without the plt.'s knowledge. He now admitted that the gift of 210*l.* was incomplete, and consented to give up the leaseholds.

With respect to the 400*l.*, the deft. insisted that the plt. had repeatedly expressed her intention of making a gift to him; that she met Mr. Jones, and signed the transfer for the purpose of carrying that intention into effect, and that she had afterwards expressed her satisfaction at having done so.

To the reformation of the settlement no opposition was offered.

The deft. Thomas Davies, by his answer, admitted that he assumed the guardianship of his daughter's affairs with her consent, and said that she looked up to him with implicit confidence as the only relative who was in a position to protect and assist her.

Malins, Q. C. and O. Morgan, for the plt., submitted that the alleged gift was void, on the ground of parental influence, and cited

Archer v. Hudson, 7 Beav. 551;

Hoghton v. Hoghton, 15 Beav. 278;

Wright v. Vanderplank, 8 De G. M. & G. 133.

Bacon, Q. C. and Piggott supported the transaction as being a deliberate and irrevocable disposition.

Redwell appeared for the deft. Joseph Davies.

Elderton for the trustees.

THE VICE-CHANCELLOR.—The main question is as to the validity of the transaction by which the deft. Thomas Davies obtained possession of the 400*l.* from his daughter, and he insists that that sum of 400*l.*, which was in a bank at interest at the time of the transaction, became his property by a gift of it from his daughter the plt. There are certain relations existing between persons which, where any transactions of the nature of a gift are alleged to have taken place between them, induce this court always to hold that a gift is invalid on account of the influence

arising from those relations, unless it be shown in the clearest and most unequivocal manner that the influence of those relations did not subsist at the time of the gift, and that is done upon grounds of public policy which have been repeatedly explained and expounded. Upon the ground of public policy alone the existence of the relation which creates the influence must of itself annul the gift, unless it can be shown that the transaction was wholly free from that influence. Freedom from the pressure of influence can be shown in many ways; for example, that there had been a long-continued intention, often expressed, to make a gift; or that the donor perfectly understood the nature of the transaction, and that he had resolved, perhaps by the advice of unbiased friends, to make the gift. In all cases where gifts have been supported it has been shown that nothing equivocal remained in reference to the existence of the relation. But in this case the deft., the father, states the circumstances under which he stood to the plt. his daughter, and those circumstances show that the influence arising from the relation of parent and child was subsisting in full force at the time of the transaction. The relation of guardian and ward, and the relation of parent and child, are here exhibited in their most important points. The father, in his answer, distinctly states that he believes that in the months of April, May and June 1859, and until the marriage of the plt., he being the father of the plt., assumed with her consent the guardianship or direction of the plt.'s affairs and property, and that the plt. looked up to him with implicit confidence as the only relative she had, who was of an age or in a position to protect and assist her in the management thereof. But he denies that he by the means in the bill mentioned, or by any other means, or in fact, acquired or exercised the most complete influence and control over the plt., or a complete influence and control over her. It is impossible to state more strongly and distinctly the existence of the influence arising from the relation, and its existence at the very time when the transaction was entered into. The deft. states that the plt. implicitly confided in his assuming the direction of the management of her property. Then what do I find? That at the very time of this alleged gift of the 400*l.* being made, the deft. had been dealing with the sum of 200*l.* in a way which, taking his own account of all that was done, cannot be considered as proper, or as showing that he had discharged the duty which he undertook to discharge towards his child. The deft. said he considered the 200*l.* to be his wife's property, though he knew that his daughter claimed it; and he also states in various paragraphs in his answer, which relate to his conduct in reference to the 200*l.*, that his daughter considered the money was her own; that she objected to a receipt for it being drawn up in his name, and that she wished the property, which she knew had been purchased with the money, to be assigned to her in her own name. All that is stated by the deft. in his answer; and what does he say about the conveyance of the property? That his solicitor had, by his instructions, when he paid the said purchase-money to the vendor, prepared a draft assignment of the said leasehold house and premises, and of a small tenement adjoining thereto, and that such house, tenement and premises were, by his instructions, expressed in such draft to be assigned to the plt. for the residue of the term of years subsisting therein; but considering that the said house had been purchased with his wife's money, he instructed his solicitor to alter such draft, and the solicitor, by his instructions, altered the draft by inserting his name in the place of that of the plt. as the purchaser under the deed, and that such draft was altered without any instructions from the plt., and he believed without her knowledge or consent. That was a transaction by

a father in whom there was implicit confidence placed, acting as the manager of his daughter's property, and that was the way in which he discharged his duty. Now, as to what took place upon the 30th May—the day upon which the gift of 400*l.* was made—there is a conflict of evidence in the accounts given by the daughter, by the father and by Mr. Jones who prepared the instrument which is called a gift. No two of them concur in their testimony respecting this transaction. The father says his daughter expressed a wish to give part of her property to him and her mother; and what is a very strange thing to state as having been part of the conversation upon the subject, that his daughter asked him if he would be satisfied if she gave him 400*l.* That is a very strange statement with reference to a transaction in the nature of a gift, which should be voluntary. To ask whether the father would be satisfied with 400*l.* shows a state of mind not free from influence and control to the extent which is necessary in cases of this kind. Then as to what took place on the 30th May, when the debt went out early in the morning; the inference is, that he went to see Mr. Jones, the manager of the bank, respecting the transfer. Mr. Jones's account is, that upon the morning of the 30th May the father and daughter came together to his private residence, and that the daughter expressed an intention of making a gift of 400*l.*, and said she had come to ask if it could be done. The father states the same thing, and that such was the object of his going to the bank. The daughter states that her father went to the bank alone previously. The father states that he did not, but that they went together, taking with them the deposit receipts, and that Mr. Jones gave instructions as to how the transaction could be effectually carried out. This is a small matter; but in the evidence of the daughter she states that she originally took the receipts and placed them upon her father's desk, and after having had her attention called to the evidence of the other witnesses, she denies that she took the two deposit receipts to the bank, or handed them over to Mr. Jones; but she says she left them in the desk at her father's house, and cannot state by whom they were taken to bank. It is beyond a doubt that at the bank she was told that she ought to sign her name, in order (as Mr. Jones stated) to make an effectual gift; but her own statement is wholly inconsistent with that. She says, she was told by her father that, as executrix, in order to obtain the interest on the moneys, it would be necessary that the name in which they stood should be changed, and that the moneys should be transferred into another name. Now, looking at all the circumstances and the evidence of the parties, it seems to me that there is a naturally coherent and consistent story told on the part of the daughter. The plt. states that when Mr. Jones told her she had signed away the 400*l.* to her father, she was quite startled, and that she believed that what had been done could not be undone. The matter was, therefore, allowed to rest. At the time when the transaction of this gift took place, the influence of the father was in full force, and unless it can be proved that all influence was removed, the gift is vitiated. In cases of this kind, where there is a conflict of testimony, the rule of the court requires that the evidence should show, in the clearest and most unequivocal manner, that the transaction was well understood by, and was the deliberate and voluntary act of, the person who made the gift. That evidence is wanting in this case, and consequently the gift is one which cannot be sustained. I cannot leave the case without referring to the law as stated by Lord Eldon in the case of *Batch v. Hatch*, 9 Ves. 296. Lord Eldon, upon a question in reference to a case of guardian and ward, and not of parent and child, said: "This case proves the wisdom

of the court in saying it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it except quite satisfied that the act is of that nature, for the reason often given; and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a court of justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression." The doctrine of the court cannot be more clearly stated than in that case. There is wanting, in this case, that degree of evidence which would show the removal of all influence on the part of the father, and that alone vitiates the gift to him, and he cannot be allowed to retain the 400*l.* There will be a declaration to that effect, and that the debt Thomas Davies must pay the costs of the suit, excepting so far as they would be increased by a reformation of the settlement. Declare that the gifts of the sums of 200*l.* and 400*l.* to the debt. Thomas Davies are invalid, and that he is bound to repay those sums to the trustees of the settlement; that the settlement be rectified as prayed, by conveying the property of the plt. to trustees in trust for her separate use for her life, without power of anticipation, with immediate remainder for her children; that the debt. Thomas Davies do pay all costs of the suit, excepting so far as they relate to the rectification of the settlement, and that he account for the rents received by him, and be allowed 40*l.* for improvements.

Solicitors for the plt., Jones and Starling, agents for R. J. Cathcart, Newport.

Solicitor for the debt. T. Davies, Edward Baldea, agent for W. H. Thomas, Aberystwith.

V. C. WOOD'S COURT.

Reported by W. H. BENNETT and EDWARD LLOYD, Esqrs., Barristers-at-Law.

Tuesday, June 2.

GILBERT v. LEWIS.

Married woman—Separate estate—Bankruptcy—Fraud—Parties.

A testator gave and bequeathed to his wife all his real and personal estate "for her sole use and benefit:" Held, that these words alone did not give to the wife a separate estate in testator's property.

A bankrupt, by fraud committed before his bankruptcy, acquired property which passed to his assignees. He was made deft. to a suit for setting aside the fraudulent transaction. The bill sought discovery from him as incidental to the relief prayed:

Held, on demurrer by him, that he could not be compelled to answer as to the discovery, not being a necessary party as to the relief sought by the bill.

Demurrer.

This was a bill filed by Sophia Gilbert, the wife of a debt. William Henry Gilbert, by her next friend, against the debts, praying that certain deeds, after stated, might be declared to be fraudulent and void, and ought to be set aside, and might be delivered up to be cancelled, or that the debts. Lewis, Graham and Hunter might be decreed to reassign the hereditaments therein mentioned to plt. for the residue of a term of 2000 years free from an annuity; that plt. might be

let into possession; that deft. Hunter might be decreed to deliver up to the plt. the deeds relating to such hereditaments and premises; for payment of costs, and for further relief.

The bill stated the following circumstances:—Geo. Philip Bradley, the former husband of the plt., being entitled in remainder expectant on the decease of his mother Phoebe Bradley, who died in 1846, to certain freehold property at Kingswinnford, in Staffordshire, by his will dated in the year 1842, gave all his real and personal estate to his wife, the plt., "for her sole use and benefit." He died in 1843. Some time afterwards the deft. John Hunter, who had since become bankrupt, entered into possession of the property, having, as was alleged by himself and his assignees, become entitled thereto under the following deeds.

By an indenture dated the 22nd March 1828, Mr. Bradley and G. P. Bradley, being entitled in equal shares to the remainder in question, granted to R. S. Hele an annuity of 100*L.* determinable on lives secured by a term of 2000 years, with full powers of sale in default of payment.

By an indenture of the 2nd Aug. 1837 the annuity was assigned to the then Earl of Strathmore, in consideration of 2000*L.*, subject to the right of repurchase, and the term was assigned to Hunter determinable on the repurchase.

By an indenture of the 4th Aug. 1837, the term was, under the power contained in the deed of 1828, sold and assigned to George R. Elkington absolutely.

By an indenture indorsed on said last-mentioned deed, and dated 5th April 1841, after reciting that the purchase-money paid by Elkington was the proper moneys of John Hunter, and that Elkington was a trustee for him, the term was assigned to Hunter absolutely.

The bill then charged that the transaction was a fraudulent transaction, on the part of Hunter, to obtain said hereditaments without payment of the value thereof; that said deeds were fraudulent and void, and ought to be set aside and cancelled; that the deed of 1828 was made without consideration, and that the pretended consideration therein mentioned did not in fact pass, and that the said deed was really made for Hunter's benefit, and was fraudulently contrived by him; that the assignment and transfer of 1847 were fraudulent and merely colourable, and the sale was in equity a sale by a mortgagee, with a power of sale to himself; that Hunter acted as the attorney and solicitor of the Bradleys in the preparation and execution of the deed of 1828, and that all the parties interested under the several deeds were his clients, and acted under his influence and for his benefit; that Hunter, as such attorney and solicitor of the Bradleys, obtained possession of the title-deeds, and that same were then in his custody and power; that deft. Hunter was adjudicated a bankrupt on the 29th Oct. 1861, and that defts. Lewis and Graham were his assignees; that deft. Hunter alleged that there would be a large surplus coming to him under his bankruptcy, after payment in full of all his creditors, and he insisted, and Lewis and Graham admitted, that for this and other reasons the term in said hereditaments was not vested in Lewis and Graham as the assignees of Hunter; that Hunter had retained possession of said premises until the appointment of assignees, shortly after which Lewis and Graham had entered into and continued in possession.

The deft. Hunter filed a demurrer. It demurred to the whole relief sought by the bill except the delivery up of the deeds, and as to this part of the bill he answered by denying possession of them.

Rolt, Q.C. and *Dickenson*, in support of the demurrer, contended that Hunter was not a proper party to the bill. They cited

Benfield v. Solomons, 9 *Ves.* 77;

Lloyd v. Lander, 5 *Madd.* 282;

Collins v. Shirley, 1 *R. & M.* 638;

Rochford v. Battersby, 2 *H. L. Cas.* 388;

Whitworth v. Davis, 1 *Ves. & B.* 545.

Giffard, Q. C. and *Reilly*, for the bill, cited

Mackworth v. Marshall, 3 *Sim.* 368;

King v. Martin, 2 *Ves. jun.* 641;

Tenton v. Hughes, 7 *Ib.* 287;

Le Tezier v. The Margravine of Anspach, 15 *Ib.* 159;

Plummer v. May, 1 *Ves. sen.* 426;

Dalton v. Hayter, 7 *Beav.* 313; *a.c.* 3 *De G. M. & G.* 817;

Boyes v. Rossborough, Kay, 71;

Plumbe v. Plumbe, 4 *You. & C.* 345.

THE VICE-CHANCELLOR said he had been carefully considering the case, and he thought it one in which the demurrer should be allowed. First, as regards the bankrupt, no bill can be sustained against him for the purpose of relief, because all his interest passes to his assignees; but it is said he may be made a party for the purpose of discovery. In *Whitworth v. Davis* it was considered doubtful whether the case of a bankrupt constituted an exception to the general rule that a mere witness having no interest ought to be a party; but it is unnecessary to consider it here, because, whether he could or could not be made a party for the purpose of discovery, there can be no right to the relief prayed against him. Then comes the question which is more material, whether, having been charged with fraud which will affect the estate vested in him anterior to the bankruptcy, he can now be made a party, as an accomplice in the fraud, for the purpose of fixing him with costs. The only authority cited on that point is *King v. Martin*, in which the fraud was alleged to be between the bankrupt and his assignees, the bankruptcy itself being fraudulent. That comes within the principle of a host of other cases which might be cited, deciding that where two or three persons concur in a fraud, no one of them can escape being made a party to the suit and being liable to costs, by saying that he derived no benefit from the fraud, and only gratuitously assisted in procuring a fraudulent benefit to another. A party cannot defend himself on that ground, but he may be made a party for the purpose of making him pay costs. A distinction is very rationally drawn, although it is but a *dictum*, in *Lloyd v. Lander*, between the case of a fraud committed by the bankrupt as an agent taking no benefit whatever, and being brought before the court in order to answer for costs, and the case of a person who has committed a fraud of which he takes the sole benefit, and then the whole interest in his estate, by virtue of the operation of the bankruptcy laws, passes to his assignees. The question then is, whether, he having committed a fraud for his own benefit, the plt. can, when it comes to a hearing, split her rights and deal with the bankrupt, irrespective of the assignees, in reference to the rights which will pass *ultra* the bankruptcy, and in respect of which she has remedies against him. The only case approximating to an authority is *Mackworth v. Marshall*, but the judgment there is given in such an unsatisfactory manner that it is impossible to concur in the reasons alleged. They were not the reasons urged in the argument by the counsel adverse to the plea, and which are now urged by Mr. Giffard. It is not said by the V. C. that, the bankrupt having committed a fraud, that fraud is to be split and severed from the benefit that he derived from it, and he is to be made a party in respect of the costs on account of the fraud committed by him anterior to his bankruptcy; but certain persons, defts. in the suit, had taken the bills of exchange which were the subject-matter of the suit, and held them in their hands, saying they held by way of security, but

subject to their security they held for the benefit of Marshall, the bankrupt, and the V. C. says Marshall is a necessary party in respect of his interest in the bills. But, according to the plea, that interest was in the assignees, and therefore the assignees would be the persons to represent that interest, and if the plt. established his right against them, of course the holders of the bills would have to hand them over. The case is put on a footing which I am quite unable to follow. I cannot regard it as a decision that a person committing a fraud anterior to bankruptcy may afterwards be brought before the court for the sole purpose of fixing him with costs. In the present case the bankrupt, as it is alleged, concurred with others and obtained a benefit by that fraud, which benefit is now vested in the assignees, and the assignees, choosing to stand or fall by the transaction, will either surrender the property or make such compensation out of the estate as may be necessary. If they insist on holding it, they will hold it at their own risk, and subject themselves to costs if they should fail to establish their right. There is no charge in the bill that since the bankruptcy the assignees and this bankrupt have concurred together in fraudulently withholding this property from the plt. If there had been such a charge, that would have brought the case a little nearer to the case of *King v. Martin*; but I find no authority for saying that a bankrupt who has committed a fraud before his bankruptcy is, on that ground alone, a proper party to the suit. Then, there was another point which was argued, as to the possession of the deeds. I was a good deal struck with the fact that, while the pleader has thought it necessary to cover by the answer that part of the bill which says that "the four deeds herein particularly mentioned, together with other documents relating to the indentures aforesaid, are now in his possession, custody, or power," he has not thought it necessary to cover that part relating to the general possession of deeds and documents. I was rather struck with that, because it would seem to lead us to the admission that he has got those documents in his possession which might make it necessary to retain him as a party for the purpose of the suit. I think, however, that it is answered by the observation in *Lloyd v. Lander*, that you must distinguish between the special deeds which are charged as being those to which the fraud refers, and which may or may not be recovered from him, and his other deeds. With respect to that, there is a general allegation in the bill that, as solicitor of the Bradleys, he obtained possession of the deeds. Whatever he obtained, acting as solicitor of the Bradleys, if the four deeds in question ought to be set aside, they will be so, and therefore they are not to be considered, and you do not want him as a deft. Of course, as you file your bill against the assignees, you have nothing more to do with him; and if you succeed against the assignees he is only holding the general deeds as the solicitor of the Bradleys. It appears to me, therefore, that it is right that no answer should be put in, as they were simply retained by him as the solicitor of the Bradleys, without relation at all to the four deeds in question, and wholly unconnected with the alleged fraud. As to the four deeds, he has answered (following the suggestion of the V. C. in *Lloyd v. Lander*) that there might be some special averment relating to them which might make it necessary to have an answer. Then there remains this question. At one time it struck me for a moment that, if the plt. succeeds in setting aside all the deeds, the bankrupt will be a trustee of the term; and in that case it might be well held that the term being a trust term would not pass under the bankruptcy. I think, however, that is not the proper way of viewing it, because you must first set aside the deeds. When you set aside the deeds, he is simply a trustee; but that is not the character of

the relief you want in this suit, because it will then be determined that on that account the estate would not pass to the assignees. But it has been argued here, that the ground on which it does not pass to the assignees is, that there will be a large surplus after payment of all the bankrupt's debts, and you must take the whole case together. It is alleged that all these deeds were executed by which, amongst other things, the estate has been sold up, and the trust of the term has been vested in Hunter, and if so it must in his assignees. That is attempted to be got over in this way. Hunter says there will be a large surplus. He alleges, and his assignees admit, that for that and other reasons (the other reasons not being alleged) the term in the hereditaments is not vested in them. The fact of there being a surplus is not material. The averment that Hunt claims an interest of this particular character makes the bill absurd, for no such interest can be in him. In *Plummer v. May* and *Dalton v. Hayter*, and that class of cases, it was decided that where a person claims an interest which he will not disclose in the subject-matter of the suit, it is necessary to make him a party to the suit in order that you may force the discovery from him; but no case has been cited which bears on the facts stated in this bill in which the nature of the interest claimed by Hunter is stated. That disposes of the argument raised on the bills of exchange, and the possibility of setting aside this deed hereafter against the assignees, in which case it may then be held that the term, being a trust term, has not become vested in them. If I were to hold that, then in every case in which it was sought to set aside a transaction against the assignees of a bankrupt, the bankrupt would always be obliged to be made a party, because in all cases, if you succeed in setting aside the transaction, there would be a resulting trust in favour of the person said to be defrauded by the bankrupt. There is no authority at all for any such proposition; and I think, therefore, upon all these grounds the demurrer must be allowed. *Demurrer allowed.*

Confirmed on appeal to the L. C.

Saturday, July 11.

BOYD v. BOYD.

Will—Construction—Portions to children—Trusts of a fund by reference to those of a prior fund.

In cases where trusts of a fund are declared by way of reference to the trusts of a prior fund, such limitations ought not to be so construed as to multiply the charges which had been made on such prior fund.

Where, therefore, A. by his will bequeathed to trustees a considerable sum of money in trust for R. B. during his life, after his decease in trust to raise portions of 5000l. each for the younger children of R. B. as therein named, with gifts over, subject to these charges, and he also bequeathed one-fifth of his residuary personal estate upon the trusts before declared concerning the capital sum of which the dividends were given to R. B. for life, the residuary personal estate being of very considerable amount:

Held, that the children of R. B. were not entitled to double portions of 5000l. each.

This was a petition presented in a suit of *Boyd v. Boyd*, which had been instituted for the purpose of administering the estate of Walter Boyd, late of Plaistow-lodge, Kent, and the petition prayed (amongst other things) that it might be declared that certain persons who were children of Robert Boyd were entitled to double portions of 5000l. each under the following circumstances:—

By his will, dated the 21st Feb. 1833, Walter Boyd, the testator in the pleadings named, bequeathed a sum

of 187,500*l.* to trustees therein named, with the usual powers of investment, and to pay the dividends to his son Robert Boyd during his life; and after his decease upon trust to raise and pay out of such sum of 187,500*l.*, and the stocks and funds in which invested, the sums of 5000*l.* for each son of his said son who should attain twenty-one; and the like sum to each of the daughters who should attain that age or marry with consent, with the usual powers of maintenance and education, &c.; and he declared that his said trustees were to stand possessed of the residue of said sum of 187,500*l.* upon trust for Walter Boyd the younger for life, and then upon certain trusts therein mentioned. After bequeathing the sum of 14,000*l.* to each of his four daughters, in addition to a sum of 16,000*l.* given to each on her marriage, he divided the residue of his personal estate into five equal parts. The will then proceeded as follows: "And one of the said five parts shall be held upon such trusts, and under and subject to such powers and provisions, as are hereinbefore expressed concerning the said sum of 187,500*l.*, and the stocks, funds and securities in which the same may be invested, or such of the said trusts and provisions as shall be subsisting or capable of taking effect." And the testator declared that the remaining four-fifth parts of the last-mentioned residue were to be held upon the trusts of the four several legacies of 14,000*l.* given to his said four daughters.

Testator died on the 18th Sept. 1837, and Robert Boyd, the first tenant for life of the sum of 187,500*l.*, died on the 16th Jan. 1863, leaving his eldest son Walter (grandson of the testator) and seven younger children surviving him.

The question raised was, whether the seven younger children of Robert Boyd were entitled to double portions of 5000*l.* each under the will of the testator.

Daniel, Q. C. and *C. Parks*, for the younger children, contended that they were so entitled. They endeavoured to draw a distinction in the present case from

Hindle v. Taylor, 5 De G. M. & G. 577; and *Stanley v. Stanley*, 2 J. & H. 491; 7 L. T. Rep. N. S. 136.

Chapman Barber for parties in the same interest.

Giffard, Q. C. and *Fitzhugh* for Walter Boyd the eldest son.

Willcock, Q. C. and *Nalder* for the trustees of the will.

The VICE-CHANCELLOR said, he had no doubt that the present case must be governed by the decision of Lord Cranworth in the case of *Hindle v. Taylor*. Indeed, there were additional reasons in the present case, arising from a consideration of the scheme of the will, why the principle involved in that case should be carried out. The testator was making a provision for his family: first, he made a provision for his son; he then made up his daughters' fortunes to 30,000*l.* each; and then he divides the residue of his general personal estate into five equal parts. As to one-fifth share thereof he bequeathed it by reference to the former bequest of the 187,500*l.* for the benefit of his son; as to the other four-fifths, he gives one to each of his four daughters. The principle laid down in the case of *Hindle v. Taylor* was this: that in cases where trusts are declared by way of reference to the trusts of a prior fund, such limitations ought not to be so construed as to multiply the charges which had been made on such prior fund. That principle was precisely applicable to the present case. Here the trusts of the prior fund were after the decease of Robert Boyd for the benefit of Walter Boyd, subject to the charges for the younger children of Robert. What were those charges? 5000*l.* to each. The residue of the testator's personal estate would therefore be held upon the same trusts as the residue of this prior fund. The younger children

of Robert were not entitled to double portions of 5000*l.* each.

Order, on this point, accordingly.

Solicitors, *Parks and Pollock*; *Domvilles and Co.*

Aug. 1 and 3.

SALT v. STANDISH.

Settled estates—Mortgage—Joint power of appointment—Successive tenants for life—Proviso as to proportion of liability—Charge on inheritance.

A father and son, successive tenants for life of settled estates, in exercise of a joint power of appointment given them by the deed of settlement, raised 15,000*l.* by mortgage of the estates. The mortgage-deed contained a joint and several covenant by the mortgagors for payment of the debt, and a proviso fixing, as between themselves, the proportion in which each was to be liable for payment of interest and principal. By a deed executed two days after the mortgage, the settled estates were vested in trustees for a term of 150 years (determinable on the death of either tenant for life), upon trusts for the management of the property, to pay out of the rents and profits annuities and interest on incumbrances, and to accumulate the surplus for the purpose of paying off incumbrances, and ultimately for the tenants for life in their respective proportions. The trustees of the deed of settlement were not parties to either of those deeds:

Held, that the effect of the two deeds was not to exonerate the inheritance from the 15,000*l.*, and that, upon the death of the father, a fund in court, arising from accumulations, was payable to the son as his sole legatee.

This was a petition raising the question whether successive tenants for life of settled estates had, under the provisions of certain mortgage-deeds executed by them, exonerated the inheritance from the charges created by those deeds, so as to make themselves personally liable for the amount of those charges in the respective proportions pointed out by the deeds.

By a statutory indenture of release of the 13th Jan. 1845, certain estates in Lancashire were limited to trustees to such uses as C. Standish and C. H. Standish (his eldest son) should appoint, and in default of appointment, and subject as to a part of such settled estates to the trusts of a term of 100 years, to the use of C. Standish for life, with remainder to the use of C. H. Standish for life, with remainder to his first and other sons in tail, with remainders over in strict settlement. The trusts of the term of 100 years were for securing an annuity of 600*l.* to C. H. Standish during the joint lives of himself and his father. By three several indentures of the 24th Jan., the 24th Jan. and the 27th Jan. in the year 1845, C. Standish and C. H. Standish, in exercise of their joint power of appointment, charged parts of the settled estates with sums amounting in the aggregate to 61,000*l.*

By an indenture of the 5th July 1848, made between C. Standish and C. H. Standish of the first part, G. Barker of the second part and F. J. Prescott and J. Leigh of the third part (to which the trustees of the deed of 1845 were not made parties), a further sum of 15,000*l.* was raised on mortgage of the settled estates by C. Standish and C. H. Standish, under their joint power of appointment, with a proviso that as between C. Standish and C. H. Standish, but without prejudice to the rights of the mortgagees, C. Standish should be liable to the payment of 300*l.* a-year as the proportion or share payable by him of the interest of the 15,000*l.*, and C. H. Standish should be liable to the payment of 450*l.* a-year as his proportion of interest on that sum, and that C. Standish and C. H. Standish

should be liable to pay the 15,000*l.* itself, in the like proportion.

By an indenture of the 7th July 1848, made between C. Standish and C. H. Standish of the first part, the trustees of the term of 100 years of the second part, Prescott and Leigh of the third part, and F. C. Standish and W. Salt of the fourth part, the whole of the settled estates, including those comprised in the term of 100 years were conveyed (subject to the existing charges upon them) to F. C. Standish and W. Salt, for the term of 150 years, if C. Standish and C. H. Standish should so long live, upon trusts for the general management of the estates, for keeping down the interest on the mortgages according to their priorities, and then to pay an annuity of 2500*l.* to C. Standish, and of 1000*l.* to C. H. Standish, and to accumulate and invest the surplus rents and apply such accumulated investments to pay off the mortgage for 15,000*l.*, and, subject to these trusts, in trust for C. Standish and C. H. Standish, according to their several interests.

A bill was filed on the 6th March 1854 by W. Salt, the surviving trustee of the deed of the 7th July 1848, for the purpose of having the trusts of that deed administered; and on the 15th Dec. in the same year an order was made in accordance with the prayer of the bill. Various orders were from time to time made in the suit during the lifetime of C. Standish, who died on the 10th June 1863, having by his will, dated the 10th April 1845, made C. H. Standish his sole legatee and executor.

There was at the date of the petition a sum of 5974*l.* 19*s.* 10*d.* Consols, and of 87*l.* 0*s.* 3*d.* cash in court, arising from the accumulations of the surplus rents, and the petition, presented with the assent of all the incumbancers on the estates, prayed for the payment out of court of that sum to or for the benefit (after taxation and payment of certain costs) of the petitioner C. H. Standish, and that the trusts of the deed of the 7th July might be declared to be determined, and the petitioner be put in possession of the settled estates.

Giffard, Q. C. and *J. T. Humphry*, for the petitioner, contended that the inheritance was not exonerated. The deeds of the 5th and 7th July were to be taken together, and to neither of them were the trustees of the settlement of 1845 parties, while the latter of the two deeds expressly bound the life-estates only of C. Standish and his son. They cited

Colyear v. Countess of Mulgrave, 2 Keen, 81.

J. Bateman, for a mortgagee of the life-estate of C. H. Standish, supported the same view.

Pigott, for the mortgagees of the inheritance, assented to the payment of the money out of court.

Rolt, Q. C. and *D. P. Crooke*, for the plt. in the suit, pointed out that in *Colyear v. Countess of Mulgrave* (*vide sup.*) the trust was executory; here it was a trust executed for the benefit of the remaindermen.

Humphry, in reply, referred to

Walwyn v. Coutts, 3 Sim. 14.

Aug. 3.—The VICE-CHANCELLOR said, that upon the authority of *Pulvertoft v. Pulvertoft*, 18 Ves. 84, and *Heap v. Tonge*, 9 Hare, 90, the present case must be distinguished from those relating to voluntary deeds. The two deeds of July 1848 must be looked at together, and, taking them in this way, the question was, whether the arrangements contained in them implied an intention to exonerate the inheritance from the payment of the mortgage of 15,000*l.* Certainly no such intention was expressed in either of the deeds; on the other hand, there was in the deed of the 5th July a covenant by C. Standish and C. H. Standish for the payment of this mortgage-debt; now, if there had not been such a covenant there could have been no reason for stating the proportions in which they were respectively to be

liable for the mortgage, except on the supposition of an intention to liberate the inheritance. The joint covenant, however, rendered necessary the insertion of the proviso. Any implication of intention was further negatived by the circumstance that the trustees of the settlement of 1845 were not parties to the deeds of 1848. The intention of the parties to the latter deeds was not to enter into any arrangement as between themselves and the estate, but as between themselves only, so as to fairly distribute the burden on the inheritance as between themselves, as successive tenants for life, but not to impose on themselves the burden in exoneration of the inheritance. The order would be prefaced by a declaration that the deeds of the 5th and 7th July were not intended to, and did not, exonerate the inheritance from the mortgage for 15,000*l.*

Solicitors for petitioner, *Barker, Bowker and Peake*.

Common Law Courts.

COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs., Barristers-at-Law.

Thursday, Nov. 6.

SIMMONS v. HUMBLE AND OTHERS.

Statute of Frauds—Contract—Sale of goods—Acceptance—29 Car. 2, c. 3.

Certain pockets of hops were sold by sample by the salesman of a joint-stock company, who acted as agent of both parties. Afterwards the respective parties, by their agents, met, compared the samples of the hops with the bulk, weighed the pockets, and adjusted certain allowances in respect thereof. There was evidence that sampling and weighing completed the transaction, and no repudiation was admissible afterwards:

Held, that this was a sufficient acceptance of the goods to satisfy the requirement of sect. 17 of the Statute of Frauds, 29 Car. 2, c. 3.

This cause was tried before Erie, C.J., at the sittings in Guildhall, on the 15th July: verdict for the plt. on all the issues, 85*l.* 9*s.* 6*d.*, with leave reserved for the defts. to move to enter a verdict for themselves, or a nonsuit.

It was an action to recover damages for the non-acceptance of a quantity of hops sold by plt. to defts. The defts. traversed the making of the contract.

It appeared at the trial that the plt. and defts. are hop merchants, carrying on business respectively in London in the Borough. In Jan. 1862 the plt. sold to defts. 176 pockets of hops, through one Peacock as his factor, who was the salesman of "The Hop Planters Joint-Stock Company." The following sale-note was made out by Peacock:

"Jan. 29, 1862.

"Messrs. Humble and Co. bought of the Hop Planters Joint-Stock Company 176 pockets hops (Smith 1859), at 58*s.* cwt. cash."

This contract note was not signed. It was objected at the trial, on behalf of defts., that there was no contract sufficient to satisfy sect. 17 of the Statute of Frauds.

The learned judge, however, acting on the authority of *Durell v. Evans*, 31 L. J. 337, Ex.; 7 L. T. Rep. N. S. 97, in error, ruled otherwise, but gave defts. leave to move as already stated.

It was then further contended, on behalf of the plt., that the facts disclosed a sufficient acceptance of the goods to take the case out of the statute. It was shown in evidence that the usual course in sales of hops is for the parties to meet and ascertain the weight and to compare samples with the bulk before the day

of payment. Here the parties attended, the goods were weighed and compared and certain allowances made. [ERLE, C. J.—A witness said that the sampling and weighing completed the transaction, and he never knew repudiation afterwards.] His Lordship left it for the jury to say whether there had been any acceptance of the hops by the defts., and they found in the affirmative, giving the damages above stated.

Hawkins now moved, pursuant to leave reserved, to set aside the verdict, and enter a verdict for the defts., or a nonsuit. He contended, first, that the memorandum of the contract was not sufficient to satisfy the 17th section of the Statute of Frauds. Secondly, that there was no evidence of acceptance of the goods so as to bind the vendee. He endeavoured to distinguish this case from that of *Durell v. Evans* (*ubi supra*), which he said was going to the H. of L.

WILLIAMS, J.—It seems to me that it is not necessary to consider the first point raised by Mr. Hawkins in this case, whether there was a sufficient memorandum in writing to satisfy the Statute of Frauds, because it becomes immaterial, if there was an acceptance of the goods sufficient to satisfy the statute. The question is, was there a misdirection by my Lord in putting it for the jury to say whether there had been an acceptance of the hops by the defts.? I am clearly of opinion there was no misdirection. The vendor employed a warehouseman as his agent to conduct the sale. He accepted the hops for the defts. as their agent, and held them on their behalf. Then, with respect to the acceptance, the question is, was there any evidence of it to go to the jury, on which they might properly be directed to find that there had been a sufficient acceptance? I think there was evidence to justify the verdict. There was not only a comparison of the samples with the bulk but also a weighing of the hops and allowances made by the agents of both parties. Furthermore, there was the statement of the witness that sampling and weighing always completed the transaction, and that he never knew of repudiation afterwards. That, in my opinion, is enough; the verdict will therefore not be disturbed.

BYLES, J.—I am of the same opinion. I express no opinion as to the binding nature of the sale-note; but, as to the acceptance of the goods, there was evidence that the goods were sampled, weighed and certain allowances made. The making the allowances is *prima facie* evidence that the goods were accepted, for they were to be paid for minus the allowances. Then the statute requires that there shall have been a receipt of the goods. Were the goods in this case received? I think they were. The moment the contract was made the agent between the parties became the agent of the vendee and held the goods for them. No objection was made at the trial that there had been no receipt, nor could such have been made successfully.

KEATING, J. and ERLE, C. J. concurred.

Rules refused.

Jan. 17 and 20, and July 6.

BLASCO v. FLETCHER.

Ship and shipping—Damage to vessel—Re-delivery of cargo to shippers.

The owner of goods shipped to proceed to a foreign port has a right to have them re-delivered to him when the vessel, having commenced her voyage, meets with a disaster whereby the goods are damaged so much that they cannot be profitably carried to their destination.

This cause was tried before Willes, J., at the last summer assizes in Liverpool.

Declaration.—The first count stated that on the 3rd June 1861 a charter-party was made by and between the pit. and the defts., and which said charter-party was and is in a foreign, to wit, the Spanish, language, and

was and is to the tenor following, that is to say (setting out the instrument in Spanish); and such being translated into the English language, was and is as follows, that is to say: "Liverpool, 3rd June 1861. It is mutually agreed between Jacobo Blasco, captain of the good ship *Primera de Torreveja*, of about 332 tons, classed 5-6 A. Q. 1 for three years in Bureau Veritas, zincd, being tight, staunch, and strong of keel and sides, and every way fitted for the voyage, and with all the necessary papers to combine the privileges of the Spanish flag, now in Liverpool, and Messrs. G. H. Fletcher and Co., merchants, that—

1. The captain cedes the whole of the ship from stem to stern for the exclusive benefit of the charterers, cargo to be brought to and taken from alongside the vessel at charterers' expense, and received at the port of discharge, according to the custom of the place; the cargo to consist of licit goods, including powder, in the river.
2. The stowing of the ship, and the needful for this to be done by captain in a seamanly style, but by no means to exceed what she can reasonably stow and carry under deck; the captain binds himself to employ charterers' stevedores, paying 10d. per ton; but, as he is to work under the inspection of the captain, charterers are not answerable for the stowage.
3. The captain to sign bills of lading as soon as the cargo or portion is delivered alongside in the usual and customary manner, and for any freight that may be inserted in them by charterers, and it may be the duty of the mate to sign a receipt for all cargo as it is delivered alongside the ship.
4. The port charges, stowage, customs and consular dispatches, dock charges and quarantine, and any others that may be incurred in the ports of refuge, loading and discharge, to be for account of the ship.
5. The averages that might happen, no matter what, to be arranged according to the custom of the reigning laws; the captain nor his agents at no time are to make any claims against the charterers for damages, accidents, or misfortunes that might happen to the ship on her voyage.
6. Thirty running days (Sunday excepted) to be allowed the charterers for loading the ship, to commence on the day the "leal" clears, being ready to receive the cargo; the captain to advise this by writing to the charterers, and to expire the moment the dispatches are delivered to the captain, or advise that they are at his disposal; 3d. per day over and above the said days to be paid captain if the ship be not sooner dispatched.
7. The captain allows a brokerage or commission of 5 per cent. on the freight and demurrage as soon as this charter is signed.
8. As soon as the ship is loaded and dispatched in the Custom-house she will immediately sail, and, if weather permits, proceed to Havanna without touching at any port except in case of need, and on arrival to be consigned to the agents of the charterers who they will appoint, paying the usual commission in and out; the captain binds himself to take 500 tons dead weight, or freight to be reduced in proportion.
9. On the right and true delivery of the cargo, the charterers will pay the captain, or his order, the agreed sum of 1000*l.* and no more, in discharge of all rents and freight, in the following manner: the captain will receive the bills of lading payable in the port of discharge, and the balance to be settled here in the usual manner, deducting the premium of insurance on the amount.
10. The captain binds himself to sail as soon as he receives his dispatches, if weather permits and other vessels sail, or allow the charterers 10*l.* per day for that delay, and to be answerable for any prejudice that may arise from that delay.
11. If the ship be detained on account of bad weather after all the lay days have expired, he will receive cargo on board in the meantime without charging any demurrage. For the punctual and exact fulfilment of this charter the parties con-

cerned bind themselves in the forfeited amount equivalent to the amount of freight, in case either should not fulfil the terms of this charter. In faith and testimony this present is signed in duplicate in Liverpool, *fecha ut supra*. This agreement will only be valid if the existing contract for Santanan is annulled, the result of which is to be known to-day." Averment, that the said Messrs. G. and H. Fletcher and Co. in the said charter-party mentioned were and are the defts., and the said ship was duly laden with a cargo to be conveyed therein upon the said voyage from Liverpool to Havanna, and the defts. delivered to the plt., and he received from them, the said bills of lading of the said cargo payable in the port of discharge, according to the terms of the said charter-party; and the said ship, being laden with the said cargo, sailed and proceeded on the said voyage; and the said ship, while proceeding on the said voyage and laden with the said cargo, by and through the perils of the seas, became and was greatly damaged, and it became and was necessary that the said damage to the said ship should be well and sufficiently repaired, in order that the said ship might further proceed upon and complete the said voyage, and that the plt. might convey and deliver the said cargo at the port of discharge as aforesaid; and that the plt. always was ready and willing to procure the said ship to well and sufficiently repaired within a reasonable time in that behalf, and to have the said ship further proceed upon and complete the said voyage, and to convey the said cargo in the said ship to and to deliver the same at the port of discharge aforesaid; of all which premises the defts. had notice; and all conditions precedent had been performed, and all things had happened, and all times had elapsed, necessary to entitle the plt. to maintain this action: yet the defts. did, before a reasonable time for the said repairing of the said ship had elapsed, wholly refuse, and from the time of their refusal to the commencement of this suit continued to refuse, to suffer and permit the plt. to convey the said cargo in the said ship upon the said voyage, and hindered and prevented the plt. from further proceeding upon and completing the said voyage, and from conveying the said cargo to and delivering the same at the port of discharge as aforesaid; and by reason of the premises the plt. has been prevented from obtaining payment of divers large sums of money payable for freight and otherwise under the said bills of lading respectively, and of any part thereof, and thereby the said agreed sum of money, to wit, 1000*l.*, due and payable to and to be retained by the plt. under the said charter-party, had become and was wholly lost to the plt., and the plt. had been and was by means of the premises otherwise injured.

Pleas.—1. To the first count, that defts. did not make and enter into such charter-party as alleged. 2. To the first count, that the said ship was not, whilst proceeding on her said voyage, damaged, as in the declaration alleged. 3. To the first count, that the plt. was not ready and willing to procure the said ship to be well and sufficiently repaired within a reasonable time in that behalf, as in the declaration alleged. 4. To the first count, that the plt. was not ready and willing to have the ship further proceed upon and complete the said voyage, and convey the said cargo in the said ship, and to deliver the said cargo at the port of discharge as aforesaid, as alleged. 5. To the first count, that before the breaches complained of it was mutually agreed, between the plt. and the defts., that the said voyage should be wholly abandoned, and the said charter-party should be no further acted upon or proceeded with, and that the same should be rescinded or determined, and the same were then respectively abandoned, rescinded and terminated accordingly. 6. To the first count, that the defts.

did not refuse and continue to refuse to suffer and permit the plt. to convey the said cargo, nor did they hinder the plt. from further proceeding upon and completing the said voyage, and from conveying and delivering the said cargo, as in the declaration alleged. 7. To the first count, that the deft. did what the plt. complained of by his leave and with his consent. 8. To the first count, that by the said damage and injuries which happened and occurred to the said ship as in the first count mentioned, divers parts and portions of the said cargo then on board of her were wholly lost, and the residue thereof was so much and so greatly injured and damaged that it was not and could not, nor could any part of it, be put into a proper state and condition to proceed upon the said voyage; and that, if the said residue of the said cargo had been reshipped, even after the best endeavours to put it into proper and fit order in that behalf, it never would or could have arrived at the said port of discharge in specie, or otherwise than in a state of decomposition, and it would have been valueless and useless to all parties, and in such a condition that the consignees thereof at the said port of discharge would not have received and would not have been, nor would anybody have been, liable to receive the same, or to pay any freight for the said goods; whereas the defts., for the general benefit of all parties concerned, sold the said goods; and that the breach complained of was the said disposition by the defts. of the said goods.

To the *indebitatus* counts, the defts. pleaded, never indebted, payment before action, and set-off for work done and money paid, &c.

Issue was joined upon each of these pleas.

The circumstances under which the action was brought, and the evidence adduced in support of the defence, are fully set out in the judgment.

The learned judge in his summing-up told the jury, that if a vessel starts upon her voyage and is so disabled by perils of the sea that she is obliged to put into a port, and is unable in her then state to proceed upon the voyage, the owner of the vessel is nevertheless entitled, if the voyage can reasonably be prosecuted, having regard to the interest of all parties concerned, to take out the goods, to repair the vessel, and to put the goods on board again and carry them to the port of destination, and so earn freight; that, if the owner does not choose to repair, the freighters get their goods and pay no freight; that, if the freighters do not choose to wait so long a time as will be required to put the ship in condition to continue the voyage, and by agreement between the parties, express or implied, they take their goods, they pay freight *pro rata*; and he left the following questions to them: First, did the master elect not to go on with the voyage, or did he elect to go on with the voyage, and did he give notice of such election to the shippers in a reasonable time? Secondly, whether under the circumstances the voyage could in their judgment have been reasonably prosecuted; whether the damage sustained by the goods was so great and the delay necessary to set it right such that the voyage could not reasonably be continued? Telling them that there must be a possibility of carrying a substantial part of the cargo to its destination, to make it the same adventure; and that of the reasonableness of time they must judge from all the surrounding circumstances.

The jury found that the goods were not in a reasonable state to send forward, and that the voyage could not reasonably have been prosecuted; but as to whether or not there was an election by the master to abandon the voyage, they could not agree. The verdict was thereupon entered for the defts.

Brett having on a former day obtained a rule to show cause why a new trial should not be had on the ground of misdirection, in this, that the judge misdirected the jury in telling them that the defts. had a right to pre-

vent the goods being carried on if it was unreasonable to carry them on having regard to the interests of all parties.

E. James, Q. C. and Milward showed cause.

Brett, Q. C. and Quain supported the rule.

July 6.—WILLIAMS, J. now delivered the judgment of the court.—This was an action brought by the master of a Spanish ship, the *Primera de Torrevieja*, against the defts. as charterers, upon a voyage from Liverpool to the Havanna, and for a lump sum of 1000*l*. The charter was dated at Liverpool, the 3rd June 1861, and it provided that bills of lading, for an amount of freight equal to the sum in the charter, should be handed to the master. The defts. loaded no goods of their own, but procured a general cargo from others. The bill of lading, the freight of which amounted to about 1210*l*., was made up, in round numbers, as follows:—Manchester and Bradford goods, 630*l*.; beer, 13*l*.; iron, 22*l*.; paint and earthenware, 85*l*.; and rice, 461*l*. The bills of lading were handed to the master, and he gave security for payment of the balance of the freight to be received in the Havanna. To this extent the defts. were interested in the ship and the prosecution of the voyage. The vessel left Liverpool on the 1st Aug. 1861, and, in the course of her voyage down St. George's Channel, on the 7th of the same month, struck on the Black-water Bank, off the Irish coast, where she lay with her cargo under water for a considerable time. The crew made their way to the shore with some difficulty. Assistance was obtained and the vessel and cargo saved and taken into Arklow in a damaged state. Then the plt. telegraphed for Mr. Spark, one of the defts., and that gentleman arrived on the 9th Aug. He had authority to represent the owners of the cargo, and he appears to have acted at the plt.'s request as agent of the ship, and to have incurred expenses upon his account in paying the salvage, and having the vessel taken to Dublin with a view to her repair, if it should be determined upon; and that, which is the only important matter with reference to this question, in engaging a vessel to take to Liverpool the portion of the cargo in respect of which the complaint arises, the rice, which represented alone more than one-third of the freight, was so damaged as to be admittedly incapable of being taken on. Before Mr. Spark acted in the matter, he required a written authority from the plt., which he received as follows:—"Arklow, 9th Aug. 1861. Gentlemen,—As you are here to represent the interests of the shippers of the *Primera de Torrevieja*, I hereby request you will act on behalf of the owners to the best of your judgment and ability, and this has my concurrence.—Jacob Blasco, Master." The vessel was taken to Dublin and there repaired. The repairs to the extent of 2300*l*. commenced in September and were finished in the following February. She then proceeded to Cardiff, where she obtained a charter. The defts., acting, as they alleged, upon the authority of the letter of the 9th Aug., at their expense engaged a vessel to take this part of the cargo in question to Liverpool, where it was examined, and the bulk of it was found to be much injured by the salt water, and in such a state that it would continue to get worse if it was kept. The evidence upon the character and amount of injury, except as to the rice, was conflicting. The jury believed the witnesses for the defence. One of them, the deft. Spark, stated that he decided on an immediate sale on the recommendation of two surveyors; that the woollen goods and the rest of the cargo were not in a condition to have been sent on under any circumstances; that it would not have been for the interest of the ship to have prosecuted the voyage under the circumstances, and that it was a great gain not to do so; that the packages were nearly all falling to pieces, the cargo in a very bad state, damaged in his opinion to the amount of 75 per cent., and

a great part of it could not be set right, and that it would have been to sacrifice the goods entirely to send them out to the Havanna; that they were available in this country, but would have been sacrificed by going out. Mr. Campbell, the broker to the Liverpool Underwriters' Association, stated that the goods were saturated with salt water, and rendered unmerchantable, which he explained to mean in such a condition that they could not have been disposed of at the Havanna as merchantable and sound goods, quite irrespective of any question of freight; that the Manchester and Bradford goods, the freight upon which was 630*l*., or more than half the entire freight, were perishing rapidly and quite unfit for reshipment to the Havanna, and that the great bulk of them would have been almost worthless; that the goods had been deteriorated to the extent of 55 or 60 per cent.; that the delay of a week in selling them would have made a material difference, and that unless they were recalendered and reprinted they would not have been available for any purpose in the Havanna. In answer to the jury he stated, that probably the printed goods might be sent back and reprinted, but that because of the rice having got into almost every package, there was an amount of mildew which rendered that unadvisable. Then Mr. Alexander, surveyor to the Irish Dock Board, confirms this evidence; and Mr. Fallows, a calenderer and packer, gave evidence to the same effect, and with respect to the blankets stated that a great many of them were in such a state that if you took them by one end the other would come off. He added that all the goods were not entirely worthless, but in his opinion they would have been so if kept for six months or less. Upon finding this state of the case the defts. came to the conclusion that the best thing to do for the parties was that the goods should be at once sold, which they were on the 12th Sept., when they realised the gross sum of 7687*l*. 18*s*. 2*d*. After the goods had been taken by the defts. to Liverpool, and before the sale, a correspondence took place between the defts. and the owners of the vessel, which ripened before the sale into a claim for the entire freight to the Havanna, or that the goods should be detained or forwarded in the vessel. In the result the sale was allowed to take place, but, as we shall assume, in favour of the plt. without prejudice to his rights. Thereupon the present action was brought, claiming, in one count, damages for wrongfully detaining and not carrying on the goods to the Havanna and earning freight; and in another count, freight for the carriage of the goods. This latter count, to which the defts. have pleaded a set-off of the moneys paid by them for salvage on account of the vessel, was abandoned at the trial before my brother Willes at Liverpool, and the plt. relied upon the first count, to which the set-off was inapplicable. The learned judge told the jury in effect that the defts. were justified in what they did, provided what they did was a reasonable course to take, having regard to the interests of all parties concerned; and the jury found for the defts., adding, that they believed their witnesses. A rule was obtained to set aside this verdict upon the ground of misdirection in telling the jury that, if it was unreasonable, having regard to the interests of all parties, that the goods should go on, the defts. were justified. This rule was argued in Hilary Term last before Erle, C. J., myself, my brother Willes and my brother Keating, and the court took time to consider. On the part of the plt. it was insisted, in an argument of uncommon force and learning, that the shipowners were entitled to insist upon having the goods returned to them, if any substantial part thereof was capable of being carried on in specie to the Havanna, and it mattered not how injurious this might be to the shippers, or even indeed to the shipowners; but that

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the shipowners had not the power to do it, and that the attempt to give up the voyage and the sale of the goods, however reasonable it might be, was a breach of the contract, and must be answered for in damages. This argument, that applied to the case where the agent of the ship in continuing possession of the goods did that which was wrongful and unauthorised, is sustained by a series of authorities cited in the argument, and which are unanswerable to the extent of showing that the shipowners are entitled to the entire freight, unless there was a discount. It is inapplicable to a case where the goods are taken absolutely and unconditionally by consent on both sides, and ordinarily in such a case the shipowners become entitled to freight *pro rata*. The jury were not agreed upon the question whether the goods were retained absolutely and unconditionally. Whether this argument is applicable to the immediate case of the goods being returned, not absolutely, but on the authority of the charterers to act for the ship as well as for the cargo, is the question we have to consider. That question divides itself into two branches: first, as to the lawfulness of the act of the defendants apart from the express opposition of the owners to the sale taking place. As to this we think it clear, that the sale of the damaged goods was within the scope of the defendants' authority, under the letter of the 9th Aug., provided such a sale was a reasonable course to be taken, or was to the interest of all parties. Under the extraordinary circumstances, it became the duty of the plaintiffs, as master, to act for the best with a due regard to the safety of the cargo. A great responsibility rested upon him with respect to this duty which he was then entrusted with. The state of the cargo was sure to raise difficulties at the Havana, and the master was answerable for part of the freight, so that at the best the certain present risk and inconvenience of keeping the cargo could only be paid for in a future and uncertain profit. Considerable expenses had been already incurred, and it was necessary to incur more. The vessel had been lightened of the greater part of her cargo, while she herself was in a state in which it was doubtful whether she could ever be repaired. Under these circumstances, the plaintiffs gave this authority to the defendants, upon which they declined to act. The circumstances, therefore, under which the letter of the 9th Aug. was given established beyond a doubt the intention that the defendants, receiving the cargo did not simply consent to take upon them the burden and expense of reinstating the vessel, which they were under no obligation to do, but either absolutely to put an end to the voyage, or, at least, do what they had authority to do as best they could, having regard to the interests of all parties. Indeed, the plaintiffs, though he stated that he gave no authority to sell the goods, and that they went to Liverpool because Mr. Spark said it was the best place to try and repair them, admitted that Mr. Spark's offer was to do his best for him as well as the cargo, for which the letter of the 9th Aug. was given, and though the plaintiffs left it to Sparks to do the best he could, the defendants' letter had an authority to sell, unless that was countermandable and countermanded by the owners of the vessel. In our opinion, however, it was an authority which could not under the circumstances be countermanded after the defendants had incurred expenses in acting upon it, as they did, *inter alia*, by incurring expenses in taking the goods to Liverpool long before any objection was made. In our opinion, therefore, the plaintiffs' argument has failed, and having carefully considered the evidence we think the verdict for the defendants is in accordance with the manifest justice of the case, and therefore the rule must be discharged.

Rule discharged.

Phillips and Son, plaintiffs' attorneys.

Gregory, Rowcliffe and Skirrow, defendants' attorneys.

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Tuesday, Oct. 6.

(Before Mr. Commissioner GOULBURN.)

Re ANON.

Witness—Costs—Sect. 250 B. L. C. A. 1849.

Where, upon an adjudication in the first instance, a witness is summoned for examination as to the bankrupt's property, he is entitled to his expenses upon the scale of costs the master shall consider applicable to his grade and condition in life.

In the matter of an adjudication in bankruptcy before the registrar a dispute arose respecting the expenses of a witness who had been summoned and charged with having the bankrupt's property in his possession or under his control, and upon an appeal to the commissioner,

Lawrence stated that the witness having been summoned and sworn, objected to give his evidence unless his expenses were first paid. The witness resided in Monument-yard, and he submitted that no witness living in London and having had his conduct money of one shilling tendered to him had any right to object to give evidence.

Mr. Commissioner GOULBURN referred to sect. 250 of the 12 & 13 Vict. c. 106, which enacts, "that every persons summoned to attend before the court as a person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall have such costs and charges as the court in its discretion shall think fit; and every witness summoned to attend before the court shall have his necessary expenses tendered to him in like manner as is now by law required upon service of a subpoena to a witness in an action at law."

Lawrence.—Suppose this was an action at law, all that this witness would be entitled to was 1s.

Mr. Commissioner GOULBURN.—That depended upon the grade and condition of life of the witness.

Lawrence.—In some cases, as a matter of courtesy, a witness got his guinea; but a man could not take the non-receipt of that as a preliminary objection.

Mr. Commissioner GOULBURN.—I differ from you on that point. You had better go before the master and ascertain what the witness is entitled to.

Lawrence said:—My objection is that a witness cannot take this objection in the first instance.

Mr. Commissioner GOULBURN.—Whatever the master says he is entitled to he shall have.

The master being then absent, it was arranged that the witness should have whatever that officer declared him entitled to, and the case proceeded.

Wednesday, Oct. 7.

(Before Mr. Commissioner GOULBURN.)

Re JOHN HENRY KING.

Disobedience to order of court—Commitment of bankrupt—Sect. 226 of the Bankruptcy Act 1861.

Applications to commit a bankrupt for non-compliance with an order of the court, under sect. 226 of the Bankruptcy Act 1861, must be made upon affidavits of facts duly filed, when a rule nisi upon the bankrupt to show cause may be granted.

There must be personal service of the rule upon the bankrupt and notice to the bankrupt's solicitor will not be sufficient.

This was an application to commit the bankrupt under sect. 226 of the Bankruptcy Act 1861, which invests the court with power to commit persons wilfully disobeying any rule or order of the court. The section enacts: "If any person shall wilfully disobey any rule or order of the court, duly made for enforcing any of the purposes and provisions of this Act, the court

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may, by warrant in the form contained in the schedule (F) to this Act annexed, commit the person so offending to the Queen's prison, or to the common gaol of any county, city, or place where he shall be found or where he shall usually reside, there to remain, without bail or mainprize, until such court, or the Court of Appeal in Chancery sitting in bankruptcy, shall make order to the contrary." The bankrupt had filed his petition in Aug. 1862, and it being alleged that he had disposed of the bulk of his property shortly before his bankruptcy, and filed no accounts, the court ordered him to file a goods, cash and deficiency account, which, not being done, an application was made for his committal in June last, when his Honour thought there should be a personal service on the bankrupt.

Brough now renewed the application, and intimated that with great difficulty they had at length served the bankrupt with notice of this application. They were in this peculiar position: his client, having proved, could not arrest the bankrupt, and their only resource was an application to the court under this section.

His HONOUR said, he did not remember any similar application under this section. Was there any precedent for issuing a warrant under this section to commit a person for not filing an account?

Sargood said, that in a previous case a suggestion had been made to commit a bankrupt under similar circumstances; but no motion had been made.

The bankrupt appeared and explained that he had not the means of complying with the order of the court. He had done all he could.

His HONOUR intimated that there should be a rule to show cause upon affidavits filed, and a rule being granted, it should be served upon the bankrupt.

Brough said that, as they had great difficulty in effecting service, would service upon the bankrupt's solicitor be sufficient?

His HONOUR replied in the negative. Before a commitment, personal service was indispensable.

Rule nisi granted.

Thursday, Oct. 8.

(Before Mr. Commissioner GOULBURN.)

Re W. S. C. LAURENCE.

Damages recovered in a suit in the Divorce Court—Opposition.

Damages and costs recovered against a co-resp. in the Divorce Court is no ground of opposition to the order of discharge under the Bankruptcy Act 1861.

This was a meeting for the last examination and order of discharge. The bankrupt was described as formerly a milliner and draper of Stratford-le-Bow, but now a commercial traveller of Somers-town. The bankrupt, who had been in custody from the 17th June to 29th July, had petitioned *in forma pauperis*, and sought to be relieved from debts and liabilities amounting to 826*l.* 18*s.* 1*d.*, having no assets. In the list of creditors was entered the name of "F. Derry, Hendon, Middlesex, a creditor for the sum of 269*l.* 17*s.* 4*d.*, damages and costs in a suit of divorce *Kerry v. Kerry and Laurence*, in which I was co-resp. This creditor sued me and obtained judgment, and issued execution." The solicitor for the detaining creditor stated to the commissioner that his client had the bankrupt in custody for debauching his wife, and intimated his wish to oppose the granting of the order of discharge on that ground.

Mr. Commissioner GOULBURN said it had been decided that there was nothing in the late Act to meet such a case. A man recovered damages for a most grievous wrong, and it was immediately got rid of by an application to that court. He thought it a great hardship and injustice, but it was no ground of opposition, and the order of discharge must be granted.

Order of discharge granted.

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COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

Nov. 19 and 21.

STUDDART v. JELICO AND ANOTHER.

Policy of insurance—Interest—Stat. 3 & 4 Vict. c. 105, ss. 53, 54—Operation of statute.

Sect. 53 of stat. 3 & 4 Vict. c. 105, extends to the case of a policy of insurance effected before the passing of the statute, but becoming payable after its passing; and when such a policy was sued upon, it was held that the jury was justified, the proper notice having been served, in giving the plt. interest upon the principal sum secured by the policy.

This was a motion on behalf of the plts., to show cause against a conditional order obtained by the deft. on the 4th Nov., directing that the verdict had for the plts. at the last summer assizes for the city of Limerick, before Christian, J., should be set aside, and a verdict entered for the deft. instead thereof, pursuant to leave reserved, on the ground of misdirection of the learned judge. The action was brought by the executors of Mr. Jonas Studdart, against the deft., the secretary to the Eagle Insurance Company, upon a policy of insurance, dated the 19th Oct. 1827, upon the life of the said Jonas Studdart, for the sum of 500*l.* By the particulars indorsed on the plaint, there was claimed (besides the principal sum of 500*l.*) 80*l.* 4*s.* 11*d.*, for interest from the 24th Sept. 1859, till the 29th April 1862, the day of the commencement of the action, with further interest until paid. The deft. lodged in court 500*l.* The only issue was, whether the plts. had, by reason of the breach by the company of their agreement, sustained any, and what, further or greater damages than the said sum of 500*l.* Jonas Studdart died on the 25th Sept. 1859. Several letters passed between his executors and the company, which at first declined to pay the policy without some proof of the age of Jonas Studdart when he effected it. On the 5th Nov. 1861 the plts.' attorney wrote to the officers of the company a letter, stating that he had peremptory orders to proceed for recovery of the amount of the policy, with interest, if not paid forthwith. The amount not having been paid, the present action was brought. Upon the trial of the issue stated above, the learned judge ruled that the letter of the 5th Nov. 1861 amounted to a demand of interest within sect. 53 of the stat. 3 & 4 Vict. c. 110, and that that statute affected policies of insurance in existence at the date of its passing, and left as a question to the jury, whether they thought fit to allow interest from the 5th Nov. 1861 to the issuing of the writ. To these rulings and directions counsel for the deft. objected, and his Lordship reserved liberty for the deft. to apply to enter a verdict for the deft. in case he should not have so ruled. The jury found for the plts. 12*l.* 1*s.* 8*d.* The only question upon the present argument was, whether interest was payable upon a policy of insurance effected before the passing of the statute 3 & 4 Vict. c. 105, and in existence at the date of its passing.

Clarke, Q.C. (with him *Barry, Q.C.* and *M. B. Smith*) for the plts.—If any question should arise upon the subject, *Mowatt v. Lord Lonsborough*, 3 E. & Bl. 307, and s.c. on appeal, 4 E. & Bl. 1, are authorities to show that the letter of the 5th Nov. 1861 was a sufficient demand of interest. Then, as to the main question in the case. Previous to the statute 3 & 4 Vict. c. 105, interest was not recoverable upon demands of this description. Sect. 53 of that statute enables a party to recover interest. It will be said

(a) From the Irish Jurist, by permission.

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that, because certain policies are provided for by sect. 54, policies of insurance cannot come at all within sect. 53. But it is plain that *prima facie* they do come within it; the amounts secured by them are sums payable "at a certain time" in one sense, and certainly are sums payable "otherwise," within the very words of the section. The words of the section are large enough to include policies then in existence. Sect. 54 applies only to policies effected after the passing of the Act. There is no case directly bearing upon the present question.

Heron, Q. C. (with him *Jellett*) for the deft.—The Legislature having provided for policies of insurance in certain cases, by sect. 54 of the Act, they cannot be held to be within sect. 53. The only true way to construe the Act is by having regard to the rule, that, except in cases expressly mentioned, a statute is to be held to be prospective only and not retrospective. [*HAYES, J.*—The sum secured by the policy never became a sum payable until after the passing of the Act, although the contract was entered into before the Act. The Legislature might have intended to provide for the case of policies made after the Act by the 54th section, and as to policies existing at the date of the Act, to leave the parties to take the course of making a demand of interest, as pointed out by sect. 53.] An Act of Parliament is not to be taken to vary contracts existing at the date of its passing. At common law no interest was payable on a contract which did not expressly provide for it:

Woolley v. Jackson, 8 El. & Bl. 778;
Moon v. Durdan, 2 Ex. 35;
Perry v. Skinner, 2 M. & W. 471;
Broom's Legal Maxims, 29;
Edmunds v. Lawley, 6 M. & W. 285;
Moore v. Philips, 7 M. & W. 576;
Chappell v. Purday, 12 M. & W. 363;
Ashburnham v. Bradshaw, 2 Atk. 36;
Attorney-General v. Lloyd, 3 Atk. 541;
Gilmore v. Shuter, 2 Lev. 487.

Assuming that the sum secured by a policy of insurance is a sum payable either "at a time certain" or "otherwise," there was no object in introducing the 54th section.

O'BRIEN, J.—The sum in this case is a very small one; but the amount must be thrown out of consideration, and we must decide the case upon the law only, without any reference to the merits or demerits of the opposition made by the company. It has been contended that policies of insurance are not within sect. 53 of the statute 3 & 4 Vict. c. 105, because they are provided for by sect. 54. It has been remarked by my brother *Fitzgerald*, that a certain class of policies, as marine and fire policies, would not be provided for by the 53rd section. Then the question is, whether, because life policies effected subsequently to the passing of the Act are expressly provided for by the 54th section of the Act, we are prevented from giving their natural construction to the words of the 53rd section, on which construction they would include policies effected after the passing of the Act, as well as the 54th section. Now, where the words are large enough to include one class of a particular thing, I am yet to learn that we are to restrict their meaning because another class of the same thing is provided for by another section. That would not, in my opinion, be sufficient reason for restricting the clear and natural construction of the words of the 53rd section. Well, the next argument for the conclusion at which we arrive is, that the words of the 53rd section are clearly sufficient to include a policy such as this. The sum secured by it is a debt or sum certain. There is nothing to be implied—no reason why this policy effected before the passing of the Act should not be included in the section. It is difficult to separate this argument from the other, that the

operation of this section is not retrospective in this sense, that it should not be considered to apply to debts which had their inception before the Act, and we were told by Mr. *Heron* that there was no case leading to the conclusion that any of the sections of the Act were to be considered as retrospective. Other sections of the Act, however, have been held to apply to a state of things existing before the Act, and that, too, in cases of much greater hardship than the present one. A question upon this very 53rd section was raised in the case of *Berrington v. Phillips*, 1 M. & W. 48. The Act upon which that case came before the court was the 3 & 4 Will. 4, c. 42, the 28th and 29th sections of which are analogous to those the effect of which we are now discussing, and that Act, it is to be remembered, was passed in 1833. The question in the case arose upon the bill of costs, the last item in which bore date in 1831. A claim for interest was made and resisted, but upon other grounds than the Act not being retrospective, and finally was rejected, but it never occurred to any one to suggest that the costs were incurred before the Act, and that therefore the Act did not apply. The matter, however, does not rest there. Looking at the subsequent sections of the same Act, we find an important provision relating to writs of error in sect. 30, which enacts that if any person shall sue out any writ of error upon any judgment in any personal action, and the Court of Error shall give judgment for the deft. therein, then interest shall be allowed by the Court of Error for such time as execution has been delayed by such writ of error for the delaying thereof. That section is clearly prospective, and consequently, on that ground, the court, in the case of *Burn v. Carvalho*, 1 Ad. & Ell. 895, where the writ of error had been sued out before the Act, granted an application to disallow interest which the master had allowed. In a note to that case, another case is referred to upon another section of the same Act. That is the case of *Freeman v. Moyes*, 1 Ad. & Ell. 338. The 31st section of the Act gives costs against executors who have been nonsuited, or against whom a verdict has passed, and in the case which I have mentioned it was held that where an action was commenced by an executor before the Act, and the trial took place after the Act, and there was a verdict against the plt., he was liable to the costs. We were referred to Lord Tenterden's Act. There are repeated decisions showing that that statute applies to cases which had arisen before its passing. Under these circumstances, it is too much to contend, where the words of the statute are large enough to embrace the case of policies in existence at the passing of the Act, and the words of another section expressly apply to policies effected after the Act, that we are bound on the general doctrine to give judgment for the deft. In my opinion we are not so bound, and the point must be ruled in favour of the plts.

HAYES, J.—It may be some satisfaction to have a judicial decision on the question in this case; but I confess I thought, on a reading of the Act, that the point was clear enough without any decision. It appears to me, on the 53rd section, that without giving it a retrospective effect, we may come to a conclusion in this way. It deals only with "debts or sums certain, payable at a certain time or otherwise," and it would seem to me that this means, that wherever after the passing of the Act there should be a debt or sum certain, payable at a time certain or otherwise, then the creditor to whom that money is so payable should not be at the mercy of his debtor, to be kept aloof from time to time by the debtor refusing to pay that which was properly due, and that when he would at last be driven into a court of justice, he should not merely get a verdict which would fail to do complete justice, by not giving him interest, but the Act says

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the jury may give interest where the debtor will not pay the debt which he fairly owes. Apply that here. In 1827 the policy is effected; but it never becomes a debt or sum certain until Mr. Studdart died, which is not until 1859, nineteen or twenty years after the Act passed. Then for the first time it can be said that there is a debt or sum certain, and then the Act applies, as I think, without any retrospective operation being given to it. The company refuse to pay, and a jury says they ought to pay, and we think that there is law to make them pay, both principal and interest. The 53rd section is large enough to give the interest, and we do not think that its force is taken away by the 54th section because that section happens expressly to give interest on policies of assurance made after the passing of the Act.

FITZGERALD, J.—I also think that the 53rd section applies to debts which have become payable after the passing of the Act, and that there is no foundation for the argument that you must exclude from the operation of the Act all contracts entered into before its passing. I think, in that sense, the Act is retrospective, where the contract is entered into before the Act, and the debt becomes due after it; I do not think there is any hardship in so holding, as the party gets notice that interest will be demanded, and can avoid it by paying what he really owes. A policy of insurance on a life is, no doubt, a debt. I do not think it a debt payable at a time certain, but it is a debt payable otherwise than at a time certain, namely, at a time to be ascertained by the occurring of a certain event. The case, then, is within the words of the 53rd section, which are general, and intended to apply generally. I asked if there would be any difficulty at all in the case but for the 54th section. There would be none; and that section appears to me to raise no difficulty. It puts all policies effected after the Act upon this footing, that the jury may give damages, in the nature of interest, over and above the money recoverable upon them, without any notice being served. The other section, which embraces all policies, requires the service of a notice claiming interest.

Conditional order discharged, with costs.

COURT OF COMMON BENCH.

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

Wednesday, May 6.

BATES v. M'CORMICK AND ANOTHER.

Cruelty to animals—Construction of 12 & 13 Vict. c. 92, s. 2.

To cause one cock to fight another is an offence punishable under the 2nd section of the 12 & 13 Vict. c. 92.

A cock is an "animal" within the meaning of the 2nd section.

Coyne v. Brady, 7 Ir. Jur. N. S. 66, distinguished.

The 2nd section of 12 & 13 Vict. c. 92, deals with offenders who, if the offence were a felony, would be principals in the first degree; the 3rd with those who would be accessories before the fact or principals in the second degree: (per Christian, J.)

This was a case stated by the justices of the peace for the county of Longford, assembled at Longford, for the opinion of the Court of C. P., pursuant to 20 & 21 Vict. c. 43, s. 2. The case stated that, at a petty sessions holden on the 13th April 1863, the defendants were charged, by a certain summons, for that they, on the 17th March last, at Longford, were guilty of cruelty to animals in having encouraged, aided, or assisted in fighting cocks, contrary to the 2nd section of the 12 & 13 Vict. c. 92; that at the hearing of the said complaint it was proved, on the part of the complainant, Constable Henry Bates, of Longford, that the defendants

cruelly treated, abused and tortured certain cocks by fighting same on the 17th March last; that it was contended, on the part of the defendants, that cock-fighting did not come within the meaning of the 2nd section of the Act; that the justices being of opinion that the offence so committed rendered the defendants legally liable under the statute, gave judgment against them, and adjudged that each of the said defendants should pay respectively the sum of 1*l.* 1*s.* as a fine, and 1*s.* costs.

Waters (with him *Sullivan*, Serjt.) claimed to be heard first in support of the conviction, and cited

Bridge v. Parsons, 32 L. J., N. S., 95, Mag. Cas.

J. A. Curran, jun. (with him *W. Irvine*) contended that the appellants' counsel had a right to be heard first, and cited

W. and L. Railway Company v. Kearney, 12 Ir.

C. L. Rep. 224;

Fosberry v. W. and L. Railway Company, 8 Ir.

Jur. N. S. 64;

Coyne v. Brady, 7 Ir. Jur. N. S. 66.

[CHRISTIAN, J.—It is a mistake to call the parties appellants and respondents at all; it is a matter between the justices and the court.] It was suggested by the court that the counsel in support of the conviction should not press the point until the members of the court had communicated with the other judges.

J. A. Curran, jun. cited

Clarke v. Hague, 8 Cox's Crim. Cas. 324;

Coyne v. Brady, 7 Ir. Jur. N. S. 66;

Morley v. Greenhalgh, 32 L. J., N. S., 93, Mag. Cas.

These were all decided on the 3rd section (a), the concluding part of which would be perfectly useless if, under the more general words of the 2nd section, cock-fighting could be put down in any place. [MONAHAN, C. J.—The 3rd section applies to any one who aids, encourages, or assists; but the charge against your clients is, that they fought the cocks themselves.] In *Bridge v. Parsons*, 32 L. J., N. S., 95, Mag. Cas., which will be relied on on the other side, one cock had its leg broken, and therefore was tortured; but though two cocks were fought, they were not both tortured. [MONAHAN, C. J.—Was it put upon the defenceless condition of the cock?] Yes.

Sullivan, Serjt. and *Waters* contra.—As a matter of fact it is found in this case that the defendants tortured the cocks by fighting, and the quantum of torture has nothing to do with the question. There are two points of law to be considered: whether fighting is torturing within the 2nd section, and whether a cock is an animal within the 2nd section. *Bridge v. Parsons* is conclusive. The point of that decision did not lie in the fact that one cock was disabled, as has been stated. Upon the argument that there had been cruelty, Wightman, J. says: "You may assume that that was so; but the more difficult question is, whether the cock is an animal within the meaning of

(a) 12 & 13 Vict. c. 92, s. 2. And be it enacted that, if any person shall, from and after the passing of this Act, cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall, for every such offence, forfeit and pay a penalty not exceeding 5*l.*

Sec. 3. And be it enacted, that every person who shall keep, or use, or act in the management of any place for the purposes of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid. Provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed to be the keeper thereof. And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence.

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the statute." It was held that he was; and Wightman, J., in giving judgment, says: "The Legislature, therefore, may have intended to exclude from sect. 2 animals of a wild nature, such as foxes, for instance, so that no one should be liable for practising the ordinary sports of the field; and therefore they have limited the operation of sect. 2 to animals of a domestic nature. I think, therefore, that this case falls within the 2nd and 29th sections; and I am well disposed to put such a construction upon the words of the Act if that construction may have the effect of preventing such cruelty as we find described in this case." Fighting is torturing; and the cock is an animal. As to *Coyne v. Brady*, this court decided that case upon the 3rd section; but it never expressed, and never meant to express, any opinion on the 2nd. It is as great cruelty to set cocks fighting in a private yard as in a place kept for the purpose.

W. Irvine in reply.—If the argument on the other side were to hold good, there would be no use in the 3rd section being added to the 2nd. It is assumed that fighting cocks and torturing them are the same thing, but the true assumption is the reverse. The justices have stated in the case that the defts. have tortured the cocks by fighting; but the English courts have decided that that can only take place in a place kept for the purpose. The justices do not aid themselves by jumbling together the 2nd and 3rd sections. Unless *Coyne v. Brady* is overruled this conviction must be quashed. *Bridge v. Parsons* was decided on its own merits. A great deal of weight was attached to the fact that the cock was maimed and disabled. *Ipsa facto* that cock was tortured. In the present case there is not even mention made of spurs being used. To allow the cock to follow its own wicked nature is not torturing it.

MONAHAN, C. J.—We do not entertain any doubt but that this case comes within the 2nd section of the 12 & 13 Vict. c. 92. *Coyne v. Brady* was decided in reluctant obedience to a case in England, in which it was held that the latter part of the 3rd section referred to publicly fighting cocks in a place kept for the purpose. It is not necessary to consider that now, for the present case is stated under the 2nd section [his Lordship read the section]. In *Bridge v. Parsons* it was decided that a cock is an animal within this section, and we think that was rightly decided. The next question is, whether the causing one cock to fight another is causing or procuring the animal to be tortured. We do not doubt but that doing so in the manner described in this case is an offence within the 2nd section.

CHRISTIAN, J.—The 2nd and 3rd sections deal with distinct classes of offenders. The 2nd deals with those who, if the offence were a felony, would be principals in the first degree. The 3rd deals with those who would be accessories before the fact or principals in the second degree. I fasten on the words "cruelly abuse." Unless fighting cocks be not cruelly abusing them, this conviction must be affirmed.

Conviction affirmed.

This being the first case, and the Crown being the prosecutor, no costs were given.

COURT OF EXCHEQUER.

Reported by H. J. WRIXON, Esq., Barrister-at-Law.

Tuesday, Nov. 11.

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Liability of attorney for the undertaking of his clerk. Attorney held bound by the undertaking of his clerk, though he, on the same day, in another place, refused to give the same undertaking to the agent of the person to whom his clerk gave the promise.

Armstrong, Serjt. (with him *P. White*) moved that

a judgment which had been obtained, and on which a writ of *fi. fa.* had issued, should be set aside on the ground that it had been obtained in violation of an agreement between the attorneys in the cause. It appeared that Mr. Strange, the attorney for the deft., being desirous to effect a compromise, called at the office of Mr. Whitestone, the plt.'s attorney, in Waterford, on the 12th July, where he saw a Mr. Thornton, who was acting as chief clerk of Mr. Whitestone. Mr. Thornton gave him, on behalf of his principal, a written consent to extend the time for pleading from the 12th, which was the last day, till Tuesday, the 15th, deft. agreeing to take short notice of trial. On the same day, Mr. Whitestone had seen Mr. Strange's Dublin agent, and had refused to extend the time of pleading. On Monday, 14th July, Mr. Strange sent a notice to Mr. Whitestone, reciting the consent of the 12th, and cautioning him against marking judgment. Mr. Whitestone replied that he would mark judgment forthwith, unless deft. agreed to plead *issuabily*, in addition to the terms stipulated by Mr. Thornton. This not being done, judgment was marked on Tuesday, and execution issued for 9*l.* 1*s.* 8*d.* and 4*l.* 7*s.* 6*d.* costs. Strange had given notice of an application for obtaining the plt.'s security for costs on Tuesday, 15th, serving notice after four o'clock on Tuesday, and it was suggested that such notice was only served for a colourable purpose.

J. E. Walsh, Q. C. (with him *T. Harris*) appeared in support of the judgment, and contended that, as Mr. Strange had withheld from Mr. Thornton the fact that he had issued a preliminary notice for security for costs, the extension of time was obtained under misrepresentation of facts, and was not binding.

PROOT, C.B.—This is an important case in reference to the dealings between professional men. There can be no doubt that Mr. Thornton was acting *bona fide* as a conducting clerk of Mr. Whitestone's, and that he was held out by Whitestone as invested with full authority to act in his absence; independently of the fact that his acting in his master's absence furnishes grounds for imputing to him authority. Moreover Whitestone seems to have recognised his authority, by ratifying his conditions as far as they went, and then going on to impose a new condition. Should we then bind the attorney by the acts of his clerk, who was the only person who could act for him? I am clearly of opinion that Whitestone was bound by the act of his clerk, and that by the terms proposed by that clerk we must now act. This quite removes the question of whether there is any defence on the merits or not. In some cases where a judgment is set aside for irregularity, there is an affidavit of merits required. But where the judgment is marked in violation of a contract, the party who violates the contract cannot prevent the defence being met on the file by requiring an affidavit of merits. How, then, has this contract been violated? On the 12th the undertaking was given. After this, and before judgment was marked, Whitestone demanded of the deft. that he should plead *issuabily*. He had no right to impose such a condition. Nothing could have been more reasonable than the arrangement of the 12th. That arrangement was simply, that the deft.'s time for pleading should be extended, and that he should take short notice of trial, which was the only condition imposed. The plt.'s attorney relies on another fact. The deft. appears to have contemplated applying for security for costs, and he did serve a notice for motion on the 14th, and if I thought that he had endeavoured, by the undertaking of the 12th, to throw his adversary off his guard, then the plt. could certainly complain of a breach of faith. But here there was no dissemblance. The statement that the deft. had not prepared any pleas is not supported by the affidavits. It is sworn on the deft.'s part that

the pleas were prepared and transmitted to Dublin for the purpose of being filed. In this case, the undertaking to give time has been violated, judgment marked, and an execution founded on it. It cannot stand. Deft. must get the costs of this motion, and the costs incident to setting aside this judgment. Who is to pay those costs? Is a seafaring man like the plt., who is now out of Ireland, and who was so at the time of this unjust proceeding? Certainly not. I clearly think that they must be paid by the person who is the cause of this litigation—the plt.'s attorney. The execution of course falls, and all the costs are to be paid personally by the plt.'s attorney.

COURT OF PROBATE.

Reported by W. R. MILLER, Esq., LL.D., Barrister-at-Law.

Nov. 13 and 17.

TODD v. THOMPSON.

Acknowledgment by testator—Express or virtual.

A will was signed by the testator in the absence of the two attesting witnesses, and the survivor of them in his evidence negatived an express acknowledgment of them, but admitted that the will was on the table, signed, before the testator, and that it was handed over to them to sign. The drawer and the deft., who were present, swore to an express acknowledgment:

Held, on the evidence, that there was an express acknowledgment; but, besides, that there was enough to constitute a virtual one in law.

This was a cause heard before the judge without a jury, to try the validity of the will of the deceased John Todd, bearing date the 29th June 1858, propounded by the deft. The plea was undue execution. The evidence had been on a former day given before the judge, and the points raised now came on for discussion.

Dr. Ball, Q.C. and M'Gusty, for the deft., contended that the will was sufficiently proved. The question was merely whether, on the evidence, the acknowledgment by the testator of his signature was proved. There are three witnesses who were present; of these, two agree in their account of what occurred, and one disagrees, the difference being that he says, O'Hare, the drawer, did not ask (as the other two say he did) the deceased if the paper on the table was his will, and that the deceased did not say it was; but this is not even necessary to be done if the acknowledgment can be inferred from the conduct of the deceased. He was sitting at the table with the will, signed, before him, as all the witnesses admit, and the will was handed over to them to sign:

- 1 Jarm. on Wills, 90, 2nd edit.;
- Gwillim v. Gwillim, 29 L. J. 31, and
- Lloyd v. Roberts, cited in that case;
- Goods of Holdgate, 1 S. & T. 261;
- Falls v. Jackson, 6 No. Ca. App. 1;
- Leach v. Bates, lb. 699;
- Goods of Bosanquet, 2 Rob. 577;
- Baylis v. Sayers, 3 No. Ca. 22.

Dr. Chatterton and F. M'Blain for the plt., contended that there was no evidence sufficiently satisfactory as to acknowledgment. There must be some act on the part of the deceased to show an adoption of the signature. Here he was only passive. Counsel relied on the discrepancies in several affidavits made by the witnesses from the *vis à voce* evidence to discredit them, which is fully detailed in the judgment.

- Goods of Summers, 2 Rob. 295;
- Moore v. King, 3 Curt. 243;
- Goods of Davis, 2 Rob. 337;
- Burgoyne v. Showler, 1 Rob. 19. *Cur. adv. vult.*

Nov. 17.—KEATINGE, J.—The question in this case

is, whether a sufficient acknowledgment by the deceased of his name at the foot of the will has been made by him. It is conceded on all sides that this will was not signed in the presence of the two attesting witnesses, but of a man named O'Hare, who drew it and read it to the deceased, who signed it in his presence. O'Hare then went for the two witnesses, who were down stairs, and brought them up to the room in which the deceased was sitting at the table, and they then attested the will. The will was lying on the table where the deceased was sitting; and the question raised on the evidence which has been given is, whether there was then a sufficient acknowledgment by the deceased of his signature to the will. There is a controversy among the witnesses as to what then occurred. O'Hare, the drawer of the will, swears that when he brought up the two witnesses he asked the deceased in their presence if it was his will? and that he replied that it was; and that then the witnesses attested it. If that is believed there was clearly a sufficient acknowledgment; but it is argued for the plt. that O'Hare is not to be believed, as he made an affidavit when an application was made for probate in common form, in which there was a statement inconsistent with his evidence on this trial; and that one of the attesting witnesses also then represented what occurred in a different way; and also that he made a somewhat inconsistent statement in an affidavit in Chancery in certain proceedings had under a decree there to take an account of the assets of the deceased. But on looking at those affidavits I do not see that the affidavits were so prepared as to render it necessary for the parties to state that the deceased acknowledged the will in the way they have deposed to here. It appears that a matter occurred, which is in evidence here, which may have misled the professional gentlemen who prepared the affidavits. It now appears that after the deceased had signed, and after the witnesses had attested, he and all the witnesses went down stairs, and then one of them said, "I doubt the will is not right, as we did not see the deceased sign his name;" and that the deceased refused to sign his name again, but afterwards opened the envelope in which the will was and acknowledged his signature again to the witnesses. This is mentioned in the two affidavits, but that in Chancery says, "and then the witnesses attested." But affidavits, I regret to say, are often loosely drawn; and the witnesses probably told the solicitor that the deceased had only acknowledged and not signed the will in their presence, without mentioning the fact of there being two acknowledgments, one before and the other after the attestation; and he drafted it in that way. The deft. Thompson was present, and he confirms O'Hare in his account; but then Scott, the surviving attesting witness, says positively that no question was asked at all about the will being the deceased's will, but he admits that it was on a table where the deceased was sitting, and that the will was drawn over to the witnesses who attested. The general rule is, that where one or two persons swear positively to a matter of fact, and another swears that it did not occur, giving credit to all the witnesses to intend to tell the truth, the persons swearing to the affirmative are to be credited, as the most that can be said as to the other is that he has no recollection of the matter. And in the evidence of Scott there is a matter which suggests that this is what really did occur. He says that when they came down he said to Crawford, his co-witness, that he doubted that the will was not good, as they did not see the testator write his name. But, according to his evidence, what he ought to have said was, that the deceased never said a word about it being his will. I therefore am clearly of opinion that on the evidence there was an express acknowledgment by the testator of his signa-

ture, and that the party propounding this will has made out his case. But, supposing I am wrong in that view of the evidence, and that I ought to hold that the deceased was not asked about it being his will at all, and that he did not in terms acknowledge it as such, nevertheless I should still hold that there was here a sufficient acknowledgment in law to sustain this will. It is not necessary that the acknowledgment should be in any particular form nor in any particular words, nor in words at all; it is enough if the conduct of the person on the occasion amounts to an acknowledgment. Now the fact of the will having been signed before the two witnesses came up—the will being on the table—the witnesses being those whom the testator sent for, and the will having been handed over to them to attest, all amount to sufficient conduct to create in law an acknowledgment. The case of *In the Goods of Summers*, 2 Rob. 295, would appear to be an authority against the latter view; but it is material in the decisions in the Prerogative and Probate Courts to consider whether such decisions were made *ex parte* or in a cause, as a judge may, without objection or without argument, in the former case make an order which on argument in a cause when the will is propounded he would not adhere to. Besides, I do not see that that case, though decided in 1850, has ever been quoted or acted on in any other case; and the case of *In the Goods of Bosanquet*, 2 Rob. 577, is exactly in point with this case. I therefore would, if necessary, hold this a good *virtual* acknowledgment, but I am equally clear it was an express one. I therefore decree in favour of the will, and give the deft. his costs; but, as the estate is not considerable, as between party and party and not solicitor and client.

Common Law Courts.

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

Feb. 4, 5 and 11.

(Before COCKBURN, C.J., WIGHTMAN, WILLIAMS, CROMPTON, WILLES, BYLES and KEATING, JJ.)

HOLMES v. CLARKE.

Master and servant—Factory Acts, 7 & 8 Vict. c. 15, and 19 & 20 Vict. c. 38—Injury to adult servant from unfenced dangerous machinery—Liability of master for—Contributory negligence.

Plt., a servant of deft., was employed to oil certain mill machinery, of a nature required by the statute to be fenced, and which at the commencement of the employment was properly fenced, but the fence subsequently became broken. Upon plt.'s complaining of this to deft.'s manager, in the deft.'s hearing, the manager promised that the fence should be presently repaired, and plt. thereupon continued in the service; but before the fence was repaired, and whilst plt., in discharge of his duty, was oiling the machinery, an accident happened by which, without negligence on plt.'s part, he was injured. An action having been thereupon brought by him against his master the millowner, the Court of Ex. Ch.

Held (affirming the decision of the Ex.), that the master was liable, and that plt. could maintain an action against him for the injury, and that, independently of any statutory obligation, there was negligence in deft. in not fencing the dangerous machinery on which plt. was employed:

Per Byles, J.—The master is liable on the broad ground that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. The principles laid down in

Priestly v. Fowler, and all the examples given of their application, relate to the circumstances and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery.

This was an appeal from the decision of the Court of Ex., discharging the rule nisi hereinafter mentioned. The deft. in the action was the occupier of a factory, and the plt. was a workman above twenty-one years old, who was employed by the deft. to oil certain machinery in the deft.'s factory.

The action was brought for the purpose of recovering damages for an injury sustained by the plt. while oiling the machinery at the time when the machinery was in motion for manufacturing purposes.

The machinery was such as, according to the Factory Acts, required to be fenced, and was not fenced.

The declaration and pleas are annexed to the case, of which they are to form part.

The cause was tried at Liverpool, before Wilde, B., at the summer assizes 1860, and the evidence for the plt. and the deft. appear in the copy of the note of the trial, which is annexed and is to form part of the case.

The declaration is set out at length in the report of the case below, 3 L. T. Rep. N. S. 675.

Pleas 1:—Not guilty. 2. That before and at the time, &c., the plt. was a servant of the deft., employed by the deft. as such to work for the deft. in his said business in the said factory for reward to the plt. in that behalf; and the plt. was upwards of twenty-one years old, and well knew that the said mill-gearing was not securely fenced as aforesaid, and the said clothes of the plt. were caught in and by the said parts of the mill-gearing, and the plt. was drawn in and to the same and dragged about, and was injured as in the declaration alleged by and through the plt.'s own negligence and carelessness, and want of due and proper caution in that behalf; and by ordinary care he could and might and ought to have avoided and prevented the same; and the plt. caused and was himself the author of the said injuries so sustained by him.

It appeared by evidence adduced on the plt.'s part at the trial that in July 1857 he was in deft.'s employ, and had been so five years, and that his duty was to attend to the scutching machines originally; and, at the time in question, his duties were to look after the women and children in the room, and to keep the machines properly oiled. He was ordered to oil them five times a-day, and oftener if required. The machines, by order of the manager, were never stopped. It was requisite to oil them twenty times a day. There were places for oil cups; but there were no oil cups there, only oil holes. On the 5th July the accident happened. In lowering himself down to oil the machine, his arm was caught and torn off by the running machinery. There was no fence over the two wheels in question; it was dangerous. There had been an iron guard which covered the wheels, but it had been broken, and was not put up again. It had been away nearly twelve months. Plt. had pointed out this to the manager several times, and he said he would see to it. The deft. himself was present when plt. complained of it. He used to be there nearly every day. All the other machines had guards.

It was contended for the deft. at the trial that the plt. having undertaken a dangerous employment, could not recover, and that the accident was occasioned by the plt.'s own carelessness. Wilde, B., in summing up, told the jury not to find a verdict for the plt. unless they were satisfied that the accident was not caused by want of proper caution on the plt.'s part. The jury found a verdict for plt. with 200*l.* damages, and there-

upon the learned judge gave deft. leave to move to enter the verdict for the deft. if the court should think the plea was sufficient independent of the allegation of negligence, and also to amend his pleadings so as to raise the question of plt.'s voluntarily entering a dangerous service, if the court should think he ought to be allowed to do so.

A rule nisi was afterwards obtained to enter the verdict for the deft., on the following among other grounds, viz.: that there was no evidence for the jury of deft.'s liability, and on the ground that the plt. did the work voluntarily and of his own accord, knowing the danger, and also as the servant of deft.; which rule the Court of Ex. subsequently, after argument, unanimously discharged: (see report of the case below, 3 L. T. Rep. N. S. 675; 30 L. J. 135, Ex.; 6 H. & N.)

From this decision the deft. below appealed, and the appeal now came on for argument.

App.'s grounds.—The app. will contend that the judgment of the court below is erroneous, on the ground that the plt. knowingly accepted the risk of the employment in the course of which the injury was sustained.

Resp.'s grounds.—That there was ample evidence for the jury of the app.'s liability; that the jury have concluded the matter by the verdict, which involved a finding that the resp. was not guilty of negligence; that the finding of the jury affirms that there was no negligence either in continuing in the service or in the manner of performing it; that the allegation of negligence not being supported, the second plea is not proved; that the proper fencing of the machinery was a duty imposed by the statute for the protection of workmen amongst others, the performance of which duty could not be dispensed with by the resp.; that performance was not in fact dispensed with, but was insisted on by the resp.; that dispensation is not alleged, and no defence on that ground is raised by the pleas; that there was evidence of the app.'s own personal negligence and default sufficient to make him liable; that the app. was on the facts of the case liable for the negligence of his overlooker, or other servant other than the resp.; that the resp. did not undertake or voluntarily enter into a dangerous service, the machinery being properly fenced when the employment began, and the danger arising from not attending to the resp.'s request to replace the fencing after it was off, and not keeping the promises repeatedly made to the resp. to restore it.

T. Jones for the app., the deft. below.—The action is not maintainable. Plt. undertook the employment voluntarily, with a knowledge of all the incidental risks, and cannot sue the master for injury received in the service. Plt. was himself the proximate cause of the mischief, and the conversation as to the absence of the fence cannot make any difference in the legal relations between the parties. It was no more than a contract to incur the risk until the fence was replaced; and if plt. chose to continue and accept the risk, he came within the rule, *volenti non fit injuria*. He was contributory to his own injury, and his contributory negligence was a bar to his recovering. The statute was passed to protect women and children, and there is nothing, it is submitted, in it which either expressly, or by implication, renders a master liable for an accident happening to a man of full age who voluntarily engages to work with unfenced machinery, and who is not supposed to be under any incapacity. The case of *Coe v. Platt* was decided before the 19 & 20 Vict. c. 38 was passed. Take the case of a tremendous accident in a colliery by reason of the omission or neglect of some duty prescribed by the statute for the benefit of the boys employed in the mine, and suppose 300 men are killed, is the owner to be liable because some statutable duty as to apprentices has been neglected, these men having agreed to run the risks of the

employment for their wages? The circumstances dwelt on below do not take the case out of the general rule. Plt. being the proximate cause, the case is not within the statute, and the general rules apply, that, having contributed and being in deft.'s service, he is not entitled to recover:

Priestly v. Fowler, 3 M. & W. 1; 7 L. J. 42, Ex.;

Williams v. Clough, 3 H. & N. 258; 27 L. J. 325, Ex.;

Senior v. Ward, 28 L. J. 139, Q. B.;

Seymour v. Maddox, 16 Q. B. 326; 20 L. J. N. S., 327, Q. B.;

Dymen v. Leach, 26 L. J. 221, Ex.;

Aloop v. Yates, 2 H. & N. 768; 27 L. J. 156, Ex.;

Skipper v. Eastern Counties Railway Company, 9 Ex. 223; 23 L. J. 23, Ex.;

Caswall v. Worth, 5 E. & B. 849; 25 L. J. 121; Q. B.;

Cowley v. Mayor of Sunderland, 4 L. T. Rep. N. S. 120, 6 H. & N. 565; 30 L. J. 127, Ex.;

Coe v. Platt, 6 Ex. 752; 20 L. J. 407, Ex.;

Paterson v. Wallace, 1 Macq. H. of L. Cas. 748;

Brydon v. Stewart, 2 Ib. 30;

Barton's Hill Coal Company v. Read, 3 Ib. 300.

Bliss Q.C. (with him *Aspland*) contra, for resp., the plt. below.—When plt. entered the service the machinery was fenced; the contract therefore was that the plt. should serve and that deft. should properly fence. He continued in the service after discovery of the want of fencing, under the promise and expectation that it would be presently replaced; which distinguishes it from an original agreement to work with unfenced machinery. Plt.'s knowledge of the danger does not touch the deft.'s duty or responsibility, in the absence of consent on plt.'s part to incur the risk, nor is it negligence, but an ingredient only in the proof of negligence. Plt.'s voluntary presence is not the proximate cause. The protection of women and children was the main object of the statute, but a general duty was thereby imposed on the millowner to fence dangerous machinery, and the 19 & 20 Vict. c. 38 only modified the application of the previous statute, 7 & 8 Vict. c. 15, and added a qualification to the definition of certain factories where women and children were employed. A right of action therefore was given to adults as well as to women and children for injuries from unfenced machinery. He commented on and distinguished the cases cited by the other side, and cited the following cases in addition:—

Butterfield v. Derby, 7 East.;

Clayards v. Dethuck, 12 Q. B. 439;

Couch v. Steel, 3 El. & B. 402; 23 L. J. 121, Q. B.;

Mellors v. Shaw and another, 30 L. J. 333, Q. B.;

Thompson v. North-Eastern Railway Company, 2 L. T. Rep. N. S. 618; 30 L. J. 67, Q. B.;

Ashworth v. Stannix, 4 L. T. Rep. N. S. 85; 30 L. J. 383, Q. B.;

Roberts v. Smith, 26 L. J. 319, Ex.; 2 H. & N. 213.

(He was stopped by the Court.)

T. Jones replied.

COCKBURN, C.J.—Our judgment in this case will be for the resp. (the plt. below), and we will deliver it on the next day we meet for Exchequer errors.

Curr. ad. vult.

Feb. 11.—Judgment was now delivered by

COCKBURN, C.J.—In this case I am of opinion that the decision of the Court of Ex. should be upheld; although not precisely on the grounds on which that decision appears to have proceeded. I think the question, whether any liability in the deft. arises under the statutes 7 & 8 Vict. c. 15, and 19 & 20 Vict. c. 38, is open to considerable doubt, owing to the plt. being

an adult. It appears to me, however, unnecessary to decide this question, being clearly of opinion that, independently of any statutory duty or obligation, there was negligence in the deft. in not fencing the machinery on which the plt. was employed; and although the declaration in this case is based on the alleged statutory duty of the deft. to fence the machinery, the leave to move was reserved on the question of negligence, and there is full power to amend the pleadings; and we can, therefore, so mould the declaration as to make it applicable to the grounds on which we think the case should be decided. I consider the doctrine laid down by the H. of L. in the case of the *Barton's Hill Coal Company v. Reid*, as the law of Scotland, with reference to the duty of a master, as applicable to the law of England also; namely, that where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects, from which increased and unnecessary danger may arise. No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and, with knowledge of the facts, enters on the service, the master cannot be held liable for injury to the servant, within the scope of the danger which both the contracting parties contemplate as incidental to the employment. The rule I am laying down goes only to this, that the danger, contemplated on entering into the contract, shall not be aggravated by any omission, on the part of the master, to keep the machinery in the condition in which, from the terms of the contract, or the nature of the employment, the servant had a right to expect that it would be kept. In the present case, at the time the plt. entered on the employment, the machinery was properly fenced; on its ceasing to be so, the manager of the defts., on the remonstrance of the plt., promised, in the presence of the deft. the master, that the defect should be made good. It must be taken, therefore, that at the time the contract between the plt. and the deft. was entered into, it was contemplated by the parties that the machinery should be fenced. It follows that, through the negligence of the master, in omitting to keep the machinery fenced, the servant has been exposed to danger to which he ought not to have been exposed; and, the injury of which he complains having thus arisen, the deft. is justly and properly liable. It was, indeed, strongly urged upon us, on the part of the deft., that, as the plt., upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is therefore in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion that there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service, under the promise that the defect shall be remedied. In the latter case it seems to me that the servant by no means waives the right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation. No doubt a defect, thus arising in machinery, may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that the party complaining had materially con-

tributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is a well established rule that a plt. who has materially contributed to his own injury by his own negligence cannot recover, although he may show negligence in the opposite party. But the question, whether the injury of which the plt. complains is to be ascribed wholly to the negligence of the deft., or whether the plt. has had any share in bringing it about, is one only for the jury. In the present case the jury have determined this question in favour of the plt., and we are bound by their decision. It is, indeed, put to us that notwithstanding this finding of the jury the knowledge of the plt. that the machinery was unfenced is, in point of law, sufficient to prevent the plt. from recovering. But, I am of opinion that it is only a fact in the case to be taken into consideration by the jury, with all the other facts and circumstances, in determining the question whether the plt. has himself helped to bring about the accident, in respect of which he seeks to charge the deft. In this sense, and in this sense only, such knowledge might afford an answer to the action. It does not do so in point of law; and in the present case, on the finding of the jury, it does not do so in point of fact. I am therefore of opinion that the Court of Ex. were right in refusing to disturb the verdict for the plt.

WIGHTMAN, J.—I agree with the conclusion, which has been expressed by the Lord Chief Justice, that the judgment should be affirmed, but I do not entirely concur in all the reasons which he has assigned. The case is divided into two points, and one was disposed of at the trial; the statutory obligation upon the millowner to keep the machinery fenced, and the contract said to be existing between the master and the servant. I attribute more importance to the statutory obligation than has been put upon it by my Lord; but I do not think it necessary to say more than that I concur in the general result of the opinion which he has expressed.

CROMPTON, J.—I arrive at the same conclusion. It seems to me that the only question really reserved to us in this case is, whether the mere knowledge by the plt. of the danger, when he did the act which produced the consequences complained of, is a sufficient bar to his recovering damages for the injury received by him from the clearly established negligence or default of the deft. Here, I think, we must take it, on the ruling not complained of, and upon the point reserved and on the verdict of the jury, that there was default or negligence on the part of the deft., for which he is answerable. I do not think it is now necessary to be considered by us whether the liability of the deft. arises from his disobedience to the statute or from his negligence. There was plenty of evidence of his negligence; and from the report, at all events, it was left to the jury. If it was necessary we should have to consider, after the judgment of Parke, B. in *Coe v. Platt*, which is almost directly in point as far as it goes, whether, although the principal objects of the statute might be young women and children, if there is a direct disobedience to the statute, anybody who is injured has a right to complain. Parke, B. lays it down in very express terms in *Coe v. Platt*; but it was not absolutely necessary for the decision there, as that case was decided on another point. Certainly his judgment is very precise upon the point. But I do not think it necessary to go into that case, one way or the other. We must now take it that there was a cause of action arising from deft.'s negligence, unless the ground taken by his learned counsel at the trial, and afterwards on the argument of the rule, can be maintained; and the question really is, whether the mere knowledge of the plt. of the dangerous nature of the service prevented his having a right of action. I found my judgment

principally upon these two propositions; the one that there is no defence to the action under the rule of law as established in *Priestly v. Fowler*, and other cases of that kind; and the other, that there is no defence, under the notion that the plt. has contributed to the injury complained of by his own negligence. Those are the two distinct defences. The plea stated that the plt. contributed to the injury by his own negligence. That was negatived; but it also contained an averment that he knew of the nature of the danger, and on that there was leave to amend, if necessary; and the point was reserved. Then comes the question, is that alone a sufficient answer to the action? In *Priestly v. Fowler*, and all that class of cases, a limitation was put upon the general rule of law that entitles the party injured to bring an action. That rule was considered as subject to an exception, in cases where the party entering on a certain duty and employment, must be necessarily supposed to have contemplated the ordinary danger, or, as my lord has expressed it, the danger arising from the scope of the employment, and including in it danger arising from any misconduct of a fellow servant. Persons may talk of a contract between the master and his servant: I do not suppose, however, that any such contract really exists. The servant enters the service with an understanding of the nature of the employment. This is one of the ordinary risks attending it, and he cannot expect to be indemnified against such ordinary risks, any more than against those that result from the carelessness of fellow servants. Whether it was or was not before known in the law we need not now consider; but, when that exception was established, there arose, almost necessarily, a most sound distinction in my mind, which one ought never to lose sight of, namely, that where the negligence was brought home to the master, that exception did not apply. We need not, for the reasons before given, consider in the present case whether it was the personal negligence of the master. We must take it as assumed that there was personal negligence on his part. I should be inclined to hold, if necessary, in accordance with what has fallen from my Lord, that it is negligence in the master if he does not take care that the machines are properly fenced; and that where that duty is delegated to a manager, the master may still be liable. Clearly in this case we must take it that the deft. had done that for which he was responsible, unless the second defence arises. What is that defence? It is said that mere knowledge is a sufficient defence. I certainly cannot think so. It is said that the plt. cannot recover if he has contributed to the accident, that is, if he had used ordinary care it would not have happened to him, though the deft. was negligent. I quite agree with the last observations of my lord, and it is hardly necessary for me to add a word to the view he has taken, that the knowledge of the danger is only one part out of many in the question of negligence. Here it was so applied to negligence. One may put a great many cases in which it is a question very often of degree whether it is negligence or not. It occurred to me during the argument thus: suppose a man knows well that there is great danger in going to open a trap in a coal mine; he knows that the duty of opening the trap has devolved on him, and that there is actual danger in it; but he goes and does it and receives injury. Is he guilty of negligence? You must always balance the several matters, and the jury must say whether, on looking at all the circumstances, there is negligence. Take the case of a man crossing the street if an omnibus is very near; it may be negligence in him to do so; but if he is a young and active man and likely to get over, there may be no negligence. The difficulty of saying whether or not there was negligence is for the jury.

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In all these cases it really comes to the question of contributory negligence and I am strengthened in my view by the view taken by my Lord Campbell, in *Senior v. Ward*. Upon these grounds I think the judgment of the court below ought to be affirmed.

WILLES, J.—I am of the same opinion. I entirely agree with what has been already stated by my learned brother Wightman, and I need not say more.

BYLES, J.—I am of opinion that the judgment of the Court of Ex. must be affirmed. This is a case of very great importance, and I am anxious that this decision should repose on what seems to me the true ground. I do not rest the right of the plt. to recover on the statutory obligation incumbent on the master to fence the machinery, nor yet on the personal knowledge of the master that the machinery was improperly left unfenced—though I do not mean to intimate any disagreement with the Court of Ex. But I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. The case of *Priestly v. Fowler* introduced a new chapter to the law; but that case has since been recognised by all the courts, including the courts of error and the H. of L., so that the doctrine there laid down, with all the consequences fairly deducible from it, is part of the law of the land. But the principles laid down in *Priestly v. Fowler*, and all the examples given of their application, relate to the circumstances and casualties of ordinary or domestic life and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery. It is, in such cases, impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power; and, if he could, he is quite incapable of estimating the degree of risk involved in reference to the condition of the machine; but the master may be able, and generally is able, to estimate both. The master, again, is a volunteer; a workman ordinarily has no choice. To hold that the master is responsible to his workman for no absence of care, however flagrant, seems to me, in the highest degree, both unjust and inconvenient. On the other hand, to hold that the master warrants the safety and proper condition of the machinery is equally unjust to the master, for no degree of care can insure perfect safety; and it is equally inconvenient, for who would employ such a machine if he were an insurer? It seems to me that the true rule lies midway between these extremes, and I therefore agree in the conclusion arrived at by the Lord Chief Justice. The master is neither, on the one hand, at liberty to neglect all care; nor, on the other, is he to insure safety; but he is to use due and reasonable care. The degree and nature of that care are to be estimated on a consideration of the facts of each particular case. I do not say that the degree of care is in all cases the same as the master must observe towards strangers. This rule seems to me the only rule consistent with justice and public convenience; but I do not rest it on those considerations alone. It reposes on very high authority. Lord Cranworth, in delivering the judgment of the H. of L., in the *Barton's Hill Coal Company v. Reid*, states that, in the case of dangerous machinery the master is bound to exercise due care. It is true that this was a Scotch case; but, in that very case the law of Scotland and the law of England were held to be the same in this branch of the law of master and servant. It may be true that some of the cases cited at the bar are not quite consistent with this rule, particularly those which seem to make the personal misconduct or personal knowledge of the master a necessary ingredient in his responsibility. But we are, in a court of error, at liberty to decide on principle, and fortified by higher authority. Why may

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not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow-servants? And, if a master's personal knowledge of defects in his machinery be necessary to his liability, the more the master neglects his business and abandons it to others, the less will he be liable. It is said that the verdict, exempting the servant from the charge of negligence, is inconsistent with the fact that he knew the machinery to be unfenced. But knowledge is only an ingredient in negligence. It may be, that the knowledge of the servant induced him to use extra care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risk. Lastly, the original contract of the servant was to work with fenced machinery, and it was his master, and not he, that violated the condition, and in so doing exercised a species of compulsion over the servant. For these reasons I think the *plt.* below is entitled to our judgment.

KATING, J.—I concur in the decision of the court that the judgment of the court below should be affirmed. I do so for the reasons already expressed by the Lord Chief Justice. *Judgment affirmed.*

Attorney for the app., *J. E. Fox*, 40, Finsbury-circus, agent for *Earle, Son, Hopps and Orford*, Manchester.

Attorneys for the resp., *Torr, Janeway and Tagart*, 38, Bedford-row, agents for *George Richardson*, Manchester.

House of Lords.

Reported by **JAMES PATERSON, Esq.**, of the Middle Temple, Barrister-at-Law.

Friday, July 10.

SHAW'S WATER COMPANY v. GREENOCK POLICE TRUSTEES.

Local Improvement Act—Police rate—Rateable value—Waterworks—Milling power.

The S. Waterworks Company were empowered to make reservoirs and to let sites for mills on the banks of the waterfalls at rents, which water rents were payable to the company by the millowners in respect of the water power of which they had the use. In rating the company as occupiers, these water rents were included as part of the annual rateable value of their waterworks; but the company contended that the millowners alone ought to be rated as the occupiers:

Held, that the rate was right, for these water rents were part of the yearly value of the waterworks occupied by the company.

This was an appeal from a judgment of the Court of Session as to the rateability of certain waterworks under a local improvement Act.

In 1825 the Shaws Water Company was incorporated by statute 6 Geo. 4, c. 120, in order to supply water to the town and harbour of Greenock. The statute empowered the company to construct waterworks and reservoirs, and on the sloping ground between the reservoirs and the town to sell pieces of land to mill-owners, that mills might be erected which might use the water power of the waterfalls. These pieces of land were granted by feu contracts or conveyances, which conveyed in consideration of a rent the ground, together with the privilege of the waterfall, and the use and benefit of the water adjoining, to be held for ever of the Shaws Water Company.

The Greenock Police Act, 3 Vict. c. 27, empowered certain trustees to assess all tenants and occupiers of dwelling-houses, mills, &c., at a sum not exceeding 2s. in the pound of the yearly rent towards the purposes of that Act. Waterworks were included in the

definition of the word "lands." Under this statute the Shaws Water Company were rated in respect of the annual sums paid by way of rent by the millowners for the use of the water power, being part of the rent of the waterworks. The company then commenced the present proceeding, the object of which was to obtain a declaration of the court that such water rents ought not to be included in the rate upon the company, but were properly included in the rate upon the mill-owners. The Court of Session held, that the water rents were no part of the rateable value of the waterworks, whereupon the company brought the present appeal.

Rok, Q.C. and Anderson, Q.C. for the appa.

The Solicitor-General (Palmer), Mure and J. Brown for the resps.

Civ. adv. vult.

The LORD CHANCELLOR.—My Lords, the resps. are a company incorporated for the purpose of supplying water to the town of Greenock. Under the powers granted by their Acts of Parliament they have constructed large works, including reservoirs and aqueducts or watercourses within the burgh of Greenock, by means of which they collect and conduct the water for the use of the town and the ships in the harbour. As the reservoirs are at a considerable elevation above the level of the town, the fall in the stream of water as it flows down the aqueduct or watercourse is considerable, affording a constant supply of water power. And accordingly the company is empowered to feu sites for mills upon the line of their watercourse, and also to contract to supply water power to the mills at such annual rate as might be agreed on. Accordingly, under feu contracts entered into by the company, mills have been erected along the line of and adjoining their watercourse, and the company has engaged to supply water for the purpose of driving the machinery in those mills at various annual sums, which are reserved and made payable by the feu contracts. In these contracts provision is made to the end that the water supplied as a driving power may not be diminished or deteriorated in its passage through the mill, but may be returned again to the watercourses so that it may flow on to the town of Greenock. The sums thus paid to the company for water power constitute a considerable portion of its revenue, and in respect of their annual income derived from this source the company are assessed by the appa., who are trustees under a local Act, the 3 Vict. c. 27, at the annual sum of 976*l.* By the 51st section of that local Act, it is provided that the assessment to be levied under the Act upon any mills erected or hereafter to be erected upon any of the falls or mill sites of the Shaws Water Joint Stock Company shall not exceed the rate of 4s. for each and every horse power of such falls or mill sites respectively, such horse power to be reckoned and computed according to the regulations of the said Shaws Water Joint Stock Company, with further provisions which it is not necessary to state at length. It is this section which has given rise to the present controversy. It is contended by the resps. that the mills are rated in respect of the water power supplied to them, and that to rate the resps. in respect of the water so supplied would be to rate the same property a second time. But in my opinion this is erroneous. The mill is rated in respect of its own independent value, which is no doubt increased by water power, and the resps. are properly rated in respect of the waterworks, of which they are the possessors and occupiers, and by means of which they receive and enjoy, as part of their revenue, the income which has been assessed at the sum of 976*l.* per annum. This sum is not income arising from anything which is in the exclusive occupation of the millers, but is income derived and enjoyed from and in respect of the works within the borough of Greenock, which are in the occupation of the company. The water-way will give an additional

value to two properties which were the subject of distinct occupation. The water in passing through the mill augments the value of the mill, and the money received for the service done by the water is incident to the possession of the waterworks from which the water is supplied. The provisions with respect to the water in the feu contracts show that the stream of water in its transit through the mill is still the property of the company, and that it is not in the possession of the miller, who has only a qualified use of it. Upon the general question, therefore, I am of opinion that the view taken by the Lord Ordinary is correct, and that the judgment appealed from is erroneous and ought to be reversed. There is a minor ground on which it is clear that the judgment of the Court of Session is wrong. Under the Scotch Valuation Act the resps. have had the entirety of their works valued by the Government assessor, who has fixed the sum of 976*l.* (at which the resps. are rated by the apprs.) as the annual value of such part of the resps.' works as are situate within the burgh of Greenock, being the premises to which this appeal relates. And by the 33rd section of the same Act it is in effect enacted that the valuation appearing on the valuation roll shall be always deemed and taken to be the just amount of real rent for the purposes of every county, municipal, parochial, or other public assessment, rate, or tax, under any Act of Parliament; and that the same shall be assessed and levied according to the same yearly rent or value accordingly. Therefore it is plain that, so long as the valuation remains, the apprs. are not only justified, but bound to assess the resps. at this sum of 976*l.*, being the annual value fixed by the assessor on their property in the burgh of Greenock. As this valuation still continues, the judgment of the Court of Session is plainly wrong, being at variance with the Act of Parliament. It is said that this valuation may be corrected in the future year, which is true, if it be wrong; but, for the reasons already given, I am of opinion, and submit to your Lordships, that the assessment is correct, and that the judgment of the Inner House ought to be reversed, and that of the Lord Ordinary restored and affirmed, and the prayer of the reclaiming note refused with expenses.

LORD CRANWORTH.—My Lords, concurring as I do entirely with my noble and learned friend on the woolsack, perhaps I should be adequately discharging my duty by merely expressing that assent; but inasmuch as I differ from the judgment of the learned judges below, I will briefly state the mode in which the case has struck me. The whole case turns upon the question as to the rating of the mills. I will not again refer to the 51st section of the Act, which has been read by my noble and learned friend. I merely remark that, pursuant to the provisions of that clause, the mills have been regularly assessed according to the amount of horse power which they respectively enjoy; and it was argued, that to make the resps. pay any rate for the water which they supply to the mills would be to make a second assessment on property already rated. But this is not so. If the owner of a house in a town rated at 50*l.* a-year were to discover a spring of water in his house by means of pipes connected with which he should be able to supply pure water to ten adjoining houses at a rate of 5*l.* per house, his house would properly be rated thenceforth at 100*l.* instead of 50*l.*, and every one of the ten houses would also be properly rated the additional value which was conferred on them by a stream of pure water. The rateable value of the house supplying, as well as of all the houses supplied, would be increased in value, and so become liable to an increased assessment. But it was further argued that the resps. could not be rated as being in the occupation of the water supplied to the mills. The mill sites, it was truly said, have been feued out to the millers, and therefore no longer occupied by the water com-

pany, and these sites, in most if not in all cases, comprise the *solum* of the aqueduct over which the water passes, and so are in the occupation, not of the company, but of the millers. Some question was raised as to how far the feu contracts with the millers did pass the *solum* of what was feued, so as to carry with it a right to the water; but I do not think it necessary to go into this inquiry. By the 48th section of the Water Companies Act, they are authorised to feu out mill sites, and by the next section, to contract for the supply of water to the farmers of such mill sites. The Legislature plainly considered them as continuing in the enjoyment of the running water, however they might have dealt with the soil over which it passed; indeed, on no other hypothesis could they continue to carry into effect the purposes of the Act, which was to secure a constant supply of water to the town and harbour of Greenock. What is rated, and properly rated, is the entire waterworks. Of those works, treated as a whole, the resps. are in possession; they derive their revenue from the works as one entire undivided property, extending through several parishes; and the only difficulty in such cases is to say how much beneficial occupation there is in each parish through which the entire property extends. But here the Legislature has interfered. By the Scotch Valuation Act of 1854 (17 & 18 Vict. c. 91), the commissioners of supply in every county, and the magistrates of every burgh, are authorised and required to make, annually, a valuation of all land and heritages in every parish in the county, and in every burgh respectively; and the Legislature seeing that, in the case of railways, canals, waterworks, and other like undertakings traversing many parishes, there might often be great difficulty in fixing fairly the value of such undertaking, and the part fairly attributable to each parish, has provided that, in such cases the Treasury shall appoint a special assessor; and directions are given by the Act as to the mode in which the assessment shall be made and apportioned among the several parishes in which the works of the railway, canal, or other company are situate. The valuation so made is liable to be questioned in the mode pointed out by the Act; but unless so questioned is to be final for the year for which it is made. With respect to the railway and canal companies, no option, as I understand the Act, is given; they are obliged to have the valuation of their undertakings made by the Government assessor. But with respect to the waterworks companies the case is different. They are at liberty to insist on having their works valued by the Government assessor as one entire heritage, and the value apportioned among the several parishes in which they are situate; or they may leave every parish in which any part of their works is situate to value that part singly according to its value. The resps. have since the passing of the Act of 1854 had their entire works valued by the Government assessor, probably because they thought that the most beneficial course to be pursued by them; and it is by that officer's decision that the sum of 976*l.* has been fixed as the value of so much of the works as is situate in the town of Greenock. By sect. 33 of that Act it is enacted, "that where in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax, under any Act of Parliament, is authorised to be imposed and made upon or according to the real rent of the lands and heritages, the yearly rent or value of such lands and heritages, as appearing from the valuation roll in force for the time under this Act in such county, burgh, or town, shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value

accordingly, any law or usage to the contrary notwithstanding." It is clear, therefore, that under the express provisions of that Act, the apprs. were bound to assess the resps. at the sum found by the assessor to be the value of their works properly assessable on the burgh of Greenock, and even if in the ascertaining that value the assessor had made any mistake, it could not now be corrected. I have, however, stated that in my opinion there was no mistake; and therefore I think that the Lord Ordinary was right in dismissing the case, and in finding the resps. liable to expenses; so that the judgment complained of ought to be reversed.

LORD CHELMSFORD.—My Lords, the question to be determined in this case is, whether the defts., as trustees acting under the said statute, are entitled to impose on or levy from the plds. assessments in respect of any annual duties payable to the plda. under feu contracts with the proprietors of any mills or other buildings erected upon any of the falls or mill sites held of the plda. upon or along the Shaws Water aqueduct. Both the Lord Ordinary and the judges of the first division seem to have considered that the validity of the assessment depended upon whether the *solum* of the aqueduct, by means of which the water for which the annual duties were paid passed to the mills, was in the mill-owners or in the water company. It may perhaps be difficult to collect from the feu contracts whether the soil of the aqueduct is granted to the millowners; but it seems to me that the apprs. may afford to concede this point, and yet successfully contend for the propriety of the assessment upon the company. The counsel for the resps. stated the question to be, whether the millowners or the company were to be rated in respect of the annual duties payable under the feu contracts. If this really were the question, the decision would not be difficult. It certainly would be extraordinary to lay a rate upon the millowners in respect of an annual payment which is not a benefit to them, but a burden upon their lands. The millowners are not assessable in respect of the water supply, though a quantity of the supply of water may at their option be taken as the means of ascertaining the assessable value of their occupation. But they are at liberty to have the valuation made according to the yearly rent or value. In neither mode of rating could the annual duties which they pay to the water company come within the reach of the rate. The water company are clearly liable to assessment by the Greenock trustees; and the assessable subject upon which the rate is to be laid is their waterworks generally according to the yearly rent and value under the Valuation Act. In ascertaining the yearly rent or value, are the annual duties paid by the millers to enter into and form part of the valuation, or to be altogether excluded? In other words, are the company overrated to the extent of these annual duties? This question might, and probably ought, to have been decided in another form. If the water company considered that they had been improperly assessed, they ought to have appealed to the trustees, and from them to the sheriff or his substitute, whose judgment or decision would have been final and conclusive. But passing by the subject of the jurisdiction altogether, the question seems to be reduced to the simplest point. The water company are assessable in respect of their waterworks as a whole. The aqueduct, whether the *solum* of it is in the company or in the millowners, is at all events a part of the waterworks. It is clear that the waterworks generally must be assessed upon the yearly value of the entire subject. The annual duties paid by the millers for the water supply are part of the yearly rent or value. No person is rated separately in respect of them, and no reason exists for separating the aqueduct from the rest of the works as a distinct subject of assessment altogether. It could not, for the reasons given, be laid upon the millowners, and, if it

were not imposed upon the company, they would not be assessed according to the entire value of their waterworks. It was asserted in argument that if the company were rated for the increased value of their property arising from these feu duties, the same subject matter would be twice rated. But this is not the case. If the millers are rated according to the amount of horse power, it has been shown that the water duties would not be reached by such an assessment; and even if they were to elect to have their mills rated in the same manner as other property, although the rate upon them might be higher in consequence of the increased value of their mills occasioned by the water supply, the duties which they are liable to pay would not be any part of the subject of this assessment, but would rather be a reduction to be made before the rateable value could be ascertained. Upon these short grounds I agree that the judgment appealed from ought to be reversed.

Judgment reversed.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

June 23 and July 25.

(Before the LORDS JUSTICES.)

HOWELLS v. JENKINS.

Will—Election—Compensation to the disappointed devisees—Inquiry.

*The testator was entitled to a moiety only of each of two farms called T. and P., the remaining moiety of each belonging in equal shares to W. and L. The testator by his will, after giving all his real and personal estate to his wife for life, with remainder to L. for life, from and after the decease of the latter gave "my farm called T." to his nephew W. and his niece E., their heirs and assigns, as tenants in common. And he gave them 200*l.* towards rebuilding and repairing the house, &c. "on my said farm T." He then devised "my farm called P." to the plds. in like manner, but without any similar gift for repairs. After his death L. conveyed all his interest in the two farms, after successive life-estates, to the plds.: Held (affirming the decision of Wood, V.C.), that W. must elect whether he would take under or against the will.*

Upon his electing to take against the will:

Held, further, that the benefits he would have taken under the will must be apportioned in compensation of the disappointed devisees, in proportion to the value of the gifts which they lost by his election, and the consequential inquiries as to those values were directed in chambers.

This was an appeal from a decree of Wood, V.C., who had declared that the deft. William Jenkins was put to his election whether he would take under or against the will of Lewis Jenkins, under the following circumstances:—

William Jenkins (since deceased) devised two freehold messuages and farms, called Tyr-y-wain and Pedola, upon trust to apply the rents for the benefit of his wife, his reputed son Llewelyn Jenkins, and his sons Lewis and Rees Jenkins, and upon the youngest of these attaining twenty-one to convey the same to the survivors of the four persons as tenants in common in fee.

The testator died in 1810, leaving all the four living; his heir-at-law was Lewis Jenkins. The widow died in 1817 intestate, and Lewis Jenkins was her heir-at-law also. Before her decease Rees Jenkins, the youngest of the three sons, had attained twenty-one, so that upon her death Lewis Jenkins became en-

titled to his own fourth and to that of his mother; Llewelyn Jenkins to one other fourth, and Rees Jenkins to the remaining fourth. The last-mentioned died in 1832, and left two children, the defts. William and Elizabeth Jenkins.

Lewis Jenkins, by his will dated the 27th Jan. 1847, after certain bequests, devised and bequeathed as follows: "As to all other my real and personal estate, money, securities for money, and other property whatsoever, which I may die possessed of, I give, devise and bequeath the same unto my said wife until her decease or second marriage, whichever shall first happen. And I direct that she may receive the rents of the leaseholds, and the interest of all moneys out upon security, without being liable to have the said leaseholds sold, and the proceeds invested, or the said money called in and invested in any other than their present security, or other personal security in pursuance of any rule in equity; and from and after her decease or second marriage, I give, devise and bequeath the same unto my brother Llewelyn for and during his natural life, and the interests and rents aforesaid to be received by him in the same manner as I have directed with respect to my said wife. And from and after his decease in manner following: As to my farm called Tyr-y-wain I give and devise the same unto and between my nephew (the deft.) William Jenkins, and my niece Elizabeth Jenkins, and their several heirs and assigns for ever, as tenants in common; and I direct that, in case either of them shall die without lawful issue at the time of his or her death, the share of the one so dying shall go to the other of them, his or her heirs and assigns for ever. And I give and bequeath unto the said William and Elizabeth the sum of 200*l.* towards rebuilding and repairing the houses, outhouses and other buildings on my said farm called Tyr-y-wain; and as to my farm called Pedola, and my two leasehold houses at Dowlais, I give and devise and bequeath the same unto my nieces (the plts.) Ann Jenkins and Jennett Jenkins, and to their several heirs, executors, administrators and assigns, according to the nature of the property, as tenants in common. And I direct that, in case either my niece Ann or my niece Jennett shall die without leaving any lawful issue living at the time of her death, that the share of the one so dying of the said farm and houses, shall go to the other of them, her heirs, executors, administrators and assigns." Then, after certain pecuniary legacies, he proceeded thus: "All the rest, residue and remainder of my said real and personal estate, I give, devise and bequeath, after the decease or second marriage of my said wife, and the death of the said Llewelyn Jenkins, unto and between my said nephew and nieces William, Elizabeth, Ann and Jennett, their several heirs, executors and administrators, share and share alike, and I appoint my wife and the said Llewelyn Jenkins executor and executrix of this my will."

Lewis Jenkins died shortly after the date of his will, and before the 28th Sept. 1847, on which day Llewelyn Jenkins conveyed all his interest in the two farms, Tyr-y-wain and Pedola, to Anna Jenkins and her heirs, to the use of himself for life, with remainder to the use of the said Ann Jenkins the widow, for life, with remainder to the plts. Ann and Jennett, as tenants in common in fee; but if either should die without leaving lawful issue living at the time of her death, her share was to go to the survivor.

Llewelyn Jenkins died in the lifetime of Ann Jenkins the widow, intestate and without issue, and Ann Jenkins died in Nov. 1858.

The bill was filed by Mrs. Howells (formerly Ann Jenkins the niece) and Jennett Jenkins, to assert their rights under the deed dated the 28th Sept. 1847, to all the interest of Llewelyn Jenkins, namely, of each of the farms of Tyr-y-wain and Pedola; and under

the will of Lewis Jenkins to the remainder of Pedola in case the deft. William Jenkins should elect to take under the will of Lewis Jenkins; but in case he should elect to take against the will, then they claimed compensation out of the one-fourth of Tyr-y-wain devised to William Jenkins. The legal estate of both properties was still outstanding. The prayer of the bill was, that William Jenkins might be ordered to elect whether he would take under or against the will of Lewis, and for possession of Pedola, and of one-fourth of Tyr-y-wain, and for an account of past rents.

V.C. WOOD said that the question of election raised by the bill depended upon this question of construction, whether the testator (Lewis) had used words which must be read as intended to pass the entirety of Pedola, or, whether, having regard to the fact that he was only entitled to a moiety, the devise could be construed as a gift only of such interest as he had. The gift of the 200*l.* to William and Elizabeth towards rebuilding and repairing the premises at Tyr-y-wain greatly strengthened the plts.' argument, and would imply an intention on the part of the testator to dispose of the entirety of that property; nor could a different construction be given to the devise of Pedola, which was in precisely the same form, except that it was not followed by a bequest for repairs. His Honour therefore was of opinion that the deft. William Jenkins was put to his election, and he declared accordingly. Against that decision William Jenkins appealed.

Willcock, Q.C. and F. J. Wood supported the appeal.

W. M. James and Freeling, for the plts., were not called on.

The authorities cited before the V.C. and in the Court of App. were these:—

Padbury v. Clark, 2 M. & G. 298;

Fitzsimons v. Fitzsimons, 28 Beav. 417; 3 L. T. Rep. N. S. 141.

Rancliffe v. Parkyns, 6 Dowl. 149;

Dummer v. Pitcher, 2 Myl. & K. 262; and

Cleave v. Cleave, 2 Joh. & Hem. 713, n.

Their LORDSHIPS briefly expressed their opinion that the decision of Wood, V.C. was correct in principle, and that his Honour's decree must be affirmed. If a person elected to take against a will, the share of the testator's property given to and renounced by him must be applied to compensate those who were disappointed, in proportion to the benefits of which they were deprived by his election.

The case was mentioned on the minutes on the 25th July, when the deft. William Jenkins elected to take against the will, and the following were the minutes of the order made:—

"The deft. William Jenkins, by his counsel, electing to renounce all benefits given or devised to him by the will of Lewis Jenkins, this Court doth declare that three-fourth parts of the farm called Pedola belong to the plts. and the remaining one-fourth thereof belongs to the deft. William Jenkins; and that one-fourth part of the farm called Tyr-y-wain belongs to the plts., and one other fourth part thereof belongs to the deft. William Jenkins, and that one other fourth part thereof belongs to the deft. Elizabeth Jenkins, subject to the limitation in the said will contained of the last-mentioned one-fourth to the deft. William Jenkins, in the event of the death of the said Elizabeth Jenkins without leaving issue living at the time of her death.

"Direct an inquiry, what are the respective values of the one-fourth of the farm called Pedola, of which the plts. have been deprived by the election of the deft. William Jenkins, and of the vested interest of the deft. Elizabeth Jenkins in one-eighth of the farm called Tyr-y-wain, and her contingent interest in one other

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eighth part of the said farm, of which she has been deprived by the like election.

"And it is ordered that all the estate and interest to which the deft. William Jenkins would have been entitled in the said farm called Tyr-y-wain under the said will, and which has been renounced by him, be apportioned between the pls. and the deft. Elizabeth Jenkins, in proportion to the values found upon the said inquiry."

Solicitor for the pls., the resps., *Thos. Clarke.*

Solicitors for the defts. appealing, *Bell, Broderick and Bell.*

Friday, July 31.

(Before the LORD CHANCELLOR.)

Re CARDIFF COAL AND COKE COMPANY, *ex parte* NORTON.

Joint-stock company — Winding-up — Transfer of property.

The bonâ fide sale or transfer of property of one company to another, in consideration of certain shares in the one company being transferred to the other, is not such a return of capital as would be a contravention of the statute.

This was an appeal from an order of Mr. Commissioner Hill made at the District Court of Bankruptcy at Bristol. The facts were these:—In the year 1858, a joint-stock company, called the Cardiff Preserved Coal and Fuel Company, was established and registered under the Limited Liability Act, for the purpose of making patent fuel, and all the shares, viz. 1900 shares of 5*l.* each, were paid up in full soon after the company was formed, and in 1860, the company being in want of more capital, sold their plant and machinery to a company called the Crown Preserved Coal and Coke Company (Limited), in consideration of 1750*l.* in cash, and 950*l.* shares of 5*l.* each fully paid up in the Crown Company.

The 1750*l.* received in cash was applied in discharging the debts of the Cardiff Company, which, as it was alleged by the directors, at that time did not exceed that amount, and the 950 shares were thereupon distributed amongst the shareholders of the Cardiff Company, in the proportion of one 5*l.* share of the Crown Company for every two shares of 5*l.* each which they held in the Cardiff Company.

It was alleged that the property sold to the Crown Company did not comprise all the Cardiff Company's assets, as various debts were due to them, and they had also stock-in-trade to the value of about 200*l.*, which was sold, and the proceeds applied in payment of their debts. About six months after this arrangement, a Mr. Hill, who was a large shareholder and a director in both companies, and under whose immediate direction the arrangements were made, settled a claim made by a firm of Cory and Co. upon the Cardiff Company. Without the sanction, as was alleged, of the shareholders or of his co-directors, and after they had in fact passed a resolution to defend Cory's action, he gave Messrs. Cory his acceptance on the 12th Feb. 1861 for 500*l.*, which fell due on the 12th May 1861, and was then paid by him out of moneys which he as a director of the Cardiff Company had received from the directors of the Crown Company on account of the debt which they owed to the Cardiff Company. Besides this item of 500*l.* Mr. Hill also claimed in his account against the Cardiff Company a sum of 262*l.*, being a charge for commission of 6*d.* per ton on all the fuel manufactured by them in return for certain occasional loans of money and accommodation bills with which he had accommodated the company's manager. By inserting these two items in his account to the debit of the company, he made them debtors to him in the sum of 648*l.*, whereas, if the items were not properly placed to the company's debit, he would have been their

debtor to the extent of 114*l.* or thereabouts. The four items were resisted by the shareholders.

Shortly afterwards Hill presented a petition for a winding-up order, which was opposed on the ground that the sum of 648*l.* 7*s.*, claimed to be due to him from the company, was not in fact due, and that the company could not be considered or dealt with as having committed an act of bankruptcy by not paying a sum which they did not in fact owe. The commissioner, however, overruled this objection, being of opinion that, if only 50*l.* were due, the petitioner was entitled to an order for winding-up the company.

After this, some litigation took place as to Hill's proof of debt, and eventually the sum of 648*l.* 7*s.*, originally claimed by him, was reduced by the commissioner, upon an application made to him by the contributories to expunge or reduce the same by the sum of 280*l.*, and his Honour's order was subsequently confirmed, on appeal, by the Lords Justices, save only that the Lords Justices allowed him the additional sum of 43*l.* 4*s.* for interest, and Mr. Hill stood as a creditor of the company to the extent of 411*l.* 11*s.* only, instead of the sum of 648*l.* 7*s.*

On the 23rd June Mr. Hill applied to the commissioner to make a call (for the purpose of paying his debt) on the contributories and the costs of the winding-up, and this application was opposed on their behalf on the ground that, as nothing remained unpaid upon the shares, no call could be made under the 61st section of the Act of 1856.

On the part of the shareholders it was contended that the delivery of the shares of the Crown Company to the Cardiff shareholders was tantamount to a return of capital, and thus their shares in the Cardiff Company were unpaid, to the value of such return, and that in this way a call could properly be made upon them. In answer to this it was contended on behalf of the contributories, that all the shares having been fully paid up, the commissioner had no jurisdiction whatever in the matter; that the statute did not enable him to do more than the directors could have done if the company had not been wound-up, and that, as under the circumstances the directors could have made no call, so neither could he; that the creditor having chosen to take a statutory remedy, could take no more than the statute gave him, and that his Honour had no power to adjudicate on the equities, if any, between partners or their creditors; that the delivery of shares in a public company, especially of shares being of uncertain and fluctuating value, could not be regarded as a return of capital; and that even if it could be so regarded, the statute gave the commissioner no power on that account to deal with the original shares otherwise than as fully paid up.

It was also contended that, as Mr. Hill became a creditor only after the Crown shares had been allotted, and as he himself had allotted them, he at least was precluded from questioning the validity and propriety of the transaction; and further that, inasmuch as it appeared from the evidence that he had by reason of his notice served on the Crown directors prevented the shareholders from realising their Crown shares, he was estopped from saying that they had received any return of capital. It was also pointed out to the commissioner that it was in fact impossible under the circumstances to make such a call as the Act required, inasmuch as each shareholder either had received or would receive a different sum of money per share from the proceeds of his Crown shares from the others, and that thus a call of so much a share on all the Cardiff shares would not represent as it ought to do the amount of calls unpaid, even if the delivery of the Crown shares could be considered and dealt with as a return of capital.

The learned Commissioner ordered a call to be made of 7*s.* 6*d.* per share on all the shares in the Cardiff

Company, equal to about 750*l.*, and the contributories then brought the present appeal.

De Gez appeared for the app.

Rosburgh, for the official liquidator.

The LORD CHANCELLOR (without hearing a reply).—I think the commissioner's order would be much the more convenient and the wiser course of proceeding, but I must be of opinion that the order is not warranted by the terms of the statute. The case is a *bond fide* one, and the remarks I have to make will have no application to the case of money returned by a company in order to evade the statute. But the case I have to consider is the *bond fide* sale of part or all of the property of one company to another, in consideration of certain shares in one company being transferred to the other. The shares, so far as the contract is concerned, are taken by the company collectively, but the shares are of that number and character which admit of being parcelled out and distributed among the shareholders of the purchasing company. Each shareholder, I will assume for the purpose of my judgment, to be now a transferee of shares in the Crown Coal Company. I must treat the transaction as a return of capital, and that its effect is to produce this result, that, to the extent of the return of capital, each share of every shareholder receiving that return becomes not a paid-up share within the meaning of the section. But unless it be a share upon which something exists and remains due according to the original contract, then there is no liability to answer calls, nor any parliamentary power to make calls. Now, it is quite clear here that the original amount of each share (that is, the money due upon the original limited contract) was *bond fide* paid up in respect of the original contract. Therefore there is no remnant of liability in respect of acquired property. There may be a liability, but it will be a partnership liability in respect of property belonging to the partnership. It will not be an individual and personal liability, in the sense of being a remnant unsatisfied upon the original contract to take shares. I cannot therefore justify the order of the commissioner. If the parties have any good sense, they will consent to contribute the money which the commissioner has called upon them to contribute, because it is quite clear that the case will not be without remedy, although that remedy may be a protracted and a costly one; but if, following a course too frequently adopted, and evincing an amount of obstinacy and want of prudence, they resist it, the official liquidator will have no other course than to institute proceedings for the purpose of making the property thus received by each individual available for the debts of the company. I must discharge the order of the commissioner. The app. will receive back his deposit, and the official liquidator must have his costs out of the estate.

June 30, July 1, and Aug. 1.

(Before the LORDS JUSTICES.)

THE ATTORNEY-GENERAL V. THE PORTREEVE, ALDERMEN AND BURGESSES OF AVON (otherwise ABERAVON) AND OTHERS.

Municipal Corporations Act, 5 & 6 Will. 4. c. 76—*Charter—Corporate property and rights—Practice—Amendment—Supplemental bill—Trusts—Adverse claimants—Parties.*

Where there was no title to sue at the time of the filing of an original bill or information, a decree cannot be founded upon a right of suit subsequently acquired and brought forward by supplemental bill; for although the Chancery Amendment Act enables matters which have occurred subsequently to the filing of an original bill to be introduced by way of amendment, it does not alter the law or practice of the court so as to enable a *plt.* in that

manner to seek relief to which, at the time when his original bill was filed, he had no title whatever. There must be a right of suit when the suit is commenced, and a supplemental bill is merely the continuance of a suit already instituted, and not the commencement of a new one.

The *defts.*, the portreeve, &c., of Aberavon, were a corporation from time immemorial, and that town was exempted from the provisions of the *Municipal Corporations Act*. By the *Aberavon Market Act*, 1848, the portreeve, &c., were empowered to construct a market, market-place, &c., and to levy and receive rents and tolls, which were to be applied, first, in defraying the costs of obtaining the Act; secondly, in making and maintaining the buildings and in paying off borrowed moneys; and thirdly, to such objects as the portreeve, &c., should think fit. In 1860, pending an application by the inhabitants for a charter of incorporation, the portreeve, &c., sold all their property except the town-hall and the market, &c., constructed under the above-mentioned Act, and early in 1861, after an intimation that the Lord President would recommend the Queen to grant the charter, they sold the town-hall, and agreed to let the rents and tolls to J. J. for fifty years, at an annual rent of 5*l.*, in consideration of a fine of 600*l.*

On the 15th March 1861, the original information was filed, praying a declaration that the portreeve, &c., were not authorised so to demise or lease the rents and tolls, and that any such demise or lease would be a breach of trust, and praying an injunction accordingly.

On the 2nd July 1861 the new charter was granted, which enabled the new corporation to hold lands over and above any real estate to which the corporation might then be entitled, and on the 6th Feb. 1862 the information was amended by making the mayor, aldermen and burgesses under the new charter *defts.*, and praying a declaration that the markets, market-place, &c., and the lands belonging thereto, and all rights to levy rents and tolls, and all other the property and rights of the portreeve, &c., had become vested in the mayor, &c., under the *Municipal Corporation Act*, &c.; that the portreeve, &c., might be decreed to deliver up possession thereof, and that inquiries and accounts might be directed to ascertain what property belonged to the portreeve, &c., at the date of the new charter.

The portreeve, &c., insisted that there was no trust for the benefit of the inhabitants, and their Lordships having come to the conclusion that this was so except as to the property under the *Aberavon Market Act* 1848; it was

Held, that a decree of the M. R., in conformity with the prayer of the amended information must be discharged, and that a decree should be made affecting only the market, market-house, rent and tolls, inasmuch as with respect to them the *Aberavon Market Act* 1848 had created a public trust which the Attorney-General had a right to enforce.

Persons claiming a title purely adverse to a trust cannot be made parties to a suit for the execution of the trust.

It is not the province of a court of equity to declare the effect of an Act of Parliament.

This was an appeal by the *defts.* the portreeve, aldermen, and burgesses of Avon (otherwise Aberavon), in the county of Glamorgan, against a decree of the M. R., the hearing before whom is reported at 8 L. T. Rep. N. S. 594. The circumstances under which the apps. became entitled to the property in dispute will be found fully stated in *Evan v. The Portreeve, &c. of Avon* (otherwise Aberavon), 3 L. T. Rep. N. S. 347, and from that report, together with the report of the

hearing of the present information at the Rolls, and the judgment of Turner, L. J. on this appeal, the facts will so fully appear that it is unnecessary now to state them.

The M. R. having made a decree in conformity with the prayer of the information as amended, the defts. the portreeve, aldermen and burgesses now appealed against it. Its material effect is stated by Turner, L. J. below.

Baggallay, Q. C. and *William Pearson* supported the decree on behalf of the informant, the appeal being from the whole decree. They contended that the portreeve, &c., constituted a public corporation, having certain property and rights solely for the benefit of the inhabitants, and that by the charter of incorporation granted under the Municipal Corporations Act in July 1861, all its property, rights and privileges had become vested in the mayor, aldermen and burgesses. The granting of that charter, though subsequent to the original information, was properly introduced by amendment; but, at all events, as to the market and the rents and tolls under the Aberavon Market Act 1848, there was created by that Act an express trust before the institution of the suit. They referred to

15 & 16 Vict. c. 86, sect. 53;

The Municipal Corporations Act, 5 & 6 Will. 4, c. 76, ss. 1, 6, 71, 92, &c.;

The Municipal Corporations Amendment Act, 7 Will. 4 & 1 Vict. c. 78, sect. 49;

The Attorney-General v. The Corporation of Leicester, 9 Beav. 546; and

The Attorney-General v. Wilson, 9 Sim. 30; on appeal Cr. & Ph. 1.

Selwyn, Q.C., *Speed* and *Everitt*, for the apps., argued that there was no trust affecting the property of the portreeve, &c. If the charter of July 1861 created a trust at all, that trust was not in existence in March 1861, when the original information was filed, and the charter creating it could not be introduced, either by amendment or supplemental bill. The Attorney-General must stand upon such rights as he had when the suit was commenced. Upon this question they referred to

Tonkin v. Lethbridge, Coop. 43;

Pilkington v. Wignall, 2 Madd. 240;

Pritchard v. Draper, 1 Russ. & Myl. 191.

The Aberavon Market Act 1848 did not create any trust, for the surplus rents and tolls were to be applied at the sole discretion of the apps. This court would not determine the effect of the statutes, nor of the charter granted under them, and if the informant desired to have that effect declared, his proper course was to go to a court of law.

The Corporation of Arundel v. Holmes, 4 Beav. 325.

Baggallay, Q.C. having been heard in reply, judgment was reserved until the 1st Aug., when

Lord Justice TURNER said:—This is an appeal by the defts. the portreeve, aldermen and burgesses of Avon (otherwise Aberavon), and by the deft. Griffith Williams, their common attorney, from a decree of the M. R. made on the hearing of the cause, by which his Honour declared “that all and singular the estates, money, property and effects of or belonging to the portreeve, aldermen and burgesses of Avon (otherwise Aberavon), in their corporate capacity, at the time of the granting of the charter of incorporation in the information mentioned, including the market, market-place, place for holding fairs, slaughterhouses, and the lands, buildings, premises and appurtenances belonging thereto in the information mentioned, and the right to levy and receive the stallages, rents and tolls leviable and recoverable under the Aberavon Market Act, have become and are now vested in the defts. the mayor, aldermen and burgesses of the borough of Aberavon, for

the purpose and subject to the provisions of the Municipal Corporations Act, and the several Acts for amending the same; but subject nevertheless to any mortgages, charges, or incumbrances, or any debts or obligations of the said portreeve, aldermen and burgesses lawfully affecting the said premises, or any of them, at the time when the said premises became vested in the said mayor, aldermen and burgesses. And it is ordered that the following inquiries be made, that is to say: 1. An inquiry what the estates, moneys, property and effects of the said portreeve, aldermen and burgesses consisted of at the time of the granting of the said charter of incorporation, and what mortgages, charges, or incumbrances, debts, or liabilities then affected the same, and whether any and what proceedings are proper to be taken with a view to the recovery of the same, and the informant Edward Jones is to be at liberty to serve any person or persons now in possession of any of such estates, moneys, properties and effects, with a copy of this decree, who are to be at liberty to come in under the decree. 2. An inquiry whether any, and what estate, moneys, property, or effects of or belonging to the said portreeve, aldermen and burgesses on the 16th Jan. 1861 were sold or otherwise disposed of between that date and the date of the charter, and under what circumstances respectively.” And then directions are given as to the costs. The borough of Avon (otherwise Aberavon) is an ancient borough, and the defts., the portreeve, aldermen and burgesses of the borough, were at the time of the passing of the Municipal Reform Act, 5 & 6 Will. 4, c. 76, a corporate body which had existed from time immemorial. It was one of the many like corporations scattered through the country which was not made subject to the provisions of the above-mentioned Act. By an Act of Parliament made and passed in the 11th & 12th of the Queen (the Aberavon Market Act 1848), after reciting that there was no established market-place or place for holding fairs for the sale of horses or cattle or other live stock, provisions, or agricultural produce in or for the town and borough, but that the sale was carried on in the streets and other inconvenient places, and that the Earl of Jersey had agreed to convey to the portreeve, aldermen and burgesses of the town and borough, by way of free gift, certain hereditaments therein described, the site whereof was convenient for the erection of a market-place and place for holding fairs for the town and borough, and that it would be highly advantageous to the inhabitants and the neighbourhood if the portreeve, aldermen and burgesses were empowered to erect a market-place and place for holding fairs on the site, subject to certain regulations, powers were given to the portreeve, aldermen and burgesses to construct upon the lands therein described a market-place and place for a fair, with all necessary buildings and works for the sale of the commodities as therein mentioned, and also a market-place for the sale of cattle, and might enter upon, take and use such of the lands as should be necessary for that purpose. And after various provisions authorising the taking of stallages rents and tolls, it was enacted, by the 21st section of the Act, that all “the moneys arising from the said stallages, rents and tolls, should be applied, firstly, in paying the expenses of obtaining that Act and incident thereto; secondly, in making and maintaining the market or fair, and works connected therewith; and the slaughterhouses to be established or constructed as aforesaid, and in payment of the interest and repayment of the principal of all moneys borrowed on the security of the said works, stallages, rents and tolls, and that the residue of such moneys (if any) should be retained by the said portreeve, aldermen and burgesses, and be applied by them as they should think fit.” After the passing of this last-mentioned Act, and in the year 1853, application was made to Her

Majesty in council, by some of the inhabitants of the borough, for the grant of a charter of incorporation for the borough under the Municipal Reform Act, in pursuance of the powers given to Her Majesty by the statute of the 7 Will. 4 & 1 Vict. c. 78, s. 49; but this application was opposed by the defts., the portreeve, aldermen and burgesses, and was not successful. Subsequently, and in the year 1859, a further application was made on the part of some of the inhabitants to Her Majesty in council for a grant of a charter of incorporation. This application was again opposed by the defts., the portreeve, aldermen and burgesses. Preceding this application, and in the year 1860, those defts. sold and disposed of and conveyed away all their estates and property except the town-hall of the borough and the market-places and slaughterhouses constructed under the Aberavon Market Act 1848. On the 16th Jan. 1861 a communication was made from the Privy Council that the Lord President had decided on recommending Her Majesty to grant the charter of incorporation for the borough. After this communication, and in the month of Feb. 1861, the defts. the portreeve, aldermen and burgesses, sold and conveyed away the town-hall of the borough, and they also came to an agreement with John Jones, another of the defts. to this information, to grant him a lease of the stallages, rents and tolls, to be levied or taken under the Aberavon Market Act 1848, for the term of fifty years at a rent of 5*l.* per annum, in consideration of a sum of 600*l.* to be paid by him to them. It was under these circumstances the original information in this cause was filed on the 15th March 1861, stating to the above effect, and that the above-mentioned sales and the agreement to grant the lease to the deft. J. Jones had been made by the portreeve, aldermen and burgesses under the apprehension that estates vested in them would by the charter to be granted be taken out of their control, and be transferred to the corporation to be created under the charter, and in effect for the purpose of defeating such transfer, and further stating that "from time immemorial until the sales hereinafter mentioned the said corporation were seized in fee of a town-hall and appurtenances within the said town and borough, and of large freehold estates situated in the parish of Avon (otherwise Aberavon), and in the parish of Michaelstone-super-Avon, and elsewhere in the county of Glamorgan. All the said estates were held upon certain trusts for the benefit of the said town and borough and the burgesses and inhabitants thereof." Then it states that a draft of the charter had been prepared, but had not been yet engrossed. And then it is submitted that the proposed lease or demise to John Jones was not authorised by the Aberavon Market Act, or the statutes incorporated therewith, or otherwise, and by such a lease and demise the stallages, rents and tolls leviable and receivable under the Act will be altogether misapplied and misappropriated and diverted from the purpose to which by the Act of Parliament they were expressly made applicable, and that no funds existed for maintaining the market and fair and the works connected therewith for the said slaughterhouses and inhabitants of the said town and borough, and that the persons using the market and slaughterhouses would be greatly prejudiced and injured. Therefore the information prayed that it might be declared that the defts. the portreeve, aldermen and burgesses of Avon (otherwise Aberavon) are not authorised by the said Aberavon Market Act 1848, or the Acts incorporated therewith, or otherwise, to demise or lease the stallages, rents and tolls leviable and receivable under the said Act, or any of them, to the deft. John Jones or any other person or persons for the term of years upon the terms hereinbefore mentioned, or upon any other similar terms or conditions, and that any such demise or lease would be a breach of the trust upon which the said market and slaughterhouses and the right to the

stallages, rents and tolls leviable in respect thereof, are now respectively vested in the said portreeve, aldermen and burgesses;" and therefore praying an injunction to restrain the defts., the portreeve, aldermen and burgesses of Avon (otherwise Aberavon) "from making, executing, or granting to the deft. John Jones, or any other person or persons, any demise or lease of the stallages, rents and tolls, or any of them, leviable or receivable in respect of the said market or slaughterhouses under the provisions of the Aberavon Market Act 1848, for the term of years and upon the terms and conditions hereinbefore mentioned, or upon any similar terms or conditions, and from applying or appropriating, or causing or sanctioning or permitting the application or appropriation of, the said stallages, rents and tolls, or any of them, to any other use or purposes than the purposes in the said Aberavon Market Act 1848 in that behalf mentioned." Immediately after the filing of this information, and on the 16th March 1861, an *ex parte* injunction was granted in the terms of the prayer. The deft. John Jones, it appears, then refused to accept the lease, and in consequence of his refusal the lease was, notwithstanding the injunction, granted to the deft. Griffith Williams, the common attorney of the portreeve, aldermen and burgesses. No payment, however, was made by him in respect of the lease, and the lease granted to him was shortly after cancelled. In April 1861 a motion was made on the part of the defts. to dissolve the injunction. This motion was supported by affidavits denying that the estates of the defts. the portreeve, aldermen and burgesses were ever held upon trust for the benefit of the town and the burgesses and inhabitants, as alleged by the information, and asserting that on the contrary they were the absolute property of that corporation, and further stating that the corporation was largely indebted on mortgage and otherwise, and that the sales had been made for the payment of the debts, and the proceeds applied for that purpose, and that the 600*l.* proposed to be raised by the lease was required for the same purpose. It further appeared from these affidavits that the lease proposed to be granted contained covenants on the part of the lessee for keeping the demised premises in repair. This motion was met by counter affidavits asserting acts of ownership on the part of the inhabitants over the estates of the corporation. Ultimately the motion was ordered to stand over until the hearing of the cause. The defts. then on the 23rd May 1861 put in their answer to the information, which was to the same effect as the affidavits filed on their part in support of the motion to dissolve the injunction. At this point of the case, and on the 2nd July 1861, the new charter was granted by which Her Majesty, as well by virtue of the powers and authorities vested in her by virtue of her Royal prerogative, as by virtue of the powers and authorities given to her by the Act of the 7 Will. 4 & 1 Vict. c. 78, incorporated the inhabitants of the borough within certain limits mentioned in the charter by the title of the Mayor, Aldermen and Burgesses of the borough of Aberavon, with all the powers, authorities, immunities and privileges of the boroughs named in the schedules to the Municipal Reform Act, as if the said borough of Aberavon had been one of the boroughs included in the second section of schedule B. to the said Act annexed, and extended to the said inhabitants of the said borough all the powers and provisions of the said Act, and amongst other things granted and declared that the said mayor, aldermen and burgesses should be capable to take, purchase and acquire lands, tenements and hereditaments, and other provisions, to the value of 1000*l.* a-year within the said borough over and above any real estate which the corporation might be entitled to. The information was then, on

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the 6th Feb. 1862, amended by naming as defts. the mayor, aldermen and burgesses in their corporate character under the new charter, and stating amongst other things that: "The said portreeve, aldermen and burgesses still remain and are in the possession of the said market, market-place, place for holding fairs, and slaughterhouses, and the buildings and premises belonging thereto, and in the receipt of the said stallages, rents and tolls, and they claim and insist that they are now entitled to the same, notwithstanding the granting of the said charter of incorporation and the creation of the said new corporation. The defts., the portreeve, aldermen and burgesses of Avon, have, or ought to have, in their hands large sums of money and property derived by them from the sales of the said estates as aforesaid, and from mortgages created by them thereon, and from the rents and profits of the said estates, and the said stallages, rents, or tolls, and it would so appear if accounts were taken of all such moneys and the application thereof;" and by making the following addition to the prayer: "That it may be declared that, under and by virtue of the said Municipal Corporations Act, and the several Acts for amending the same, and by the granting of the said charter of incorporation and the creation of the said new corporation under the same, or otherwise by operation of law, all and singular the said market, market-place for holding fairs, slaughterhouses, and the lands, buildings, premises and appurtenances belonging thereto, or connected therewith, and the right to levy and receive all and singular the stallages, rents and tolls leviable and receivable under or by virtue of the said Aberavon Market Act, and all and singular other the estates, moneys, property and effects of or belonging to the said portreeve, aldermen and burgesses of Avon (otherwise Aberavon) in their corporate capacity at the time of the granting of the said charter of incorporation, have become and are now vested in the defts. the mayor, aldermen and burgesses of the borough of Aberavon, for the purpose and subject to the provisions of the said Municipal Corporations Act, and the several Acts for amending the same, but subject, nevertheless, to any mortgages, charges, or incumbrances, or any debts or obligations of the said portreeve, aldermen and burgesses, lawfully affecting the said premises or any part thereof, at the time when the said premises vested in the said mayor, aldermen and burgesses, and that the defts., the said portreeve, aldermen and burgesses of Avon (otherwise Aberavon) may be decreed to deliver possession and pay over to the defts. the mayor, aldermen and burgesses of the borough of Aberavon, all such premises as aforesaid. That all such inquiries may be made and accounts taken as shall be necessary for ascertaining what moneys, property and effects were in the hands of or belonging to the said portreeve, aldermen and burgesses at the time of the granting of the said charter of incorporation, and what mortgages, charges, or incumbrances, debts or liabilities then affecting the same." The defts. the portreeve, aldermen and burgesses, and the deft. Griffith Williams, put in their answer to the amended information, by which they stated, amongst other things, that their debts and liabilities still amounted to 11,000*l.* and upwards, and they insisted as follows: "We are advised and humbly submit and insist, that the charter in letters patent of the 2nd July 1861, in the said amended information mentioned, are invalid and void, and that there is not and never was any such corporation as the mayor, aldermen and burgesses of the borough of Aberavon. And we further submit and insist, that if any such corporation as the mayor, aldermen and burgesses of the borough of Aberavon does exist, they have no estate, right, title, or interest whatsoever in the estates and hereditaments of these defts. the portreeve, aldermen and burgesses of Avon (otherwise Aber-

avon) or any of them, and that if they had or claim to have any such estate, right, title, or interest as aforesaid enforceable in equity, they ought to have been parties complainants to this suit instead of being defts. thereto; and we humbly submit and insist, that this suit is improperly constituted as to parties and otherwise, and that the informant is not entitled to the relief prayed by the said amended information, or to any relief in equity, as against us or either of us, and that the said amended information ought to be dismissed with costs." Further affidavits were afterwards made both on the part of the informant and of the defts. It is not, I think, necessary to go into the details of these affidavits. The conclusions, to be drawn from them and from the documents in proof in the cause seem to me to be these: that the new charter was accepted by the inhabitants, and that the sales made by the defts. as above mentioned were made with a view to prevent the property falling into the hands of the corporation created by the new charter, but that on the other hand there is no foundation for the allegation in the information of the property having been originally subject to any trust for the benefit of the inhabitants. This latter point seems to me to be all-important in the case, for, assuming that there was originally no trust, I cannot (speaking with all deference to the *M. R.*) at all see my way to the declaration contained in this decree, and the inquiry founded upon it. Assuming that there was originally no trust, there was not, so far as I can see, at the time of the filing of the original information, any right or title in the Attorney-General to institute a suit in respect of any property of the defts. except the market-place and slaughterhouses. The right to introduce into the second, by way of amendment, matters which had accrued subsequently to the filing of the original, bill or information, is, as I apprehend, a right which is given merely for the purpose of saving the expense of proceeding by supplemental bill. It was not, as I conceive, intended to alter, nor, as I think, does it alter, the law and practice of the court in any other respect. Now, I take it to be a well-settled rule of the court, that where there has been no title to sue at the time of the filing of an original bill or information, a decree cannot be founded upon a right of suit subsequently acquired and brought forward by supplemental bill. The substratum falling the superstructure falls also; and I think this rule must apply not only in cases where the title to sue in respect of the whole matter of the suit is acquired subsequently to the filing of the original bill, but also in cases where the title to sue in respect of any part of the matter of the suit is so acquired; for the principle would seem to be this, that there must be a right of suit when the suit is commenced, and a supplemental bill is not the commencement but the continuance of the suit. If, therefore, the case rested upon this ground alone, I should think that the declaration contained in this decree, and the inquiry founded upon it, could not be maintained; but, supposing this difficulty could be got over, there is still this further difficulty in the case. The right of the Attorney-General in this court can go no further than to have the trust executed, if there be a trust; but the claim of the apps. is adverse to the trust, and I do not think that persons claiming a title purely adverse to a trust can be made parties to a suit for the execution of a trust. The case of *Talbot v. Lord Radnor*, 3 *M. & K.* 252, is the only case of which I am aware at all bearing upon this point; and that case has been constantly disapproved and never followed. This is not, it is to be observed, the case of following trust property, but it is an attempt to fix upon property a trust to which it has never been subject. There is besides a further objection to the declaration contained in this decree, that the case made by the information

rests upon the operation of the Act of Will. 4 and the Act of 1 Vict. c. 78. Either that Act gives the corporation created by the new charter a title to the property, or it does not. If it does not, there is no foundation for the information; if it does, no declaration of this court is needed to give effect to it. It is not, as I conceive, the province of a court of equity to declare the effect of an Act of Parliament. For these reasons my opinion is that this decree cannot be maintained; but I do not think that the case made by the information wholly fails. The case made by the information as to the market-place, market and slaughterhouses, is, I think, well founded. The Market Act seems to me to create a public trust, which the Attorney-General had and has a right to enforce. Whether the debts were entitled to grant any lease of this property it is not necessary for us to decide, but assuming that they were so entitled, they were not, I think, entitled to demise the property at diminished rents upon payment of fines, the rents being devoted to the maintenance of the property. In the result, therefore, my opinion is that this decree should be reversed and a decree made restraining the debts from granting any leases of this property upon payment of fines, and to dismiss the rest of the information without prejudice to any other proceedings, and without costs; and of course there will be no costs of the appeal.

Lord Justice KNIGHT BRUCE.—Had my learned brother been disposed to dismiss the whole of the information without costs and without prejudice to another suit, I believe that I should have concurred. He has taken a view to a certain extent different to mine, but I do not think it is incumbent upon me to dissent from that view; therefore I agree to the decree which he proposes.

Solicitors for the informants, *Loftus and Young*, agents for *Cuthbertson*, of Neath, Glamorganshire.

Solicitors for the debts., *Rowland and Hacon*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

ERRATUM.—At page 162, col. 1, line 33 from top, for "appointed" read "unappointed."

Feb. 20, 21 and 23.

IZOD v. IZOD.

Trustees of fund—Discretionary power—Interest of cestui que trust.

Trustees of a will had a discretionary power to apportion either the capital or the income of a fund to or for the benefit of "S., the widow of B., and his three children." The will contained a clause of cesser of the interest of S., if she married again. The trustees refused to accept the trusts of the will. Upon the question, what interest S. and the children took in the unapportioned fund; it was held, that she and the children were entitled to share equally in the capital of it.

Elizabeth Izod, the testatrix in this suit, by her will, made the following bequest:—"I hereby direct William Izod and George Izod to invest the sum of 600*L.* (subject to reduction as hereinafter mentioned) in the names of Henry Izod and of my son-in-law Charles Heaton, in the purchase of Government stocks or funds, which I hereby give to the said Henry Izod and Charles Heaton, and the survivor of them, and the executors or administrators of such survivor, upon trust to pay and apply the dividends, interest and annual income of the said Bank Annuities, and also all or any portion of the principal thereof, to or for the benefit of Mrs. Sarah Izod, the widow of my son Joseph Izod, and of his

three children, Thomas Izod, William Henry Izod and Elizabeth Maria Izod, in such manner, shares and proportions, at such time or times, under such conditions and for such purposes as they, the said Henry Izod and Charles Heaton, or the survivor of them, or the executors or administrators of such survivor, shall, in their or his absolute or uncontrolled discretion, think proper; but if the said Sarah Izod shall marry again, then I direct that her interest under this my will shall cease and determine; and I hereby declare that the said Henry Izod and Charles Heaton shall not be accountable to the said Sarah Izod, or to any of the children of my said son Joseph Izod, or to any person claiming by, under, or in trust for her, them, or any of them, for the manner in which they shall exercise the discretionary powers hereby vested in them. And with regard to all sums of money which I have or shall have advanced to either of my said sons, William Izod, George Izod and Henry Izod, or to or for the said widow and children of my deceased son Joseph Izod, or either of them, since the 15th day of June 1849, and which shall not have been repaid to me at the time of my decease, I direct that such sums shall be considered and taken by them respectively as in part satisfaction of the legacies or share of residue given to them, or any of them respectively, in and by this my will."

The testatrix appointed William Izod and George Izod her executors, and died soon after the execution of her will. The two trustees refused to accept the trusts of the will; and the power of apportionment given to them by it, in favour of Mrs. Sarah Izod and her children, became, therefore, incapable of being exercised. Mrs. Sarah Izod was now dead, and the *plt.* was her legal personal representative.

The question was, what interests Mrs. Sarah Izod and her children took in the property under the will, in default of the apportionment being made by the trustees?

Hobhouse, Q.C. and *T. A. Roberts* appeared for the *plt.*, and argued that Mrs. Sarah Izod was entitled to share equally with her children in the *corpus* of the unapportioned property. They cited

Crockett v. Crockett, 2 Ph. 553;

Pyne v. Franklin, 5 Sim. 458;

Penny v. Turner, 2 Ph. 493.

Lloyd, Q.C. and *Prendergast* appeared for the debt, and contended that Mrs. Sarah Izod was entitled to a life-interest only in the property, subject to which her children were to have the capital of it equally between them.

The MASTER of the ROLLS, in the course of the argument, cited

Brown v. Higgs, 4 Ves. 708; a. c. 5 Ves. 495; and 8 Ves. 561.

Hobhouse, Q.C. in reply.

Feb. 23.—The MASTER of the ROLLS (after observing that the clause which prevented Mrs. Sarah Izod, as well as her children, from calling the trustees to account for the manner in which they might exercise their discretionary powers, seemed to show that both she and her children were interested in the *corpus* of the property) said: I was at first somewhat embarrassed by the direction in the will as to the cesser of Mrs. Sarah Izod's interest. But the trust or power given to the trustees by the will was, to pay and apply either the capital or the income of the property. The trustees might therefore have given her the capital. That being so, I must hold that the rule in *Brown v. Higgs* applies; and the fund must be divided equally between the *plt.* and Mrs. Sarah Izod's three children. The rule in *Crockett v. Crockett* has not, I think, any application to the present case.

Solicitor for the *plt.*, *May and Son*.

Solicitors for the debts., *Winter, Williams and Co.*

June 10, 11 and 22.

SUFFIELD v. BROWN.

Easement—Dominant and servient tenement—Rights of respective owners of—Notice of easement—Injunction—Costs.

The 2 & 3 Will. 4, c. 71, ss. 2 and 3, observed upon. A grant of an easement may be implied, and a right to it acquired, either, first, when the ownership and occupation of the dominant and servient tenements are distinct, from user, by prescription; or, secondly, where one person, having been originally the owner both of the dominant and the servient tenement, has made a subsequent grant of them to others: and that may have been made either because the easement was essential to the enjoyment of the dominant tenement, or because the grantor having, prior to his grant, attached an easement to one of two adjoining tenements, cannot afterwards derogate from his own gift; in other words, he cannot give to the grantee of the servient tenement an immunity from the effect of the right conferred by him upon the owner of the dominant tenement.

Where a right is acquired by prescription, it must be so acquired by user, for twenty years at least, as against the adjoining owner, whose interest it is to resist it. In the two other cases, time forms no element in the acquisition of the right, which springs from the circumstance that the person under whom both the subsequent owners claim was originally the owner of the dominant and the servient tenement.

Where a right is acquired by prescription, the right springs from this, that different owners are possessed of the property in question, viz. one of the dominant, and another of the servient tenement.

If an easement be enjoyed by the owner of one tenement over the tenement of another, for twenty years uninterruptedly, the right is thereby acquired; and if after that period of time both the tenements are occupied by one and the same person, who is not the owner of both tenements, then the right to the easement is suspended during such joint occupation, but is not thereby destroyed, and on the severance of such joint occupation the right to the easement revives. If an easement be enjoyed by the owner of one tenement over the tenement of another for a period less than twenty years, and then both the tenements are occupied jointly by one who is not the owner of both, that joint occupation cancels and destroys the effect of the previous user, and the easement can only be acquired by twenty years' fresh and continuous enjoyment against the owner of the servient tenement, who is interested in contesting it.

If an easement has been enjoyed for any period of time, however long, by the owner of one tenement over the tenement of an adjoining owner, and one person becomes the absolute owner of both tenements, then the right by prescription is destroyed; and if the owner grants one tenement to one person, and the other tenement to another person, the right to the easement does not revive in the grantee of that which has been the dominant tenement. But in the event of such a grant, a right to the easement may be created by reason of the operation of one or other of two causes from whence such an easement may arise, viz., either from the necessity of uninterruptedly enjoying the tenement granted, or because the loss of the easement would be in derogation of the grant of the original owner.

What is meant by "the enjoyment" of the tenement is the full and complete use of it, as it stands at the time when the joint owner of the two adjoining tenements grants one of them to one person and the other to another.

An easement may be either latent or patent; and notice of an easement may be either written or oral from the grantor of the tenement over which it exists, or, because the easement is apparent on the face of the property, or necessarily to be inferred from the nature and character of the tenement itself, which renders it necessary to inquire how the fact stands. In all those cases it is immaterial which of the two tenements was first granted. If the grantee of the servient tenement takes it with notice, written or oral, that the grant of the dominant tenement is to include an easement over the servient tenement; or if he takes it with a knowledge that, unless by reason of such easement, the dominant tenement cannot be enjoyed, in either case he has notice of the easement over the tenement of which he becomes the owner, and he cannot afterwards dispute it.

Where the *plts.*, who were dockowners, sought to restrain the *defts.* by injunction from interfering with their right (or easement) to have the bowsprits of vessels in their dock overhanging the adjacent wharf of the *defts.*, it was, in accordance with the above-stated principles, and having regard to the particular circumstances of the case,

Held, that the *plts.* had not established a right by prescription to the easement claimed by them; but that as the easement was necessary to the full enjoyment by them of their dock, and as the *defts.* must have known that fact when he became the owner of the wharf, the *plts.* were entitled to an injunction accordingly. No costs on either side.

This was an injunction suit. The *plts.* were the owner in fee and the lessee of a dry dock called the Fore and Aft Dock at Bermondsey, and the *defts.* was the owner of the adjoining wharf. The injunction prayed by the bill was one to restrain the *defts.* from interfering with the *plts.* in the exercise and enjoyment by them of an alleged right on their part to have the permanent bowsprits of vessels in their dock overlying and overhanging the *defts.*' wharf, to the extent of about fourteen feet, viz., from a show-board fixed on the land to an adjoining highway called Bermondsey-wall.

The facts of the case were shortly these:—

In 1794 there was, upon the tenement which was now the *defts.*' wharf, a warehouse and sail loft, made of timber. That structure was burnt between the years 1794 and 1800. In 1797 the *plts.*' tenement was first used as a dock; but it appeared from the evidence in the suit that from 1794 to 1800 no bowsprit could have projected over what was now the *defts.*' wharf. In 1810 both the dock and wharf were occupied by the same persons, viz., by a Mr. Smith and a Mr. William Rattenbury. In 1813 or 1814 the bowsprits of vessels in the *plts.*' dock did overhang the *defts.*' tenement, and they had continued to do so from that time until 1845.

In 1817 there was a change in the occupation of the dock and wharf; for they ceased to be in that of Messrs. Smith and William Rattenbury, and passed into that of William Rattenbury and an assignee of his. In that occupation they continued till 1839. In that year the then subsisting leases in the dock and wharf were assigned to John Morris, the owner in fee of both, subject only to a mortgage which he had effected upon them. On the 13th Sept. 1841 the mortgages and John Morris granted, assigned and confirmed the whole of their respective interests in both the dock and the wharf to a Mr. Knox absolutely in fee.

On the 3rd June 1845, Mr. Knox being then in the occupation of both the dock and the wharf, put them up for sale by auction. Lot 1 consisted of the dock, and was described in the particulars of sale as unoccupied. Lot 2 consisted of the wharf, and was in like manner described as unoccupied. Lot 1 was not

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then sold. Lot 2 was purchased by a Mr. Gibson; and conveyed to him by an indenture dated the 15th June 1845, but without the reservation of any easement. Gibson afterwards sold the wharf to the deft. Brown.

By an indenture dated the 14th Aug. 1846, Lot No. 1, the dock, was demised to the plt. Mills, as the lessee thereof, for twenty-one years, and in 1861 the fee-simple of the dock, subject to the demise to Mills, was conveyed to the plt. Suffield.

It also appeared from the evidence in the suit, that since 1845, and up to the present time, the bowsprits of vessels entering and using the plts.' dock had overhung the deft.'s wharf, in the same manner as they had done prior to 1845. Some alterations had been made in the plts.' dock, particularly in 1846, but they were not material to the case. The space over which the bowsprits so hung was, as already stated, one of about fourteen feet. The deft. had lately constructed a warehouse on his wharf, and was about to cover the whole of it, so as to exclude the plts. from the enjoyment of their right to have the bowsprits of vessels in their dock projecting over the space in question.

The plts.' case was, that they were entitled to the easement, either by prescription, or by an implied reservation thereof in their favour. If they had not the right claimed by them they would be injured in the full enjoyment of their property in the dock; as they would be able to receive in it only vessels of a small and inferior tonnage.

Selwyn, Q. C. and *Piggott* appeared for the plts., and cited

Beaudely v. Brook, Cro. Jac. 169;
Swanborough v. Coventry, 9 Bing. 305;
Pyer v. Carter, 1 H. & N. 916;
Hinchcliffe v. Earl of Kinnowl, 5 Bing. N.C. 1;
Esart v. Cochrane, 4 MacQ. 117; 5 L. T. Rep. N. S. 1;
Richards v. Rose, 9 Ex. 218;
Riviera v. Bower, 1 Ry. & Moo. 24.

Baggallay, Q.C. and *Wickens*, for the deft., denied the plts.' right as set up by them, and the mischiefs which their not having it would produce to them. They cited

2 & 3 Will. 4, c. 71, ss. 2 and 3;
Onley v. Gardiner, 4 M. & W. 496;
Hardinge v. Warwick, 3 Ex. 552;
Physe v. Vicary, 16 M. & W. 484;
Cooper v. Halbach, 30 Beav. 160; 6 L. T. Rep. N. S. 826;
Jones v. Tapling, 12 C. B., N. S., 826; 5 L. T. Rep. N. S. 728.

Selwyn, Q. C. in reply.

The MASTER of the ROLLS.—The object of this suit is to establish the right claimed by the plts., who are the owners in fee and lessees of a dock adjoining the deft.'s land, to have the bowsprits of any vessels used in their dock extending over a certain portion of deft.'s property. The portion in question is only about fourteen feet in extent, and lies between a show-board erected on the land and an adjoining highway called *Bermondsey-wall*. The right or easement which is so claimed by the plts. was not granted to them either by deed or by any instrument in writing. If it exists, it must do so by the implication of a grant. A grant of an easement may be implied, and a right to it acquired, thus: either where the ownership and occupation of the dominant and servient tenements are distinct, from user, by prescription; or, where one person, having been originally the owner, both of the dominant and the servient tenement, has made a subsequent grant of them to others, either because the easement was essential to the enjoyment of the dominant tenement, or because the grantor having, prior to his grant, attached an easement to one of two adjoining tenements, cannot afterwards derogate from his own gift; in other words, he cannot give to

the grantee of the servient tenement an immunity from the effects of the right conferred by him upon the owner of the dominant tenement. Where a right is acquired by prescription, it must be so acquired by user for twenty years at least as against the adjoining owner whose interest it is to resist it. In the two other cases, time forms no element in the acquisition of the right, which springs from the circumstance that the person under whom both the subsequent owners claim was originally the owner of the dominant and the servient tenement. Where a right is acquired by prescription, it springs from this: that different owners are possessed of the property in question, namely, one of the dominant and another of the servient tenement. Prior to 2 & 3 Will. 4, c. 71, as well as now, the rules relating to the establishment of, and resistance against, an easement, were and are the same at law and in equity; and all that the statute does is to take away certain grounds of defence, by which the establishment of an easement might previously have been resisted. Light is by that statute put on a different footing from other easements; and by the 3rd section the use of light enjoyed for twenty years creates an indefeasible right, unless it be shown to have been enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. The 2nd section, which applies to easements of all other descriptions, provides that the uninterrupted use of the easement for twenty years creates a right which shall not be defeated by showing the first enjoyment of the right prior to the twenty years; and it further provides, that when the right has been enjoyed forty years it shall be indefeasible; unless it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. Prior to the passing of the Act, twenty years' continuous usage was sufficient at common law to create the presumption of a grant; but that presumption might be rebutted by showing how the user arose, even though it was prior to the twenty years; or by showing how the right, if it existed, had been extinguished, as by unity of possession or otherwise, prior to the twenty years. The 2nd section of the statute puts an end to that species of defence; but where the user has only been for twenty years, and not forty years, it admits all other defences by which the inference of a right by custom, prescription, or grant might be rebutted; and where the user has exceeded forty years, the right is indefeasible, unless upon proof of a written instrument limiting the right. In this case the right is claimed, in the first place, by prescription, and the evidence given of that renders it material to consider how unity of possession may affect the right; and on that point I think three propositions may be stated as defining the law on the subject. First, if an easement be enjoyed by the owner of one tenement over that of another for twenty years uninterruptedly, the right is thereby acquired; and if, after that period of time, both the tenements are occupied by one and the same person, who is not the owner of both tenements, then the right to the easement is suspended during such joint occupation, but is not thereby destroyed; and on the severance of such joint occupation the right to the easement revives. Secondly, if the easement be enjoyed by the owner of one tenement over the tenement of another for a period less than twenty years, and then both the tenements are occupied jointly by one who is not the owner of both, that joint occupation cancels and destroys the effect of the previous user, and the easement can only be acquired by twenty years' fresh and continuous enjoyment against the owner of the servient tenement, who is interested in contesting it. Thirdly, if the easement has been enjoyed for any period of time, however long, by the owner of one tenement over the tenement of an adjoining owner, and one person becomes the absolute owner of both

tenements, then the right by prescription is destroyed; and if the owner grants one tenement to one person, and the other tenement to another person, the right to the easement does not revive in the grantee of that which has been the dominant tenement. But in the event of such a grant, a right to the easement may be created by reason of the application of one or other of the two causes from whence such an easement may arise; namely, either from the necessity of uninterruptedly enjoying the tenement granted, or because the loss of the easement would be in derogation of the grant of the original owner. Having stated those propositions of law, I will now proceed to consider how far they apply to the facts of the case established before me. On the evidence I think there is but little contradiction; and even that may be reconciled without much difficulty. [His Honour then stated the facts of the case as above set forth, down to the deed of the 13th Sept. 1841, and continued:] In that state of things, applying the principles I have already enunciated, no right by prescription could have arisen prior to that period, there being evidence of the existence of the dock for thirteen years only before 1810, which is insufficient to create the right; and there having been, not merely a joint occupation since that period up to 1841, but from that time until 1845 a joint ownership as well as joint occupation, which ownership would have destroyed the right by prescription, if any then existed. On that part of the case, therefore, I am of opinion that the *plts.*' contention fails. I have now to consider whether their case can be supported on either of the other grounds with which the time during which the easement has been enjoyed has nothing to do. And here it is proper to point out how closely the two portions of it are allied to each other, though at first sight they seem to stand on different, and even to some extent on opposite, principles. If a man grant to another a piece of land, surrounded by the whole of the land of the grantor, that necessarily implies the grant of the right of way to it, because, without access to it, the tenement granted could not be enjoyed; and there the implied grant of the easement is in extension of the actual grant of the tenement; the grant being, by the hypothesis, silent on the subject. But when the grantor, who has already granted the tenement in the middle of his own land, afterwards makes to a stranger a grant of the servient tenement—that is, of all the land that surrounds the tenement first granted—although that latter grant does not notice the right of way which the grantor of the dominant tenement possesses, the right of way still binds the grantee of the servient tenement; on the ground that the grantor of both tenements cannot derogate from the grant he has already made to the grantee of the dominant tenement; and also because the grantee of the servient tenement has notice, from what is patent on the face of the tenements, that the dominant tenement cannot be enjoyed without the easement over the servient tenement granted to him. When, therefore, the grantee of the servient tenement is bound not to disturb the easement, it is because he has, before acquiring the grant, notice of the existence of that easement, which easement may be either latent or patent. Notice of that easement may be of two kinds: a direct notice either written or oral from the grantor; or implied because the easement is apparent on the face of the property, or to be inferred from the nature and character of the tenement itself, which renders it imperative to inquire how the fact stands. In all those cases it is immaterial which of the two tenements is first granted; for, if the grantee of the servient tenement takes it with notice, written or oral, that the grant of the dominant tenement is to include an easement over the servient tenement, or if he takes it with a knowledge that, unless by reason of such easement, the dominant tenement cannot be enjoyed, in either

case he has notice of the easement over the tenement of which he becomes the owner, and he cannot afterwards dispute it. In other words, the grantee of the servient tenement, when he becomes the owner of it, has notice that the easement over that tenement has already been granted, or that it must be granted in order that the dominant tenement may be duly enjoyed. On that part of the case I have felt considerable difficulty, not from any doubt as to the principles applicable to such cases, but owing to the difficulty of defining precisely what is meant by the words "necessary for the enjoyment of a tenement." Upon the best consideration, however, that I have been able to give to the subject, I have come to the conclusion that the *plts.* have made out a case for relief, and for the intervention of this court. [His Honour then stated the facts of the case, as above set forth from the deed of the 13th Sept. 1841, to the transactions which led to the institution of this suit, and continued:] The *plts.*, therefore, or at least one of them, *Mills*, has, since the year 1846, used the dock in the manner stated. The question then is this: can the *def.* now contest the right of the *plts.* so to put vessels in their dock as that the bowsprits shall project over such a portion of the wharf as is necessary for the perfect and complete enjoyment of the dock as it stood at the time of the sale of the wharf to Gibson? I think that the *def.* cannot contest the right. In the first place, it is proper to observe that my judgment on this point is in no respect founded on the circumstance that the *def.* has permitted the user of the dock in such a manner that the bowsprits overhang his wharf since he became the purchaser. It is clear, on the evidence, that he permitted that to be done simply as a neighbourly act; it in no way binds him, and time has nothing to do with the point I am now considering. It is also clear that the *def.* only contests the right now because it will interfere with his making his wharf more useful and profitable than it has heretofore been, by the erection of a warehouse thereon. But the ground on which I think he cannot contest the right in the *plts.* is, because the projection of the bowsprit from the vessel in the dock is essential to the full and complete enjoyment of the dock as it stood at the time when he, or rather Gibson, under whom he claims, purchased the wharf; and that Gibson and he had distinct notice of that fact; not merely from the description contained in the particulars of sale under which he bought, but also because the fact was patent and obvious to any one, on the ground that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the wharf which I have pointed out. The real question, then, is this—is the projection of the bowsprit over the wharf essential to the enjoyment of the dock? It was argued for the *def.*, that the restriction prohibiting the bowsprit from projecting over the *def.*'s wharf will not render the dock useless; but that it may still be enjoyed for repairing and constructing vessels; and that is unquestionably true. But this fact is also undeniable, that thereby the dock becomes less useful. Assuming the extent to which the bowsprit might project over the wharf to be ten feet, to that extent, at least, whatever it be, the length of the largest vessels which enter the dock must be lessened. I am not, of course, speaking of the moveable bowsprit, which it is the duty of the *plts.* to cause to be removed, but of the permanent bowsprit, which is let into the vessel, and forms a part of it as much as the mainmast itself. If, therefore, it be true that the dock can still be used, it is equally true that it cannot be used exactly as it has been heretofore; and my opinion is, that the projection of the bowsprit is necessary for the due enjoyment of the dock, in the ordinary sense of that term. What is

meant by the use of that word in these and analogous cases is, in my opinion, the full and complete use of the tenement, as it stands at the time when the joint owner of the two adjoining tenements grants one of them to one person and the other to another. That seems to be established by the cases of *Hinchcliffe v. The Earl of Kinnoul* and *Pyer v. Carter*. In both those cases the dominant tenement, which was a house, could have been enjoyed, although the easement over the servient tenement had been extinguished; not, indeed, in the former case, quite so conveniently as before, without the use of a coal-shoot; but, in the latter case, the outlay of a small sum of money would have enabled the plt. to dispense with the use of a drain which passed under the deft.'s house. At the time when Gibson, and afterwards the deft., bought this wharf, each of them knew that it adjoined a dock which would admit a vessel 132 or 133 feet in length, but that by so doing the bowsprit would project over a corner of the wharf, to the extent of ten feet or thereabouts. I think that the deft. is not entitled to restrict the owner of the dock in his enjoyment of it to that extent, as if it had been ten feet shorter, that is, as if the head of the vessel had been ten feet further distant from the deft.'s land. In all this reasoning I have assumed that the plts. have no right to go beyond the deft.'s land; but, if they have such a right, then the case of the deft., if established, would still further limit the right of the plts. to the extent to which the bowsprit might project beyond the land of the deft. over the adjoining highway. The case of *Pyer v. Carter* has also an important bearing on this case in other respects. In that case the purchaser of the servient tenement was ignorant of the easement when he bought, and still the Court of Ex., considering that the case was one of drains, thought that it was incumbent on him to inquire and ascertain in what manner the waste water escaped from the adjoining house. In this case the deft., or Gibson, under whom he claims, was fully cognisant of the size and use of the dock, and of the necessity of the bowsprit of a large vessel, docked therein, projecting over his land, in order to enable the dock to be fully enjoyed. That case also establishes that no distinction can be founded on the circumstance that the servient tenement was sold prior to the sale of the dominant tenement; for that indeed only results in a question of notice, as I have already explained. Some argument was founded on the fact that the dock had been altered and enlarged on two several occasions, once in 1814, and again in 1846. The alteration in 1814 does not touch the question on which I decide this case. It is however not so as regards the latter alteration in 1846, subsequent to the purchase by the deft. That alteration would be very material if it appeared that thereby larger vessels had been introduced, or could be introduced, into the dock, but I am of opinion that the evidence does not establish that. It is true, however, that the alteration was made for a purpose which, if it had succeeded, would have enabled the dock to hold a larger vessel than it had formerly done, and would probably have enlarged the space occupied over the wharf. It was not, however, completed; the vessel for which it was made, or begun to be made, did not take advantage of it; nor does it appear that, since 1846, larger vessels than theretofore have been, or could have been, introduced into the dock. The deft. is, in my opinion, bound to permit the easement to the extent that is necessary for the complete enjoyment of the dock as it stood at the time of his purchase, but no further or otherwise; and, if my judgment should be sustained, the exact line and extent over which the bowsprit of any vessel in the dock may overhang the deft.'s land ought to be clearly defined. That extent, judging from the map proved in the cause, I suppose to be a

triangular piece, nearly equilateral, the sides varying from eight to ten feet in length; but whatever it is, it ought to be precisely defined by metes and bounds, so that no further alteration of the dock should enable the owner to extend the easement, or prejudice the rest of the deft.'s wharf. I have only one further point to consider. The deft. contends, that the only case raised by the plts.' bill is one of prescription, and that the point on which I have decided in his favour is not raised by the pleadings. It is certainly true that it is not prominently brought forward; but I still think that it is open to the plts. to raise the question on the bill and answer as they stand; and that I should be acting with such technical strictness as to defeat justice, if I were to dismiss the bill on the grounds that it does not more distinctly raise the question of a claim to the easement, as being necessary to the enjoyment of the dominant tenement; that it had been, or was to be, included in the grant thereof by the owner of both tenements; and that that was known to the deft. The point certainly does not appear to have taken the deft. by surprise. It has been most thoroughly and ably argued on his behalf by his counsel, and if I were to give leave to amend the bill, it would afford no benefit ultimately to the deft. I think it proper to state, that though I have come to this conclusion, it was after some hesitation, the state of the authorities not being in all respects perfectly reconcilable. I have before explained very fully the grounds on which I have proceeded. I am of opinion that this is no case for costs. On the question of prescription, on which the principal evidence was adduced in the cause, I am of opinion that the plts. have not made out their case; and although I think that no lawyer would consider that he could have safely advised his client to rest his case exclusively on the joint ownership of both tenements by Mr. Knox in 1845 and the subsequent acts, still it is on those alone that I have decided in the plts.' favour. If the case had rested on the ground of prescription alone, I should have dismissed the bill. The decree that I shall make will therefore be to this effect: Let there be a perpetual injunction to restrain the deft. from preventing or interfering with the full use and enjoyment by the plts. of their dock, in the manner in which the same has heretofore been used, viz., by allowing the permanent bowsprit of any vessel in the plts.' dock to overlay or overhang that portion of the deft.'s wharf which lies between the show-board and the street called Bermondsey-wall. That portion must be carefully marked out by proper metes and bounds. There must be no costs of the suit on either side, and liberty must be reserved to all parties to apply to the court as they may be advised.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's Inn,
Barrister-at-Law.

Friday, Jan. 16.

BONSER v. BRADSHAW.

Solicitor and client—Costs of infant plt.—Attorneys and Solicitors Act 1860.

Where a solicitor had recovered property for an infant, the Court, on the infant attaining his majority, declared the costs of the solicitor to be a charge upon the property recovered, under the 28th section of the Attorneys and Solicitors Act (23 & 24 Vict. c. 127), having refused an application for the same purpose made during the infancy of the person entitled.

This suit was instituted by the next friend of an infant, the grandson and heir-at-law of John Bonser, who at the time of his death in 1854 was entitled to the equity of redemption in certain real estate

V.C. S.]

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consisting of houses and land, of small annual value, in the county of Leicester, against the devisees of the same property under an alleged will of John Bonser, dated the 7th Aug. 1850, and which had been proved in the Archdeaconry Court at Leicester.

The bill alleged that the will was a forgery, and prayed that it might be set aside; that the devisees thereunder might be directed to convey the real estate to the plt.; and that, if necessary, an issue of *devisavit vel non* might be directed.

Upon motion, in March 1858, for an injunction and receiver, and also for an issue, the court said it was evidently a case to be tried by a jury; and the common order for an issue *devisavit vel non* was made. The issue was tried at Leicester, and the jury having found a verdict for the plt., the application for a receiver and for an injunction was renewed and granted. Upon the occasion of a sale of some portions of the estate to a railway company, the court ordered that the will should be set aside, so far as it purported to pass real estate; that the heir-at-law was entitled to the property; and that the devisees were trustees for him: (see 32 L. T. Rep. 172.) The court also ordered that the deft., who had set up the alleged will, should pay all the costs of the proceedings.

The purchase-money for the land which had been sold to the company, amounting to 266*l.*, was paid into court.

The taxed costs incurred in prosecuting the infant plt.'s rights in the suit and action amounted to the sum of 492*l.*, a large part of which had been paid out of pocket by the solicitor employed by the next friend. The deft. having become insolvent, a petition was, in Dec. 1860, presented on behalf of the infant plt. and his next friend, praying for the payment out of court of the sum of 266*l.*, and for payment, so far as that sum would extend, of the costs due to the plt.'s solicitor; and the petition also prayed that the residue of the costs of the solicitor might be raised and paid out of the real estate recovered, or that the same might be declared to be a charge on the residue of the real estate under the 28th section of the Attorneys, Solicitors, &c. Act of 1860 (23 & 24 Vict. c. 127).

On the 21st Dec. 1860 the court ordered payment to the solicitor of the fund in court, on liquidation *pro tanto* of his costs; but refused to make any order declaring that the solicitor was entitled to a charge on the estate for the residue of his costs, being of opinion that the Act of 1860 had no application to the case of a suit instituted on behalf of an infant; but that it applied only to cases where the parties were *sui juris*: (see the Report, 3 L. T. Rep. N. S. 545.) The infant plt. having attained the age of twenty-one, a petition was now (Jan. 16, 1863) presented on behalf of the solicitor, praying that the residue of the costs, charges and expenses incurred by him on recovering the estate might be declared to be a charge on the estate, and might be raised and paid out of it.

Malins and *R. W. E. Forster* appeared on the petition.

The VICE-CHANCELLOR made an order directing the costs, charges and expenses to be taxed, and declaring that the amount certified by the taxing master should be a charge on the estate, to be raised by a sale of the same.

Thursday, July 16.

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Notice of claim by a creditor—Alleged fraudulent settlement—Right to serve notice—Effect of notice.

A creditor having filed a bill for the purpose of establishing the validity of his security in priority to a voluntary settlement executed by the debtor whilst he was indebted, and having succeeded in his claim and been paid his debt, sent to the trustees of the

settlement a notice, announcing his intention of impeaching the settlement, and warning them against parting with any of the funds in their hands. The trustees replied, that unless proceedings were taken within one month, they should disregard the notice. Proceedings were not taken within the month.

On motion by the cestui que trust under the settlement, for an injunction to restrain the creditor from continuing the notice, it was ordered that the trustees should be at liberty to deal with the income of the trust-funds until further order, according to the trusts of the settlement.

This was a motion on behalf of the plt. Mrs. Lonergan, that the deft. George Carew might be restrained from continuing the notices of the 3rd Nov. 1860, and the 20th Feb. 1863, in the bill mentioned, and from applying for, claiming, obtaining, or receiving the sum of 153*l.* 4*s.* 3*d.* in the bill mentioned, or any dividends, interest or annual produce of the trust-funds of the settlement of the 2nd May 1846, or from preventing the plt. from receiving the same; also, that the defts. Messrs. Arundell and Smart might be restrained from retransferring to the account of Messrs. Stourton and Arundell the same sum, or from paying the same, or the income of the trust-funds, to the deft. Mr. Carew, or any other person whomsoever, except according to the trusts of the settlement.

By the settlement of the 2nd May 1846, which was made on the occasion of the marriage of the plt. with her former husband, the Hon. John Stourton, it was declared that certain sums of stock should be held by the defts. the Hon. William Stourton and H. R. Arundell upon trust, after the decease of John Stourton, to pay the interest, dividends and annual produce to or permit the same to be received by the plt. and her assigns during her life. It was also declared that six-elevenths of a sum of 15,000*l.* should (subject to a settlement which the grantor, William Lord Stourton, then had it in contemplation to make for his daughter) be held, after the decease of the said John Stourton and the failure of children of the marriage who should, under the trusts therein comprised, become entitled to the same, upon trust for the plt. and her assigns during the remainder of her life.

The Hon. John Stourton died in 1847, leaving one child of the marriage, and in 1857 the plt. married the deft. William Lonergan.

By an indenture of settlement dated the 18th June 1858, all the interest of the plt., or of the deft. her husband in her right, was assigned to the said deft. H. R. Arundell and the deft. R. W. H. Smart, upon trust for the plt. for her life for her separate use, without power of anticipation, and as to such interest as she might have in the capital of the said funds, upon certain trusts for the benefit of the plt. for life, and after her decease for the deft. her husband for his life.

On the 23rd Oct. 1860 the deft. Wm. Lonergan, who was then in prison for debt, was discharged from custody under the Insolvent Debtors' Act, and his estate had become vested in S. Sturgis, the assignee.

On the 2nd Feb. 1861 the deft. Carew filed a bill against Messrs. Arundell and Smart, and Mr. and Mrs. Lonergan, alleging that prior to the settlement of the 18th June 1858, namely, on the 14th June 1858, four days previously, William Lonergan signed a letter addressed to Mr. Carew, whereby he stated that in consideration of Mr. Carew's forbearance in not requiring immediate payment of the moneys he had advanced, he (Lonergan) agreed and undertook to give and execute to him forthwith a good and available charge in the interests to which he claimed by right of marriage with his present wife to be entitled; and he

further pledged himself not to incur his interests by way of settlement or otherwise until he had given and executed such charge.

Notice of this letter was sent on the 15th June 1858 to the deft. Arundell, and on the 13th July 1858 a mortgage of the deft.'s interests under the settlement of 1846 was executed for 800*l*. Notice of this deed was, on the 21st July 1858, sent to Mr. Arundell, and a similar notice was subsequently sent to Mr. Stourton.

The bill alleged that the settlement was subject to Mr. Carew's securities and rights under the agreement; and prayed for an account, and in the alternative a foreclosure of the mortgaged premises.

On the 18th Nov. 1861 a decree was made in the cause directing an account to be taken of what was due to the plt. on the 13th July 1858, and it was declared that Mr. Carew had a valid charge on the interest and dividends coming to the hands of Messrs. Arundell and Smart as trustees of the indenture of the 18th June 1858 for what should be certified to be due: (see the report, 5 L. T. Rep. N. S. 498.)

On the 9th Aug. 1862 the sum of 679*l*. 0*s*. 11*d*. for principal and interest was certified to be due to Mr. Carew, and a sum for costs, which with the former amounted to 849*l*. 13*s*. 9*d*.

The defts. Stourton and Arundell had in consequence of the notice of the 21st July 1858 been accumulating the income of the trust-fund. On the 18th Feb. 1863, on receiving from Mr. Carew a withdrawal of the notice, they directed a transfer of these accumulations to the account of Messrs. Arundell and Smart, and on the same 18th Feb. 1863 Messrs. Arundell and Smart paid to Mr. Carew the sum of 849*l*. 13*s*. 9*d*., leaving the balance of 153*l*. 4*s*. 3*d*. standing to Messrs. Arundell and Smart's account.

After receiving this sum, and on the same day, Mr. Carew wrote to the solicitors of Mr. Stourton, saying that they would find amongst the notices he had given them one of the 3rd Nov. 1860, which had not been withdrawn, and the benefit of which he claimed. They would do well therefore to consider before they sanctioned their client's concurrence in paying over the trust-funds to Messrs. Arundell and Smart in the face of that notice, and that he would do so at his peril. Also that it was the writer's intention to take steps in reference thereto.

The notice of the 3rd Nov. 1860 made mention of the deed of the 13th July 1858. Mr. Carew claimed the benefit of that deed, and informed Messrs. Stourton and Arundell that they would be held responsible for transferring or paying to Mr. and Mrs. Lonergan, or either of them, or any person (other than Mr. Carew) claiming under them, or either of them, any part of the income of the property so charged in favour of Mr. Carew.

On the 20th Feb. 1863 the solicitors of Messrs. Arundell and Smart received another notice from Mr. Carew, addressed both to them and to Messrs. Stourton and Arundell, announcing his intention of taking proceedings to set aside the settlement of the 18th June 1858 as void under the statute of Elizabeth, and in the meantime warning them against parting with any of the moneys in their hands as trustees.

On the 24th Feb. the solicitors wrote to Mr. Carew to say they should not be justified in withholding Mrs. Lonergan's income for an indefinite time, and that unless Mr. Carew commenced proceedings within one month, they should advise their clients to treat the notice as a nullity.

This bill was filed on the 23rd, and amended on the 27th June last, praying in the terms of the notice of motion, and for other relief.

Bacon, Q. C. and Chisholm Batten supported the motion on behalf of the plt.—They argued that Mr. Carew was not justified in giving the notice of the

20th Feb. Mr. Carew could not take any steps to set aside the settlement; such a proceeding, if it were commenced at all, must be instituted by Sturgis, the assignee, and if it succeeded, would result in the plt., by reason of her equity to a settlement, having the whole of the income paid to her for her separate use.

Greene, Q.C. and Dickinson, for the deft. Carew, argued that, to grant this motion would be virtually to decide the merits of the cause upon an injunction. If Mr. Carew were entitled to impeach the settlement, he was authorised to serve this notice on the trustees.

Jessel, Riddell and Smart appeared for other defts.

The VICE-CHANCELLOR, after observing that the motion was misconceived in point of form, said:—It is impossible for the court to allow that a mere notice is to have the effect of an injunction. Mr. Greene has argued that, if the court refuses to allow this notice to operate as an injunction, the effect will be to decide the question in the cause. That is a strong thing to say; but the next argument of Mr. Greene answers it, for he says that the court ought not to allow anything to be done upon a settlement which is alleged to be invalid. Now, if the settlement be, as he states, invalid, and the court is to do nothing upon it, permitting this notice to stand would have the same effect as if the court had granted an injunction upon an interlocutory application to restrain the trustees of the settlement. Where the court has to consider what ought to be done, pending a litigation, with a fund with respect to which a dispute has arisen, it must look at all the circumstances of the case. In the present instance, the party who served the notice was told, in the month of February, that he had no claim, and very good reasons were suggested against the validity of his alleged claim. He was told that unless he filed his bill to assert his claim, and thereby became a litigant, the trustees would disregard the notice. Mr. Greene says there is no difference between a notice and a distringas. But a distringas has the effect of notice, and is recognised by the general orders of the court, and what is the principle upon which that recognition proceeds? First of all, the writ of distringas is of a formal kind, and can only issue upon the oath of a person that he has a right to the fund. That is much stronger than a mere notice, in the judgment both of the Legislature and of this court, for it is provided by the general orders of the court that if a man does not file a bill to assert his title within eight days after service of the distringas, the Bank of England is authorised totally to disregard it. Applying that principle to the present case, it leads to this, that the plt. is now entitled to an order that the trustees shall be at liberty to act as if the deed were a valid one. The order in form will be, that the trustees may be at liberty until further order to deal with the income according to the trusts of the settlement.

Solicitors: for the plt., *Lamb*; for the defts., *Rashleigh and Smart*; *Carew*.

Saturday, July 18.

Re HAYES'S TRUSTS.

Will—Construction—"Survivors" not synonymous with "others."

Testatrix bequeathed the interest of a fund to her niece for life, and after her death she bequeathed the fund unto the three daughters of her niece (naming them) in equal shares; and she declared that in case any of them should die without leaving any lawful issue, the share or shares of her or them so dying should go to the "survivors" of them in equal shares; and if but one, then to such only one; but if any or either of them should leave any

child or children, then testatrix gave the share or shares of her or them so dying unto her or their child or children respectively in equal shares; provided, that if the three should all die without lawful issue in the lifetime of their mother, then the fund should go to her niece absolutely.

Two of the daughters died in the lifetime of the tenant for life, and the remaining daughter survived and was unmarried:

Held, that the share of the surviving daughter, in the event of her dying without issue, was at her absolute disposal, and did not pass to the children of the two deceased daughters.

Margaret Hayes, by her will, bequeathed as follows:—"I give and bequeath unto my brother Charles Hayes, and to my nephew the Rev. Charles Boyd Abdy, the sum of 3000*l.* sterling, upon trust that they my said trustees, and the survivor of them, his executors or administrators, do and shall lay out and invest the same in the purchase of stock in some of the public funds of this kingdom, in their names, and from time to time pay the dividends, interest and proceeds arising therefrom, as the same shall become due and payable, unto my niece Maria Henrietta Sykes, for her own use and benefit during her natural life, and her receipts alone, notwithstanding any coverture, shall be good and sufficient discharges to my said trustees for the same. And from and after the decease of my said niece Maria Henrietta Sykes, then in trust for, and I do hereby give and bequeath the said principal stock, moneys, and all accumulations thereof, unto and amongst her three daughters, Harriet Sykes, Mary Ann Sykes and Isabella Sykes, in equal shares and proportions, the dividends and interest of each share of the said Harriet Sykes, Mary Ann Sykes, and Isabella Sykes, to be laid out and applied by my said trustees in and towards their maintenance and education during their respective minorities. And I do hereby declare that in case any or either of them the said Harriet Sykes, Mary Anne Sykes and Isabella Sykes, shall depart this life either before or after she or they shall become entitled to her or their share or shares of the said principal stock moneys, without leaving any lawful issue, then the share or shares of her or them so dying shall go, and I bequeath the same, to the survivors of them in equal shares, and if but one, then to such only one; but if any or either of them, the said Harriet Sykes, Mary Ann Sykes and Isabella Sykes, shall leave any child or children at her or their deaths respectively, then I give and bequeath the share or shares of her or them so dying unto her or their child or children respectively in equal shares and proportions; provided nevertheless, and it is my will and meaning, that if it shall happen that the said Harriet Sykes, Mary Ann Sykes and Isabella Sykes shall all die without lawful issue in the lifetime of their mother the said Maria Henrietta Sykes, then the said principal stock, moneys, and accumulations shall go, and I accordingly bequeath the same, to her my said niece Maria Henrietta Sykes, for her own absolute use and benefit.

Testatrix died shortly after the date of her will.

Maria Henrietta Sykes, the tenant for life, died on the 15th March 1862. Harriet Sykes, one of the daughters, married J. A. Symonds, and died in the lifetime of her mother, leaving several children. Isabella Sykes, another daughter, married Dr. H. Gamble, and also died in the lifetime of her mother, leaving children. Mary Ann Sykes, the third daughter, was still living and unmarried.

The question now was, whether the share of Mary Ann Sykes in the fund was, in the event of her death without issue, to go, under the provisions of the will, to the children of her sisters who had predeceased her, or was at her own absolute disposal.

Bird appeared for the petitioners.

Whately for resps. in the same interest.

Martell for Dr. Gamble, another resp., cited

Barlow v. Saller, 17 Ves. 479; and

Holland v. Allsopp, 29 Beav. 498;

and contended that the word "survivors" must be read as meaning "others." Any other construction would lead to most absurd consequences.

Levin, for the trustees, also contended that the word "survivors" meant "others." The gift was not to a class, but to three persons named. The first part of the limitation was, "I hereby declare that in case any or either of them (naming the three daughters) shall depart this life either before or after she or they shall become entitled to her or their share or shares, without leaving any lawful issue, then the share or shares of her or them so dying shall go to the survivors of them in equal shares." These words were meant to apply to all the three daughters, and unless the word "survivors" be construed "others," it would be impossible for the children of the deceased daughters to take the share of Mary Ann, in the event of her death without leaving issue. The testator had inserted two limitations: one in the event of the death of the daughters without leaving issue; the other in the event of the daughters leaving any child or children at their deaths respectively. The words were intended to apply to Mary Ann as much as to the other daughters. If she were to die, leaving children, the share was intended to go to them; if she were to die without leaving children, the share was intended to go to the children of the other daughters. He cited

Smith v. Osborne, 6 H. L. Cas. 375;

Wilmot v. Wilmot, 8 Ves. 10.

Dickinson contended that Mary Ann Sykes took an absolute interest. If property be given to A. for life, and after A.'s death to the children of A., with a gift over in case of the death of the donee, it means death without issue in the lifetime of the tenant for life. The testatrix in this case went on to say that if all the daughters should die without lawful issue in the lifetime of their mother, the fund was to go to her niece, clearly showing that what she had in contemplation was the death of the daughters without issue during the lifetime of the tenant for life. He referred to

Monteith v. Nicholson, 2 Keen, 719;

Boulton v. Beard, 3 De G. M. & G. 608;

McLachlan v. Tait, 3 L. T. Rep. N. S. 492; *ac.*

6 Jur. N. S. 1269;

2 Jarm. on Wills, 648.

The VICE-CHANCELLOR.—I think the language of the gift in favour of the children here is so clear and distinct that they take absolutely under the gift in remainder. There is an absolute gift to the three daughters, which is cut down by the testatrix on the occurrence of certain events. Neither of the cases cited has, I think, any application to the present. I think this lady is entitled to one-third of the fund absolutely.

It was ultimately ordered that one-third of the fund and interest be carried over to the credit of the matter, "the account of the share of Mary Ann Sykes, spinster, with remainder to her children, if any." It was directed that the interest be paid to her during her life or until further order.

Solicitors: *Joseph Aldridge; Llewelyn Wynne; Whately.*

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Thursday, July 9.

HOTTEN v. ARTHUR.

Injunction—Copyright—Bookseller's catalogue.

A bookseller's sale catalogue, containing in addition to the mere titles, &c. of the books, original annotations descriptive of the nature of the works offered for sale, is a proper subject of copyright.

The court will therefore grant an injunction to restrain the piracy of such a catalogue.

This was a motion for an injunction by the plt., who is a dealer in old and curious books in Piccadilly, to restrain the deft. Arthur, in the same trade, from selling or distributing, and the other defts. from printing and publishing, a catalogue of the books offered for sale by the deft. Arthur, on the ground that the deft.'s catalogue was a piracy of those from time to time compiled by the plt.

It appeared that the plt. was in the habit of publishing successive catalogues of the works he had on hand, with notes and descriptions of such of them as were remarkable from their rarity or antiquity, these notes being originally compiled by him and evidencing much research and information. At the time of the institution of the suit he had published three of such catalogues, appearing as successive editions of the first compilation, all of which were duly entered at Stationers'-hall. He was then on the point of publishing a fourth edition, when he discovered that other booksellers in the same way of business as himself, and more especially the deft. Arthur, were in the habit of taking the notes and descriptions from his catalogue, and appending them in their own sale catalogues to the same books in their libraries.

Sir H. Cairns, Q. C., and E. B. Lovell, in support of the motion for an injunction, pointed out the very numerous instances of identity in the notes and descriptions between the catalogues, extending in some instances to a reproduction in the deft.'s catalogue of errors in the earlier editions of that of the plt., and which in his fourth edition, then in course of publication, he had corrected. The manuscript of the new edition was put in evidence. They contended that the case depended only on the question whether the quantity of matter pirated was sufficient to entitle the plt. to his injunction; and cited

Mawman v. Tegg, 2 Russ. 385.

Tripp and E. Macnaghten, for the deft. Arthur, contended, first, that no injunction could be granted on the form of this suit; the printers had been made co-defts. improperly. Secondly, that there could be no copyright in a catalogue of this sort, which was a mere ephemeral work. They also alleged, supporting their argument by several affidavits, that, in the ordinary custom of the trade, booksellers were in the habit of copying each other's catalogues. They cited

Saunders v. Smith, 3 My. & Cr. 711;

Sweet v. Benning, 11 C. B. 459.

Thirdly, the injury to the plt. was so small that this court would not grant the relief asked. The deft.'s catalogue was not printed for sale, but for distribution and by way of advertisement, and, in fact, only ten copies of it had been sold at 1s. 8d. apiece. Fourthly, no sufficient quantity of matter had been taken to constitute a piracy; citing

Bramwell v. Holcombe, 3 My. & Cr. 737.

Bristowe, for the other defts., relied on the first objection.

The VICE-CHANCELLOR, without calling for a reply, said that he felt no doubt as to the propriety of protecting a work like this, which was not a mere dry catalogue, but full of annotations and explanations,

the materials for which must have been procured with much labour and diligence. If the plt., instead of undertaking the task himself, had employed an author to do the work, there would have been no question as to the existence of his copyright, and it could make no difference to the present case that the plt. was himself the author. Then, as to the amount of the injury, it was clear that the value of these catalogues consisted not merely in the sale price, but in the amount of labour that had been expended in preparing them, and the deft. could not be allowed to use the plt.'s labour without making him some compensation for it. Nor was there more force in the objection that these catalogues were mere ephemeral productions; on the contrary, it was well known that persons who were curious in such matters would buy such catalogues. He would take the illustration proposed by Mr. Macnaghten, that of Dr. Waagen's catalogues of pictures, in which there was certainly a copyright in the notes of the compiler; nor would any one employing another to make a similar catalogue of the pictures in his private gallery have a right, in selling the pictures, to append to the name of each picture in his sale catalogue the notes and illustrations so compiled. Again, it had been said, that the piracies were committed upon the early editions, which had now gone out of use; but if this were true of any, it would apply equally to all cases; and yet it would hardly be maintained that such a piracy might be committed with impunity on an early edition of Lord St. Leonards' works. The whole case rested on the quantity of matter taken, and whether it was a case of fair abridgment or not. Here the deft. failed on all the ordinary tests: a very large quantity of matter was alike in both catalogues; errors in the plt.'s catalogue had been copied by the deft.; some alterations had been made by the latter which were most clearly colourable. The *bona fides* of the deft. might have been strongly supported by the production of his manuscript, as in a recent case before him. That, however, had not been done; he must therefore hold the plt. to be entitled to the injunction prayed.

Solicitors for plt., *Hancock and Saunders*.

Aug. 1 and 3.

BRAHAM v. BUSTARD.

Injunction—Trade-mark.

The word "Excelsior" is one in which an exclusive right of user as a trade-mark may be obtained.

It is not necessary, in order to maintain a prayer for injunction, that the whole of a trade-mark should have been imitated.

Where the court is of opinion that the use of a particular mark is likely to deceive, it will not require evidence of actual deception.

This was a motion for an injunction to restrain the defts. from selling any soap under the name of "Excelsior White Soft Soap," or any name similar to, or only colourably differing from, that title, and from using labels or cards containing those or similar words, or so contrived as to represent or tend to the belief that the article manufactured and sold by the defts. was the plt.'s article of manufacture.

The plt. were soap manufacturers of Hatton-garden, and in the course of their business began, in the month of Dec. 1862, to make white soft soap, for which it was stated they ultimately succeeded in establishing a considerable trade in Manchester and the surrounding manufacturing districts. The article was made and sold in jars or casks, on which labels were affixed, stamped with an ornamental border and other devices, the words "The Excelsior White Soft Soap" being the principal part of the trade-mark, which also contained the names of the plt. as manufacturers of the article.

The defts. were manufacturing chemists and dealers

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in drysaltery articles, in Manchester, and first resolved, in Feb. 1863, to enter upon the manufacture of soap, and in the following month of March actually commenced that manufacture.

It was stated, on the part of the plts., that the idea of entering upon this new course of trade originated in a conversation which took place in the month of May, between an agent of the plts. and the defts. The latter, however, denied this, and stated that the soft soap made by them was an article inferior to that of the plts., its superiority being the result of their own research and chemical knowledge.

The labels used by the defts. were in these words: "Bustard and Co., Excelsior White Soft Soap Works, Collyhurst, Manchester," and there were some points of resemblance between the two labels, though it seemed doubtful whether there was enough, *per se*, to show an intent to deceive. The plts., on discovering the adoption by the defts. of the word "Excelsior," complained to them of the course pursued, and some correspondence took place with a view to the amicable arrangement of the question. Ultimately, however, the defts. stated their determination to stand upon what they considered to be their legal right.

W. M. James, Q.C. and E. Charles, for the plts., in support of the motion, cited

Knott v. Morgan, 2 Keen, 313;

Croft v. Day, 7 Beav. 84;

Collins Company v. Brown, 3 K. & J. 423.

Rolt, Q.C. and G. L. Russell, for the defts., argued, that the word "Excelsior" had become of such common use in various articles of trade, as sewing machines, lucifer matches, steel pens, &c., that there could be no exclusive right to the use of it; that in fact, like "Extra—Superfine," it was merely a term used in puffing goods to denote their assumed superior quality. They urged further, that the word "Excelsior" was only a part of the whole trade-mark (on which the plts.' right must rest), and that upon the whole mark there was no case of imitation; that the intention to imitate was negatived by the fact that the defts. inserted their own name in their labels in a conspicuous manner, and that there was not the least evidence that purchasers of the article had been deceived. They also contended that the conduct of the defts. during the dispute had been perfectly fair.

W. M. James, Q.C. replied.

The VICE-CHANCELLOR said, that he could not agree with the view that the defts.' conduct in this matter had been such as the court could approve. He could not but think that they had been induced to make and sell this article under the title "Excelsior" from finding the success of the plts. The plts. had clearly been the first makers of this white soft soap, and to distinguish it by the name "Excelsior." He could not hold that the name merely described a quality, so that, like "superfine," it had become common property; and whether it were used only as a means of puffing the article or not, was of no importance in a case where the court was applied to for the purpose of preventing a fraud. As to the argument, that these words were only a part of the whole trade-mark, it was clear that the court would prohibit the use of certain signs or marks which were distinctive in, though they might not constitute the whole of, a trade-mark. This was done in the case of *Rodgers and Son*, where the use of that name was restrained, though the plts. had additional marks to which they were entitled from the Master and Corporation of Cutlers: (*Rodgers v. Nowell*, 6 Hare, 325.) The order would be to restrain the defts. from using the words, "The Excelsior White Soft Soap," or any words so contrived as to represent or tend to the belief that the article made and sold by them was the plts.' article of manufacture.

Solicitor for plts., *J. Bourdillon*; for defts., *Edwards, Layton and Jaques*.

Common Law Courts.

COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs.,
Barristers-at-Law.

SITTINGS AFTER TRINITY TERM.

June 20 and July 6.

WILLIAMS v. OWEN.

Will—Construction—Speaking from date or from testator's death—1 Vict. c. 26, ss. 24, 28.

A devise by a testatrix in a will ran as follows:—
"Also I give her, my said sister L. G., all my wearing apparel, with the use of the house I now live in, and all its furniture, free of rent, during her natural life."

Held, that this devise referred to the house as occupied by her at the time of making of the will, and not to the house as occupied at the time of her decease.

This cause was tried before Bramwell, B., at Carnarvon Spring Assizes: verdict for the deft. It was an action of ejectment brought to recover a house and premises. The plt. claimed under a will executed about eighteen months before her decease by one Mary Ellis. The devise in the said will ran as follows:—"Also I give her, my said sister Lowry Griffiths, all my wearing apparel, with the use of the house I now live in, and all its furniture, free of rent, during her natural life, and also after her death, I give, devise and bequeath the said house and furniture to my nephew John Roberts, to him, his heirs and assigns for ever." The date of the will was 5th July 1840, and the testatrix died in 1842. The will contained a further devise as follows:—"Also I give, devise and bequeath unto Catherine Owen, the infant daughter of Richard Owen Mariner, all that my house and premises now occupied or held by the said Richard Owen, unto her, her heirs and assigns for ever." The testator occupied the house in dispute when the will was made and down to her death. The plt. claimed under a mortgage from John Roberts.

Morgan Lloyd having on a former day obtained a rule calling on the deft. to show cause why the verdict, judgment, and subsequent proceedings should not be set aside and a new trial had, on the ground of misdirection in this, that the question left to the jury pointed to the date of the testator's death, and not to the date of the will,

MacIntyre now showed cause.—He referred to

The Wills Act, 1 Vict. c. 26, ss. 24, 28;

Cole v. Scott, 1 Mac. & Gor. 518; 16 Sim. 264.

Morgan Lloyd and *V. Williams* supported the rule, citing

All Souls College v. Codrington, 1 P. Wms. 597;

Douglas v. Douglas, Kay, 460;

Bullock v. Burnett, 1 K. & J. 315;

Goodland v. Burnett, 1 K. & J. 341; and

Cole v. Scott, *ubi supra*.

WILLIAMS, J.—In this case the alleged misdirection was, that the question left by the judge to the jury pointed to the date of the testator's death and not to the date of the will. The first question which arises is, whether the direction was proper, by reason of the 24th section of the Wills Act, 1 Vict. c. 26, by which it is enacted that every will shall be construed with reference to the real estate and personal estate comprised in it. It must, to take effect, be taken as if executed before the death of the testator, unless a contrary intention appears by the will; but, as the devise in question is of "the house I now live in," we think the testator has indicated a contrary intention within the meaning of the class of cases cited in the course of the argument. The cases of *Cole v. Scott*, 1 Mac. & G. 518, and 16 Sim. 264; *Douglas v. Douglas, Kay*, 400; *Bullock v. Burnett*, 1 K.

& J. 315; *Goodlad v. Burnett*, Ib. 341, fully establish the principles which lead to this construction of the will; but it was further urged in showing cause that even if the direction was wrong in this respect it was immaterial, because the evidence as to the state of things at the two dates was identical. But, on reading and considering the judge's notes at the trial, we find ourselves unable to adopt this view, for we think, having reference to those portions of the evidence to which the attention of counsel was called by the court in the course of the argument, it cannot properly be assumed that the jury would not have found a different verdict if the question for their consideration had been the enjoyment at the date of the will. We therefore think the rule should be made absolute for a new trial. *Rule absolute.*

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

ERROR FROM THE EXCHEQUER.

Tuesday, Dec. 2.

(Before WIGHTMAN, WILLIAMS, WILLES, KEATING and BLACKBURN, JJ.)

EDWARDS AND ANOTHER (Assignees, &c.) v. GABRIEL AND OTHERS.

Bankruptcy Law Consolidation Act 1849, sects. 76 and 133—Petition for arrangement—Act of bankruptcy—Notice of prior act of bankruptcy—Execution.

The goods of a trader having been taken in execution by the sheriff under a fi. fa. issued at the suit of A., on the 6th July, were sold by the sheriff to A. on the 13th. In the interim, on the 9th, A. had received notice that the execution-debtor had filed a petition for arrangement with creditors, which petition was dismissed on the 7th Aug. following, and on the same day the execution-debtor was adjudicated a bankrupt on a creditor's petition:

Held, by the Ex. Ch. (affirming the decision of the Ex.), in an action of trover by the bankrupt's assignees against A., that the filing of the petition for arrangement became, by relation back, an act of bankruptcy, from the time of the filing, under sect. 76, of the 12 & 13 Vict. c. 106, and that the notice to A. of the filing of the petition for arrangement was notice of an act of bankruptcy within the 133rd section of the same statute, and that the assignees were entitled to recover the goods, as the transaction was not protected by sect. 133 of the Act.

This was an action of trover, brought by plts. as official and creditors' assignees of one Maurice, a bankrupt, against the defts. Gabriel and Phillips, who were the late sheriffs of the city of London, and Roby, the execution-creditor, who purchased the goods, for an alleged conversion of certain goods belonging to the bankrupt's estate. The declaration contained a count in trover for an alleged conversion of the bankrupt's goods before bankruptcy, and also a count for a conversion of the goods of plts. as assignees after the bankruptcy.

The deft. Roby pleaded not guilty to the whole declaration, and also, to the first count, a denial that the goods were the goods of the bankrupt; and to second count, a denial that the goods were plts.' goods as assignees. At the trial of the action before Pollock, C.B., at Guildhall, the following appeared to be the facts, either as proved or admitted:—On 29th May 1860 the bankrupt Maurice, then carrying on business as a merchant in London, sent the goods in question to the premises of one Southgate, a packer, at London-wall, to be packed

and forwarded to Odessa. The deft. Roby having, on the 26th June 1860, recovered a judgment against the bankrupt in the C. P. for 93*l.* 18*s.*, debt and costs, caused the goods in question to be seized under a writ of *fi. fa.*, which was issued and delivered to the other defts., the sheriffs, on the 3rd July following, and the goods being seized thereunder on the 6th, Roby called at Southgate's place, and pointed out to the officers the goods in question as Maurice's goods, Thereupon the officers seized them and left a man in possession. On the 9th July Maurice petitioned the Court of Bankruptcy under sect. 211 of B. L. C. A. 1849, for arrangement with his creditors, which petition was filed the same day, and notice thereof was also on the same day served on the sheriffs and their officers to the following effect.

"In the C. P., between A. J. Roby, plt., and S. S. Maurice, deft. Take notice that the above-named deft. has committed an act of bankruptcy by filing a petition in the Court of Bankruptcy, London, for a private arrangement with his creditors; and I further give you notice not to sell or otherwise dispose of the goods and chattels seized by you under and by virtue of the writ of *fi. fa.* issued between the parties. Dated this 9th July 1860.—Yours, &c., S. SPYER, solicitor in the matter of the said petition." This petition was dismissed on 7th Aug. 1860, and Maurice, on the same day, was adjudged a bankrupt on a petition for adjudication at the instance of a creditor.

By sect. 76 of 12 & 13 Vict. c. 106 (B. C. Act 1849) it is enacted that "the filing of a petition by any trader for an arrangement between such trader and his creditors under the provisions of this Act with respect to arrangements between debtor and creditors under the superintendence and control of the court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed."

By sect. 133, all payments really and *bona fide* made by any bankrupt, or by any person on his behalf, before the date of the fiat, or the filing of a petition for adjudication, to any creditor of such bankrupt, and all contracts, dealings and transactions by and with any bankrupt really and *bona fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the goods and chattels of any bankrupt *bona fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with, or paying to, or being paid by such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed."

The petitioning creditor's debt and the other requisites necessary to support the plts.' appointment as assignees were admitted, and the action was brought by leave of the Court of Bankruptcy. A verdict for the plts. was directed on the above facts by Pollock, C.B., and was entered for them for 103*l.* 4*s.*, with leave to the defts. to move to set it aside and enter it for the defts.; and a rule having accordingly been obtained to that effect, on the ground that the notice of the 9th July was not a notice of an act of bankruptcy, the court below, after argument had, thought that it was, and discharged the rule accordingly: (see report below, 4 L. T. Rep. N. S. 308; 30 L. J. 245, Ex.; 6 H. & N. 701.) From this decision the defts. ap-

pealed and brought error to reverse the said judgment.

Gray (with him *Barnard*), for the apps., the defts. —There was no act of bankruptcy at the time, for though the deft. Roby, the execution-creditor, had notice of the filing of the petition before the sale, he could not tell whether or not it would become an act of bankruptcy. Until the petition was dismissed nobody could have notice of the act of bankruptcy. The creditor at the time of sale could not have notice of it until that future thing happened, without the happening of which the act of bankruptcy could not take place. It may be admitted that under sect. 76 the filing of the petition on the 9th July, became an act of bankruptcy at that date by relation back upon the petition being dismissed on the 7th Aug., but at the time of the sale on the 13th July, it was lying *in futuro*, and impossible to determine whether there would be an act of bankruptcy or not; it could not be affirmed that the petition would be dismissed, and so at that time he had no notice. [BLACKBURN, J.—Why can there not be notice of an act of bankruptcy, although it may be contingent?] It is inconsistent with the nature of notice that it should be so. The statute may make anything an act of bankruptcy by relation back, but it does not follow that in the intervening period a creditor can have notice, as it lies *in futuro*. [WIGHTMAN, J.—Upon the happening of the event contemplated by the statute, the intermediate time is annihilated.] Unless the court can say that Roby, the execution-creditor, had notice of the prior act of bankruptcy, the execution which was duly executed by seizure and sale is good and must stand, being protected by sect. 133. [BLACKBURN, J.—Your argument is, that the words in the statute, "notice of any act of bankruptcy," should be read with the words "on which an adjudication might be made."] I wish to distinguish between its being an act of bankruptcy and the having notice. They referred to sects. 76, 88, 133, 211, 213, 218, 223 of the 12 & 13 Vict. c. 106, and cited the following cases:

Nicholson v. Gooch, 5 El. & B. 999; 25 L. J. 137, Q. B.;

Ex parte Harrison, re Lawford, 26 L. J. 30, Bank.; and the judgment of Turner, L. J.;

Monk v. Sharp, 2 H. & N.; 27 L. J. 92, Ex.;

Rea v. Leith, 2 T. R. 141;

Follett v. Hoppe, 5 C. B. 226; 17 L. J., N. S., 76, C. P.;

Coppendale v. Bridgen, 2 Burr. 814;

Green v. Lauris, 1 Ex. 335; 17 L. J., N. S., 61, Ex.

Honyman and *H. James* contra, for resps. the plts., were not called upon.

WIGHTMAN, J.—We are all of opinion that the judgment of the Court of Ex. ought to be affirmed. The only question is, whether the execution-creditor had notice of a prior act of bankruptcy at the time of the execution being executed. The 133rd section of 12 & 13 Vict. c. 106, protects all executions against the goods and chattels of any bankrupt *bona fide* executed and levied by seizure and sale, notwithstanding any prior act of bankruptcy, provided the person at whose suit such execution shall have issued had not, at the time of such execution, notice of any prior act of bankruptcy. In the present case, the execution-creditor had, before the sale, received notice of the filing of the petition for arrangement. The question then is, whether he is to be deemed as having received notice, before the process was executed, that the execution-debtor had committed an act of bankruptcy by filing such petition? We are of opinion that he is to be so considered. The 76th section enacts, that the filing by a trader of a petition for arrangement "shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time

of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed." Now by the terms of the statute the petition is a conclusive act of bankruptcy from the time of its being filed. It seems to me and to the rest of the court that the effect of the words of the statute is to make it an act of bankruptcy at that time, and that, under the circumstances notice of the filing of the petition for arrangement, which the execution-creditor received before the sale, was notice of a prior act of bankruptcy within sect. 133. It was said, however, in argument that this could not be, because it was impossible to say at the time whether the filing the petition would be an act of bankruptcy or not, inasmuch as it was uncertain whether a petition for adjudication would be filed. True that it was a contingent act of bankruptcy dependent on something that might or might not thereafter happen; but when once certain incidents mentioned in the statute, making it an act of bankruptcy, occurred, it became from the filing of the petition a complete act of bankruptcy, and of that the execution-creditor had notice. It seems to us to fall within the very terms of, and to fulfil the requirements pointed out by, the statute. The execution-creditor had notice of an act of bankruptcy, because by the 76th section the filing of the petition is conclusive evidence of an act of bankruptcy at the time it was filed. When once the adjudication took place it had relation back for all purposes. The question depends upon the statute, and upon that our decision is founded, and not upon the cases cited, upon which we do not think anything turns. For these reasons, therefore, we think that notice of the filing of the petition for arrangement was notice of a prior act of bankruptcy, and that the assignees are entitled to recover, and, consequently, that the judgment of the court below must be affirmed.

WILLIAMS, J.—I think the case of *Rea v. Leith*, which has been referred to in the argument before us, certainly does not apply to the present case.

Judgment affirmed.

Attorneys for the apps. (the defts.): for the execution-creditors, *Brown and Goodwin*, Finsbury-place; for the sheriffs, *Thos. Price*, Abchurch-lane.

Attorneys for the resps. (the plts.), *Spyer and Son*, Broad-street buildings.

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Tuesday, Oct. 13.

(Before Mr. Commissioner GOULBURN.)

Re MICHAEL WELSH.

Application for bankrupt's release—Sect. 112 B. L. C. A. 1849—Sect. 159 B. A. 1861.

The vexatious and frivolous defence of an action is no ground of opposition to an application for the release of a bankrupt under the 112th section of the B. L. C. A. 1849.

The bankrupt had petitioned *in forma pauperis*, and to-day he applied for his release from custody under sect. 112 of the B. L. C. A. 1849, which provides that "whenever any bankrupt is in prison or in custody under any process, attachment, execution, commitment, or sentence, the court may, by warrant directed to the person in whose custody he is confined, cause him to be brought before it at any sitting, either public or private, &c., and where any person who has been adjudged bankrupt and has surrendered and obtained his protection from arrest, is in prison or in custody for debt at the time of obtaining such protection, the court may, except in the cases next hereinafter mentioned, order his immediate release, either absolutely or upon such

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Re THOMAS JOHNSON.

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conditions as it shall think fit; provided always, that the court shall not order his release where it shall appear by any judgment, order, commitment, or sentence under which the bankrupt is in prison or in custody, or by the record or entry of any such judgment, order, commitment, or sentence, and the pleadings or proceedings previously thereto, that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication in bankruptcy: provided also, that such release shall in nowise affect any rights of the creditor at whose suit the bankrupt may be in prison or in custody against the bankrupt, except the right of detaining him in prison or in custody whilst protected from imprisonment by order of the court.

The 3rd rule of the 159th section of the Bankrupt Act 1861 as to granting orders of discharge provides, "If the bankrupt shall not be accused of acts amounting to misdemeanor, or if he shall have been accused and acquitted, but in either case there shall be made, or shall appear to the court to exist, objection to the granting of an immediate discharge, the court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in and under which his debts have been contracted; and if the court shall be of opinion that the bankrupt has carried on trade by means of fictitious capital, or that he could not have had at the time when any of his debts were contracted any reasonable or probable ground or expectation of being able to pay the same, or that, if a trader, he has, with intent to conceal the true state of his affairs, wilfully omitted to keep proper books of account, or whether trader or not, that his insolvency is attributable to rash and hazardous speculation, or unjustifiable extravagance in living, or that he has put any of his creditors to unnecessary expense by frivolous or vexatious defence to any action or suit to recover any debt or money due from him, the court may either refuse an order of discharge, or may suspend the same from taking effect for such time as the court may think fit, or may grant an order of discharge subject to any condition or conditions touching any salary, pay, emoluments, profits, wages, earnings, or income which may afterwards become due to the bankrupt, and touching after-acquired property of the bankrupt, or may sentence the bankrupt to be imprisoned for any period of time not exceeding one year from the date of such sentence."

Ernest Reed, for the detaining creditor, asked the court not to exercise its discretion in granting to the bankrupt his immediate release. He contended that his client had a grave cause of complaint against the bankrupt. The facts were few. The bankrupt had taken premises of the creditor, and was unable to pay the rent. The landlord naturally desired to regain possession, and the bankrupt had no reason to withhold possession, inasmuch as he had ceased to occupy them, yet nevertheless he had the dishonesty to retain the key until he had obtained from the landlord a loan of 10*l*. For that loan and the rent a promissory note was given, upon which an action was subsequently brought against the bankrupt, who aggravated his previous dishonesty by defending the action and putting the landlord to 20*l*. expense. Being arrested for debt and costs, he filed a petition as a pauper, and now asked for his release. The learned counsel could conceive no greater wrong which one man could inflict upon

another, than that which characterised the whole of this bankrupt's conduct.

Oct. 15.—Mr. Commissioner GOULBURN said:—This case renders it necessary to consider whether the legislative offences ought not to be reserved till the time when the Legislature says they are to be taken notice of. Are such offences as these, or are they not, to be brought forward in the first instance upon applications for release, when they are omitted from the category of offences enumerated in the 112th section, upon proof of any one of which the court is disabled from granting a release? It is true that the Act invests the court with a discretion to withhold the release under certain circumstances, and there might be atrocious cases of fraud that might justify the commissioner in withholding a release; but this is not one of them. The vexatious defence of an action is a ground of opposition when the proper time comes, that is, upon an application for the order of discharge. The learned counsel, in urging this ground of objection, has occupied a great deal of time, as it appears to me, unnecessarily, although his observations will be of consequence hereafter. The Legislature says, in the 159th section, that when the bankrupt applies for his order of discharge, the frivolous or vexatious defence of an action shall be a ground of opposition, and if then proved to the satisfaction of the commissioner, he is authorised to visit it in the manner there indicated. The learned counsel knew that as well as he did, and that this objection was entirely out of place. The object of the Act was to release a man from custody so as to enable him to assist in the winding-up of his affairs. In this case certainly the object was somewhat futile, because they had been already attended to by the official solicitor. It is true that the commissioner has a discretion in considering these applications; but that does not refer to cases of this kind. If the statutory grounds of opposition to the order of discharge were permitted to be urged and entertained at this stage of the proceedings, it would lead to endless confusion, and the bankrupt would be twice punished for the same offence—first, by the exercise of the discretion of the commissioner under this clause, and the next under the enactment of the 159th section. The man may be a worthless character, but he must not be twice punished for the same offence. The learned counsel, if on the other side, would urge that principle as strongly as anybody. The proper time to urge this offence is when application is made for the order of discharge. The bankrupt's release must therefore be ordered.

— *Application granted.*

Oct. 10 and 15.

(Before Mr. Commissioner FANE.)

Re THOMAS JOHNSON.

Bankrupt in custody—Application for release—Sect. 112 of the Bankrupt Law Consolidation Act 1849.

Held (per Commissioner Fane), that the vexatious defence of an action is a ground of opposition to an application for the release of a bankrupt under sect. 112 of 12 & 13 Vict. c. 106:

Held (per Commissioner Goulburn), that the vexatious defence of an action is no ground of opposition at that stage of the proceedings.

This bankrupt, a solicitor, was in custody at the suit of his own clerk, and upon a former day he applied to be released under the 112th section of the Bankrupt Law Consolidation Act 1849, when he was opposed by *Dowse* for an alleged vexatious defence of an action, and adjudged by Mr. Commissioner Fane to be imprisoned for three months, before any fresh application would be entertained for his release.

Upon a subsequent day *Macrae* applied for a day to be named upon which the bankrupt might renew the application upon an affidavit that the bankrupt was

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Re JACOBS.

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taken by surprise, and therefore unprepared to rebut the charge of a vexatious defence, and showing that part of the alleged debt was discharged by the Insolvent Act, and that he had a good defence to the action had been able to appear before the arbitration to which it was referred by the court.

Mr. Commissioner FANE, after inquiring what day the previous application was made, referred to his notes and intimated that he then decided that, as the bankrupt had been guilty of a most vexatious defence of an action, he had recorded that his application for a release should not be renewed until he had been three months in custody.

Macrae said he was prepared to show that that decision was not justified by the facts, and to argue that it was contrary to law.

Mr. Commissioner FANE intimated that, having once decided, he would not again entertain the case, and if he was wrong in law there was an appeal.

Chidley then applied to Mr. Commissioner Goulburn for the release of the bankrupt.

Dowse again opposed the application, intimating that on the 19th Aug. a similar application had been made to Commissioner Fane, who had then decided that as the bankrupt had vexatiously defended an action, he would not entertain a renewed application for his release until he had been three months in custody.

Mr. Commissioner GOULBURN wished to know about this limitation of time. Would counsel refer him to any portion of the Act justifying that decision? He was not aware of any power to say that a bankrupt should not be released for three months. There was certainly a discretionary power, and a commissioner might impose conditions, and one of them might be that he should continue in prison for three months.

Chidley said that was not the practice of the court.

Mr. Commissioner GOULBURN said, it could not be intended that one commissioner should review the decisions of another.

Chidley observed, that if a *habeas* was refused in one court in Westminster-hall it was the privilege of a prisoner to go into another. But they need not go into these principles. It was a very remarkable circumstance that one of the reasons upon which Mr. Commissioner Fane acted, namely, the vexatious defence, was not enumerated in the 112th section as a ground of opposition. But if it were it was not made out against him by reason of his being compelled to be in one court when the judgment was obtained against him in another. There was no reason, he submitted, why because one acting commissioner refused to release a bankrupt in August that he should not be able to apply to another in October.

Mr. Commissioner GOULBURN intimated that an application must be made to Commissioner Fane, as the case properly belonged to his court, and if he had no objection he would entertain the application.

Oct. 10.—Chidley produced a letter from Mr. Commissioner Fane, requesting Mr. Commissioner Goulburn to hear and determine the motion, whereupon his Honour fixed it for the 14th Oct. On this day the motion for release of the bankrupt out of custody was renewed by Chidley (solicitor).

Dowse, for the detaining creditor, urged that Mr. Commissioner Fane had determined the question, and it ought to be remitted to him.

Mr. Commissioner GOULBURN overruled that objection, and said he should entertain the application and go into the case on its merits.

Dowse then urged that the bankrupt having been sued in an action for work and labour and money advanced, entered appearance and pleaded never indebted, but shortly before the day of trial had applied to a judge at chambers, who had (under the C. L. P. A.) referred the action to the master, who made an appointment to proceed, which the bankrupt

did not attend, and the master reported in favour of the plt.'s claim, and his costs were taxed at 29l.

Chidley, in reply, was stopped by

Mr. Commissioner GOULBURN, who said he did not think that it could be urged that the case amounted to a vexatious defence under any circumstances, but even if it did that was not one of the grounds mentioned in the 112th section of the Consolidation Act 1849, and he should therefore order the immediate release of the bankrupt.

Tuesday, Oct. 20.

(Before Mr. Commissioner GOULBURN.)

Re JACOBS.

Application for release—Sect. 112 B. L. C. A. 1849—Opposition—Breach of trust.

Debt contracted by a breach of trust forms no ground of opposition to a release under sect. 112 of the Consolidation Act of 1849, unless it appeared upon the face of the proceedings, or upon the record.

Parol evidence of the offence inadmissible.

This bankrupt applied for his release from custody under the 112th section of the B. L. C. A. 1849.

Robertson Griffiths opposed the application, upon the ground that the debt was contracted by means of a breach of trust. He urged this objection on behalf of Mr. Spiers, an attorney, whose clerk Jacobs was. The latter had received a sum of 25l. for his employer, and had appropriated it to his own purposes.

Mr. Commissioner GOULBURN inquired whether it appeared, upon the face of the proceedings, that the debt was contracted by means of a breach of trust? He drew attention to the words of the 112th section: "Provided always, that the court shall not order such release where it shall appear by any judgment, order, commitment, or sentence under which the bankrupt is in prison or in custody, or by the record or entry of any such judgment order, commitment, or sentence, and the pleadings or proceedings previously thereto, that he is in prison or in custody for any debt contracted by fraud or breach of trust," &c.

R. Griffiths said he would put Mr. Spiers in the witness-box, and support the judgment by *visé voce* testimony.

Nicholson, for the bankrupt, intimated that he was arrested on a warrant of attorney, and not as represented.

Griffiths cited the case of *Archibald Logan*, as one in which parol evidence was allowed to be given as to the mode in which the detaining creditor's debt was contracted. That the debt in that case was contracted by fraud could not appear on the face of the proceedings, but it was proved by parol evidence.

Mr. Commissioner GOULBURN said he did not determine the case of *Logan* as coming within the Act of Parliament, but as a case so outrageous that it must be dealt with under the discretion of the court.

Nicholson submitted that this was not the time for entering upon questions of conduct.

Mr. Commissioner GOULBURN thought they had nothing to do with conduct at that stage of the proceedings. He doubted whether he was regular in going into the facts in the case referred to, because if he did it in one case he ought to do it in all.

Griffiths observed, that inasmuch as a breach of trust was omitted as a ground of opposition to the order of discharge, if the court did not entertain it at this stage that offence would not be punishable under this Act of Parliament.

Mr. Commissioner GOULBURN said:—This was not a case within the Act of Parliament. If he was to enter into a *visé voce* examination as to conduct at this stage of the proceedings, he should be doing that which the law told him he ought not to do. In the 159th section of the recent Act, it was said that, in the grand-

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Re JOHN FLINN—Re EUGENE VACHER.

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ing of an order of discharge, the court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in and under which his debts have been contracted. They were not to do that in the first instance, although they were constantly required to do it. The 112th section did not say a bankrupt's release was to be refused when he was said to be guilty of fraud, but when it should appear by any judgment order, commitment, or sentence under which the bankrupt was detained, or by the record or entry of any such judgment, &c., and the pleadings or proceedings previously thereto. By none of these was this offence made to appear. It could only be made to appear by proof *aliunde*. The case referred to by the learned counsel was quite out of the ordinary course, and was so outrageous and grossly fraudulent that the court was asked to exercise its discretion under the word "may" in the section referred to. But these cases were very rare, and the exception proved the rule. In this case the detaining creditor had himself made the case a mere debt, and if they let in evidence under the discretion of the court in this case they must do it in every case, which would consume much time, and would be, in his opinion, contravening the intention of the Act of Parliament. He would illustrate the consequences of an opposite practice by the case of Johnson, a solicitor, before Mr. Commissioner Fane. His release was opposed by his clerk, who had brought an action and arrested him on a contested claim. Mr. Fane did entertain an opposition to the application for a release under the 112th section, upon the ground of a vexatious defence of an action, and the consequence was, the man was punished by being kept two months in custody. Now that same bankrupt would come up again for his order of discharge under the 159th section, when he would be arraigned a second time for the same offence. That was contrary to a well-known maxim of the law, *nemo debet bis vexari pro una et eadem causa*. To punish a man twice for the same offence was contrary to all our notions of right, and he would not sanction the practice. The release of the bankrupt was given with a different view, namely for the benefit of his creditors. That was the principle, but it had been deviated from in practice, but he would not encourage the practice. The bankrupt's release would be ordered.

Application granted—Release ordered.

Re JOHN FLINN.

Petition—Wrong stamp.

Where a petition has been filed with a wrong stamp, and the error discovered before anything has been done, the court will dismiss it and give leave to file another.

When through mistake or inadvertence a wrong stamp has been used, the court will allow for the spoilt stamp.

Chidley applied upon the following affidavit of the bankrupt for the dismissal of his petition and leave to file a fresh petition:—

"I, the above-named John Flinn, the petitioner named in the said petition, make oath and say as follows:—

"1. That I this day presented a petition for adjudication of bankruptcy against myself, upon which a stamp of one pound is impressed.

"2. That at the time I so presented my said petition I believed that my debts did not amount in the whole to the sum of three hundred pounds, but since the said petition was presented I have discovered that my debts exceed three hundred pounds, I having inadvertently omitted one creditor for sixty-eight pounds in the list of creditors I had prepared.

"3. That nothing has been done under the said petition, and I have prepared and am ready to present

another petition on a five-pound stamp, if this court be pleased to permit me to do so.

"Sworn and signed, JOHN FLINN."

Mr. Commissioner GOULBURN said the first stage was to dismiss the first petition; the next stage was to file another properly stamped; and the last is to get the 1*l*. stamp allowed. He thought there should be an affidavit as to how the error was discovered.

The following affidavit was thereupon prepared and filed:—

"In the Court of Bankruptcy.

"In the matter of a petition for adjudication of bankruptcy presented by John Flinn.

"S. C., of , gentleman, make oath and say:—

"1. That I attested and filed a petition by the said John Flinn, upon which was impressed a stamp of the value of one pound.

"2. That after so filing that petition I perused the rough list of creditors prepared by the bankrupt, and while discussing the particulars of the same, with the view of preparing the schedule required by the Bankruptcy Act 1861; s. 93, I discovered that the said John Flinn had omitted to insert the name of a creditor for sixty-eight pounds, which when added to the list already prepared, made the debts amount to more than three hundred pounds.

"Sworn at, &c., before me, &c., at, &c.

"S. C."

The COMMISSIONER then made orders respectively for the dismissal of the first petition, the filing of another with the proper stamp, and for the allowance of the spoilt stamp.

[*Note*.—See Dor. and Mac. Bank. Pract. 67.]

Re EUGENE VACHER.

*Bankrupt in custody—Application for release—Sect. 112 B. L. C. A. 1849—Petition in form *à pauperis*—Insufficient description.*

Where a bankrupt's description in his petition is insufficient by the omission of names under which he has contracted debts and residences, his application for a release from custody will be refused.

This bankrupt applied for his release from custody under sect. 112 of the Consolidation Act 1849.

Dowse opposed for the detaining creditor, and stated that this bankrupt had come before Mr. Commissioner Fane on a former day, the 7th Sept., when his release was refused for misdescription, with permission to come up again upon paying the costs of the day.

Mr. Commissioner GOULBURN suggested, whether the proper course, under such circumstances, was not to dismiss the petition?

Dowse said that, as the petition was in form *à pauperis*, the bankrupt would again appear at the public expense.

Mr. Commissioner GOULBURN inquired, how many residences he had omitted?

Dowse.—Since he last appeared he has added to his description several residences and places in which he has traded; but he had still omitted the name of Lacreux and Co., and it was upon that point that he raised the objection.

Mr. Commissioner GOULBURN thought that a pauper ought not to be discharged if he omitted in his description any names under which he had contracted debts, or any residences.

Evidence *visd voce* was then tendered to the effect, that in May last the bankrupt had given an order for some zinc plates in the name of Lacreux and Co., as the firm to which they were to be sent. That name did not appear in the description.

The bankrupt's debts (in reply to the Commissioner) were stated to amount to 270*0*l**.

Mr. Commissioner GOULBURN said, it was clear a

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Re ANON—Re HALL—Re J. J. AND J. R. BLAGBURN.

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bankrupt could not be discharged unless he gave all his names and places of business. A man who came up to be discharged from such an amount of debt should set out in his description every name by which he had been known, and every place of residence. His release must be refused.

Doussé asked that it might be refused with costs, as Mr. Commissioner Fane had done.

Mr. Commissioner GOULBURN doubted whether costs could be given against a pauper.

Doussé urged the example of Commissioner Fane.

Mr. Commissioner GOULBURN declined to make an order on a pauper to pay costs.

Application refused.

Tuesday, Oct. 13.

(Before Mr. Commissioner GOULBURN.)

Re ANON.

Non-attendance of witness—Peremptory summons—Sect. 120 B. L. C. A. 1849.

Where, after adjudication, any person is suspected of having property of the bankrupt in his possession, or capable of giving information concerning the person, trade, dealings, or estate of the bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of his dealings, he may be summoned to attend the court for examination.

Where a witness, after having been duly summoned, does not attend, the court will issue a peremptory summons.

Bagley applied for the issue of a peremptory summons to compel the attendance of a witness named Warburton, a manufacturer at Leicester, who had 300*l.* worth of the bankrupt's goods in his possession, and who had given an unsatisfactory account. This gentleman had been summoned and did not attend. Under these circumstances there were two courses that might be pursued: the court might issue a warrant to arrest the person whose attendance was required, and bring him to the court in custody of the officer, or it might issue a peremptory summons.

Mr. Commissioner GOULBURN.—Take a peremptory summons, and if this person does not attend, a warrant will issue.

Order accordingly.

Re HALL.

Judgment-debtor summons—Service.

Where service of summons cannot be effected, the court may order notice in the London Gazette.

Braham (attorney) applied to the court for an order to advertise the summons, as the debtor was keeping out of the way, under sect. 81 of the Bankrupt Act 1861, which enacts, "If service of the summons be not effected, and the court is satisfied that the debtor is keeping out of the way to avoid service, it may order that one or more notices be inserted in the *London Gazette* and in one or more newspapers published in the district in which is the debtor's usual or last known place of abode, requiring him to appear on a day named, being not less than fourteen days after the publication of the first notice." He read an affidavit of the circumstances under which repeated attempts to serve the judgment-summons on the debtor James Hall had proved unsuccessful.

Mr. Commissioner GOULBURN directed the insertion of an advertisement in the *London Gazette*, the *Times* and the *Daily Telegraph*, but observed, if the object of the summons was to make the debtor a bankrupt, why not do it upon the ground of the debtor absenting himself from his dwelling-house with intent, &c. The course proposed was going a long way about.

Braham said he would consider the suggestion. The course he had adopted would delay them certainly fourteen days.

Order accordingly.

NEWCASTLE DISTRICT COURT.

(Before Mr. Commissioner ABRAHALL.)

Re J. J. AND J. R. BLAGBURN.

Refusal of certificate—Misdemeanor—Sects. 159 and 221—Prosecution directed.

Circumstances under which a trader was held to be guilty of offences under sect. 159, and certificate refused.

Circumstances under which the court will direct a prosecution under sect. 221.

This was a certificate meeting.

Britton (solicitor) appeared for the assignees.

Harle for the opposing creditor.

Story for the bankrupt.

The facts of the case are fully set out in the following

JUDGMENT.

Mr. Commissioner ABRAHALL.—This is a case of so much importance that I feel it my duty to go at considerable length into it. John James Blagburn and Robert Blagburn the elder petitioned this court, and were adjudicated bankrupts on the 12th March last. They are described as of High-street, Gateshead, grease and tallow merchants, and copartners, the latter in business, too, at the same place, as an auctioneer and appraiser. They attributed their insolvency to the general depression of trade and losses in business. They owe creditors in round numbers the sum of 3000*l.*, of which upwards of 2500*l.* is admitted to be due the firm of Messrs. Curtis and Harvey, the well-known gunpowder manufacturers; the debt incurred by them in the character of agents for the sale of gunpowder on commission. The history of the trade of the Blagburns is singular. Robert Blagburn the elder began life as an apprentice to a house carpenter, was subsequently an operative till the year 1838, then became an innkeeper and auctioneer, continued an innkeeper till 1855, when he retired from that line, and as executor to Jonathan Robson—who at his decease was a tallow merchant, and also agent to Messrs. Curtis and Harvey—carried on Robson's business of a tallow merchant for the benefit of his widow, it seems, to the year 1860, when he took his own son, John James, into partnership in the tallow trade, John James having succeeded to the agency of the Messrs. Curtis and Harvey in March 1855, jointly with his brother, Robert Blagburn the younger, with whom he continued in partnership up to the time when his father took him into partnership in the tallow business, at which time his father became joint agent instead of his brother. The firm was then established of John James Blagburn and Robert Blagburn the elder, as tallow candle and grease merchants, and agents for Curtis and Harvey, gunpowder manufacturers—Robert Blagburn the younger merely superintending the warehouse department, and receiving pocket money, and both brothers residing with their father in the premises in High-street. Special accounts having been required, including a separate cash account of dealings with Messrs. Curtis and Harvey from the commencement to the date of the bankruptcy, the bankrupts had been allowed the assistance of an accountant in their preparation, and a manager had been appointed by the creditors in aid of the assignees. Both these gentlemen having furnished reports, to which I shall have occasion presently to refer. The bankrupts have passed their examination, and on the 24th of last month application was made for their discharge. This was opposed by Mr. Britton for the assignees, and by Mr. Hodge for Messrs. Curtis and Harvey, the elder bankrupt being supported by Mr. Story, and the younger by Mr. Blackwell, his counsel. The charges prepared by the solicitor of the assignees were that the bankrupts, either or both, had brought themselves within the penal operation of the 159th section

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the Bankruptcy Act 1861, paragraph S, by omitted to keep proper books of account, or was the graver charge—had been guilty of a crime within the meaning of the 221st clause, providing, “within three months next before the bankruptcy, with intent to conceal the state of the bankrupt’s affairs, he made fraudulent entries in, and omissions in, his books of account, or writings relating to his trade dealings.” Similar charges were urged on behalf of Curtis and Harvey, by Mr. Hodge, who contended that he had clearly brought the bankrupts, either or both, within the 221st or misdemeanor clause, upon which he mainly relied, or failing that, at any rate within the 159th section, charging them with the specific offences of having contracted debts without any reasonable or probable ground of expectation of being able to pay the same. Mr. Story, for the elder bankrupt, contended that his conduct had not been brought within the 221st clause, inasmuch as the evidence of the younger bankrupt acquitted him, there being no knowledge on the part of the elder of the acts charged, and that he did not in fact come within the 159th clause, he having, in his business of auctioneer to which he entirely confined his attention, kept proper books. Mr. Blackwell contended, for the younger bankrupt, that the books in question were not the bankrupt’s books (I presume on the ground of their being kept by them in the character of agents, or because one of them was termed “Messrs. Curtis and Harvey’s ledger”); that there was no difference in their private account (I suppose former memorandum books) from those in the ledger (meaning, I still suppose, the ledger known as Messrs. Curtis and Harvey’s). The bankrupt John James Blagburn was examined very minutely by Mr. Scaife on the 27th April. These were substantially the important points of his evidence:—He would not say whether, at the time his father took him into partnership in the tallow business, the accounts were adjusted between himself, his brother, and Messrs. Curtis and Harvey. He thinks he informed a Mr. Brough, on behalf of Curtis and Harvey, of the change of agency. He used the old books, and received no fresh directions. The original mode of dealing between him and Curtis and Harvey, he says, was this: they used to settle once in six months during the time his brother was with him. He was debited with the goods supplied, and accounted every six months to them for the quantity of powder sold during that period, deducting commission at the rate of 7½ per cent. and expenses. From about Jan. 1853 to the time of the bankruptcy, Messrs. Curtis and Harvey required him to furnish them with monthly accounts, on a printed form supplied by them; such accounts to show at the end of each month what accounts, if any, were outstanding, all cash received during the month, all disbursements, to show the balance in hand, which was to be remitted with the account, an account of all powder in the magazine, and a stock account, showing the quantity and the state of the powder at the time of rendering the account. He admits that these accounts were not regularly furnished, but asserts that the following month’s account contains what was omitted in the preceding, and that the transactions were not entered in any other books than those supplied by Messrs. Curtis and Harvey. Prior to his father’s joining the agency, he says he had no banking account; but up to within a year of his bankruptcy he used to pay the moneys received on account of Curtis and Harvey, as well as on the tallow business, to the credit of his father’s private banking account; and when he required any money to remit to Curtis and Harvey, or for other purposes, he used to apply to his father, who gave a cheque. That there was nothing to distinguish moneys belonging to Curtis and Harvey from moneys properly belonging to the tallow concern. That he kept separate books of

account of his own for the tallow business, which might contain entries on account of Curtis and Harvey. He goes on to say—and this is of much importance to his father—that his father took no part in the book-keeping, nor his brother when with him. That the cash-book kept with Curtis and Harvey would not contain an account of all the moneys received and paid on their account; that some of the moneys received for Curtis and Harvey were kept back, kept out of their books, and entered in pocket journey memorandum books and in no other. He can give no idea when he first began to omit such moneys (in a subsequent examination, Aug. 7, he states that it was about three years ago, certainly above two). He did not inform Curtis and Harvey of such omissions. Neither his father nor his brother, that he knew of, ever inspected the books so as to ascertain how things were going on, and to ascertain his position with Curtis and Harvey. He thinks he balanced the books in 1859, but cannot say whether his father looked at the statement; cannot say whether he furnished Curtis and Harvey with a statement of how he stood with them at that time. That he took stock in tallow in 1859; he could not say whether he owed Curtis and Harvey any or what money at that time. That no account had been taken by him since 1859 showing his position with Curtis and Harvey. That a paper marked “A” then produced to him was the last monthly sheet furnished to Curtis and Harvey, and correctly showed the account then outstanding due to Curtis and Harvey, according to the books that his father and himself kept between themselves and Curtis and Harvey. That they corresponded with the books as they stood at the time the sheet was sent in, viz. the 31st Dec. 1862. No entries had been made by him, he thought, in the ledger, since he sent in that sheet; there might have been in the journal. That the accounts in the ledger did not show the correct state of accounts with each customer, but that they ought to do so. Being examined as to the particulars of the account rendered 31st Dec. 1862, he states his inability to say whether any debt returned as outstanding had been paid or not. He admits that so considerable a sum as 176*l.*, appearing to be due from the New Backworth Company, had in reality been paid; that 58*l.*, returned as due from the Beside Company, had also been paid. He gives the same answers respecting the several other accounts so alleged to be outstanding, viz.: Burradon, 123*l.*; Seaton, 259*l.*; Choppington, 236*l.*; Seaton Delaval, 303*l.*; Sleekburn, 144*l.*; Haughton, 483*l.*; West Cramlington, 384*l.*; St. Hilda, 445*l.*, except 10*l.* All these are returned as unsetting debts, all appearing, by answers to letters of inquiry, to be paid, with the last exception of 10*l.* He said that they had been paid, but he had not taken credit for the discount. He cannot say whether he had received more or less than 2500*l.* of Messrs. Curtis and Harvey’s money, unaccounted for until the special accounts subsequently supplied should have been made out. In answer to a question as to what had become of the sums unaccounted for, he says he had not taken credit for the discounts, allowances, postages, stamps and other items to which he thinks himself entitled, but admits there would still be a large sum to account for, which is all gone into the tallow business. He considered the transactions in tallow, trade losses, and bad debts and purchases, and buying and selling at a loss, would account for the deficiencies, but could not mention in either case any particular instance. He admits, that when the monthly accounts were rendered was the proper time for taking credit for discounts and allowances; then, in a subsequent answer, he says he thinks he can properly claim discount and commission on the accounts received by him for Curtis and Harvey, before accounting for them as having

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Re J. J. AND J. R. BLAGBURN.

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been so received. He states that on the 30th Nov. 1858 he was indebted to the Three Indian Kings' Building Society in a sum of 304*l.*, which had come into his hands as secretary; that he had used the money to pay accounts in the tallow business, and part, it might be, to Curtis and Harvey; that his father received the amount and paid it for him; that he himself paid some 20*l.* charged by the society against him for errors in his accounts; that his father and he never had any settlement of the partnership accounts; his father might have applied to him for money—if so, he could not say for how much, or when—but not for much on account of the partnership profits. He did not participate in the auctioneer business profits. He declined to answer a question put to him as to whether his father's business was profitable or not. Subsequently to that examination, I was furnished by Mr. Spence, a public accountant, with a special report of the results of his investigation of the bankrupt's accounts. In speaking of Robert Blagburn the elder, he represents him as carrying on his business of an auctioneer up to the time of the bankruptcy, and as never apparently having taken any part in the general business with the exception of receiving and paying money as a banker would have done, and as having introduced into the business all the capital that was employed in it. He has called my particular attention to the gunpowder agency account, which he says, owing to the improper manner in which the books have been kept, is very long, occupying sixty-one sheets, and has been a work of labour. Up to Dec. 1858 all the sales, it seems, of whatever sort, were entered in the general books, although in July 1857 books were furnished by Curtis and Harvey for the purpose of keeping separate the transactions in powder, the effect being greater confusion. Had Curtis and Harvey's instructions been carried out, all sums of money received for powder during the month would have been remitted on the first of the following month, deducting commission, and accompanied by a list of outstanding accounts. That plan, he adds, has not been adhered to. Instead of it, sums of money have been withheld for periods of from one to six months, and then forwarded as though they had been received during the previous month. The result of which has been that Curtis and Harvey, according to bankrupt's books, are creditors for 2570*l.* At the same time, he observes, the amount due to Curtis and Harvey on the 1st July 1858 was 714*l.*, by which it appears, to use his own words, they had either a lax system of supervision, or had had great faith in the stability of the bankrupt. With reference to other parts of the accounts, he goes on to say that he found the books in a very bad state. The ledgers had not been posted up for nearly two years, and the cash-book had to be entirely written up, with the exception of the periods during 1859 and 1860, from different sources, necessitating the assumption of various sums for expenses, &c. I have also perused a report by Messrs. Richardson and Son, the managers on behalf of Curtis and Harvey, of the result of their examination of the accounts. The substance of their remarks is, that Messrs. Curtis and Harvey have been unable to check the account furnished by the bankrupts through their books in London, as they are framed from returns rendered by the bankrupts, which the accounts now filed show to have been systematically false. That as far as they could, Curtis and Harvey checked each month's returns of sales and stock at the magazine, but without direct application to the outstanding debtors they were unable to check the amount of receipts; and that therefore Mr. Spence is not justified in inferring a laxity of supervision on the part of Curtis and Harvey from the fact of the sum of 1714*l.* having been received for them up to the 11th

July 1858 unaccounted for; that although the cash account might not be incorrect to any great extent, it unequivocally proves that from the time of its commencement, and, indeed, prior to that date, Curtis and Harvey had been systematically deceived by bankrupts with reference to their true position, and will eventually lose above 2000*l.* through their agency. That during the whole of the period over which the account extends they had been in the habit of appropriating moneys received from debtors to Messrs. Curtis and Harvey, instead of remitting them at the stipulated times, returning the parties from whom they had received them as debtors still. In illustration of these dealings, they mention the Harton, West Cramlington, Seaton Delaval, and Burradon Companies as having been returned as debtors from 120*l.* to 480*l.*, though those companies appear to have made regular payment for powder supplied, and the balance had never exceeded a small amount. That those false statements had been systematic is proved by particulars supplied of the amounts for which they are also returned as debtors on the 31st Dec. in the years 1858, 1859, 1860 and 1861 respectively. They consider that the remark of Mr. Spence, that sums of money had been withheld for periods of one to six months, and then forwarded as though they had only been received during the previous month, is not borne out by the facts, as a large amount has clearly been received and not entered or forwarded at all, of which also instances are furnished. The report of these gentlemen on the accounts are explicit, and show the great pains they have taken in the investigation. I must, however, say that, in my opinion, the observations of the Messrs. Richardson, in answer to Mr. Spence's allegation of carelessness on the part of Curtis and Harvey, and undue confidence in the stability of the bankrupts are justified, and afford a natural solution of what is apparently, at first sight, unaccountable, viz., that Messrs. Curtis and Harvey should have been unaware of the existence of so large an amount of debt being due to them in July 1858, as 1700*l.*; for, on referring to the evidence of the younger bankrupt, when he says that he thinks he balanced books in 1859, but cannot say whether he furnished Curtis and Harvey with a statement of how he stood with them at that time, or whether he then owed Curtis and Harvey any and what money; and bearing in mind his general course of conduct in his dealings with those gentlemen, it is difficult to draw any other inference than that his account with them had from the outset been deliberately falsified and that they had been systematically kept in the dark. I also must concur with Messrs. Richardson in their view that, in other particulars, the case against the bankrupts has been understated. The examinations to which they have been subjected since the filing of those special accounts, in some important respect confirmed the justness of Messrs. Richardson's view, and puts their conduct, especially that of the younger bankrupt, in a clearer light. The younger bankrupt, in his evidence on the 7th Aug. in answer to Mr. Britton, after admitting that he was insolvent in July 1858, repeated much that had been elicited in his former examination and confesses what, indeed, must necessarily follow, that, if his books had been properly kept at the time of his sending in his last monthly account to Curtis and Harvey, he would have had to remit a larger amount to them; that if he had accounted regularly every month, by entering the accounts received from the debtors, Curtis and Harvey would not be such large creditors; that the reason he did not enter them into the books was because he had not the money he had received to remit to them; that the returns were incorrect; that Curtis and Harvey could not, by looking at the ledgers, see the true state of the gunpowder business, and thus owns *totidem*

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verbiis that he had omitted to enter in Curtis and Harvey's ledger, within three months of his bankruptcy, many large sums received by him on their account. The younger Blagburn's delinquencies were more fully exposed by the result of the searching examination to which he was the same day subjected by Mr. Hodge. Robert Blagburn, the father, was then examined by Mr. Britton, and explained, or attempted to explain, how he made himself out a creditor for 1431*l.* in 1858. From the official assignee's report it appeared that the books generally have been kept with great carelessness, so that most of the estimated items in the accounts were mere guesses and assumptions; that the profits on the tallow and candle business, if correctly ascertained, are about 5 per cent., whilst the expenses are about 9 per cent., but no reliance, it seems, can be placed in their accuracy. I have had this most unsatisfactory case diligently examined, and have considered all the evidence carefully and with anxiety. I regret that I am unable to take any but an unfavourable view of the conduct of both the bankrupts; of that of the elder only less unfavourable than that of the younger. It seems scarcely credible that the father, whose position throughout has been of a most anomalous character—in fact resembling that of a banker rather than a partner—should not, when he took his son into partnership, and became himself joint agent in the gunpowder business, have taken pains, even from mere curiosity, if from no better motive, to inform himself of his son's position at so critical a juncture, and of the amount of debt then due to Curtis and Harvey, as well as that he should have, at no subsequent period, interfered in the business, or even casually inspected the books, always at hand and open to him, and that too in matters in which he had so important a stake. It is more remarkable, and almost surpasses belief, that he should have shown such indifference and gross neglect in the case of a son of no creditable antecedents, an admitted defaulter to a building society, whose deficiencies in his accounts he had paid no less a sum than 300*l.* to make up; nay, that he should have actually come forward, in that court, and publicly stated that he had no reason for mistrust. With every disposition to make allowance for the feelings of a father, I must say that, in my opinion, he has, in this case, been guilty of great injustice, not only towards Messrs. Curtis and Harvey, but towards himself and his son as well. Though I am not inclined place any reliance on the evidence of his son as bearing on this part of the case, tending, as it does, to exculpate the father of any participation in those frauds upon the Messrs. Curtis and Harvey, still, after the father's solemn disclaimer of ever having at any time interfered with the gunpowder agency, or the book-keeping in relation to it, and his emphatic disavowal of any knowledge of the true state of the accounts between Messrs. Curtis and Harvey and his son, coupling it, too, with the fact that Mr. C. W. Curtis had the interview in 1862 with the son only (for it does not appear that he had any personal interview with the elder Blagburn on that occasion), I am willing to believe the father's statement, and to acquit him of any criminal responsibility for the conduct of his son. I do not think, therefore, he has been brought within the 221*st* or misdemeanor clause of the Bankruptcy Act 1861. It seems to me I may hold him guilty of one, if not two, of the offences specified in the 139*th* clause. I consider that he has within the spirit of the Act, as a trader, with intent to conceal the true state of his affairs, wilfully omitted to keep proper books of account. He was a joint agent with his son for Messrs. Curtis and Harvey for the sale of their gunpowder upon commission. He jointly guaranteed the debts of the customers, the consequence of his persistent neglect to take any active part in the agency or book-keeping, though clothed with all the

liabilities and subject to all the responsibilities of a partner, has been to conceal from those gentlemen the true state of their account, and of his own affairs as connected with his dealings with them. Considering what little reason he had, after so painful an experience, for placing any, much less so implicit a reliance in his son's integrity, and how great a probability there was of his renewing the practice of defalcations, he has, in my judgment, wilfully, as a trader, omitted to keep proper books of account. A man must be held to intend the almost inevitable results of a confidence under such circumstances so entirely misplaced. Were it to be held otherwise, a most important security for the regular course of commercial dealing in cases of partnership would be taken away, and a wide door opened to dishonesty in mercantile transactions. I am of opinion, too, that in the same sense and from a general view of the matters disclosed by these proceedings, he has contracted that debt, or, what is much the same thing, by an obvious neglect of his duty as a partner, for which I hold him responsible, allowed that debt to Messrs. Curtis and Harvey to be contracted and increased without, as he would have known had he taken the trouble to inquire, any reasonable prospect of his being able to pay it. The former I regard as the more serious offence, and for this, more particularly, I consider it my duty to order a suspension of the elder bankrupt's discharge for a period of twelve months from the date of the adjudication; in effect, till the 12*th* March 1864. With respect to the younger bankrupt, it is impossible to read the examination taken on the 27*th* April or the 7*th* Aug., without arriving at the conclusion that the facts disclosed are abundantly sufficient to convict him of a misdemeanor within the meaning of the 7*th* section of the 221*st* clause. He has, as it appears to me, according to the evidence of his own lips, made false and fraudulent entries and statements in and omissions from, books, documents, or writings, relating to his trade, dealings, or affairs; and a document marked "A," more than once referred to, purporting to be the return of an account up to the 31*st* Sept. 1862, made to Messrs. Curtis and Harvey, of itself shows that the offence had been committed within the time limited by the statute, i.e. within three months next before the adjudication. That this was done with intent to conceal the state of his affairs, is almost, in express terms, admitted by the younger bankrupt; or is, at any rate, a matter of necessary implication. Those returns, of which that marked "A" is a sample, were to have been made monthly; but, whether made monthly or not, in the aggregate they sufficiently answer the description of documents enumerated in the Act. Either copies of them were kept in the agency ledger, or they were copies of the agency ledger, which might have been denominated Curtis and Harvey's ledger. It is the merest quibble to say these were not the bankrupts' books. They were necessary to be kept by the bankrupts in their character of commission agents. With as much sense or reason might it be said that a commission agent was not a trader. Being of opinion, therefore, that John James Blagburn, the younger bankrupt, has been brought clearly within the penal portion of the misdemeanor clause, I shall have no hesitation, if asked to do so, in directing him to be prosecuted in a court of criminal jurisdiction. In July of last year a similar application was made to me, i.e., I was pressed to direct a criminal prosecution in the case of Thomas Wilson, a builder, of this town. I was upon that occasion of opinion that though there might have been evidence to go to a jury upon which he might have been convicted for a misdemeanor, it was not very probable, at any rate far from being morally certain, that such would have been the result. I therefore

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refused the application, and suspended Wilson's discharge from taking effect for twelve months. My judgment was appealed from, and reversed by the Lord Justices, who directed a prosecution on the ground that there was probable evidence to lead to a conviction. How the matter was eventually settled it is unnecessary for me to state. My only reason for alluding to it now is, that subsequently to that decision of the Lords Justices, the Lord Chancellor, on an appeal in the case of *ex parte*, still laid it down as his strong opinion that no criminal prosecution ought to be directed by a commissioner of bankruptcy upon mere suspicion or conjecture, nor in any case except upon evidence capable of sustaining an indictment, and offering reasonable probability of a verdict. I think the case of John James Blagburn complies with these requirements. Out of his own mouth he is condemned. I repeat that, if pressed, I have no alternative but to direct a prosecution. That I am ready to do so at the instance either of the creditors' assignee or of Messrs. Curtis and Harvey, or the creditors. If these latter gentlemen are inclined to prosecute on their own account, I will adjourn the further consideration of the case for a reasonable time till they have made up their minds; or, if the creditors' assignee wishes time to consider what steps to take, I will give him a similar adjournment for that purpose, and in the interim either party will be at liberty to apply to me. Considering the importance of this case, as bearing upon the administration of the law of bankruptcy, and the gravity of the result, at least to one of the bankrupts—the younger Blagburn—I have thought it right to go more fully into the proceedings, and to give the reasons for my judgment at greater length than under other circumstances I might have thought necessary.

Britton applied to his Honour to order the younger bankrupt into custody.

His Honour, after some discussion on the matter, said he did not think that he had the power to do that. Eventually he said that an order might be made out for the committal of John James Blagburn.

Ireland. (a)

COURT OF EXCHEQUER.

Reported by OLIVER J. BURKE, Esq., Barrister-at-Law.

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Charitable bequests—Exemption from legacy duty—Secret trusts—5 & 6 Vict. c. 82, s. 38.

F., the testatrix, by will bearing date the 10th Feb. 1829, after giving several legacies, bequeathed the residue of her real and personal estate "to the Rev. P. D. and the Most Rev. D. M., and to the survivor of them, his heirs, executors, &c., requesting that the intentions expressed in her will might be carried into effect." To this will there was a codicil dated 7th Oct. 1839, as follows: "To remove any doubt as to my intention as to the devise and bequest of my real, freehold, and personal estate, I declare that the same shall go to the said P. D. and the Most Rev. D. M. named in my will, according to the directions therein, and it is not intended that same or any part thereof should be given or bequeathed to any other person." Testatrix died 5th May 1850. Most Rev. D. M. died Feb. 1852, and Rev. P. D. died in Dec. 1852, having bequeathed by will said residue to Archbishop C., who in 1853 obtained probate of said last-mentioned will. For this residuary sum so bequeathed by testatrix, legacy duty, under and by virtue of the Legacy Duty Acts, at the rate of 10l. per cent., was sought to be enforced, same having been bequeathed to strangers in blood.

(a) From the *Irish Jurist*, by permission.

Deft. declined to pay same, on the ground that certain charitable trusts were declared by letters written by testatrix to said Most Rev. D. M. and Rev. P. D., received and acceded to by them during her life, and acted upon after her death, and that therefore the personal representatives of testatrix were bound as trustees to apply said residue to purposes merely charitable, and that the trust was one which a court of equity would enforce, and that therefore the bequest of the residue to the said Most Rev. D. M. and Rev. P. D. was a bequest for charitable purposes, and that no duty was payable in respect thereof:

Held, that a secret trust cannot be made available by the legatee for the purpose of exemption from legacy duty, and that therefore the gift of the residue contained in the will of testatrix, B. F., was subject to legacy duty, and was not exempted by the 38th section of 5 & 6 Vict. c. 82, exempting charitable bequests from duty.

This was an information filed by Her Majesty's Attorney-General against the Most Reverend Doctor Paul Cullen, Roman Catholic Archbishop, &c., to obtain payment of the duty which had become payable to Her Majesty in respect of a certain residue of personal estate, amounting to a sum of 4700l., and bequeathed by the will of one Bridget Fitzgerald, the testatrix, to the Most Reverend Daniel Murray, Roman Catholic Archbishop of Dublin, and to the Rev. Patrick Doyle, both since deceased, and to the payment of which the deft. is now liable, as administrator of the goods and chattels which were left unadministered of the said Bridget Fitzgerald, and also as executor of the Rev. Patrick Joseph Doyle, deceased, the acting executor under the will of the said testatrix. The information then stated testatrix was, at the time of her making her will, and the several codicils thereto, possessed of personal estate, and by her will, dated 10th Feb. 1829, she appointed one Peter Locke, and the Rev. Patrick Joseph Doyle, executors of said will. She thereby bequeathed to the said Peter Locke the sum of 200l., and to the said Patrick Joseph Doyle 100l., and after various other bequests, she bequeathed the "rest, residue, and remainder of her property, real and personal, of every kind and description whatsoever, to said Patrick Doyle and Daniel Murray, and the survivor of them, his heirs, administrators, executors and assigns, requesting that the intentions expressed in her will might be carried into effect. To this will there were two codicils, each dated 7th Oct. 1839, being subsequent to the 1st Vict. for amendment of the laws relating to wills—the first confirming the will, and the second in the following terms: "To remove any doubt as to my intention as to the devise and bequest of my real, freehold and personal estates, I declare that the same shall go to the said Patrick Joseph Doyle (therein called the Rev. Patrick James Doyle), and the Most Rev. Daniel Murray, named in my will, according to the directions therein, and that it is not intended that the same or any part thereof should be given or bequeathed to any other person." There was a further codicil appointing Anne Carroll executrix in place of Peter Locke, deceased, and a further codicil, 24th Jan. 1849, declaring Rev. Patrick Joseph Doyle the person named in the will as Patrick Doyle.

Testatrix died on 5th May 1850 without having revoked or altered the said residuary bequests. Probate was granted on the 18th June 1850 to Anne Carroll and Rev. Patrick Joseph Doyle. Said Rev. Patrick Joseph Doyle thereupon took possession of the assets, either for his own or some other person's benefit, but did not pay legacy duty on the residue. The Most Rev. Daniel Murray died in Feb. 1852, and Rev. Patrick Joseph Doyle died in December in the same year, having first made his last will in writing, whereby,

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after some pecuniary legacies, he bequeathed the residue to the deft. for such religious and charitable purposes as he should think fit, and appointed deft. and Rev. Philip Dubey executors. Probate of said will was granted to the most Rev. Archbishop Cullen in Jan. 1853. Anne Carroll died intestate in 1853, never having interfered in the administration of the personal estate of said Bridget Fitzgerald, the testatrix. Administration *de bonis non* of the testatrix was granted to deft. on the 20th June 1854, who then took possession of the assets, and retained same either for his own use and benefit, or for the benefit of some other person, to a large amount, comprising the remaining part of the residue bequeathed by said will of Bridget Fitzgerald, and also delivered and paid to certain persons, or otherwise satisfied and discharged the remaining part of said residue. The information averred that legacy duty at 10l. per cent. was payable by the said Patrick Joseph Doyle, and that there was and is payable by the defts. to Her Majesty a duty of 10l. per cent. upon the value thereof, the same having been bequeathed to strangers in blood; that application was made to said Rev. Patrick Joseph Doyle, who in his lifetime declined, and deft. now declines, to pay same, on the ground that certain charitable trusts were declared by letters written by testatrix to said Most Rev. Daniel Murray and Rev. Patrick Joseph Doyle, and that, therefore, the personal representatives of the testatrix were bound, as trustees, to apply said residue to purposes merely charitable, and as such, said residue is exempt from legacy duty; that such letters were not admitted to probate, or alluded to in the will or codicils. The prayer of the information was, in accordance with the above facts set forth, that defts. might be chargeable with legacy duty at 10 per cent.

To this information deft. filed an answer, stating that he admits the will and codicils, and believes same to be correctly stated in the information; and deft. further says that although said Most Rev. Archbishop Murray and Rev. Patrick Joseph Doyle appear upon the face of the said will and codicils to be residuary legatees for their own use and benefit unaffected by any trust, yet in fact and truth they took no personal interest in the said residue, and deft. submits that, under the circumstances hereinafter mentioned, the said Most Rev. Doctor Murray and the Rev. Patrick Joseph Doyle were but trustees of the said residue for charitable purposes, they having accepted in testatrix's lifetime the trusts directed by her in relation to said residue in communications in writing made by her to them in her lifetime as hereinafter mentioned. That contemporaneously with the execution of her said will, that is to say on the 10th Feb. 1829, the testatrix wrote, signed, and sent to the Most Rev. Doctor Murray, and Rev. Patrick Joseph Doyle respectively, three letters, the first of them to the Most Rev. Doctor Murray—the second directed to Rev. Patrick Joseph Doyle (therein termed the Rev. Patrick Doyle), and the third directed to the Rev. Patrick Joseph Doyle. That said first letter is as follows:—

“26, Temple-street, Dublin, 10th Feb. 1829.

“My Lord,—I have, on the 10th Feb. 1829, made my last will, &c. The high opinion I have of the Rev. P. J. Doyle has induced me to nominate him one of my executors, in order that certain intentions of mine shall be faithfully complied with. In my will I have left him absolutely 100l., and I have left him and you, my Lord, residuary legatees of my remaining property, after discharging my debts and legacies. I trust your grace will be aware, by my leaving the residue of my property to you and the Rev. P. Doyle, I do so merely as a trust that the property left to you may be disposed of in the manner and for the purposes I shall direct, thinking it better to do so than mention

them particularly in my last will and testament (some part of them arising from a conscientious feeling). I desire that after my debts, legacies and bequests are satisfied, money is to be given for masses for my soul, and for different charitable institutions, all of which I have particularly specified in my letter to the Rev. P. Doyle, a copy of which I inclose you, that you may more fully understand my intention about what I wish to have done with the residue of my property. After what I have mentioned, I leave for you and the Rev. Dr. Doyle the remainder of my property. I wish it should be laid out towards the foundation of a convent for the education of female children of respectable parents reduced to poverty. I would prefer convents that would take children to live with them, of the order of the Visitation, provided they undertook to instruct the poor, and were bound to do so, and I would by no means leave my property to a convent unless it benefited the poor, &c. I remain, my Lord, your Lordship's most humble servant,

“BRIDGET FITZGERALD.”

That the second letter was of like date and import, addressed to the Rev. P. J. Doyle, also explaining the said trusts on which she appointed him and the Most Rev. Dr. Murray trustees of her said will; and the deft. denies that he took possession, or retained any portion of the said personal estate for his own use and benefit, but claims to hold the same for the charitable purposes disclosed in the letters above mentioned, and therefore, for the reasons hereinbefore and after mentioned, deft. declines to pay said legacy duty of 10 per cent. in information claimed; and deft. now submits, as a matter of law, that inasmuch as the said most Rev. Dr. Murray and Rev. Patrick Joseph Doyle did, in the lifetime of testatrix, receive from her directions in writing aforesaid to apply, and did in pursuance thereof consent to apply, the residue of her personal estate for the charitable trusts mentioned in the foregoing letter, the trust was one which a court of equity would enforce, and that, therefore, the bequest of the residue to the said Most Rev. Dr. Murray and Rev. P. J. Doyle was really and substantially a bequest thereof for charitable purposes, and that no duty is payable in respect thereof.

The *Solicitor-General* and *Jebb* appeared for the Crown.—The question for the consideration of the court is whether, under the circumstances of the case, the residuary bequest is exempted from legacy duty or not by the 38th section of the 5 & 6 Vict. c. 82. It is submitted that the late Archbishop Murray and the Rev. P. J. Doyle were strangers in blood to the testatrix, and, as such, their legacies now in the hands of Archbishop Cullen are liable to pay a legacy duty of 10l. per cent.; and that as the charities for which the trusts contended for were intended did not appear on the face of the will, same were not exempted by the proviso at the close of the 38th section of the 5 & 6 Vict. c. 82.

Sir *Colman O'Loughlin*, Q.C. and *John O'Hagan* contended that a trust was created of the residue of Bridget Fitzgerald's estate for charitable purposes, which, in a court of equity, could have been enforced adversely against the late Most Rev. Dr. Murray and Dr. Doyle; that, if this were so, the residue was a legacy given to be applied for a purpose merely charitable within the meaning of the 5 & 6 Vict. c. 82, s. 38.

The following cases were relied on in support of the deft.'s case:—

Strickland v. Alderedge, 9 Ves. 519;
Tee v. Ferris, 2 K. & J. 357;
Shary v. Garty, 2 I. C. 351;
Drakeford v. Wilks, 3 Atk. 539;
Sweeting v. Sweeting, 1 Drew. 331;
Attorney-General v. Nash, 1 M. & W. 237;
Walgrave v. Tebbs, 2 Kay & John. 313;

Attorney-General v. Dillon, 13 L. Ch. 127;
Hobson v. Neale, 17 Beav. 178.

The arguments on both sides are fully reviewed by the two members of the court who delivered judgment in the case.

PIGOT, C. B.—My brother Deasy is obliged to attend this morning in the Chancery Appeal Court, but he has authorised me to say that he fully concurs in the judgment of the court, which I am now about to deliver. The Solicitor-General, in opening the case on the part of the Crown, stated (very properly in my opinion) that he did not mean to contravene the proposition relied upon in the answer, viz., that the two residuary legatees of the residue bequeathed to them by the testatrix were trustees for the purposes indicated in the letters dated contemporaneously with the will, and transmitted to them by the testatrix. The cause was set down to be heard on the information and answer; the statements in the answer must therefore be taken as admitted—the statements not only that the two letters addressed by the testatrix to the Rev. Patrick Joseph Doyle, one of the residuary legatees, and the letter addressed to the Most Rev. Dr. Murray, the other residuary legatee, were transmitted to and received by them in the lifetime of testatrix, but that copies of the letters addressed to the Rev. Mr. Doyle were transmitted to the Most Rev. Dr. Murray, and that a copy of the letter addressed to the Most Rev. Dr. Murray was transmitted to the Rev. Mr. Doyle; that in the testatrix's lifetime both the residuary legatees accepted the trusts declared in those letters, and that those letters remaining in their possession after the death of the testatrix in 1850 were found among their papers after their respective deaths. The answer further states that after the death of testatrix, the Rev. Mr. Doyle acted with the assent of Dr. Murray in applying the property bequeathed to them in conformity with those trusts, that they did not claim any benefit for themselves in reference to that property, and that the deft., who is the executor of the surviving residuary legatee, and the administrator *de bonis non* of the original testatrix, claims no benefit under her said will, and admits that he possesses the remaining portion of the residue as trustee, and now claims exemption from the legacy duty on the ground that the residuary legatees took the property as trustees. Although some reliance was placed in the reply upon the codicil of 7th Oct. 1839, as a testamentary document annulling the trusts created by the letters, and by the acceptance of the trusts by the residuary legatees, it appears to me that the evidence conclusively establishes that the trust continued to be reposed by the testatrix, and to be accepted and adopted by the legatees after that codicil, and to have been wholly unaffected by it. It is hardly necessary to refer to authorities on the subject of trusts of this nature; almost all of them are collected in *Lover v. Ripley*, 3 Sm. & Giff. 48; *Walgrave v. Tebbs*, 2 K. & J. 313; and *The Attorney-General v. Dillon*, 13 L. Ch. 127. The rule is thus enunciated by the V.C. in *Walgrave v. Tebbs*, 2 K. & J. 321: "Where a person, knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust." In the codicil of the 7th Oct. 1839, the testatrix, after indicating her desire to remove any doubt as to her intention as to the devise of her real, freehold and personal estate, uses these words: "I hereby declare the same shall go to the Rev. Patrick James Doyle and the Most Rev. Daniel Murray named in my will according to the directions therein, and that it is not intended to be bequeathed or given to any other person." It appears strange enough that she misdescribed or inadequately

named the Rev. Mr. Doyle in the will, and in the letters addressed to him she named him as the Rev. Patrick Doyle. In the codicil of the 7th Oct. 1839 she designated him as Patrick James Doyle, and in a codicil of the 24th Jan. 1849 she corrected the error she had made, and stated that he should have been described as Patrick Joseph Doyle, which appeared to have been his true name, and she declared that he was the person whom she appointed as one of her executors and joint residuary legatees with the Most Rev. Daniel Murray, Roman Catholic Archbishop of Dublin. If I am to express an opinion as to the motives and purpose of the testatrix in making the codicil of the 7th Oct. 1839, it would be that she intended to describe Patrick James Doyle as the person whom, under the name of Patrick Doyle, she had made by her will joint residuary legatee with Dr. Murray. Whatever might be her motive, the words she used had no further efficacy in disposing of the property than those of her will; the bequest in the will was to the Rev. Patrick Doyle and the Most Rev. Dr. Murray; that in effect was a bequest to him and to another person. The words of the codicil indicating that the legatees named, and they only, shall take under the will, are not stronger or more conclusive than the words of the will in *Shary v. Garty*, 3 L. C. 351. The main object of the trusts was not to bestow any part of the fund on any specified person; it was to found and establish an institution of a specified kind, for the purpose of educating in a specific way a specified class of the poor; but independently of any criticism on the form of the codicil of the 7th Oct. 1839, the fact that the testatrix, during the rest of her life, nearly eleven years, left the letters unwithdrawn in the possession of the residuary legatees, that they retained those letters until their respective deaths, and that they acted in the performance of the trusts which those letters purported to create, lead irresistibly to the inference that the trust was treated after the codicil, as well as before, both by the testatrix and the legatees, as imposing a continuing and binding obligation to take the property at her death, not for their own benefit, but upon the trusts of the letters which they so retained. The main question which we have to determine is, whether the legacy duty attaches to the bequest of the residue, or whether it is exempted by the proviso in the 38th section of the 5 & 6 Vict. c. 82, exempting charitable bequests from duty. It is contended on the part of the deft. that the legacy duty does not attach, because this is a bequest for a purpose within the scope of the proviso. On the part of the Crown it is not denied that the purposes are within the scope of the proviso; but it is contended that the legacy is not within the exemption created by this proviso, because the legacy is not given for a charitable purpose on the face of the will. The deft.'s counsel, by whom this case has been argued with great ability, contended that the court ought now to resort to matters *dehors* the will to ascertain the purpose of the legacy, with a view to determine whether it is at all chargeable with duty, in the same way as we must resort to matters *dehors* the will to ascertain what is the amount of duty chargeable; for example, on determining whether the legatee does or does not stand in such a relation to the testator as renders him liable to duty less than what would be chargeable by a stranger; or to determine, as in *Sweeting v. Sweeting*, 1 Drew. 331, whether a provision created by an appointment under a power given by a will was or was not chargeable with legacy duty as if given directly by the will. Cases have been suggested in which evidence extrinsic of the will must confessedly be resorted to for the purpose of determining with what duty the legatee shall be chargeable with respect to the legacy. If there be a bequest of 1000*l.* to A. B., who claims to be the testator's son, and it is

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disputed that he stands in that relation to the testator, the amount of the duty may depend upon the legitimacy of the legatees. If there be a legacy to C. D., who claims to be the testator's widow, the amount of the duty may depend upon the validity of the claimant's marriage. It is contended that the question whether the purposes of the legacy are within the proviso excepting bequests from duty, is an inquiry as much within the contemplation of the statute as an inquiry whether the legatee is the legitimate son, or was the lawful wife of the testator, or whether the appointee under a power takes the legacy under the provisions of the Act of Parliament. I confess I have not come without doubt and hesitation to the conclusion that those analogies do not furnish a safe rule for construing the exempting proviso of the statute. The answer to the argument founded upon them appears to me to be furnished by the terms of the schedule to the 55 Geo. 3, c. 184, and by the terms of the 38th section of the 5 & 6 Vict. c. 82, and the 4th section of the 8 & 9 Vict. c. 76, indicating, though not exclusively defining, what shall be deemed a legacy within the meaning of the Acts granting duties on legacies; the schedule to the 55 Geo. 3, c. 184, extended to Ireland by the 5 & 6 Vict. c. 82, where any such legacy or residue, or any share of such residue, shall have been given to or have devolved to or for the benefit of the child of the deceased, &c., imposes a duty at or after the rate of 1 per cent. on the amount or value thereon; then, after several other sections, comes this section: "When any such legacy or residue, or share of such residue, shall have been given or have devolved to or for the benefit of any person in any other degree of collateral consanguinity to the deceased and as above described, or to or for the benefit of any stranger in blood to the deceased, a duty at or after the rate of 10 per cent. on the amount or value thereof." The 38th section of the 5 & 6 Vict. c. 82, and the 4th section of the 8 & 9 Vict. c. 76, correspond nearly in terms. The former enacts that every gift by any will or testamentary instrument of any deceased person, which by virtue of such will or testamentary instrument shall have effect or be satisfied out of the personal estate of such person so dying, &c., shall be deemed and taken to be a legacy within the true intent and meaning of this Act. The 4th section of the 8 & 9 Vict. c. 76, contains with others the provisions in nearly similar terms applicable to all the several Acts granting or relating to debts or legacies in Great Britain and Ireland respectively. The proviso at the end of the 38th section of the 5 & 6 Vict. c. 82, is, that nothing herein contained shall extend, or be construed to extend, to Ireland, to charge with duty any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable. This provision contains in terms the following as express enactments of the Legislature—first, that a gift by will which, by virtue of a will, shall be payable out of the personal estate of the testator, shall be deemed to be a legacy; secondly, that the duty of 10l. per cent. shall attach wherever any such legacies shall have been given or devolved to or for the benefit of any person who shall be a stranger in blood to the testator; thirdly, that the exemption provided at the close of the 38th section of the 5 & 6 Vict. c. 82, shall apply where the legacy is given for some of the purposes mentioned in the proviso. What, then, is the true meaning of the words "given for" in connection with the words that describe the purposes exempting the legacy from duty? Do they mean that the legacy, in order to be so exempted, shall be given for such purposes by the will, or did they mean that if the legacy be given by the will, the purposes may be shown by matter extrinsic of the will? In other words, is it a legacy

given for this purpose, unless the will by which it is given declares the purposes for which it gives them? I have come to the conclusion that such is the true construction of the Act of Parliament, and that the exemption does not exist within the proviso unless the purposes are so disclosed by the will itself as to show that the legacy is given for this purpose. The statute deals with what is done by the will; that is a legacy within the meaning of the statute which is a gift by the will, and which is to have effect or be satisfied by virtue of the will; and though the interpretation of the term "legacy" given by the 38th section of the 5 & 6 Vict. c. 82, and the 4th section of the 8 & 9 Vict. c. 76, is not exclusive, and only purposes to include within that term what it describes, yet it shows that the Legislature contemplated—as, indeed, they obviously must have done—that the will is that which should determine what should be the legacy. I am sensible that the words are large enough, if not controlled by the context, to embrace a bequest for any of the purposes specified in the proviso, howsoever that purpose may be proved; and I am sensible, also, that the construction for which the Crown contends may possibly furnish the means of avoiding duty by making bequests to relatives upon secret trusts for strangers, under circumstances in which the Crown may not easily discover the trust, or may be unable to establish by legal evidence, to deprive the Crown of the duty. It is quite possible, also, that the Legislature, having before them the established rule of the courts of equity, which formed in effect a part of the law of the land, may have intended to comprise trusts engrafted by that rule on legacies, to use the language of some of the judges; and the expressions in the several sections of the schedule, "where such legacy, &c. shall have been given, or have devolved to or for the benefit of any person," must be considered large enough and sufficient to include the trust for a person not named in the will created by the undertaking from the legatee to the testator, to hold the legacy on trust for that person. This view may be considered as deriving some colour from the rule laid down expressly in some of the cases, that the legacy duty shall be payable by or at the expense of the person who is beneficially entitled to the legacy: (*Re Wilkinson*, 1 Cromp. M. & R. Ex. Ch. 142.) Notwithstanding this construction, which I mention for the purpose of showing that they have not been overlooked, I feel constrained to hold that this is not a legacy given for a charitable purpose by the will, and that not being so given, it is not within the proviso creating an exemption from duty contained in the 38th section of the 5 & 6 Vict. c. 82. The result, then, must be a decree in conformity with the prayer of the informations. I have not, as I have already intimated, come to the conclusion at which I have arrived without considerable doubt, and some fluctuation of opinion. I should, speaking for myself, not regret that some inexpensive mode might be adopted for reviewing our decision, if not acquiesced in. The case of *Re Wilkinson*, 1 Cromp. M. & R. 142, decided in the Court of Ex. in England, was brought, I presume, by consent between the Crown and the party claiming the exemption from the legacy duty, in the shape of a special verdict before the judges of the Court of Ex. Ch., and the decision from that court is reported under the name of *The Attorney-General v. Nash*, 1 M. & W. 237. In that case the exemption was claimed on the ground that the bequest, which was for charitable purposes, and was to be distributed under the will in small sums, was within the limits which, under the 55 Geo. 3, c. 184, legacies were not chargeable with duty, and the amount of duty claimed did not differ much from the amount claimed in the present case by the Crown.

FITZGERALD, B.—I am also of opinion that the gift of the residue contained in the will of the late Bridget

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[CHAN.]

Fitzgerald is subject to legacy duty. I wish to be understood as offering no opinion whether or not the trust with which it is alleged on the part of the deft. that such a gift was effected, could or could not be enforced. Even on the assumption that it could, and that it would be considered as a trust for the education or maintenance of poor children in Ireland, or for the support of charitable institutions in Ireland, or for purposes merely charitable, I am of opinion that it is not a legacy within the Acts, because it is not a gift by a will or testamentary instrument; the only gift by the will or testamentary instrument is a gift of the residuary estate to the residuary legatees, and no trust as to the application of that residue is imposed, or can be gathered from the will. I wish further to be understood as offering no opinion as to the terms which a court of equity may or may not have in its power to impose on parties seeking through its aid to avail themselves of a secret trust of a legacy given by will, with a view of avoiding the higher amount of legacy duty than that to which the *cestui que trust* of the legacies would be liable. It may be, but I am far from saying it is so, that a court of equity may have a right to say to such parties, you shall not avail yourselves of a secret trust to escape legacy duty. In the present case it is sufficient to say, that under the provisions of the statute a secret trust cannot be made available by the legatee for the purposes of exemption of legacy duty, and I cannot say I entertain any doubt on the point.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

May 8, June 12, 13, 20, and Aug. 4.

(Before the LORDS JUSTICES.)

COLYER v. COLYER.

PAWLEY v. COLYER.

Mortgage—Redemption—Re-conveyance by first mortgagee—Tenant for life of the equity of redemption.

A mortgagee cannot be compelled to place another person in his stead as mortgagee, and he may therefore refuse to convey the mortgaged premises to any person who should become mortgagee by that conveyance. In the absence of contract, he can only be called upon to re-convey to the mortgagor or his assigns. The petition of a tenant for life of an equity of redemption for a transfer of the first mortgage on payment by her into court of the moneys secured thereby, while a second mortgagee was in possession, was dismissed with costs by Kindersley, V. C., and, on appeal, by the Lords Justices also.

The same tenant for life having filed her bill to redeem that and a second mortgage, the case was considered as though the plt. were tenant in fee, and the usual decree was made, but with a direction that the re-conveyance should be made according to the limitations of the will under which the plt. was tenant for life.

The case of *Colyer v. Colyer* came before their Lordships on an appeal from an order of Kindersley, V.C., made upon the hearing of a petition presented by the plt. in the second suit of *Pawley v. Colyer*; and this latter suit came before their Lordships for its original hearing by the consent of all parties. The circumstances were as follows:

The object of the suit of *Colyer v. Colyer* was to obtain an account of the trust property comprised in a settlement, in which Mary Colyer, the plt., formerly the wife of James Colyer, but now deceased,

was interested for her life, with remainder to her children, and the deft. to that suit was Charles Colyer, the surviving trustee. A part of the property to which the settlement extended consisted of two sums of 800*l.* and 800*l.*, which were secured by, and constituted the first mortgage on, certain real estate formerly the property of John Pawley, now deceased, who had devised the mortgaged premises to his wife, the plt. in the second suit, for her life, with certain remainders over. Among the proceedings in the suit of *Colyer v. Colyer* was an appointment of new trustees in the place of Charles Colyer, but no conveyance of the legal estate had yet been made, and it was still vested in him.

A second mortgage was made by the said Mr. Pawley to James Colyer himself to secure 2200*l.*, and he being dissatisfied with the condition and management of the estate, had entered into possession, and had, as he alleged, duly applied the rents and handed over any surplus to Mrs. Pawley.

That lady soon afterwards instituted the suit of *Pawley v. Colyer* in the Court of the M. R. for a redemption of the mortgaged property from both the mortgagees, but before that suit came on to be heard she presented her petition in *Colyer v. Colyer* praying that she might be at liberty to pay into court the two sums of 800*l.* and 800*l.* representing the first mortgage, and that thereupon Charles Colyer, the surviving trustee, might transfer the mortgage to her.

This petition was opposed before Kindersley, V.C. by the new trustees of the settlement, on the ground that it was an irregular attempt to procure redemption of the first mortgage by a short course, and oust the possession of James Colyer the second mortgagee. John Pawley, the mortgagor, had devised his estates to trustees, who were not before the court; they were the proper persons to whom the property should be re-conveyed, and the petitioner was only tenant for life. See *James v. Briou*, 3 Swans. 234.

Charles Colyer was willing to convey the estate according to the prayer of the petition.

Kindersley, V. C., thought that the real question was whether Mrs. Pawley had a right to call upon the court to compel Charles Colyer to make a transfer of the mortgage upon her paying the 800*l.* and 800*l.* into court. The effect of such a transaction would be that she would get the estate into her hands against James Colyer, and would prevent any portion of the rents going to pay interest to him, and he was of opinion that there was no ground for the petition, and he accordingly dismissed it with costs.

Mrs. Pawley appealed against that order, and when the petition first appeared in their Lordships' paper, it was mentioned that the app. had filed the redemption bill in *Pawley v. Colyer*, and the hearing of the petition was then adjourned in order that it and the suit might be brought on together.

John Pearson appeared for Mrs. Pawley in support of the appeal petition and of her bill, in *Pawley v. Colyer*.

Southgate, Q.C. and Marten, for the new trustees of the Colyer settlement, supported his Honour's order.

Karslake for other parties.

John Pearson replied.

Judgment was reserved until the 4th Aug., on which day

Lord Justice TURNER said, that this case comes before the Court of Appeal upon a petition by Mrs. Pawley, who was the tenant for life under the will of her late husband, the mortgagor, Mr. Pawley, of certain real estates which were subject to several mortgages, of which mortgages the first was vested in Charles Colyer as the surviving trustee of a settlement under which the children of James Colyer had now become entitled beneficially, and the second was vested in James Colyer himself. *Colyer v. Colyer*, the

first of these suits, related only to the trusts for the benefit of the children of James Colyer; the second, *Pawley v. Colyer*, was a suit instituted by Mrs. Pawley for the redemption of both of these mortgages. A petition had been presented in the suit of *Colyer v. Colyer* on behalf of Mrs. Pawley, which prayed that she might be at liberty to pay into court the two sums of 800*l.* and 800*l.* which represented the first mortgage, and that Charles Colyer, the surviving trustee, might be ordered to transfer the mortgage to the plt. This petition was heard before Kindersley, V.C., by whom it was dismissed with costs, and it was then brought before this court by way of appeal from his Honour's decision. The second suit of *Pawley v. Colyer* came before this court for its original hearing, by the consent of the parties, and was heard with the petition in the other suit. The first question was, whether the petition in *Colyer v. Colyer* had been properly dismissed, and his opinion was that it had. The case of *James v. Brion*, 3 Swan. 234, was an authority decisive against what was asked by the petition. It was said in that case, at page 241, that "the debt as mortgagee was in this situation, that she might refuse to convey the mortgaged premises to any one who was to become by that conveyance mortgagee or assignee of the mortgagee (because no mortgagee can be compelled to place another person in his stead as mortgagee), and might retain possession and refuse to reconvey, unless the persons entitled came to demand possession and reconveyance." There was here no contract to transfer the mortgage, and in the absence of contract his Lordship said, that he was at a loss to see on what ground the mortgagor could compel the mortgagee to transfer the mortgage. The contract was to reconvey to the mortgagor or his assigns, and this was all that the mortgagee was compellable to do. It was argued on the part of the petitioner that she could not safely pay the money to Charles Colyer, on account of the proceedings in this suit; but the answer to that was, that the petitioner was not entitled to make the payments at all. The petition was wholly without foundation, and it had been rightly dismissed with costs. Then there remained the question, what decree ought to be made in the redemption suit? No question arose as to the parties. First, there was Charles Colyer in respect of the first mortgage upon the property; secondly, James Colyer in respect of the second mortgage vested in him; and lastly, the parties entitled under the will of Mr. Pawley, the mortgagor. Further, Charles Colyer claimed also a charge upon the mortgage vested in James Colyer. Under these circumstances, it appeared, in the first place, to be the right course to frame the decree in *Pawley v. Colyer*, as if the plt. were not merely for life, but tenant in fee. Assuming the parties to be so entitled, there was no difficulty, and the only unusual direction would be, an account of what was due to Charles Colyer in respect to the charge which he alleged against the mortgage debt due to James Colyer. Of course there must also be an account of the rents and profits received by James Colyer. The next question then would be, what ought to be done by reason of the plt. being only tenant for life. The plt. alleged that the rents were more than sufficient to keep down the interest; but whether that was so or not would appear by the accounts. If they were more than sufficient, the plt. would be entitled to stand in the place of the mortgagee for the surplus, and a declaration to that effect would be inserted in the decree. A reconveyance according to the limitations of Mr. Pawley's will must be executed, and the decree would provide for this also. He had thought it right to offer these suggestions, but the case was one which ought, in his opinion, to be mentioned on the minutes, when the court would dispose of the costs of the redemption suit also, upon which they would hear the parties.

Lord Justice KNIGHT BRUCE was of the same opinion.

Solicitors for the plt. Mrs. Pawley, *Flower and Flower*.

Solicitors for the new trustees of the settlement, Messrs. *Davidson and Hardwick*.

Solicitor for the other parties, *Charles Colyer*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Wednesday, Dec. 17, 1862.

PEARSON v. CRANSWICK.

Bequest—Income—Joint tenancy.

Where there is a bequest of property to two or more persons for their lives and the life of the survivor of them, followed by a gift over of the property on the death of the survivor of those persons, the whole of the previous interests must be assumed to continue in those persons, or the survivor of them, till his death.

Where, therefore, a testator bequeathed the income of property, in trust for his three daughters, for their lives, and the lives of the survivors and survivor of them, and, after the decease of the survivor, in trust for the issue of the daughters who should attain twenty-one, it was

Held, that the daughters of the testator took the bequest as joint tenants, and not tenants in common.

Armstrong v. Eldridge, 3 Br. C. C. 215, and *Jones v. Randall*, 1 Jac. & W. 100, observed upon.

Leonard Foster, the testator in this suit, by his will bequeathed the interest, dividends, and annual profits to arise and become due and payable from certain trust-funds to the trustee of his will, upon the following trust, "to pay the same unto and equally between my three daughters Mary, Ann, and Sarah, for and during the term of their natural lives, and the lives of the survivors, and the survivor of them, during their and her natural life, to and for their respective sole and separate use and benefit, and without being subject to the debts, control, interference, or engagements of their present or any future husbands. The will then continued thus: "And I do hereby will and direct that the respective receipts of my said three daughters alone from time to time, notwithstanding their or any of their coverture, shall be a sufficient discharge to my said trustee, or the trustees for the time being, for the said interest, dividends, annual proceeds, rents and profits; and I do hereby further declare my will and mind to be that it shall not be lawful for my said daughters respectively to charge, sell, or assign, or otherwise dispose of by way of anticipation, the interest, dividends and annual produce, rents, and profits, so to them respectively payable as aforesaid; and that notwithstanding such charge, sale, assignment, or other disposition, it shall and may be lawful to and for my said trustees or trustee for the time being, and they and he are and is hereby required to pay the said interest, dividends, and annual produce, rents and profits, into the proper hands of my said daughters respectively, for their respective separate and peculiar use and benefit, upon their own respective receipts; and from and after the decease of the survivor of them, my said three daughters," upon certain trusts for the benefit of all and every the lawful issue of his daughters who should attain the age of twenty-one years.

The testator died in 1853. His daughter Mary died in 1859. The question was, whether the three daughters of the testator took their interests in the bequest as tenants in common, or as joint tenants?

Baggallay, Q.C. and *Besir* appeared for the daughter

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Ann, and contended that the words of the bequest created a joint tenancy between Mary and her sisters, and that Mary's share therefore survived to Ann and Sarah.

Southgate, Q.C. and *A. G. Marten* appeared for Sarah.

Selwyn, Q.C. and *T. Humphrey*, for the parties interested under the subsequent trusts, argued that the words of the bequest created a tenancy in common between Mary and her sisters, and that Mary's share therefore passed under the gift over.

The following authorities were cited in the arguments:

Armstrong v. Eldridge, 3 Bro. C. C. 215;

Jones v. Randall, 1 Jac. & W. 100;

Eales v. Lord Cardigan, 9 Sim. 384;

2 Jarm. on Wills, 240, 700;

Roper on Legacies, 1397.

The MASTER of the ROLLS.—I am of opinion that the words of the bequest in this will create a joint tenancy between the three daughters of the testator, and not a tenancy in common; and that the interest of the deceased daughter went over on her death to her sisters, to remain in them until the survivor of those sisters dies. *Armstrong v. Eldridge* is an authority which states very distinctly what are the principles governing such a case as the present, and that authority has been frequently followed. Mr. Roper, from his work on legacies, seems indeed to have thought that *Armstrong v. Eldridge* and *Jones v. Randall* were inconsistent with each other; and he remarks that when *Jones v. Randall* was argued, *Armstrong v. Eldridge* was not cited to the court. But other text writers have considered the case of *Jones v. Randall* to be an authority. I think that the two cases may be reconciled thus—by adopting this, as the distinction between them, viz., that, where there is a bequest of property to two or more persons for their lives and the life of the survivor, followed by a gift over of the property on the death of the survivor of those persons, the whole of the previous interests must be assumed to continue in those persons, or the survivor of them, till their or his death. *Eales v. Lord Cardigan* does not affect the present case. In that, the testator gave two persons an annuity of 200*l.* "each, for their lives and the life of the survivor." The court thought the testator then intended to give the whole income to the annuitants collectively. I must therefore in this case declare that, according to the true construction of the will of Mr. Leonard Foster, Ann and Sarah, as the surviving daughters of the three named in the will, are entitled to the whole of the income of the property bequeathed in trust for Mary and them during the remainder of their joint lives; and that the survivor of Ann and Sarah will be entitled to the whole thereof, for her life.

Solicitors: *Eyre and Lawson; Torr, Janeway and Tagart; Mason, Son and Sturt.*

March 13 and 17.

WILLIAMS v. BULLMORE.

BULLMORE v. WILLIAMS.

Mortgage—Foreclosure—Cross-bill—Indivisibility of consideration.

A mortgage instituted an ordinary foreclosure suit against his mortgagors. They filed a cross-bill against him to set aside the mortgage transaction, proving by their evidence that he had voluntarily advanced the money to that principal mortgagor, but with purpose to continue an intimacy he had formed with the mortgagor's daughter, whom (unknown to her father) he had previously seduced. The court being of opinion that it must regard the consideration for the mortgage-deed as entire, it was

Held, that the bill in the foreclosure suit must be

dismissed; that the mortgage transaction could not stand; and that the deed must be delivered up to be cancelled.

The first of these suits was instituted to foreclose a mortgage of certain copyhold property, dated the 20th Aug. 1855, made by the defts., a father and two of his daughters, to the plt.; and the money then advanced by him was applied in paying off a prior charge effected by them on the property in favour of a Mr. Tweedie.

The second suit was instituted by the father and his two daughters to obtain a declaration that the mortgage-deed of the 20th Aug. 1855, and a policy of assurance which had been assigned to the plt. in the first suit as a collateral security, should be delivered up to be cancelled.

It appeared from the evidence in the suit, that the daughters executed the mortgages under the pressure and undue influence of their father, and that they had received no consideration for their execution of the deeds; that moreover other infant children of the mortgagor had been made parties to the deeds, in the expectation that they would execute them when they came of age, but that they had not done so.

The evidence also established that, so early as July 1853, or at all events prior to the year 1855, Williams, the mortgagee, had seduced a daughter of Mr. Bullmore; that on Mr. Tweedie (who was a relation of Mr. Bullmore) and Mrs. Tweedie remonstrating with him on what was then only considered to be the notorious attentions of Williams to the young lady, that person was forbidden to visit Mr. Bullmore's family. Williams, however, afterwards volunteered to advance the money to pay off Mr. Tweedie; but did so merely with the view of being thereby enabled to continue his intercourse with the daughter. In that he succeeded; but it did not appear that there was any express agreement between him and Mr. Bullmore, that the former should be allowed to continue his visits to the family of the latter. Mr. Bullmore ultimately received the advance from Williams, and the former gentleman and his daughters joined in executing the mortgage of the 20th Aug. 1855 to Williams. The mortgage money being still unpaid, the first suit was instituted, as above stated, by Williams to foreclose the equity of redemption, and the second by Mr. Bullmore and his daughters, to be relieved from their deed on the grounds already specified.

Selwyn, Q.C. and *Danney* appeared for the mortgagee Williams, the plt. in the foreclosure suit; and cited

McQueen v. Farquhar, 11 Ves. 467;

Sugd. on Powers, 616, 8th edit.

Baggallay, Q.C., Charles Hall and Rowcliffe, for the defts. in the first, and the plt. in the second suit, cited

Archer v. Hudson, 7 Beav. 551;

Espey v. Lake, 10 Hare, 260;

Maitland v. Irving, 15 Sim. 437;

Evans v. Bremridge, 2 K. & J. 174; a. c. on appeal, 8 De G. M. & G. 100;

Evans v. Carrington, 2 De G. F. & J. 481; 1 L. T. Rep. N. S. 229, and 4 L. T. Rep. N. S. 65.

The arguments were heard in private; but the effect of them and the details of the evidence will sufficiently appear from the judgment of the M. R.

March 17.—The MASTER of the ROLLS.—It appears from the evidence in these suits that the plt. in the first, who is also the deft. in the second, of them, so early as July 1853, at all events prior to 1855, succeeded in seducing a daughter of Mr. Bullmore, the deft. in the first and the plt. in the second suit. Mr. Tweedie, a brother-in-law of Mrs. Bullmore, pointed out to him that Williams's attentions to his

daughters were becoming notorious. At the same time Tweedie applied to him for repayment of the sum which he had advanced on the security of the copyhold property; and for a settlement as to some moneys for which he had become security. Bullmore thereupon applied to Willems for assistance. Shortly after that, upon the strong remonstrances of Mr. and Mrs. Tweedie, Bullmore wrote to Willems on the subject of his attentions to the lady, and requested him to discontinue his visits to her. In answer to that letter Willems wrote another, asserting his innocence, but acquiescing in Mr. Bullmore's refusal to admit him to his house. The day after that, however, Willems wrote a letter to Mr. Bullmore, offering to advance him the sum required to pay off the mortgage to Mr. Tweedie. That transaction was afterwards carried into effect by the mortgage of the 20th Aug. 1855. It is, I think, impossible to read the evidence and not come to the conclusion, that part of the consideration—I am unable to say how much, but certainly a part—was, that the debt should be allowed to continue his visits. It is difficult to suppose from the evidence, that Mr. Bullmore was not aware that Willems had then either actually seduced, or that he was attempting to seduce, his daughter. In either case I cannot doubt that part of the consideration for the mortgage-deed was such as I have stated. In that state of circumstances, no person can ask this court to give effect to the transaction of the 20th Aug. 1855. The court is compelled to look to the whole consideration given and cannot execute it in part. It is, of course, utterly impossible for the court to give Willems any assistance whatever. I have had to consider whether I should allow the parties an opportunity of proceeding at law; but as exactly the same defence would be open there as here, I think I should not be acting rightly unless I put an end to this unfortunate case as speedily as possible. I shall therefore say nothing as to any action at law for the money, but shall order the mortgage-deed of the 20th Aug. 1855 to be delivered up to be cancelled. The ground on which I have decided the case renders it unnecessary to consider the circumstances under which the daughters executed either of the mortgage-deeds, although it is difficult to see how their execution of them can be supported. The decree must also direct the dismissal of the first bill, and after providing for the delivery up of the mortgage-deed, it must provide for the delivery up of the policy of assurance which was assigned to Willems as a collateral security. Willems must pay all the costs except those of Bullmore the father.

At the conclusion of the judgment *Baggallay, Q.C.* said that, however weak and blind Mr. Bullmore might have been throughout to Willems's conduct, he was not aware of the real circumstances of his daughter's situation.

May 6, 26, and June 8.

BAGOT v. BAGOT.

LEGE v. LEGGE.

Tenant for life—Waste—Mines—Timber—Inquiries.

It is always a question of degree, to be established by evidence, whether the working of a mine which has not been formerly worked is waste or not. A tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months or two years previously to the tenant for life coming into possession must still be considered as an open mine; but a mine which has not been worked for a hundred years cannot be properly so treated. A mine which has not been worked for twenty or thirty years from the loss of profit attending the working, may, without committing waste, be worked again by a succeeding tenant

for life; but if the working of the mine has been abandoned by the owner of the inheritance many years previously, with a view to some permanent advantage to the property, it is doubtful whether a succeeding tenant for life could properly treat that as an open mine. The opening of a fresh pit, also, may not, under some circumstances, amount to the opening of a new mine, but only to the more advantageous working of an old one, and may possibly be done without any injury to the inheritance, if the surface of the land, where it has been opened, was of little or no value to the estate.

All cutting of timber is not waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are as regularly cut every second fall, every thirty-two or thirty-six years. That timber, it should seem, would constitute the fair profits of the land to which the tenant for life would be entitled; so also, the proper and regular thinning of a wood, for the purpose of improving the rest of the trees, within certain limits, would not amount to waste.

There are many cases in which the tenant for life cannot derive any benefit from timber improperly cut by him, knowingly and wilfully. Where, however, a long time has elapsed before a bill has been filed to make a tenant for life, responsible for waste done by him, the court has, although the lapse of time has not arisen from the fault of the plt. in the suit, usually endeavoured to deal liberally with the tenant for life; considering that in most cases it would not be for the benefit of the parties concerned to go into a long and expensive inquiry as to the nature of the timber cut, and the circumstances under which it may have been cut.

The Court declined to assent to the doctrine, erroneously supposed to be laid down by many of the cases, that if an estate be limited to six or more persons for life, in succession, with several and successive estates tail to their first and other sons in succession, and if the first tenant for life commit waste, without collusion with any one, the money arising from the inheritance wasted would belong to the eldest son of the last tenant for life; because he might happen to be the only tenant in tail then in existence, and could thereby deprive all the sons of the prior tenants for life who should be afterwards born, of the inheritance settled on them. If the first tenant for life could do that, as to a portion of the inheritance, the principle would apply equally to the whole; and he might, provided there were no collusion with the tenant in tail in esse (such as if the tenant in tail in esse were an infant), give an estate, or the valuable part of it, to a remote descendant, to the exclusion of any children who, in the ordinary course of nature, might, and would, afterwards come into existence.

It is not a matter of course that, if the winning of minerals and the cutting of timber by a tenant for life is not rightful, this court will leave the parties to their remedy at law; for the court will, where the circumstances of the case allow such a course to be adopted, direct inquiries, as between the estate of the tenant for life, who has committed the waste, and the remainderman, to ascertain the nature and extent of the waste actually committed.

These two suits were set down to be heard together. The plt. in the first of them was the eldest and infant son of the Rev. Ralph Bagot, and the defts. were the executors of a Mr. Egerton Arden Bagot. The bill in that suit prayed a declaration, that the personal estate of Egerton Arden Bagot was liable to answer to the plt. for all the benefit and profits received by Mr. Egerton Arden Bagot, from or by means of certain acts of waste committed by him on some settled estates, together with interest on the

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amount of such benefit and profits, at 4l. per cent. per annum, from the periods when they were respectively received by him; that an account might be taken of the sums of money received by Mr. Egerton Arden Bagot from the sale of timber improperly felled by him, and of coals and other minerals gotten by him from mines under the said estates, which were unopened, abandoned, or dormant, at the death of the testator; distinguishing, in such account, the moneys which were received or became due prior to the birth of the plt. from those which were received or became due subsequently, and that interest might be computed on all such moneys at the rate aforesaid; that inquiries might be made as to the incumbrances on the said estates, and as to the moneys (if any) properly expended by Mr. Egerton Arden Bagot in relation to the said estates; and for further relief.

The suit of *Legge v. Legge* was instituted for the administration of the estate of Mr. Egerton Arden Bagot.

The facts common to the two cases were shortly these:—The Rev. Walter Bagot, by his will, dated the 4th May 1798, devised all his real estates in the counties of Warwick and Lancaster, subject to a term of 1000 years, to his eldest son Egerton Arden Bagot for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail male. The will then contained similar limitations in favour of each of the testator's other sons, namely Walter, William, Harvey, Humphrey and Ralph, and thier respective issue, with an ultimate remainder to the right heirs of the testator. The term of 1000 years was created for the purpose of raising money in aid of the personal estate, and also a sum of 1500l. which the testator had covenanted by his marriage settlement to pay. The will contained no provisions exonerating the respective tenants for life of the settled estates from impeachment of any waste committed thereon by them.

The testator died in 1806. Walter Bagot, William Bagot, Harvey Bagot and Humphrey Bagot, survived him, but died in the lifetime of Egerton Arden Bagot. The plt. in the first suit, viz. William Walter Bagot, was, as already stated, the eldest and infant son of the Rev. Ralph Bagot, and was born on the 21st Jan. 1847. Egerton Arden Bagot, by his will, dated the 15th May 1854, appointed the depts. the Rev. William Legge and others his executors. Egerton Arden Bagot died without issue in 1861, and on his death the Rev. Ralph Bagot entered into possession of the devised estates, as tenant for life thereof.

It appeared from the evidence in the suits that Egerton Arden Bagot, while tenant for life in possession of the estates, had committed divers acts of waste, by felling timber for other than necessary repairs; and by opening and working new mines, and mines which had been abandoned, or were dormant at the death of the Rev. Walter Bagot, the settlor; and that the principal of such felling was done in 1807. He had, however, discharged, out of his own money, several incumbrances on the estates.

The executors of Egerton Arden Bagot, by their answer in *Bagot v. Bagot*, admitted that he had granted leases for his life of certain coal-mines under the settled estate in Lancashire, some of which were new and unworked, and others of which were lying dormant; that he had felled timber on the settled estates; that he had received the sum of 19,676l. 13s. 6d. in respect of the minerals won from unopened mines; the sum of 11,000l. in respect of dormant mines; the sum of 4330l. 13s. 9d. in respect of timber cut by him; and also the sum of 12l. 10s. on account of windfalls. They claimed to be allowed in account all moneys paid by the testator in discharge of incumbrances affecting the settled estates, or expended in rebuilding or repairing the buildings, or in the improvement of the property.

Osborne, Q. C. and *G. N. Colt* appeared for the plt. in the first suit, and cited

Williams v. The Duke of Bolton, 1 Cox, 72;

Powlett v. The Duchess of Bolton, 3 Ves. 374;

Whitfield v. Bewitt, 2 P. Wms. 240;

Lushington v. Boldero, 15 Beav. 1;

Garth v. Sir John Hinde Cotton, 1 Ves. sen. 524; s. c. 1 White & Tudor's L. C. in Equity, 451;

The Marquis of Ormonde v. Kynnersley, 7 L. J., O. S., 150, Ch.; s. c. 8 L. J., O. S., 67, Ch.;

Viner v. Vaughan, 2 Beav. 466;

Caldecott v. Brown, 2 Hare, 144;

The Duke of Leeds v. Lord Amherst, 14 Sim. 357; s. c. on appeal, 2 Phill. 117;

Jesus College v. Bloomer, 3 Atk. 262;

Parrott v. Palmer, 3 My. & K. 632.

Hobhouse, Q. C. and *Lewin* appeared for the Rev. Ralph Bagot, and cited:

Rolt v. Lord Somersville, 2 Eq. C. Ab. 759;

Gower v. Eyre, Geo. Co. 156.

Baggallay, Q. C. Rasch (and *Selwyn, Q. C.*, with them) appeared for the executor of Egerton Arden Bagot, and cited

Garth v. Sir John Hinde Cotton (*ubi supra*);

Blake v. Peters, 31 L. J., N. S., 884, Ch.;

Ferrand v. Wilson, 4 Hare, 344;

Gent v. Harrison, Johns. 517; 1 L. T. Rep. N. S. 128;

Wellesley v. Wellesley, 6 Sim. 497;

Clavering v. Clavering, 2 P. Wms. 388.

Atkin for other parties.

Osborne, Q. C. in reply.

The MASTER of the ROLLS.—The object of the suit of *Bagot v. Bagot* is to make the estate of the late Mr. Egerton Arden Bagot liable for certain acts of waste committed by him on the family property while he was in possession of it as tenant for life. That his estate is liable to some extent is not disputed. The questions I have to determine relate to the extent of that liability, and the mode in which the sums that will have to be paid with respect to that liability must be applied. The property in question was settled by the will of the Rev. Walter Bagot, dated the 4th May 1798. The testator thereby created a term of 1000 years, the trusts of which were to raise some money in aid of his personal estate, and also a sum of 1500l., which, under his marriage-settlement, he was bound to pay. Subject to those charges, he gave the property in question to Egerton Arden Bagot, his eldest son, for his life, with remainder to his first and other sons in tail male, with remainder to the second and every other son of the settlor for life, with remainder to their first and other sons in tail male severally and respectively in succession; with remainder, in the event of failure of issue of all the prior tenants for life, to the depts. the Rev. Ralph Bagot, the sixth son of the testator, for his life; with remainder to his first and other sons in tail male; with an ultimate remainder to the testator's own right heirs. The will did not contain any provisions exonerating the tenants for life of the life-estates thereby created from impeachment of waste committed by them. The second, third, fourth and fifth sons of the testator all died without issue male in the lifetime of Egerton Arden Bagot. The plt. is the eldest son of the depts. the Rev. Ralph Bagot; he is consequently the heir in tail in remainder, and if he survive his father, and do not previously alienate his inheritance, he must necessarily be the tenant in tail in possession. The testator died in July 1806; and thereupon his eldest son, Egerton Arden Bagot, entered into possession of the settled estates, and continued in such possession until his death in Feb. 1861. The property consisted of the family mansion and estate in Warwickshire, and of an estate in Lancashire which contained valuable minerals. I have already noticed

that Egerton Arden Bagot had no power to commit waste, and it was shown by the evidence that he was aware of that. Notwithstanding that, however, he cut timber to a large extent and won the minerals; both by working the old abandoned mines and by opening new mines. With respect to the abandoned, or, as they are called in the pleadings and evidence, the dormant mines, I am of opinion that it has not been shown that he committed waste in the working of those mines. It is always a question of degree, to be established by evidence, whether the working of a mine which has been formerly worked is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months or two years previously to the tenant for life coming into possession must still be considered as an open mine. A mine which has not been worked for 100 years cannot, I think, be properly so treated. My present opinion is, that a mine which has not been worked for twenty or thirty years from the loss of profit attending the working, might, without committing waste, be worked again by a succeeding tenant for life. But if the working of the mine has been abandoned by the owner of the inheritance many years previously, with a view to some permanent advantage to the property, I doubt whether a succeeding tenant for life could properly treat that as an open mine. The opening of a fresh pit might under some circumstances not amount to the opening of a new mine, but only to the more advantageous mode of working an old one, and might possibly be done without any injury to the inheritance, if the surface of the land where it was opened was of little or no value to the estate. I am of opinion, however, that I have not sufficient materials before me to enable me to come to a conclusion as to those points. It may become necessary to direct an inquiry to the effect I shall presently state. Again, with respect to the timber, it does not follow that all cutting of timber is waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are as regularly cut every second fall; that is, every thirty-two or thirty-six years. The timber, I apprehend, would constitute the fair profits of the land to which the tenant for life would be entitled. So, also, I apprehend that proper and regular thinnings of the wood for the purpose of improving the rest of the trees, within certain limits, would not amount to waste. In one case Knight Bruce, L. J. held that the cutting of larch trees, twenty years old, for that purpose, was legitimately done by the tenant for life, and did not amount to waste. On the subject of the timber so felled, I am also left in the dark by the evidence; and on that subject also I am of opinion that it may be proper to direct an inquiry, the terms of which I will presently state, unless by an arrangement a different course can be adopted. The next question argued before me related to the mode in which the tenant for life should be made to account for the minerals improperly won and for the timber improperly cut by him. Two periods were distinguished by the counsel for the plt. during which the timber was cut and the minerals were won, and which, as they contended, were governed by different principles, viz., the timber cut and minerals won before the 24th Jan. 1847, when the plt. was born, and the timber cut and the minerals gotten subsequently to that period. With respect to the timber cut and minerals won during the former period, they contended that the plt. was entitled to the interest of the money derived from those sources, while, with respect to the timber cut and minerals won during the latter period, they contended that he was entitled absolutely to the money derived from those, inasmuch as he was the first tenant in tail in esse when the waste was committed. With regard to the tenant for life, who cut the timber, I held, in *Lushington v.*

Boldero, following *Garth v. Sir John Hinde Cotton* and many other cases, that the tenant for life could not derive any benefit from timber improperly cut by him knowingly and wilfully; and after reviewing the authorities, I retain that opinion. But, at the same time, the cases show that, where a long time has elapsed before the bill has been filed, although without any fault of the plt., the court has usually endeavoured to deal with the tenant for life in a very liberal manner, considering, and as I think, justly considering, that in most cases it would not be for the benefit of the parties concerned to go into a long and expensive inquiry as to the nature of the timber cut, and the circumstances under which it had been cut. If that be a correct view of the law as regards timber, it is manifest that the same considerations would apply to the case of minerals when there is such a complication of circumstances as exists in the present case, arising from the difficulty of deciding which were opened and which were unopened mines. Accordingly, in *Garth v. Sir John Hinde Cotton*, though the principle I have mentioned was in part laid down by Lord Hardwicke, he considered that instead of such an inquiry it would be better to give interest from the date of the death of the tenant for life. A similar principle was acted upon in the case of *The Duke of Leeds v. Earl Amherst*. Egerton Arden Bagot was tenant for life in possession from July 1806 till Feb. 1861, a period of fifty-four years and a-half. No complaint was made, and no opposition was offered to him, as to his dealings with the property during the whole of that period; although any one of the tenants for life in remainder, or even the trustees to preserve contingent remainders, might have done so. It is true that that negligence on their part does not affect the plt., who was not born until 1847, and who is still an infant, but taking into consideration the family relations between the parties (a circumstance which courts of equity, not merely in the case of a family agreement, but in many other cases, treat as a matter of moment and one to be regarded in dealing with questions which arise between relatives), and having also regard to the fact that the father of the infant plt. was one of the tenants for life, and that it is by his desire (and I must also say very properly) that the present suit has been instituted, taking all those matters into consideration, I am more disposed to act upon the course adopted in *Garth v. Sir John Hinde Cotton* by Lord Hardwicke, then to enforce the strict rights of the parties, having regard to the delay and expense which would be thereby occasioned in prosecuting the inquiries I should otherwise be compelled to direct. If therefore the debts, the executors of the deceased tenant for life, will consent to adopt the accounts furnished by them as conclusive against the estate of the testator, I will declare that his estate is liable for 4330*l.* 13*s.* 9*d.* for timber cut and for the sum of 19,676*l.* 13*s.* 6*d.* with respect to the minerals won from unopened mines; but that his estate is not liable with respect to the minerals won from the dormant mines. I will then direct that interest at the rate of 4 per cent. per annum may be calculated upon those two sums, amounting together to 24,007*l.* 7*s.* 3*d.* from the day of the death of Egerton Arden Bagot, and will charge his estate with that amount. Against that, his estate will be entitled to set-off any money paid by him in discharge of the incumbrances affecting the estate, which would not properly have been paid out of the estate under and by virtue of the term of 1000 years created by the will of the settlor. I should then direct the amount when paid to be invested as part of the settled estates, and the interest thereof to be paid to the deft. the Rev. Ralph Bagot during his life, on the assumption that the waste has not been wrongful; to this extent only, that the inheritance could not be injured thereby; and declare

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[ROLLS.]

the plt. absolutely entitled to the *corpus* of the money, subject to the life-interest of the father therein. If that should be acceded to by the advisers of the plt. I think it would be proper on the part of the court to accept that species of compromise on his behalf. If not I should direct an account, first of what minerals had been gotten and won by the deceased tenant for life prior to 24th Jan. 1847, distinguishing between such of the minerals as were gotten from old mines remaining dormant, and from mines newly opened by him; also an inquiry how long and under what circumstances such mines had remained dormant or unworked; also with respect to the new pits sunk or opened, whether any were so sunk or opened for the purpose of facilitating the old workings, or for the purpose of opening fresh mines, and the circumstances under which each fresh working was commenced. I should then direct a similar account as to the timber, distinguishing between the timber felled prior to the 21st Jan. 1847 and that felled subsequently; also distinguishing what parts of such timber, if any, were felled in the nature of thinnings; and whether any and what parts of such timber were properly felled, having regard to the benefit of the estate; and also an account of what parts of such timber, if any, were employed in the repairs of the settled estates. Upon the coming back of those accounts, I should direct the sum which might appear to be payable with respect to the timber improperly cut, and the minerals improperly won, prior to the 21st Jan. 1847, to be invested as part of the settled estates; and the interest thereon, since the death of the late tenant for life, to be paid to the deft. the father of the plt.; and as to the sum which might be payable with respect to the timber and minerals improperly cut and won subsequent to that time, I should declare the plt. to be entitled to the same absolutely, as the first tenant in tail; together with interest thereon at the rate of 4l. per cent. per annum from the time when the same moneys were respectively received. As to all the moneys which have been received with respect to the timber properly cut and the minerals properly won—that is, by which the inheritance has not been injured and such as this court would have directed if the application had been made to the court by the tenant for life for that purpose—all such I should direct to be invested as part of the settled estates, and treat the late Egerton Arden Bagot as entitled to the interest arising therefrom, during his life; and since his death, charge his estate with interest thereon, at the rate of 4 per cent. per annum to be paid to the present tenant for life. It would be troublesome, and probably both tedious and expensive, to work out all those inquiries, and my opinion is, that the course I have above suggested as one to be adopted in lieu of such inquiries, would be the best for all parties; the more so, as, after the great lapse of time, I should take the accounts and prosecute the inquiries in the manner which would be the most liberal to the deceased tenant for life; and when, from the difficulties occasioned by the delay, evidence was wanting, make all reasonable presumptions in favour of the estate of the deceased. In either case his estate will be allowed in discharge the incumbrances on the estate paid off by him, and not provided for by the will of the settlor. But in neither case will he be allowed anything with respect to the improvements he has made on the settled estates; whether they be lasting improvements, or otherwise; and he will not be allowed anything with respect to repairs, except timber in the rough, which may have been employed for that purpose, nor anything with respect to the interest accruing on the incumbrances which it was his duty to keep down. In intimating the course I should probably adopt if those accounts and inquiries were prosecuted, by declaring the plt. as the first tenant in tail, entitled to the *corpus*

of the fund produced by the improper felling of the timber in his lifetime, I beg to be understood as expressing no opinion that he would have been so entitled if he were presumptive tenant in tail in remainder instead of being such apparent tenant in tail. If, that is to say, he had not been a person who, if he lives long enough, must necessarily be entitled to the estate in possession. I by no means assent to the doctrine supposed (but, as I conceive, erroneously) to be laid down by some of the cases, that if an estate be limited to six or more persons for life in succession, with several and successive estates in tail to their first and other sons in succession, if the first tenant for life commit waste, without collusion with any one, the money arising from the sale of the inheritance wasted would belong to the eldest son of the last tenant for life; because he happened to be the only tenant in tail then in existence, and could thereby deprive all the sons of the prior tenants for life who should be afterwards born, of the inheritance settled on them. If the first tenant for life could do that as to a portion of the inheritance, the principle would apply equally to the whole; and he might, provided there was no collusion with the tenant in tail *in esse*, such as if the tenant in tail *in esse* were an infant, give an estate or the valuable part of it to a remote descendant to the exclusion of any children, who, in the ordinary course of nature might and would afterwards come into existence. I think that that proposition was not intended to be laid down in any of the cases referred to; and I am unwilling to do anything which might tend to the supposition that I considered that to be law. I have, in the observations I have already made, disposed of the principal objections urged by the counsel for the executors of the late Egerton Arden Bagot; but I must notice more especially one, from the pointed manner in which it was put, though I think it admits of a ready and conclusive answer. It was argued that the cutting of timber and the winning of minerals by Egerton Arden Bagot was either wrongful or not wrongful—in other words, it was either wrongful or rightful; that if it were wrongful it was a case for an action at law; but if it were rightful, then that the money ought to be settled, and that Egerton Arden Bagot was entitled to the interest of it. I assent to the proposition, that if it was rightful the money ought to be settled, but I do not concur that if it was not rightful, this court ought to leave the parties to their remedy at law. In fact, without going further, the death of Egerton Arden Bagot, and the necessity of administering his estate, entitles any one who makes a claim against his assets to ask the aid of this court for that purpose, and to compel the executors either to admit assets, or to account for his estates accordingly. Assuming that, in the case of *Legge v. Legge*, which comes on to be heard with this case, and which is brought on for the administration of the estate of Egerton Arden Bagot, a decree for the administration of that estate should be made: then, I am of opinion that the parties to this suit, both the plt., and the deft. his father, are entitled, when the amounts of their claims are settled in the suit of *Bagot v. Bagot*, to have a direction for leave to prove for the amounts so due to them against the estate of the testator in the suit of *Legge v. Legge*. In addition to the above decree which I have intimated, and which affects the estate of the deceased tenant for life, Egerton Arden Bagot, I am of opinion that it will be proper, having regard to the facts proved, to direct an inquiry to ascertain what mines and minerals are now in existence, and what is being done with respect to them, and whether it is for the benefit of the inheritance that any, and which of such mines should continue to be worked, and also an account of all profits and moneys derived from the working thereof since the death of the said Egerton

Arden Bagot, and by whom the same have been received, or how the same have been applied, and declare that the proceeds that have already arisen therefrom, and may hereafter arise from the same, ought to be invested as part of the said settled estates, and the dividends arising from the sums so invested paid to the tenant for life for the time being of the said settled estates (assuming that such proceeds have been properly obtained). If it be thought desirable, an inquiry might be taken in like manner as to the timber now standing on the estate, adopting for that purpose the form of order which was made in the case of *Tooker v. Annesley*, which I have usually followed in such cases. With respect to the costs, I must treat this as a proceeding necessary for the purpose of establishing a debt against the estate of a testator, the costs of which must be added to the debt to be proved. The debts, the executors of Egerton Arden Bagot, must be declared to be entitled to have their costs of this suit, as between solicitor and client, out of the estate of their testator. Their conduct has been perfectly proper and regular in every step which they have taken in this suit, and it was their duty to oppose, and in opposing to give all the information in their power respecting the matters in question. They were bound to protect the estate of which they are trustees to the utmost of their power; but, in doing so, to conceal nothing, and to submit to act in all respects as the court may direct. That is the course which they have adopted; and they are entitled to perfect immunity from this court for having so acted. I have gone somewhat out of the proper course for the purpose of guiding the parties, because I have done what certainly is not within the province of the court at this stage of the proceedings, viz., I have stated what I should probably do upon the cause coming back after the inquiries have been taken. I thought, however, it might be convenient, without prejudice to anything, that the parties should know my views upon the subject.

June 8.—Upon its being stated to the court that the terms of the suggested compromise could not be acceded to, a decree was made directing inquiries in the form proposed by the court.

The MASTER of the ROLLS also said:—I think that the sum of 12l. 10s., which has been received by the late tenant for life in respect of certain windfalls, must be accounted for and properly invested. It may be that a large quantity of valuable oak was levelled to the ground; but the tenant for life cannot be entitled to it; although, no doubt, that is contrary to the popular notion of what a windfall is.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-Inn, Barrister-at-Law.

April 22 and 23.

BEVAN v. THE ATTORNEY-GENERAL.

Will—Construction—Legacies demonstrative and not specific—Capital of business.

Testator by his will desired that his executor might be allowed a year for converting his "proportion of capital invested in the business he was then carrying on with H." into cash, and that such cash might be paid over as realised (with the exception of certain special bequests thereafter mentioned) to the Charity Commissioners to be invested; and he desired that all shares of which he might die possessed might be transferred into the names of the Commissioners, without being sold, the interest to be paid by them to A. for life. Testator directed that, after the death of A., sufficient of the property so invested by the Commissioners should be converted by them and paid over to a number of charities, naming the

sum to be given to each. Testator then requested his executors would pay, as soon as conveniently might be after his decease, "out of the capital employed in the business," to the persons mentioned, certain sums (naming twenty-two legatees, and sums amounting together to about 800l.)

At the date of the will the testator was in partnership with H., but before his death the business failed, and a composition was paid, mainly by the testator. At his death the partnership assets were outstanding, and the testator's "proportion of capital" consisted of half of these assets, after deducting the debts, one of which was a debt of 2649l. due to himself: Held, first, that the legacies were demonstrative and not specific:

Held, secondly, that the words "capital invested in the business" comprised all that was coming to the testator from his partner's estate, inclusive of the debt.

Smith v. Fitzgerald, 3 V. & B. 2, followed.

This cause came on upon further consideration.

The principal questions in this suit arose in the following way:—

Lewis John Woodrow, the testator, 'by his will, bequeathed as follows:—"I nominate and appoint John Haly, of &c., and William Bevan, of &c., executors of this my will. I direct that all my just debts and funeral and testamentary expenses be duly paid and satisfied by my executors, as soon as conveniently may be after my decease." After a specific bequest of household furniture, linen, books, &c., the testator proceeded: "I desire that my said executors and partner John Haly may be allowed a period not exceeding one year for converting my proportion of capital invested in the business I am now carrying on with him, into cash, and I desire that such cash may be paid over as realised (with the exception of certain special bequests hereafter mentioned) to the Charity Commissioners for England and Wales of the time being, to be invested in whatever stocks may be deemed by them most desirable; and I desire that all shares of which I may die possessed may be transferred into the names of the said Commissioners, the interest to be paid by them half-yearly as follows" (then followed directions as to the payment of interest in favour of Hannah Hart, Thomas Woodrow and Thomas Lewis, for life, and after their death of Mary Lewis, Eliza Lewis and Jane Lewis for life, after which the testator proceeded): "And after the decease of the three persons last above named, sufficient of the property so invested by the three commissioners to be converted by them and paid over to the following societies and charities, for their use and benefit" (here the testator gave eleven legacies to as many religious and charitable societies, naming sums which amounted together to 1500l., and continued): "The interest of the remainder to be paid by the said commissioners in each year, in sums of not exceeding 5l. each, to such poor deserving single persons as may to the satisfaction of the said commissioners best prove their claim to such allowance, which I propose as a reward for self-supporting industry, temperance, &c., such fund to be called the 'Woodrow Fund,' &c. Should the property be insufficient to pay the sums as above stated to the said charities and societies, then the division to be made in proportion; but I should wish that not less a sum than at the least 200l. be set apart for the last-mentioned purpose. And I request my executors will pay, as soon as conveniently may be after my decease, out of the capital employed in the business, to the persons mentioned below, the following sums:" (The testator then enumerated twenty-two legacies to as many different persons, the aggregate amount of the whole being 835l. of which three, amounting together to 140l., lapsed in testator's lifetime.)

By a codicil the testator substituted Edgar P. Stringer as executor in the place of John Haly. He died on the 4th Nov. 1860.

At the date of the will the testator was carrying on business in partnership with John Haly, under the firm of Haly and Co., as insurance brokers and general merchants. The firm afterwards stopped payment, and the creditors accepted a composition, the greater part of which was paid by the testator out of his private property. The partnership had long been dissolved, except for the purpose of winding-up.

The chief clerk found, that at the time of his death the testator was entitled to one moiety of the outstanding assets of the business, after payment of the debts due by the partnership, including a debt due to the testator of 2649*l.* 2*s.* 3*d.* The above assets were in America, and were estimated at 9298*l.* 10*s.* 9*d.*: 400*l.* only of such assets had been realised. This moiety of the assets answered the description in the will of the testator's "proportion of capital invested in the business." Two sums of 48*l.* 16*s.* 1*d.* and 268*l.* 4*s.* 9*d.* arising out of other businesses in which the testator was partner at his death, and answering the description of "capital employed in the business," had been received by the executors. The testator also possessed shares in several companies.

The Charity Commissioners had by deed renounced and disclaimed all the bequests, trusts, powers, &c. devised to or intended to be vested in them.

A small balance was due from the executors, who had paid the funeral and testamentary expenses and part of the debts.

The only next of kin of the testator at his death was Hannah Hart, except Robert Woodrow, if living, who could not be found. Thomas Lewis and Mary Lewis died in the testator's lifetime; Eliza Lewis and Jane Lewis were still living.

Malins, Q.C. and *Dickinson* appeared for the plts. the executors.—They stated the various points, and on the main object of contention argued, first, that the legacies were demonstrative and not specific; in other words, that they were payable out of the testator's general estate, if the capital in the business of Haly and Co. turned out to be insufficient, and were not restricted to such capital. They cited

Savile v. Blackett, 1 P. Wms. 778 ;

Fowler v. Willoughby, 2 S. & St. 354 ;

Kirby v. Potter, 4 Ves. 748 ;

Fream v. Dowling, 20 Beav. 624.

Bacon, Q.C. and *Field*, for Hannah Hart, the next of kin, argued that the legacies were specific; hence, if the fund appointed for their payment turned out to be insufficient, the legacies must fail. Now, at the time of the testator's death, "the capital invested in the business" of Haly and Co. was insufficient to pay the legacies, and they must therefore abate *pro tanto*. They cited

Coard v. Holderness, 22 Beav. 391 ;

Dickin v. Edwards, 4 Hare, 273 ;

Hancox v. Abbey, 11 Ves. 179 ;

Williams v. Hughes, 24 Beav. 474 ;

Spurway v. Glynn, 9 Ves. 483 ;

Gordon v. Duff, 28 Beav. 519.

They also contended that the "capital employed" in Haly's business, must mean only the balance of the assets, after payment of the debt due to the testator, and that the debt was part of the general personal estate.

Osborne, Q.C. appeared for Eliza and Jane Lewis.

Craig, Q.C. and *Bedwell*, for the legatees, on the first point, supported the same contention as the executors, and further argued, that the "capital" referred to by the testator included the partnership debt. They cited

Badrick v. Stephens, 3 Bro. C. C. 431 ;

Sparrow v. Josselyn, 16 Beav. 135 ;

Ellis v. Walker, Amb. 309 ;

Colville v. Middleton, 3 Beav. 507.

The VICE-CHANCELLOR.—There is great difficulty in this case. I do not think that the authorities are entirely reconcilable; certainly, some of the later decisions have gone to a great extent in holding legacies to be specific when no more was done than to point out the fund out of which they were to be paid. The case now before the court is one in which pecuniary legacies or legacies of quantity are directed to be paid out of a certain specific fund. If that be so, that is exactly the definition of a demonstrative legacy, so defined again and again in the books, and in one particular case which I do not observe to be cited at all in the various recent authorities and arguments on the subject. In that case the definition and peculiarities of a demonstrative legacy are exactly what I have stated. In every case of a demonstrative legacy there is a specific fund. It seemed to me that, in this case, it was a great peculiarity that the specific fund, which is said to be that demonstrated by the testator as primarily applicable to pay the legacies, is itself the subject of a clear specific legacy, with an exception out of it of the sums directed to be paid as pecuniary legacies. But on an attentive consideration, that seems to me to make no difference in the case, because, if the fund out of which the legacy is to be paid be specified, it cannot affect the question in the least, whether the fund so specified is the subject of a gift after the legacies are paid, or not, as I will presently show. In the case of *Smith v. Fitzgerald*, decided by Sir William Grant, and reported in 3 Ves. & B., the testator had a debt due to him from the Nabob of Arcot. That debt he mentions in his will, and out of that debt he directs a number of legacies to be paid. He describes the debt as outstanding—not yet recovered—and as of some degree of uncertainty as to the amount that may be recovered, but he estimates the amount, and one of the questions in the case was, whether the residue of that debt, which was indicated as the fund out of which the pecuniary legacies were to be paid, was specifically given to two individuals named in the will, or passed under the gift of the general residue. Sir William Grant decided both questions. He first decided the question as to whether the indication of that specific fund out of which the pecuniary legacies were to be paid made those pecuniary legacies specific, or, in other words, made the payment of them depend on the sufficiency or existence of the fund out of which they were to be paid. Then he decided the other question, as an entirely independent question, and wholly unaffected by the consideration whether or not the remainder of the fund was specifically given to two persons of the name of Smith or not. The case is reported at page 2. The testator recited that the Nabob of Arcot was indebted to him in upwards of 10,000*l.* arrears of his annuity, and he gave some directions about lodging some bills with his bankers which had been remitted for part payment of that charge, and he said, "Should the whole of this sum be received at stated periods, I give and bequeath out of it 1000*l.* to Colonel S., 1000*l.* to General H.," and a number of other funds, until he comes to a bequest of 1000*l.* of this debt for the use of the poor of the town of Woolwich, in Kent, with particular directions as to the application of it. "From this debt of his Highness I bequeath 500*l.* to the charity school, &c. &c." I have here bequeathed 11,000*l.* to several purposes. Should this just debt from the Nabob be paid, there will be coming to me 12,000*l.*, and I leave 1000*l.* unappropriated for casualties. Should any of the legatees be dead at the time of my decease, or ere the whole of this sum is received out of the Nabob's hands, I give such legacies to the eldest son of Mr. Smith, or, on his decease, to his second son. After all the legacies are paid (except those mentioned

from the Nabob's debt to me, as they may require time), all such balance as shall remain overplus (exclusive of the Nabob's willed to Mr. Smith's sons) to be equally divided," &c. Then comes the specific gift upon which nothing turns applicable to the present case. But the M. R. was there dealing with a gift of pecuniary legacies directed to be paid out of a fund as specifically described, and as completely separated from the rest of his assets as could occur or has occurred in any case. He says: "The first question is, whether the legacies given out of the debt of the Nabob are to be considered as specific; or, in other words, whether that debt, whatever its amount might be, was not intended to be divided among the legatees. The same legacies may be specific in one sense and pecuniary in another: specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it. A gift of a sum of money, though with ever so plain a reference to the amount of the fund out of which it is given, is very different from a gift of the fund itself, with all the chances of its actual amount." After referring to another case, the M. R. said: "My opinion is, that these legatees are entitled to nothing more than the sums of money bequeathed to them, with interest thereon from the time of payment, which seems to have been fixed by the testator himself, to the time when the debt should be recovered. Then he goes on to deal with the other question as an entirely separate one. Having disposed of that question, he might or might not have decided that the remainder of the debt was given specifically to the persons indicated, or that it passed by the gift of the general residue. He decided, expressing great difficulty on the subject, that it passed by the gift of the general residue. That case seems to me entirely to govern the present. The law laid down in that case seems to me to be perfectly sound law—sound, treating it as a legal principle, and sound as consistent with the principles of common sense, because, if a man gives to a person a legacy of 50*l*., stating that that legacy is to be paid out of a certain specified part of his property, the primary intention is to give 50*l*. to the legatee. The rest seems to amount to no more than convenience—what his purpose was in the administration of his assets. But the consequence of holding that the gift of a pecuniary legacy of that kind is specific is this, that the testator clearly indicating an intention that the legatee shall have the money, though he has assets abundant to pay it, yet if any alteration in the property takes place—if, for instance, a bond-debt due to himself happens to be paid off—the gift totally fails. That is quite contrary to what can be rationally imputed to a testator. Apply that principle to the present case, which is that of a partner in a certain partnership. The testator indicates his share in the capital of that partnership as a fund out of which these legacies are to be paid. He makes a specific gift of his share in the capital of the partnership; but he excepts from that certain special bequests, viz., the pecuniary bequests now in question. Afterwards, he desires his executors to pay the pecuniary legacies which he mentions, and again he indicates his share in the capital of the concern as a fund out of which they are to be paid. Suppose in the testator's lifetime the partnership had been dissolved, and that he had received 20,000*l*., far more than enough to pay these legacies, the specific fund which he had indicated as applicable for their payment being in his own possession in a different shape, and there being an abundance of assets; surely it would be a most extraordinary intention to impute to the testator that a mere gift of money, not given as an aliquot part of his share in the partnership, not given specifically, but having only a sufficient fund indicated for its payment—it would be a strange

violation of what would naturally appear to be the intention of the testator, to say, because he had got in his pocket the fund which he intended his executors to pay to the legatees, and that fund was in the executors' hands after his death, that therefore they were to take nothing. It is on that principle, I conceive, that the whole current of authorities seems to sanction the principle of the decision of Sir William Grant, in the case of *Smith v. Fitzgerald*; that is to say, the authorities down to a more recent period. It is scarcely necessary to enter into an examination of the more recent cases which have been very properly relied upon as tending to show that in this case the court would be justified in holding that these were specific legacies, the payment of which must depend upon the existence of the fund which is directed to be applied for their payment; for I do not find that in any of these cases the case of *Smith v. Fitzgerald*, which was carefully and elaborately argued, and decided by one of the greatest judges that ever sat in this court—a decision which follows decisions of Lord Eldon, of Lord Thurlow, and of Lord Hardwicke—was cited or referred to, and I cannot impute to any of the judges who have recently dealt with this question an intention of overruling a case that seems to me to depend on a principle so perfectly sound. Therefore I find myself bound to hold, that in this case the payment of these legacies does not depend upon the existence of the fund indicated by the testator for the purpose of convenience or otherwise, as that out of which they ought to be paid. I may also observe this, that in the words by which the testator directs his executors to pay these legacies in money, the reference to the share in the capital is really parenthetical, and more than that, it is in very inaccurate language, for he says: "I request my executors will pay, as soon as conveniently may be after my decease, out of the capital employed in the business, to the persons mentioned below, the following sums." Now there, if you read it thus, the essential part in the gift of the legacies is the direction to pay: "I request my executors will pay, to the persons mentioned below, the following sums, as soon as conveniently may be after my decease, and out of the capital;" the latter words are used parenthetically for the purpose of convenience, and it seems to me that the right of the legatees no more depends upon the direction to pay "out of the capital" than on the words "as soon as conveniently may be." They are ancillary directions, and in my mind they are not of the essence of the bequest. The gift is not of a share of the capital; but the capital is indicated as the property out of which it may be conveniently paid. As to the other question, which does not arise directly, I think, when the testator speaks of his capital, he meant to give all that was coming to him out of the assets of the partnership.

After some discussion, it was declared that, according to the true construction of the will, the several sums which the testator directed his executors to pay as soon as conveniently might be after his decease out of the capital employed in the business, were not specific legacies, but were demonstrative legacies, and were primarily payable out of the testator's proportion of capital employed in the business (Haly's), and that if such proportion should be insufficient to pay such legacies in full, the deficiency was to be made good out of the general personal estate not specifically bequeathed, and that Hannah Hart, as the next of kin of the testator, was entitled to be paid the clear residue of such personal estate. It was also declared, that such proportion of capital as aforesaid included the whole share and interest of the testator in the assets of the business (Haly's), including the debt of 2649*l*. 2*s*. 3*d*.; and it was directed that the residue (if any) of such proportion of capital as aforesaid

should be invested, and the interest of the fund, and of the shares, be paid to Hannah Hart for life, then to Eliza and Jane Lewis in equal shares, with survivorship between them. It was also declared that the two sums of 48*l.* 16*s.* 1*d.* and 268*l.* 4*s.* 9*d.*, formed part of the general personal estate.

Solicitors for the plts., *Bothamley and Freeman.*

Solicitors for the residuary legatees, *Field and Co.*

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Feb. 3 and March 13.

Re MAXWELL'S TRUSTS.

*Apportionment Act, 4 & 5 Will. 4, c. 22, s. 2—
Dividends on shares in a railway company—
Dividends on shares in an insurance company—
Declaration of payment of profits at "fixed periods"—
Companies Clauses Consolidation Act, 8 & 9 Vict.
c. 16, s. 91.*

A tenant for life being entitled to the dividends on stock in the North-Western Railway Company, on stock of the Great Western Railway Company, and on shares in the Metropolitan Gaslight and Coke Company, which companies were incorporated and contained clauses in their deeds of settlement similar to sect. 91 of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, which provides that the declaration of dividends shall be only made by directors at a general meeting of these companies, but no specified period pointed out:

Held, that such dividends were not apportionable under the Apportionment Act, 4 & 5 Will. 4, c. 22.

She was also entitled for life to the dividends on certain shares in the Alliance Insurance Company (the dividends on which were, under their deed of settlement, to be declared half-yearly, and made payable in the months of April and October in each year):

Held, that the amount of these dividends was apportionable under the Act, because the profits of the company were divisible at fixed periods.

This was a petition for the transfer and payment out of court of certain amounts of stocks and interest and dividends which had become due thereon respectively; and the question raised turned upon the construction of the Apportionment Act, and certain other private Acts of Parliament incorporating joint-stock companies.

The following clauses in these several Acts were those relied on:—

By the Apportionment Act, 4 & 5 Will. 4, c. 22, s. 2, it is provided "that from and after the passing of this Act all rents service reserved on any lease by a tenant in fee, or for any life-interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this Act), and all rent-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description of the United Kingdom of Great Britain and Ireland made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act, or (being a will or testamentary disposition) that shall come into operation after the passing of this Act, shall be apportioned so and in such manner that on the death of any person interested in any such annuities, rents, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns,

shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made."

The London and North-Western Railway Company were finally incorporated by the 9 & 10 Vict. c. cciv. with which Act the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, was incorporated. By sect. 91 of this Act, it is provided that the declaration of dividends shall be exercised only at a general meeting of the company.

By sect. 120 of same Act, it is enacted: "That previously to every ordinary meeting at which a dividend is intended to be declared, the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they consider applicable to the purposes of dividend amongst the shareholders, according to the shares held by them respectively, the amount paid them and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme."

The Great Western Railway Company were incorporated by the 5 & 6 Will. 4, c. 107, and by the 146th section of that Act it is enacted: "That it shall be lawful for the said company, and they are hereby empowered from time to time at any half-yearly general meeting, or at a special meeting to be called for that purpose, to declare and make a dividend out of the clear profits of the said undertaking, and such dividend shall be after the rate of so much per share on the several shares held by the members of the said company in the joint stocks thereof." And it is thereby provided, "that such dividends shall not be made oftener than quarterly."

The South Metropolitan Gaslight and Coke Company was incorporated by 5 Vict. c. lxxix., which, by sect. 84, made provisions as to the declaration of its dividends, similar to those contained in the Companies Clauses Consolidation Act, sect. 91, before set out.

The Alliance Insurance Company was also a joint-stock company, duly incorporated; and at an extraordinary general court of proprietors, held on the 16th April 1834, certain alterations were made in its deed of settlement, and it was resolved that the profits and accumulations made by the investment of the capital of the company should thereafter be divided half-yearly, and that such half-yearly dividends should be paid and payable at the offices of the company in the months of April and October of each year.

The facts of the case were the following:—

The testator Sir Chas. Maxwell, by his will dated 18th July 1843, bequeathed certain portions of his personal estate to trustees upon trust for his wife, Lady Mary Maxwell, for her life, and from and after her decease upon trust for other persons therein mentioned.

Lady Maxwell received the interest and dividends upon the investments upon which these portions of the testator's personal estate had been made. This personal estate consisted, amongst other things, of stock of the London and North-Western Railway Company, stock of the Great Western Railway Company, twenty shares in the South Metropolitan Gaslight and Coke Company, and fifty shares in the Alliance Fire Insurance Company.

The tenant for life, Lady Maxwell, died on the 17th Nov. 1860.

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The petition now presented was by the parties who were respectively entitled to these stocks and shares after Lady Maxwell's death; the question to be discussed being as to what portion of the interest and dividends due and payable on these sums of stock and shares formed part of Lady Maxwell's estate.

A dividend was declared on the 22nd Feb. 1861 on the London and North-Western Railway stock, for the half-year ending the 31st Dec. 1860, and was made payable on the 26th Feb. 1861.

A dividend was declared on the 15th Feb. 1861 on the Great Western Railway stock for the same half-year ending 31st Dec. 1860, and was made payable on the 1st March 1861.

A dividend was declared on the 2nd April 1861, on the shares of the South Metropolitan Gaslight and Coke Company for same half-year ending 31st Dec. 1860, and was made payable on the 12th April 1861.

A dividend was declared on the 5th April 1861 on the shares of the Alliance Insurance Company for the half-year ending the 25th March 1861, and was made payable on the 10th April 1861.

These dividends so declared were claimed by Lady Maxwell's executors as part of the testator's personal estate.

Amphlett, Q.C. and *Dickinson*, for the petitioners, the parties entitled on the death of Lady Maxwell to the stocks and shares, contended that the whole of these dividends were payable to them in the proportions stated by testator's will.

Rendall, for the executors of Lady Maxwell, as to the dividends on the shares of the Alliance Insurance Company, contended that those dividends were clearly apportionable as they became due, and were made payable at fixed periods. The income of the profits of a joint-stock company was a dividend within the meaning of the Apportionment Act. For this he cited

Hartley v. Allen, 27 L. J., N. S., 621, Ch.

As to the dividends on the railway and gas shares, the question was, whether they were dividends "made payable or coming due at fixed periods," and he contended that they were. But even if this were doubtful, they were clearly so under the testator Sir C. Maxwell's will. For this he cited

The Apportionment Act, 4 & 5 Will. 4, c. 22, ss. 66, 91 and 120;

Knight v. Boughton, 12 Beav. 312;

Plummer v. Whiteley, John. 685; a. c. 1 L. T.

Rep. N. S. 230.

W. W. Cooper and *Macnaghten*, for other parties.

Amphlett in reply.

March 13.—The VICE-CHANCELLOR said:—A question in this case arises upon the apportionment of the dividends and profits in certain joint-stock companies, the tenant for life having died between two periods of payment. The question affects four descriptions of dividends; three of them depend entirely upon the construction to be put upon the provisions of the Companies Clauses Consolidation Act. As to the fourth, there is a difference. That will depend upon the construction to be put upon the deed of settlement of the Alliance British and Foreign Life and Fire Insurance Company. The original terms of this deed were altered by a resolution of a general court of proprietors of that company on the 16th April 1834, by which a special provision was made with reference to the times of payment of their dividends, which were to be half-yearly, in April and October of each year. If the present case were *res integra*, I should feel more doubt than I now feel with reference to the question whether or not companies created for the purpose of carrying on business, and which divide their profits according as those profits may or may not accrue from period to period, and according to the amount of those profits, could be strictly held to be within the purview of the

Apportionment Act. It has been held in *Hartley v. Allen*, by Kindersley, V. C., that the dividends on shares in a joint-stock company of this description are apportionable, and following that decision I must hold that the dividends on the shares in the Alliance Insurance Company would be apportionable, and the period is to be calculated from the time when the dividend became payable, and not the time when the profits were earned, for that is the course followed by that learned V. C., and it strikes me that no other could be pursued under the provisions of the Act of Parliament. In all these cases the calculations are made in March, to the end of the previous year, and then a declaration of dividend is made in March payable in April; that is the usual course pursued in companies of this description. The Act is express, providing that it should be according to the time that should have elapsed since the last period of payment, and one sees the difficulties which one would be exposed to in any other way of looking at it, because the Act has reference to payments which become due at fixed periods. Whatever is payable in respect of dividend is not due until the meeting has declared that it shall become due and payable. Therefore the apportionment must be made with reference to the last payment, and without reference to the year when the profits may be said to have been earned, and there is good reason for that; for though the company might make up their account of the profits earned in the last year, it would be most improper in them, if they had a large sum in hand, and knew that there was a large demand coming, as for instance in the case of the great frauds which were perpetrated on the Great Northern Railway Company, to declare any dividend, notwithstanding that the previous year had been one of great profit. It is entirely in the breast of the directors who manage the concerns of the company, and the dividend can only be payable at the period when it is declared to be due and payable. As to the Alliance Company, which has said "Our profits shall be divided in April and October," I am content to follow the decision of Kindersley, V. C. However, as to the other companies, the questions appear to me to stand upon a very different footing, because these companies have passed no bye-law whatever declaring when the dividends should be paid. I can see nothing in the Companies Clauses Consolidation Act, or in their special Acts, authorising me to say that their dividends are due at a "fixed period." The case stands thus: By the general Act the ordinary general meetings are appointed to be held in specified months. It is also provided in the clause as to dividends, that where a dividend is about to be made at an ordinary meeting certain processes shall be gone through; but there is nothing in the Act which says that the dividends shall be made only at the period of the ordinary meeting; nor is there anything in the Act which says that there shall be any dividend made at all. It is hardly to be expected that any Act of Parliament should be so general in its nature as to provide that at a given time the dividend shall be made, although perhaps the company might be disposed to come to such an arrangement. The clause in the Companies Clauses Consolidation Act provides that the general meetings, if it is not otherwise prescribed by the special Act, shall be held in the months of February and August in each year, or at such other stated periods as shall be appointed, and that they shall be called ordinary meetings. There is nothing which says that the dividends must necessarily be declared at such meetings, and nothing which says that they shall be declared at all the ordinary meetings which take place at the two fixed periods of the year. It is quite true that the habit has been to divide at certain given periods; but it might well be, and I believe in many of these companies it is the fact, that they do not for three or four years declare any dividend at all, because they have none to declare;

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and although that difficulty might exist, whatever bye-law—as in the case of *Hartley v. Allen*—is framed, yet the court might give a reasonable construction to any bye-law providing that the profits shall be divided half-yearly, and without much forcing the construction of the Act of Parliament might say that a meeting at which it shall be declared there is nothing to pay may be treated in a sense as the last period of payment; but I cannot apply that principle to a case in which no period of payment is appointed, and it does not appear to me to be strictly within the purview of the Act. The object of the Act was this: the tenant for life relies upon certain fixed periods at which the dividends will be paid, and which, therefore, he frames his expenditure to meet. It appears to me that that cannot be predicated of the owners of shares in companies like these, and this argument, perhaps, goes a little beyond *Hartley v. Allen*; but the tenant for life cannot be said to have a fixed reliance on the profits earned in railways of this description, still less when he knows that there is no obligation to make these payments at a given period, and, for all that can be foreseen, the board of directors have a right to say that none shall be declared for three or four years next ensuing. It appears to me that the case does not fall within the letter of the enactment, and I cannot hold that these dividends are apportionable. *Order accordingly.*

Solicitors: Evans, Birmingham; Upton and Johnson; Desborough, Young and Co.

Saturday, May 30.

Re BATE'S TRUSTS.

Will—Construction—“Personal representatives”—“Survivors.”

A testator bequeathed a money fund to trustees to be invested for “his five daughters, share and share alike, for their respective lives, and after the respective deaths of such of his daughters as should die without leaving issue, or leaving issue, if such issue should die under the age of twenty-one years, upon trust to divide the fifth part or share of each of his said daughters who should so die without leaving lawful issue as aforesaid, in the following manner: “Immediately, or as soon as conveniently can be after her decease, unto and amongst my said son George Bates and the survivors of them my said five daughters, share and share alike, to whom I do hereby give and bequeath the same accordingly, or to their respective personal representatives.”

Held, that the word “survivors” referred to the death of the tenant for life whose share was to be divided.

On the death of the last survivor of the five daughters without issue:

Held, that “personal representatives” were to be construed in their ordinary sense, and her entire share was directed to be paid to the executors of Geo. Bates the son.

This was a petition for payment of a fund out of court. It had been paid in by executors under the Trustee Relief Act.

George Bates, gentleman, by his will, dated the 4th Feb. 1821, bequeathed to his son George Bates and to John Hunt the sum of 5000*l.*, to be raised and paid out of his personal estate within three months after his decease, upon trust for investment in the public funds, or on good real security as therein more fully expressed, and to receive the dividends, interest and profits, and thereout to pay Mary, the said testator's wife, during her life, the annual sum of 150*l.* half-yearly; and upon further trust, from time to time during the lifetime of his said wife, to pay and divide all the residue and remainder of the dividends,

interest, and proceeds and profits of the said trust moneys, and immediately from and after her decease then in like manner to pay and divide the whole of such dividends, interest, and proceeds and profits (after payment of all expenses attending the trust), as and when the same should become due and be received, unto, *between and among his five daughters*, Elizabeth Bates, Mary the wife of Robert Freeman, Beliza, the wife of Nathaniel Barthropp, Lucy Bates, and Ann Bates, share and share alike, for and during the terms of their respective natural lives, and the said will proceeded in the words following (that is to say), “and immediately from and after the respective deceases of such of my said daughters as shall happen to depart this life without leaving lawful issue, if all such issue shall in like manner depart this life under the age of twenty-one years, upon further trust to pay and divide the fifth part or share of each of my said daughters who shall so die without leaving lawful issue as aforesaid, immediately or as soon as conveniently can be after her decease, unto and amongst my said son George Bates and the survivors of them my said five daughters, share and share alike, to whom I do hereby give and bequeath the same accordingly, or to their respective personal representatives. But in case any of my said daughters shall happen to depart this life leaving any lawful issue, then upon trust to pay and divide the share or shares of such of my said daughters as shall so happen to die leaving lawful issue as aforesaid, unto and amongst such children, to be paid to and equally divided between them, or between such of them as shall attain the age of twenty-one years upon their respectively attaining that age.” And the said testator declared that it should and might be lawful to and for his said son George Bates, in case he should think proper, to take and receive himself the aforesaid sum of 5000*l.* thereby bequeathed to him and the said John Hunt as aforesaid, and to retain the same in his hands during the continuance of the above-mentioned trusts, or for so long time as he should think proper, he making and executing to the said John Hunt, his co-trustee, a good, valid and effectual mortgage security upon the estate at Huntingfield, in the county of Suffolk, lately purchased by him of Reginald Rabbit, for securing the repayment of the said sum of 5000*l.*, with interest for the same at the rate of 4*l.* 10*s.* per cent. per annum, upon the trusts to and for the intents and purposes thereinbefore mentioned, and after payment of all his just debts, funeral and testamentary expenses, and the legacies thereinbefore by him given and bequeathed, *he gave and bequeathed all the residue and overplus of all his personal estate and effects unto his said son George Bates*, his executors, administrators and assigns absolutely. The testator died on the 3rd April 1831, without having altered his said will, which on the 29th June 1831 was duly proved by his son George Bates and his son-in-law Robert Freeman.

The following are the dates of the deaths of the legatees of this fund:—Testator's widow died in 1840; Elizabeth, one of the daughters, died in 1842 without leaving issue; Ann and Beliza died in 1850 and 1852, leaving issue; Mary died in 1857 without leaving issue; Lucy, the survivor, died in 1862, without leaving issue.

At her death her share of the fund being 1043*l.* 0*s.* 6*d.* Three per Cents., was paid into court by the executors.

The executors of Geo. Bates, the son, presented this petition.

H. B. Shebbeare, for the trustees and executors.

Shebbeare, for the petitioners, contended that the entire fund was payable to the executors of Geo. Bates, who was the general residuary legatee. He cited

Nevill v. Boddan, 28 Beav. 559; 2 L. T. Rep. N. S. 273;

Taylor v. Beverley, 1 Coll. 109.

Roll, Q.C., for the representative of Lucy, contended that "survivor" meant "the longest liver;" and that, as she was such, the whole fund was payable to her personal representatives.

Busk, for the children of Beliza and Ann, contended that under the peculiar phraseology of the will the words "personal representatives" meant "children," and the fund was consequently divisible amongst the children of these two daughters. He referred to

Walker v. Malkin, 6 Sim. 148;

Robinson v. Smith, lb. 47;

Styles v. Munro, lb. 49.

The VICE-CHANCELLOR said that, according to *Taylor v. Beverley*, "survivors" meant those who survived the tenant for life of the share then in question. Geo. Bates, the son, did not survive, nor was it necessary that he should do so. He had taken a vested interest, with a right to participate with the surviving daughters, and being the general residuary legatee, his executors would take the fund after the death of the survivor of all. As to the words "legal personal representatives," they must clearly be construed in their ordinary sense, and must mean the representatives of Geo. Bates and the surviving sisters. It was impossible to construe "personal representatives" as children. No case could be cited for that proposition, and all the cases in which those words had been held to mean "next of kin" were cases between the husband's and the wife's representatives, in which that interpretation had been adopted in order to carry out the intention of the testator, so far as it could be gathered from the construction of the whole will that the husband was to be excluded. If the argument which had been used by the representative of Lucy, the last liver of the daughters, were to prevail, it would have the effect of giving her share to her own representatives, which clearly never could have been the intention of the testator.

Order for transfer of the fund to the personal representatives of Geo. Bates.

Solicitors, Abbott, Jenkins and Co.

June 20 and 25.

Peto v. THE BRIGHTON, UCKFIELD AND TUNBRIDGE WELLS RAILWAY COMPANY AND OTHERS.

Injunction—Negative term—Specific performance—Railway contract.

When the terms of a contract are such that the court cannot superintend, so as to secure, the performance by a plt. of his part, it will not decree specific performance against defts.

And if, on nonperformance by a plt., both parties cannot have equal justice, it will not, in the absence of an express negative covenant, grant an injunction to restrain acts, the doing of which is inconsistent with the maintenance of the contract.

This was a suit by Messrs. Peto and Betts, the railway contractors, against the Brighton, Uckfield and Tunbridge Wells Railway Company and its directors, and against the London, Brighton and South Coast Railway Company and two of its directors, to maintain the validity of an agreement between the plt. and the first-named defts. for the construction of their railway, and to restrain either of the deft. companies from dealing with certain shares and debentures of the former company, agreed to be applied in payment for the construction of their railway.

The Brighton, Uckfield and Tunbridge Wells Railway Company was incorporated by an Act of 1861, and the defts. Cary, Fox and Jameson were, at the date of the agreement to be afterwards mentioned, and at the time of the filing of the plt.'s bill, the directors of the company. Early in Dec. 1862, these gentlemen applied to Mr.

Bovill, an engineer, to assist them in carrying out their project, and for that purpose they ultimately by a letter under their joint hands, dated the 2nd Feb. 1863, authorised him to treat with the plt. for the construction of the line. The letter was in these terms: "We hereby authorise you to agree with Messrs. Peto and Betts on our behalf to execute the works of our railway in accordance with the several plans and sections supplied to them by you for the sum of 215,000*l.* payable by 6500*l.* in debentures bearing 5*l.* per cent. interest, and the balance in shares of the company, to be taken at par, the payments to be made in the usual way as the works progress." Accordingly, on the 23rd Feb., an agreement between the plt. and Mr. Bovill as agent for the company, embodying these terms, was mutually signed and the fact communicated on the same day to the directors. It was maintained on the part of the company, that the authority given by the letter of the 2nd Feb. to Mr. Bovill, was retracted by the directors some short time afterwards on the same day; but it seemed upon the balance of evidence, that this view could not be supported, but that all parties for some days acted as if the authority to negotiate was in force.

On the 25th Feb., however, the secretary of the company wrote to Mr. Bovill to say, that the directors could not recognise the agreement entered into by him with the plt.

It appeared that, at the time these negotiations were pending, the Brighton and Uckfield and Tunbridge Wells Company were trying to induce the other defts., the London and Brighton Company, to take a transfer of their projected line, and an agreement between these two companies was drawn up, dated the 16th March, the main provisions of which were, that the London and Brighton Company should obtain powers from Parliament for purchasing the projected line, by an issue of 4½ per cent. preference stock to the shareholders of the Brighton and Uckfield Company, the line to be constructed by the latter company, and tenders to be sent out by them for its construction. The London and Brighton Company were to undertake that a certain proportion of the former company's shares should be immediately taken up at a given price, and the residue on or before the 16th June. At the time of filing the bill, this agreement had not been confirmed by the shareholders of either company. The bill was filed on the 10th March, and charged that the agreement last mentioned was beyond the powers of the deft. companies; that they were acting in collusion to prevent the plt. from executing their contract; that the agreement was in fraud of the contract; and that by its terms there would not be a sufficient amount of shares and debentures of the Brighton and Uckfield Company left to satisfy the contract with the plt., and it therefore prayed a declaration of the validity and specific performance of the contract of the 23rd Feb., and that the Brighton and Uckfield Company and its directors might be restrained from causing or permitting the other defts. or any persons other than the plt. to construct the projected line of railway, and that all the defts. might be restrained from dealing with the 215,000*l.* shares and debentures agreed to be applied to the payment of the plt. for the construction of the line, and generally, from doing anything whereby the plt. might be hindered from performing and having the full benefit of the contract.

It seemed that the plt. had not actually begun to construct their railway, but had gone to some expense in surveying, &c.

Giffard, Q. C. and *Druce*, in support of the motion for an injunction, contended that this was a contract of such a nature that the court could grant the relief prayed; it was merely that the payment was to be in shares instead of money, and was equivalent to an agreement for the sale of shares; and that upon

V.C. W.]

BARKER v. HIGHLEY.

[C. B.]

such an agreement the court would restrain the vendor from parting with those shares to other parties in fraud of his first contract. They cited

Duncuft v. Albrecht, 12 Sim. 189;

Lumley v. Wagner, 1 De G. M. & G. 604;

De Mattos v. Gibson, 4 De G. M. & G. 276.

Sir H. Cairns, Q. C., Speed, and F. Waller, for the Brighton and Uckfield Company, argued, first, that there was a want of mutuality in the contract: (*Stocker v. Wedderburn*, 3 K. & J. 393.) The court here could not superintend the performance of those acts in return for which alone the plt. was to receive certain chattels.

South Wales Railway Company v. Wythes, 1 K. & J. 186; s. c. 5 De G. M. & G. 880;

Heathcote v. North Staffordshire Railway Company, 2 Mac. & Gor. 100;

Pickering v. Bishop of Ely, 2 Y. & C. 249;

Johnson v. Shrewsbury and Birmingham Railway Company, 3 De G. M. & G. 914.

Secondly, the contract was not certain in its terms, so as to be susceptible of performance; the only plans that had been furnished were the parliamentary plans, which could not be worked from. Again, in the last clause, what was the meaning of "payments to be made in the usual way?"

Ogden v. Fossick, 7 L. T. Rep. N. S. 515.

Thirdly, this was an appeal to the discretion of the court, asking for specific performance, when the injury by nonperformance might well be compensated by damages. Fourthly, the shares were no longer in the control of either this company or the other defts.; they had been on sale in the public market. Fifthly, the directors might themselves have contracted, but they had no power to authorise an agent to do so.

R. C. C. Act, 8 Vict. c. 16, ss. 95, 96, 97.

Kirk v. Bromley Union, 2 Ph. 640;

Jackson v. North Wales Railway Company, 6 Rail. Cas. 112.

Sixthly, the contract contained no provisions for the proper execution of the works, so that the directors would be liable for a breach of trust in entering into such a contract, in case there was a failure on the part of the plts.; this court would not enforce such a contract:

Shrewsbury and Birmingham Railway Company, v. North-Western Railway Company, 6 H. of L. Cas. 113.

Rolt, Q. C. and J. H. Taylor, for the London and Brighton Company, said that there were two cases in which the court would grant a negative injunction, even when it could not give specific performance of all the terms of an agreement: when a plt. could say, first, I have done; or, secondly, I am ready to do all that will entitle me to call on the deft. to perform his part, or to abstain from that which would render performance impossible. Now in the second of these cases the court would only grant an injunction when the act to be done by the plt. was capable of immediate execution, and not when it was to be performed at successive future periods.

Giffard, in reply, pointed out the differences in the several cases cited in opposition, and referred to

Gervais v. Edwards, 8 Dr. & War. 80.

In *Lumley v. Wagner* (*vide sup.*) there were many things to be done by the plt., which the court could not superintend. In *De Mattos v. Gibson* (*vide sup.*) there was no negative term expressed.

The VICE-CHANCELLOR, after commenting on the circumstances of the case, and observing that he entertained no doubt as to the intention of the Brighton and Uckfield Company, through their directors, to look upon the authority given to Mr. Bovill to treat with the plts. as valid up to the moment that they repudiated that authority by the letter of the 25th Feb., and remarking that there could be no question on an interlocutory

application like the present as to the power of a company to authorise an agent to treat for them, said that the difficulty he felt was, how the court could prevent the defts. from dealing with their shares, except on an engagement by the plts. that they would perform their part of the contract, and how any engagement of that sort, if entered into, could be enforced by the court. That there was a right to infer a negative term in a contract, and to enforce the observance of that term by injunction, as in a farming contract, was established on the authority of *De Mattos v. Gibson*. Here the negative term would be to hold back the shares from being dealt with in a manner inconsistent with the maintenance of the agreement. But before doing that the court must see that full justice could be done to all parties. In *De Mattos v. Gibson* the plt. had done all he had to do. In *Lumley v. Wagner* the negative term could be enforced because the deft. might have been fully compensated for nonperformance on the part of the plt., by damages. But here there could be no adequate compensation to the defts. for a failure on the part of the plts. to construct the railway according to their agreement, a failure which might arise from very many causes. In such a case the injunction would of course fail, and the shares be set free, but they would then doubtless be depreciated in value, and in such a way that the court could not replace the defts. in their original position. His Honour then referred to the case of *Ogden v. Fossick* (*supra*), and the remarks of the Lords Justices on the point, that an agreement like that before them must be taken in its entirety, and that as the court could not enforce its terms on one part, it would decline to do so on the other. He took the same view of this case, and therefore, and seeing that the defts. could get no adequate compensation on a failure of the plt. to perform his contract, he must refuse this injunction, but without costs as to the Brighton and Uckfield Company; the costs of the London and Brighton Company to be costs in the cause.

Solicitors for plts., *Freshfields and Newman*.

For defts., *H. Carnes*.

Common Law Courts.

COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs.
Barristers-at-Law.

April 15, May 28 and July 6.

BARKER v. HIGHLEY.

Ship and shipping—Ship's husband—Collision—Arrest in Admiralty Court—Release—Bail-bond.

The ship's husband or managing owner has authority to do whatever is necessary to enable the ship to prosecute her voyage and earn freight.

The deft. was part owner, to the extent of 2-64ths, in a ship which had been arrested in the Admiralty Court in a suit for collision. P., the other co-owner, who was also ship's husband or managing owner, in order to procure the release of the ship that she might be earning freight, induced the plt. to become bail for the ship in the Admiralty Court, by which means the ship was released. The suit terminated in favour of the injured vessel. P. became bankrupt, and the ship herself was lost. The plt. having paid what was due from him under the bail-bond, brought his action against the deft. to recover back the money so paid:

Held, that P., as managing owner, had, under these circumstances, authority to bind his co-owner (the deft.), and the plt. was therefore entitled to recover.

This cause was tried before Byles, J., at Guildford Spring Assizes, when a verdict was found for the plt.

for 105*l.* 12*s.* It was an action upon a bail-bond in the Admiralty Court entered into by plt. as a surety.

It appeared at the trial that the deft. was a master mariner in the service of one Zachariah Pearson, who was part and managing owner of the ship *Wesley*, to the extent of 62-64ths, the deft. owning the remaining two parts. This ship having come into collision with a vessel called the *Antelope*, whilst passing down the river, a suit for damage was instituted in the Admiralty Court by the owner of the latter vessel. On the 17th Sept. the *Wesley* was arrested in the Admiralty Court to answer damages.

According to the practice of the court, a bail-bond was required for the release of the ship. Pearson, by his agent Hargreaves, applied to plt. to become surety and sign the bail-bond, which he did, and by this means the vessel was released. The suit went on, and eventually it was found that the *Wesley* was in the wrong, and damages were given against the owners of the ship, amounting to 211*l.* 4*s.* Half of that amount was paid by the plt. under the bail-bond, and he now brought his action against Highley, as part owner of the ship, to recover the amount so paid, Pearson having become insolvent. At the time when the bail-bond was entered into, the deft. was away in command of a ship in the East Indies. The ship *Wesley* was ultimately lost.

The learned judge directed a verdict to be entered for the plt. for the amount sought to be recovered in the action, reserving leave, however, for the deft. to move to set aside the verdict and enter a verdict for himself, or a nonsuit, if the court should be of opinion that under the circumstances there was no liability on the deft.

Denman having moved accordingly in Easter Term, and obtained a rule *nisi*,

M. Smith (*Hansen* with him) now showed cause.—The question in this case must be decided on principle, for there is no case in the books going fully to the point. The question is simply this, Had Pearson, as managing owner or ship's husband, authority to give the bail-bond, and thus release the ship that she might be earning money? Story in his book on Agency defines what is the authority of a ship's husband. He says the ship's husband has authority "to do all acts necessary to send the ship on her voyage:" (Story on Agency, 35.) No words can be larger. What Pearson did was within them; for only by giving the bail-bond could the vessel be released so as to proceed on her voyage and earn freight:

Abbott on Shipping, 10th edit. 72;

French v. Backhouse, 5 Bar. 2727;

Campbell v. Stein, 6 Dow. 135;

Whitwell v. Perrin, 4 C. B., N. S., 412.

G. Denman (*Milward* with him) in support of the rule.—Pearson had no authority to bind his co-owner. There was no privity between Hargreaves and the deft. The defence of the suit in the Admiralty Court by Pearson was wrongful, and cannot affect the plt. If Pearson had allowed the suit to take its course, the amount of damages in respect of which the deft. would have been liable would have been three guineas, in respect of 2-64ths of the ship, instead of 105*l.* 12*s.* now sought to be recovered from him; for the proceeding in the Admiralty Court is *in rem*, against the ship. They cited

Helme v. Smith, 7 Bing. 709;

17 & 18 Vict. c. 104, s. 504;

Ex parte Rayne, 1 Q. B. 982; *French v. Backhouse* (*ubi supra*);

Abbott on Shipping, 73, ch. 3, pt. 1, pars. 4, 99;

Chappell v. Bray, 30 L. J. 24, Ex.; 3 L. T. Rep. N. S. 278. *Cur. adv. vult.*

WILLIAMS, J. now delivered the judgment of the court.—The deft. in this action was part owner of a vessel which had been arrested in the Admiralty Court,

in a suit for collision. The deft. held two 64th parts shares only, the other co-owner held the remaining sixty-two 64th shares and acted as ship's husband and managing owner. He, in order to obtain the release of the ship, procured the plt. and another person to become bail for the ship in the Admiralty Court, and the ship was therefore released. The suit terminated in favour of the owners of the injured vessel. The managing owner of the deft.'s vessel became bankrupt, and the ship itself was afterwards lost. The bail having each paid their proper share of the money due on the bail-bond, the plt., as one of them, sued the deft. in this action to recover his proportion of the money so paid. At the trial before Byles, J., the plt. obtained a verdict; but leave was given to the deft. to move to enter a nonsuit. The ship's husband or managing owner is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight. In this case it was absolutely necessary to release the ship from the Admiralty process, as necessary as it would be to employ salvors had the vessel taken the ground and been in danger of destruction, in which case the salvors, in addition to the security afforded by their maritime lien, might have brought an action against the owners: (see *Newman v. Walters*, 3 B. & P. 612.) We think the managing owner was not bound to deposit money out of his own pocket, or to mortgage his own shares, or to hypothecate the ship, but that he might do what was necessary according to the rules of the Admiralty Court. Those rules enabled him to obtain a release of the ship by merely procuring bail for damages and costs. The hardship on the present deft. is undoubtedly great, but that arises from the facts that he was owner of so small a portion of the ship, that he has lost his remedy against the co-owner by that co-owner's bankruptcy, and against the ship by its subsequent loss. We are, therefore, of opinion that the rule to enter a nonsuit should be discharged.

Rule discharged.

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

ERRORS FROM THE EXCHEQUER.

Friday, Feb. 6.

(Before WIGHTMAN, WILLIAMS, CROMPTON, BYLES, BLACKBURN and KEATING, JJ.)

MEASOM v. FINNIGAN.

Contract—Construction of—Order for insertion of advertisement—Option to renew the same—Onus of proof.

The deft. gave a written order to plt. for the insertion in certain railway guide books, published by plt., of deft.'s advertisement of his name and business as a trunkmaker, "to last two years from date, to be renewed on the same terms at the end of that period, provided a second edition shall be printed." After the advertisement had continued for two years, plt. brought out a second edition, and inserted the deft.'s advertisement therein, for which deft. refused to pay, and in an action to recover plt.'s charge for such second insertion:

Held (affirming the decision of the Ex.), that the meaning of the contract was, that if a second edition was brought out, the deft. was to have the option of renewing his advertisement therein or not, and was not bound so to insert it; and that the onus of proving that the contract bound the deft. to insert it lay on the plt., who contended for that construction.

This was an appeal by the plt. under the C.L.P.A. 1854, s. 39, from a judgment of the Court of Ex., making absolute a rule to set aside a verdict found for the plt., and to enter a nonsuit.

The action was brought by plt., the author and proprietor of certain railway guide books to recover from the deft., a trunkmaker, at Manchester, the sum of 21*l*. alleged to be due to plt. for advertising the deft.'s name and business in the said guide books published by the plt. The scale of charges for advertising, including a copy of the work, each page to be headed "Official Advertiser," was as follows:—

	£	s.	d.
Whole page	5	5	0
Half page	3	3	0
Quarter page	2	2	0
Wrapper pages	10	10	0

The deft. sent to plt. the following order:—

"March 8, 1859.

"Sir,—Please to insert in "The Official Illustrated Guide to the North-Western Railway and its branches," by George Measom, my advertisement, to form one page. To last two years from date, to be renewed on the same terms at the end of that period, provided a second edition shall be printed. No other trunkmaker in Manchester to appear.

(Signed) "B. FINNIGAN."

"To Mr. George Measom, 74, Charrington-street, Oakley-square, St. Pancras, London, N.W."

A separate order in the above form was sent for each of six several guide books, and in some of such orders there were added the words "favourable notice in the body of the work gratis," and in others, "favourable notice gratis."

Plt. accepted and agreed to the said orders so given by deft., and as soon as the first edition of each of the said works was published, deft.'s advertisement was duly inserted in each of them, and continued so inserted for the respective periods mentioned in the said orders, and a copy of each of the said books was delivered to deft. according to the terms of the agreement. Deft. paid plt. the agreed prices according to the said scale of charges for the said advertisement in the first edition of the said books respectively. After the said advertisement had been so continued in the said several books for the period required by the orders, plt. having sold off nearly all the first edition, spent large sums of money and devoted time and labour in correcting, altering and adding to the said books, and in preparing the books so corrected, altered and added to for the press, and gave notice to deft. of his intention to issue second editions thereof, and to renew the insertions of deft.'s advertisement in such second editions upon the same terms as those on which it had been previously inserted, and offered to deft. to make any alteration he might wish in the said advertisement. The deft., however, refused to allow the advertisement to appear therein, and withheld from plt., and refused to return to him the block of the picture or electrotype duplicate which appeared in deft.'s advertisements in the first edition of the said works, and which plt. had given back to deft. after the first edition was published. Thereupon, at the expiration of the required period for the continuance of the advertisement in the first edition, plt. inserted the letterpress of the said advertisement in the second editions of the said books published by him, excepting the words "exhibition model," and omitting to insert the woodcut picture or electrotype duplicate of the same, which appeared in deft.'s advertisements in the first edition, and he delivered copies of each of the said alleged second editions of the said books to deft., which deft. kept. Plt. duly performed all the conditions, if any, imposed on him with reference to the said alleged second editions by the said orders and agreement, except that he omitted the words and picture aforesaid, and inserted in one of the sets of such alleged second edition the advertisement of another trunkmaker at Manchester.

Deft. would not pay plt. for the insertion of the advertisement in such second edition, which was not a

mere reprint of the first edition, but was illustrated, compiled and edited by plt. at great expense and with great labour, and contained much fresh matter and many engravings.

Plt. accordingly brought an action which was tried before Bramwell, B., when the jury, by direction of the learned judge, found a verdict for plt. on all the issues; but leave was reserved to the deft. to move to set it aside, and enter a nonsuit, neither party to amend the pleadings. A rule was accordingly subsequently obtained on the grounds, first, that the agreement to insert the advertisement in the second edition was optional on the part of deft., or was to be renewed by a fresh order; secondly, that there never was a second edition printed; and, thirdly, that another trunkmaker in Manchester was allowed to insert an advertisement in the second edition, and that the agreement was not proved.

Upon the argument of the rule, the second ground on which the rule was obtained was given up as not sanctioned by the court or the judge, and the rule was made absolute by the Ex., on the other grounds to enter a nonsuit; and from that decision the plt. appealed.

The question for the opinion of the court is, whether upon all or any of the above grounds the said rule ought to have been discharged: (reported below, 6 L. T. Rep. N. S. 254.)

W. H. Cooke (with him *Haskins*, Q. C.) appeared to argue the case for the plt. the app. The contest is this, whether, in bringing out a second edition, the deft. Finnigan's advertisement was bound to be inserted and paid for. [WIGHTMAN, J.—Is Finnigan bound to go on upon the same terms?] Yes; the other side will contend that, instead of its being read "the advertisement to be renewed," it must be read, "the order for the advertisement to be renewed." Pollock, C. B. was under a misapprehension upon the argument below. The declaration was not, as his Lordship seemed to think, amended or changed at all. No doubt the pleadings were often before Martin, B., at chambers, but that was as to the plea. It was said below that there was no advantage to deft.; but that, it is submitted, cannot be maintained. The first point in the rule was, that the agreement to renew was optional, and it is contended that there was no binding obligation on the deft., because of the want of mutuality; but it is found by the case that the publication itself was not profitable to the plt., who relied solely on the advertisements for his profit from the publication, and that he incurred much cost in bringing out a second edition, in full reliance on the order, and that deft. would renew the insertion of the advertisement, if a second edition were published after two years from the first. The getting up of a new and increased work was beneficial to deft. It was a speculation; if the work was successful and came to a second edition, the deft.'s advertisement would be inserted at no increase of charge, and that was the deft.'s advantage. The second point in the rule is not named in the pleadings, and was given up; and the third point, as to the other trunkmaker, it is submitted, does not apply.

Overend, Q. C. and G. B. Hughes, contra, for the resp., were not called upon.

WIGHTMAN, J.—We are all unanimously of opinion that the meaning of the contract is, that if a second edition should be brought out, Finnigan may, if he pleases, renew his advertisement on the same terms as those on which it was inserted in the first edition. It was to be optional with him whether he would or would not renew it. That seems to us to be the most reasonable construction. The onus of proof is on the party who contends that the agreement binds the other party to insert the advertisement. And can it be that a man binds himself to insert an advertisement that he is a trunkmaker two years hence, when he may have long before ceased to be one? For these

reasons we are all of opinion that the judgment of the Court of Ex. should be affirmed.

The rest of the Court concurred.

Judgment affirmed.

App.'s attorney, G. F. Cooke, 3, Serjeants'-inn, Chancery-lane.

Resp.'s attorney, George Bowyer, 6A, Tokenhouse-yard, Lothbury.

Tuesday, Feb. 10.

(Before COCKBURN, C.J., WIGHTMAN, CROMPTON, WILLES, BYLES and KEATING, J.J.)

MILLER AND OTHERS v. TITHERINGTON.

Marine insurance policy—General average—Jettison of cargo stowed on deck—Custom of Liverpool as to.

A custom or usage of trade at Liverpool that the underwriters, on a policy effected there in the ordinary form, are not liable for general average with respect to the jettison of goods stowed upon deck, is a good custom, and may be incorporated into such policy so as to limit the liability of the underwriters, and may be pleaded in answer to an action on the policy, notwithstanding that, by the terms of the policy, the underwriters agreed to insure against the perils of jettison.

Error by plts. to review the judgment of the Ex. in favour of deft. on demurrer to pleas. The action was brought on a policy of insurance of a ship and cargo in the usual form, which stated that the insurers took upon themselves, amongst other perils, the perils of jettison, and plts. sought by it to recover from the underwriters a general average in respect of goods jettisoned for common safety.

Pleas:—2. As to so much of the declaration as relates to the said jettison of the said goods, that the said goods so jettisoned as in the declaration mentioned, consisted of timber stowed upon the deck of the said ship for the said voyage, being a voyage from a port in British North America to a port in England, and that the said policy was made in Liverpool, and that before and at the time of the making of the said policy there had been and was, at Liverpool and elsewhere in England, a well-known and approved usage and custom of trade among shipowners and underwriters, in the trade of carrying timber from British North America to England, that underwriters on ships are not liable under the ordinary form of policy, such as the policy in the declaration mentioned, to pay or contribute towards any general average or contribution payable by the shipowner on account of the jettison of any timber stowed upon deck, of which said usage and custom the plts. and the deft., at the time of the making of the said policy had notice, and made the policy with reference thereto. 3. As to so much of the declaration as the previous plea was pleaded to, that before and at the time, &c., there had been and was at Liverpool and elsewhere in England, a well-known and approved usage and custom of trade among shipowners, shippers, merchants and underwriters, in the trade of carrying timber from British North America to England, that the loss occasioned by the jettison of timber loaded on deck, for the preservation of the ship and cargo in such voyages is not contributed for by any general average among all the owners of the ship, freight, and cargo on board such ship, but the loss so occasioned by such jettison is, in the first place, apportioned over the ship, the freight of cargo both on and under deck, both jettisoned and not jettisoned, according to their respective values, by a statement which is called general contribution; but no owner of any of the above interests is, by custom, liable for the proportion falling on his interests, except those who are parties to the contract for the carriage on deck; and by the same usage and custom, no underwriter on a ship is

liable under the ordinary form of policy, such as the policy in the declaration mentioned, to pay or contribute towards the amount of the said general contribution payable or to be borne by the shipowners on account of the jettison of any timber stowed upon deck, of which usage and custom the plts. and deft., at the time, &c., had notice and made the said policy with reference thereto; and that by reason of the said usages and custom the plts., as the owners of the said ship, had not become liable to pay, nor had they paid, any sum as general average on account of the said jettison of the said goods in the declaration mentioned, but had become liable to contribute towards such general contribution as aforesaid, which was the only loss sustained by the plts., as the owners of the said ship, on account of the said jettison of the said goods.

Demurrer and joinder in demurrer to the pleas.

Replications:—To plea 2.—That there had been and was a known and approved usage of trade among shippers and carriers of timber from British North America to England for the carrying of timber upon deck during the season of the year wherein the carrying of timber upon deck is not prohibited by statute, and a known and approved usage of trade, whereby the underwriters at Liverpool insured such timber carried partly below and partly above deck, or all below or all above deck, by the words "on and over all." And plts. say that the said timber was being carried during the season when such carrying upon deck is allowed and permitted by law, and was well and safely stowed according to the said usage and custom for carrying the same. To plea 3.—That at the time aforesaid there had been and was a known and approved usage and custom of trade among shippers and carriers of timber from British North America to Liverpool, and elsewhere in England, and at Liverpool aforesaid, for the carrying of timber upon deck during the season of the year, wherein the carrying of timber upon deck is not prohibited by statute; and a known and approved usage of trade between merchants and underwriters at Liverpool aforesaid whereby underwriters insure such timber so carried along with other timber carried by the words in the policies "on and over all." And plts. say that such timber in the plea mentioned was being carried upon deck during the season when such carrying was not prohibited by statute, and was allowed and permitted by law, and was well and safely stowed according to the said usage and custom for carrying the same; and that the said general contribution in the said plea mentioned as a contribution to which plts. were liable amounted to a greater sum than a general average contribution.

Demurrer and joinder in demurrer to the replications: (reported below, 3 L. T. Rep. N. S. 893; 6 H. & N. 278; 30 L. J. 217, Ex.)

Brown for plts.—These pleas are bad. The first question is, whether the custom pleaded does not contradict the written contract, which says expressly, that the underwriter shall be liable. In *Hall v. Janson*, 4 E. & B. 504; 24 L. J., N. S., 97, Q. B., Lord Campbell says: "To let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract, would be contrary to all principle, and has been forbidden as often as the attempt has been made:" (4 E. & B. 510.) And in *Blackett v. Royal Exchange Insurance Company*, 2 Cr. & J. 244, Lord Lyndhurst held that usage may be admissible to explain what is doubtful, yet it was never admissible to contradict what is plain. [CROMPTON, J.—I think he expressly distinguished it from the case of goods lashed on deck. I don't think you can make much of that authority.] The case of *Da Costa v. Edwards*, 4 Camp. 142, cited in 1 Park on Insurance, p. 26, after the case of

Ross v. Thwaites, distinguishes that latter case, and shows that the policy applies to goods carried on deck in cases where it is usual so to carry them. They may be carried in any way that is safe, and it was proved to be safe on deck, and no statute says they shall not be so carried, the statute 8 & 9 Vict. c. 93, not applying to the time of year in which these goods were carried. [COCKBURN, C. J.—Is it not a reasonable custom to attach to the terms of the policy, that if you mean to insure your goods stowed on deck, you should expressly mention it; and that, if not so mentioned, it shall be taken that they are to be stowed in a safer and less exposed position. BYLES, J.—Which are the words in the policy which you say are inconsistent with this custom?] The word “jettisons.” It is not pleaded, and there is no pretence, that the word “jettison” has a different meaning at Liverpool from that which it has at common law. [KEATING, J.—Are not these pleas framed in accordance with *Milward v. Hibbert*, 3 Q. B. 120, 11 L. J., N. S., 137, Q. B.?] The custom of carrying timber on deck was notorious, and the underwriters, knowing it, undertook to pay for all “jettison.” “Jettison” is the old term, and is stronger than “jettison average.” Where no custom is alleged to interpret words in a different sense from the usual mode, a written contract cannot be escaped from by affixing a peculiar interpretation upon the words. The words “on and over all” refer to the insurance of the cargo and not of the ship at all. Jettison includes many species, and if you contradict one of those species you contradict the whole; because, if a particular species is to be excepted out of it by custom, there would be no limit to such a kind of thing at all. *Ross v. Thwaites* and other cases referred to below imply that it was not the usual and proper way of carrying a cargo; but here it was the usual, proper, well-known and reasonable mode of carrying it; and they had the advantage of the jettison of this very cargo. The custom relied on by defts. contradicts the contract and so cannot be imported into the policy. The underwriters contracted to be liable for all jettisons, and then attempted, by pleading this custom, to escape from liability in respect of timber carried on deck, which is shown, by custom, to be a usual and proper mode of carrying it.

Mellish, Q.C., contra, for deft. was not called upon.

COCKBURN, C. J.—We are all agreed that the judgment of the Court of Ex. in this case should be affirmed. The policy is, it is quite true, in general terms, and it is admitted that they would embrace the case of liability for general average; but then it is alleged by the plea that there is a well-known custom at Liverpool, where the policy was effected, that where a policy is prepared in general terms as here, the underwriter is not to be charged or held liable for general average or contribution in respect of the jettison of goods which, instead of being stowed in the ordinary manner below the deck, were stowed upon the deck. The whole question is, whether that custom can be so incorporated into the policy as to limit the liability of the underwriters for general average? The Court of Ex. have held that it can, and that the policy must be read as incorporating the custom. I think that we also must answer that question affirmatively, and that the reasons for the decision given by the Court of Ex. in their judgment below are so clear and satisfactory, and their judgment is so conclusive, that it is quite unnecessary for me to add a word thereto. The judgment of the court below must be affirmed.

The rest of the Court concurred.

Judgment affirmed.

Attorneys for the apps., *Gregory and Rowcliffes*, 1, Bedford-row.

Attorneys for the resp., *Field and Roscoe*, 36, Lincoln's-inn-fields.

ARCHES COURT OF CANTERBURY.

Reported by Dr. SWABET, of Doctors'-commons.

July 1, 2 and 24.

(Before the Right Hon. STEPHEN LUSHINGTON, Dean.)

The Office of the Judge promoted by BURDER v. O'NEILL.

Criminal proceedings—Admissibility of evidence—Number of witnesses—Costs.

The deft., in criminal proceedings in an ecclesiastical court, is not an admissible witness, even with consent of all parties. In a proceeding under the Church Discipline Act, the Ecclesiastical Court will act on the rules of evidence which obtain at common law. The conduct of the deft., after the charge against him is made known to him, may be such as to oblige a bishop to carry the suit through. In such a case, if there is no evidence on which the court can convict, it may dismiss the deft., but without condemning the promoter in costs.

In this case the office of the judge was promoted, under letters of request from the Bishop of Ely, by John Burder, against the Rev. J. O'Neill, clerk, vicar of Linton, in the county of Bedford, diocese of Ely and province of Canterbury, more especially for having committed the crime of fornication, lewdness, or incontinence, contrary to the statutes, the constitutions and laws ecclesiastical of the realm.

The 6th article charged “that the Rev. J. O'Neill, on the 19th Aug. 1861, being at the time a curate of Blandford Forum, Dorsetshire, directed Margaret Ellen Strickland, a girl aged sixteen, and a pupil teacher at the national school of Blandford Forum, whom he met going thereto, to call at his house at Blandford Forum at about seven o'clock the same evening, in order to obtain some needlework, which he stated he wished her to do for him; that Margaret Ellen Strickland, at the hour mentioned by the Rev. J. O'Neill, went to the said house, and, at his request, proceeded up stairs; that, in a certain closet or landing on the top of the stairs, the Rev. J. O'Neill did then and there conduct and demean himself in an indecent manner to Margaret Ellen Strickland, by putting his arm round her waist and kissing her, and that he afterwards forced or threw her down on the floor, exposed his person, and with force did have, or attempted to have, a carnal knowledge of, and criminal connection with, the said Margaret Ellen Strickland; that she became insensible, and for many days suffered great pain; that before leaving the house the said Rev. J. O'Neill enjoined her to be sure not to tell any one of his conduct towards her.”

The *Queen's Advocate* (Sir R. J. Phillimore), Dr. *Middleton and Field* for the promoter.

Collier, Q.C., Dr. *Deane, Q.C.* and *Pritchard* for the deft.

This case is reported chiefly for three points noticed in the judgment: first, the inadmissibility of the evidence of the deft., even with consent of all parties, in a criminal proceeding in the Ecclesiastical Court; secondly, that in proceedings under the Church Discipline Act, the Ecclesiastical Court will follow the rules of evidence which obtain at common law; thirdly, that though there may be no evidence before the court on which it can convict, the conduct of the deft., subsequent to his knowledge of the charge made against him, may be such as to oblige a bishop to carry the suit through; and in the present case the court dismissed the deft., but made no order as to costs.

July 24.—Dr. LUSHINGTON.—Before I enter on the facts of this case, I wish to state briefly why I refused to allow Mr. O'Neill to be examined as a witness. Before the passing of the 14 & 15 Vict. c. 99, it was agreed on all sides that in a prosecution of this description the deft. could not be examined, and such

[ARCHES.]

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was the invariable practice of the Ecclesiastical Courts; the question therefore depends on the construction to be given to the statute which I have mentioned. The 2nd section is in these words: "On the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, the parties thereto and the persons on whose behalf any such suit, action, or other proceeding may be brought or defended shall, except as hereinafter excepted, be competent and compellable to give evidence either *vidæ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding." Assuming, for the moment only, that the general terms used in the 2nd section would apply to the present case, and operate to make the evidence of Mr. O'Neill admissible, what is the effect of the 3rd section? "But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." Looking at the pleadings and evidence, I incline to the opinion that the offence is indictable and punishable on summary conviction. If I am right in the opinion, then it would follow that I also did right in rejecting the application to examine Mr. O'Neill; for, according to the words of the 3rd section, he would not be a competent witness, and if not competent, no consent, no waiver of objection, could make him so. But supposing I am in error in taking this view of the section containing the exception, I fall back on the words of the 2nd section itself, and on the construction of that section I come to the conclusion that it does not operate to render Mr. O'Neill or any other person in his position a competent witness, and I adhere to this construction on the principle and authority of the case of *Hawkins v. Gathorcole*, 24 L. J. 333, Ch. Now let me for a moment consider the consequences of holding Mr. O'Neill to be a competent witness. By the section referred to, if a competent witness, he would also be compellable to give evidence, the effect of which would be, that in a case resembling the present, where character and pecuniary prospects are at stake, where practically the issue is whether the accused should be disgraced and ruined, the accused might be compulsorily put upon his oath and might be compelled to take his choice between perjury or ruin. I cannot conceive that any proceeding could take place more utterly repugnant to the principles and practice of British law. But this is not all; the effect of holding Mr. O'Neill to be a competent witness, and consequently compellable to give evidence, would be to repeal the statute 13 Car. 2, c. 12, the 4th section of which enacts, "that it shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, &c., to tender or administer to any person whatsoever the oath usually called the oath *ex officio*, or any other oath whereby such person to whom the same is tendered or administered may be charged, or compelled to confess, or accuse, or to purge him or herself of any criminal matter or thing whereby he, or she may be liable to any censure or punishment." I do not think that this statute is repealed. One more consideration: look at the exception in the 3rd section, and see the utter discrepancy which would arise in principle if such evidence could be given. A man is protected from

giving evidence against himself in all petty offences cognisable by a magistrate, however small the penalty or slight the punishment on conviction; but, if I am mistaken, a clergyman of the Church of England would not be exempted where the penalty might be disgrace and the loss of valuable preferment. It is true that such an anomaly might exist; but I am sure that, if legal principles would permit, it is such an anomaly as every court would be most anxious to avoid. I am of opinion, that even if the words of the 2nd section could be so construed as to render such evidence admissible, still the expressions are general, and not specific; therefore I again say, upon the principles laid down with admirable clearness in *Hawkins v. Gathorcole*, and for the other reasons stated, I adhere to my original ruling against the reception of such evidence. (a) It is important to state clearly another principle as to rules of evidence which will govern my judgment in deciding the case. It is a proceeding in an ecclesiastical court under the Church Discipline Act, 3 & 4 Vict. c. 86. In former times the Ecclesiastical Court required, under some modification, the evidence of two witnesses in order to prove any alleged fact or offence, and to this rule Sir Herbert Jenner adhered to the last. In *Evans v. Evans*, 1 Rob. 165, he refused to pronounce that adultery had been proved by one witness, though the husband had recovered damages to the amount of 500*l*. As judge of the Consistory Court of London, it was my duty to follow that decision of the Arches Court, and I did so, though most reluctantly. But I am of opinion that the rule requiring the evidence of two witnesses, modified by what was very obscurely called corroborating evidence, is not applicable to proceedings under the Clergy Discipline Act; and I think so for divers reasons: first, because evidence is now taken orally, under 17 & 18 Vict. c. 47, and, according to the rules of common law; and, secondly, because I think that rules of evidence are subject to modification by courts of law. Lord Ellenborough, on a former occasion, and somewhat contemporaneously, refused to consider cases reported in *Siderfin & Kebble*, and said: "We do not sit here to take our rules of evidence from those ancient authorities. My intention is, to the best of my ability, to abide by the rules and practice of the courts of common law, in the consideration of the evidence given in this case." I have now to consider what is the charge preferred against Mr. O'Neill in these articles. That charge is pleaded in the 6th article, that Mr. O'Neill by force had, or attempted to have, sexual intercourse with the girl Margaret Strickland. So far as this article charges a rape, (b) I am in doubt whether I can proceed upon such a charge till a conviction at common law has been obtained. This objection has not been taken, but I cannot altogether pass it over in silence, though to discuss it at length would require the expenditure of much time. I have very great difficulty in trying the case at all, except upon the presumption that Margaret Strickland was a consenting party, and therefore that she must be considered an accomplice. A single witness she certainly is as to the principal fact, and the rules of evidence as to such a state of things must be borne in mind; it is not denied that there must be corroborative evidence. What is corroborative evidence I fully discussed in the case of *Simmons v. Simmons*, 5 N. C. 342, and to the principles I then adopted I adhere. [The learned Judge then discussed the evidence of Margaret Strickland and the other witnesses, and then continued:] I now come to the last, and perhaps the most important head for the determination of the court, I mean

(a) See *Moss v. C.* —, 6 L. T. Rep. N. S. 302.(b) See *Burgoyne v. Free*, 2 Hag. 466; *Burder v.* —, 3 Curt. 822; *Dean of Jersey v.* —, 3 Moo. P. C. 229; and *Boger's Eccl. Law*, 3rd edit. 786 (note).

the conduct of Mr. O'Neill himself when he was made cognisant of the charge preferred against him. Now this inquiry opens up a question of some difficulty. What, in legal acceptance of the term, is evidence corroboratory of the testimony of Margaret Strickland? There can be no doubt that a confession of the party accused is evidence against him, and also the conduct of a party accused is a material incident in the investigation of his guilt or innocence. Let me consider what has been done by Mr. O'Neill on this occasion. There were acts done by him, and there is his correspondence. The first act is his visit to Mr. Strickland's at twelve o'clock at night. Now, divested of the evidence of Strickland, the father, which the court has discarded, this act, however imprudent—and it was most improper—is not corroborative evidence, either of the charge preferred, nor is it an admission of guilt. The next act is of still more importance in the case. It appears that an action was brought against Mr. O'Neill either for seduction or some other offence of that kind, founded upon the transaction disclosed in the present case, and that when the case came on for trial at the last assizes held for the county of Dorset, Mr. O'Neill consented to a compromise on the following terms: That he should pay 100*l.* for the benefit of the girl and 60*l.* for costs, and this payment was made by Mr. O'Neill under protestation of innocence of any charge against him (a). The suggestion for this compromise came from the solicitor of Margaret Strickland. Now, the question is, whether such a transaction is consistent with innocence. Certainly, such a compromise *prima facie* raises a very strong suspicion against the innocence of a man in Mr. O'Neill's position; the very fact of such a compromise must necessarily be injurious to his character as a clergyman, for of course all would contend that no man would submit to a pecuniary sacrifice, to a certain extent necessarily based on an assumption of guilt, unless guilt really existed. I am very sensible of the strength of this argument, but still the matter may be looked at in another point of view. It may be considered as a total want of judgment in Mr. O'Neill, but still he might have been induced to adopt that course by motives perfectly consistent with innocence. It might well be that, considering, whatever might be the result of the trial, that, to a clergyman whose character was hitherto unassailed, the public exposure would be infinitely painful to himself and distressing to his family and all his friends—it might be that, to avoid such consequences, he submitted to the compromise and the pecuniary loss; even if that be so, there was a great want of moral courage, there was a great error of judgment. We know from experience that there have been many who, from the want of that inestimable quality of mind, have yielded to the imputation of acts when there was not the slightest ground for the accusation. Such instances are not of very rare occurrence, and certainly a want of moral courage, if such were the case, conveys no imputation of guilt. Having carefully reflected upon this transaction, and considered to the best of my ability the deduction that ought to be drawn from it, I have come to this conclusion, that I cannot deem it to be, however suspicious, either an admission of the charge preferred, or a confession of guilt. I abstain from commenting

upon the letters. I fully admit that these letters show that Mr. O'Neill has not met the charges preferred against him in the manner and with the feeling that a clergyman of the Church of England ought to have met them. I am very free to own that he has raised suspicions against himself by all that he has done and written since he was apprised of the accusation made against him by Margaret Strickland; but I cannot find, in any part of this correspondence, any admission of guilt, or any confession that the charge preferred was founded in truth. I am of opinion that the evidence of Margaret Strickland is insufficient to prove the facts to which she has deposed, and that there is no adequate confirmation of her testimony, either by the mouth of witnesses or from the letters of Mr. O'Neill: there is no proof of the *corpus delicti*. I must pronounce that the promotor has failed in proof of the articles, and in all ordinary cases I should feel it my duty to accompany such a decree with condemnation in costs; but I am of opinion that the conduct of Mr. O'Neill himself requires me to make an exception to this rule. I refer more especially to the letters, and to that letter he addressed to the bishop, and I think it was under the circumstances the bounden duty of the bishop to proceed. I dismiss Mr. O'Neill, but I do not give costs.

Shepherd and Skipwith, proctors for promotor.

Pritchard and Sons, for deft.

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

Thursday, March 26.

(Before the Right Hon. Dr. LUSHINGTON.)

THE INDIA.

Necessaries—Foreign vessel—Foreign port—Bondholder—Prior liens—Burden of proof—Transfer of lien.

A bottomry bondholder, having obtained a decree of sale of the vessel, has acquired a prima facie right to the proceeds, and before he can be called upon to defend and maintain such right, those claiming adverse interests in the proceeds must first have established their interests therein.

The High Court of Admiralty has no jurisdiction over a claim in respect of necessities supplied, or building, equipping, or repairs, to a foreign ship in a foreign port.

The lien in respect of necessities supplied to the credit of the ship is not transferred to a party who has paid for such necessities.

The barque *India*, of Monte Video, in the Republic of Uruguay, and owned by José L'Avegno, a subject of that republic, arrived in London on June 1st 1861, and on July 2nd was arrested on behalf of Messrs. Henckel du Boisson and Co., and Messrs. C. J. Hambro and Co. in a cause of bottomry, and on July 18 a suit in respect of necessities was instituted against the vessel, on behalf of Mr. J. A. Harper, Secretary to the Association for the Protection of Commercial Interests at Lloyd's. No appearance was entered on behalf of the owner of the barque, and the vessel was sold under a decree in the bottomry suit, and the proceeds of sale, amounting to the sum of 2306*l.* 3*s.* 2*d.*, were together with 952*l.* 13*s.* due for freight brought into the registry.

The bondholders having obtained permission to intervene in the cause of necessities, filed a petition which stated, amongst other things, that, on Oct. 2, 1860, the *India* being then at the Mauritius, two bottomry bonds were executed for repayment of the several sums of 1570*l.* 15*s.* 7*d.*, together with maritime premium at the rate of 25 per cent., payable within thirty days of the arrival of the vessel at the

(a) Note.—The memorandum of agreement was as follows: "*Strickland v. O'Neill*. Record withdrawn. No further proceedings of any kind to be taken by or on behalf of the pit, or any guardian or next friend of pit; Mr. Johns having power to undertake for such guardian or next friend. Deft. to pay 100*l.* Lord S. G. O. and Mr. Johns for pit; 60*l.* for costs to Mr. Johns, it being expressly understood that deft. makes the payment, protesting his innocence of the charge made against him, solely to avoid pain and annoyance to himself and scandal to the Church which might result from the trial of such an action."

port of London, that these bonds had been duly assigned to the interveners, and that the vessel, after leaving the Mauritius, deviated from her course, put into Malaga, and incurred certain expenses there amounting to 1498*l*. 7*s*. 2*d*., for the payment of which Mr. Harper, on behalf of the owners of cargo, gave bills of exchange.

Mr. Harper's answer to the petition of the interveners (the bondholders), pleaded, amongst other things, numerous facts in objection to the validity of the bottomry bonds, and also that the *India*, in the course of her voyage from the Mauritius, encountered severe weather, and was so much damaged as to be compelled to put into Malaga; that on the vessel's arrival there, Messrs. Pablo, Parlade and Co. were appointed provisional consignees to provide the necessary disbursements, they having previously stipulated that the *India* should not leave the said port until they should be repaid; that they accordingly advanced divers sums of money, amounting to 1493*l*. 7*s*. 2*d*., and that, by reason thereof and of the law of Malaga in such case, they were entitled to arrest the barque for repayment, and that the *India* being therefore unable to leave Malaga, and as no funds or supplies could be obtained on the credit of the owner of the vessel, Mr. Harper, by bills of exchange, repaid Messrs. Pablo Parlade the amount advanced by them; that such payments by Mr. Harper were so made on the credit of the said barque, and that by reason of 3 & 4 Vict. c. 65, s. 6, or of the Admiralty Court Act 1861, ss. 4 and 5, or some or one of them, he (Mr. Harper) was entitled, out of the freight and proceeds of the said vessel, to be repaid the said sum of 1493*l*. 7*s*. 2*d*. in priority to the claim of the bondholders.

Deane, Q.C. and Clarkson, on behalf of the bondholders, moved the court to reject the answer by reason that it disclosed no such case as could give Mr. Harper a *persona standi* to contest the validity of the bottomry bonds.

Brett, Q.C. and Pritchard for Mr. Harper.

The following sections of Parliament and cases were relied upon in the argument and referred to in the judgment:—

3 & 4 Vict. c. 65, s. 6.—The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever for necessities supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas when the necessities were furnished in respect of which such claim is made.

Admiralty Court Act 1861 (24 Vict. c. 10), s. 4.—The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the court.

Sect. 5.—The High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.

The Ocean, 2 W. Rob. 368;

The Wataga, Swab. 166;

The N. R. Gosfabrick, Swab. 344;

Beldon v. Campbell, 6 Ex. 892;

The Sophia, 1 W. Rob. 368;

The Prince George, 4 Moo. P. C. C. 25;

The Edmond, 1 Lush. 66; 2 L. T. Rep. N. S. 192, 394, 521.

Dr. LUSHINGTON.—The ship proceeded against belongs to Monte Video. She had been engaged in trade in the Mauritius and the East Indies, and on her voyage to this country put (from whatever cause) into

Malaga. Bottomry bonds were executed while the ship was in the East, and large expenses were subsequently incurred at Malaga, for repairs, refitting, and for landing and reshipping the cargo. On the 2nd July 1861 a cause of bottomry was instituted against the ship and freight, and on the 18th July a cause of necessities was instituted. The proceedings went on in the bottomry suit, and the ship was sold, and the proceeds, amounting to 2520*l*., were brought into the registry. No appearance was given on behalf of the owners; and in truth the question at present raised is, which of the two parties, the bottomry bondholders or the claimants for necessities, shall be entitled to the proceeds in the registry. The ship has been sold at the instance of the bottomry bondholder. The court never decrees such sales until it has satisfied itself by perusal of the bond that it is *prima facie* valid; that it is duly executed, and with maritime risk. True it is that a bond *prima facie* valid may be proved invalid in law; but if it is apparently regular and not opposed by owners of ship, freight, or cargo, the court pronounces for it, and decrees payment out of the proceeds if they have been brought into the registry. It appears to me quite clear that in this case the bottomry bondholder had *prima facie* a title which has not been questioned by ship, freight, or cargo. Then if this is so, who has a right to deny or question the title of the bottomry bondholder? To this I think the answer is, every person who can clearly show that he has an interest in the proceeds, an interest to which the claim of the bottomry bondholder is adverse. There might be many such; for instance, a claim of a bottomry bondholder of a more recent date, a claim for wages or damage. Generally speaking, of course the deft. is the owner of the ship, or the freight, or the cargo, though no doubt, if they fail to defend, any person having clearly an interest might intervene. I am of opinion that in this case the bottomry bondholder having first commenced proceedings, and caused the ship to be sold, and the proceeds to be brought in, and having shown a *prima facie* title, which, unquestioned by the owner of the property, would have entitled him to payment out of the proceeds, has a right, before his title is questioned, to require that any person claiming an interest shall prove that interest before he is called upon to maintain and defend his own claim. I therefore think that it would have been competent to the bottomry bondholder in this case merely to have pleaded, "I have shown a *prima facie* title unquestioned by the owners; now you the claimant for necessities show your *prima facie* title before by proof of extrinsic circumstances you are permitted to question the validity of any bottomry bond." Indeed, I more than doubt even if this was necessary. I think that if the bottomry bondholder had been simply constituted a defendant, he having shown a *prima facie* case to be paid out of the proceeds, if the bond sued upon were not proved invalid by extrinsic circumstances, would have had a right to have called upon the claimant for necessities to have proved his case as if his claim had been opposed by the owner of the ship. Before any question as to the validity of the bottomry bond can be the subject of inquiry, I must decide whether the claimant for necessities can establish his case; and assuming he can, whether he is or is not entitled to priority of payment as against the bottomry bond. Assuming that the money advanced at Malaga was to defray the expense of repairs and articles correctly denominated necessities, and that such advance was the supplying of necessities within the meaning of the 3 & 4 Vict. c. 65, s. 6, has the court by virtue of that statute power to make the ship answerable for such advance? I think it impossible to maintain that the words "in the body of a county or upon the high seas" involve necessities furnished in a foreign port; nor do I see any expression

ADM.]

THE LLOYD'S, OTHERWISE SEA QUEEN—THE DANZIG.

[ADM.]

from which I could infer that a foreign port was included; and there are strong reasons for concluding that the Legislature never intended to legislate for necessities furnished in a foreign port. I think it manifest from the Act itself that British interests were contemplated. "Furnished within the body of a county." This expression directly points to a British interest; nor is that inference destroyed by the words added, "on the high seas," for it is notorious that on the coast of this kingdom necessities are constantly so furnished. I am of opinion that this case is not within the statute 3 & 4 Vict. c. 65. The next step to consider is, whether the court can entertain the claim under the statute of 1861; and the question is, whether the statute of 1861 applies to both foreign, British and British colonial ships, or to British and colonial ships only. The 5th section is in these words: "The Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs." At first sight this enactment would appear to embrace all ships British or foreign. But what is the meaning of the words, "elsewhere than in the port to which the ship belongs? Can these words have any meaning as regards foreign ships? What, if this section refers to foreign ships, can the British Parliament have meant by that exception? What would it matter, in a British view, whether the necessities were furnished in one foreign port or another? I can discover no reason. As regards British and colonial ships the reason for this exception is not very clear; I can do little more than conjecture that the reason is that such debts must have been contracted upon personal credit, and that the recovery therefore was more easy. Then follows the proviso that the court shall not have jurisdiction if the owner or part owner is domiciled in England or Wales. I cannot believe that the Legislature contemplated the very rare case of the foreign owner of a foreign ship being domiciled in England or Wales. I think that this proviso points to the owners of British and colonial ships, and having regard to the improbability of the British Parliament legislating for the transactions of foreigners in foreign ports, I must hold that the claimant for necessities cannot maintain his case under the 5th section of this statute. It is contended that, as part of the expenses incurred related to the repairing of the ship, the court has jurisdiction under the 4th section; and I admit that, *prima facie*, the words of it might include this case; but I am of opinion, looking to the whole of the statute, that it does not comprise the repair of foreign ships in foreign ports. In my judgment, the court has no jurisdiction under either statute to entertain a claim for necessities supplied to a foreign ship in a foreign port. But I may add, that if I had such jurisdiction I could not consider this a claim for necessities within the meaning of the Act. The necessities were supplied not by Mr. Harper, the plt., but by other persons. These persons were paid off by Messrs. Pablo, Parlade and Co.; and then Mr. Harper paid off Messrs. Pablo, Parlade and Co. Under these circumstances Mr. Harper could not make a claim as having supplied necessities. This is established by the cases quoted on behalf of the interveners.

—
 June 30 and July 10 and 11.

THE LLOYD'S, OTHERWISE SEA QUEEN.

Collision—Compulsory pilotage—Ship employed in the coasting trade—The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 379.

A foreign-going vessel casually employed in taking a cargo from Liverpool to London is not a "ship employed in the coasting trade of the United Kingdom," within the meaning of the Merchant Shipping

Act 1854, s. 379, and therefore while so employed is compellable to take a pilot.

This was a cause of damage brought by the brig *John Mowlem*, against the steamer *Lloyd's* (subsequently called the *Sea Queen*), in respect of a collision which took place in the Channel. The Court, assisted by Trinity Masters, was of opinion that the steamer was alone to blame for the collision, and the question now for the consideration of the court was, whether her owners were exonerated from blame by reason that a duly licensed pilot was on board and in charge of the vessel at the time of the collision, and that such pilot was taken on board under compulsion of law.

It appeared that the steamer having been built at Hartlepool, had made several foreign voyages, and on the occasion in question was on a voyage with a cargo from Liverpool to London, whence she was advertised to sail for Matamoras, and that off Dungeness, and prior to the collision, she had taken on board a duly licensed pilot, who was in charge at the time.

Brett, Q.C. and Clarkson appeared for the owners of the steamer, and in support of the compulsion. Deane, Q.C. and Lushington contra.

The following are the sections of Acts of Parliament and the cases relied upon in argument and referred to in the judgment:—

The Merchant Shipping Act 1854, s. 379.—"The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district and in the Trinity-house outport districts; that is to say, ships employed in the coastings of the United Kingdom. . . ."

52 Geo. 3, c. 29, ss. 2 & 34;

7 & 8 Vict. c. 112, s. 26;

8 & 9 Vict. c. 88, s. 13;

12 & 13 Vict. c. 29, s. 2;

13 & 14 Vict. c. 93, s. 9;

14 & 15 Vict. c. 96, s. 15.

The *Agricola*, 2 W. Rob. 10;

Davidson v. Mekibien, 3 Brod. & Bing. 112.

Dr. LUSHINGTON.—The question is, whether a vessel ordinarily occupied in foreign trade going from Liverpool to London in order to sail from London on such foreign trade without passengers, but having on board a cargo shipped at Liverpool and deliverable at London, is by reason of that cargo to be held "a ship employed in the coasting trade of the United Kingdom" within the meaning of the 379th section of the Merchant Shipping Act, and as such to be exempt from the rule of compulsory pilotage. I have already decided in *The Agricola*, 2 W. Rob. 10, that a vessel making a similar voyage without a cargo and in ballast is not a ship employed in the coasting trade. I do not see how the fact that a vessel has a cargo on board should make any difference. Are the master and crew because they have a cargo more likely to be competent to navigate the vessel themselves without the aid of a qualified pilot? I am of opinion therefore that the *Sea Queen* was not "a ship employed in the coasting trade," that she was compellable to take a pilot, and that she cannot be made answerable for the damages occasioned by the fault of the pilot in charge of the vessel at the time of the collision.

—
 Tuesday, July 14.

THE DANZIG.

Non-delivery of part of cargo—Jurisdiction—Admiralty Court Act 1861, s. 6.

Subject to the other conditions set forth in the Admiralty Court Act 1861, s. 6, the High Court of Admiralty has, by that section, jurisdiction in a claim for non-delivery of part of cargo shipped on board a vessel that has arrived in this country.

This was an action against the *Danzig* and her owners by the consignees of a cargo of timber shipped

on board the *Danzig* at the port of Danzig for delivery at Hull. There had been, as alleged by the plts., a short delivery as to part of the cargo comprised in the bill of lading.

The answer pleaded, amongst other matters, that if there had been short delivery, the goods, in respect of which the claim was made, had not been "carried into a port in England or Wales" within the meaning of the Admiralty Court Act 1861, s. 6, and that the court had therefore no jurisdiction.

Lopes, for the plts., moved to expunge so much of the answer (the 4th article) as contained the above-mentioned averment.

F. Lushington for the defts. in support of the averment. Dr. LUSHINGTON.—The construction claimed by the defts. would, in the majority of cases, denude the statutory provision of its efficacy. I think that the remedy given by this section against a vessel, the owner of which is not domiciled in England or Wales, is open to a consignee in the case of his goods not being duly delivered, subject only to this condition, that the ship in which the goods were agreed to be carried, and on which they were shipped, reaches an English port without the goods having been transhipped. In the case of the *Ironides* this condition was not satisfied. The 4th article of the defts.'s answer must be expunged.

July 14 and 21.

THE ROBERT POW.

Misconduct of steam-tug—Consequential damage to vessel in tow—Jurisdiction.

Through the misconduct of a steam-tug the vessel towed got aground and was damaged:

Held, that the High Court of Admiralty had no jurisdiction, in a suit brought by the owners of the vessel towed, against the owners of the steam-tug, in respect of such damage.

The petition in this cause alleged that on the 13th May 1863, the steam-tug *Robert Pow* was engaged to tow the barque *Ilma* to Shields, and thence to dock; that the barque had a licensed pilot on board, that his directions were neglected or disregarded by the master of the steam-tug, and that in consequence thereof the barque got aground in the Tyne, and suffered the damage in respect of which the cause had been instituted.

Clarkson, for defts., moved to reject the petition.—The court's jurisdiction, if any, is given by 3 & 4 Vict. c. 65, s. 6, or the Admiralty Court Act 1861, but neither of these enactments contemplates the present case.

Lushington in support of the petition.—A steam-tug is liable to the vessel in tow for damage occasioned by the vessel to any other ship:

The Malvina, 6 L. T. Rep. N. S. 369;

The Julia, 1 Lush. 224.

The owners of a tug may sue in this court for towage, and it would therefore be inequitable not to allow a corresponding right to the owners of the vessel towed to sue in respect of any misconduct of the steam-tug in performing the services for which she has a right of action in this court.

Dr. LUSHINGTON.—The court could have no jurisdiction in this matter except by the statute; and I am of opinion that none is conferred by either of the statutes on which reliance has been placed. The expression in the 3 & 4 Vict. c. 65, s. 6, "damages received by any ship," and the expression in the 24 Vict. c. 10, s. 7, "damage done by any ship," each refer to damage the result of collision with another vessel. Here there was no collision, and the expression in the former Act, "claims in the nature of towage," means claims for towage rendered, not claims by the ship towed against the tug and her owner for breach of contract. I dismiss this petition with costs.

DIGEST OF MARITIME LAW CASES (EXCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from p. 119.)

[N.B.—The LAW TIMES REPORTS, N.S., will give all the Maritime Law Cases decided from Michaelmas Term 1859. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1859. A Digest of the Salvage Cases during the same period is appearing in the LAW TIMES.]

SHIPOWNER (continued.)

2117. Shipowner held liable for necessary materials for repairs done to the rigging at Bristol by orders of the master of a ship belonging to Sunderland. Observations as to right of suing owner instead of master. Report of *Frost v. Oliver* in the *Law Times*, cited by Mr. Crosby in argument: (*Moore v. Cooper*, Bristol C. C., Dec. 8, 1854, *Shipping Gazette*.)

2118. Shipowner in Liverpool held liable for the expense incurred by the master of a ship at San Francisco in nitting her up and furnishing stores, &c., in the reasonable expectation of her being employed to carry passengers. Argument by Watson, Q.C. for plaintiff. *Shoe, Serjt.* for defendant. Before Jervis, C. J. and a special jury: (*The Mary Holland*; *Mervin v. Winch*, C. P., Feb. 21, 1855, *Shipping Gazette*.)

2119. Shipowner held not liable for refreshments supplied on shore to some of the crew of a ship working at her as labourers after her arrival in the West India Dock, although the master had given a written order for the supply, and signed the account for the owners to pay. Argument by Mr. Chandler for defendant: (*Nind v. Hutchinson*, C. S. C., June 7, 1855, *Shipping Gazette*.)

2120. To render the owner of a ship, after he has sold her and retained a qualified possession as a security for the purchase-money, liable for articles supplied by orders of the master, it must be shown that he was acting as the master of that owner: (*Frost v. Oliver*, Q. B., June 24, 1853; and 1 E. & B. 301; *Mitcheson v. Oliver*, E. C., July 2, 1855; & E. & B. 419. See Macleachlan on the Law of Merchant Shipping, 103.)

2121. Shipowner held not liable for advances made by an agent, without necessity, to the master at a port in this country, where an accredited agent of the shipowner had previously supplied the ship with all that she required: (*The Cockermouth Castle*; *Hoseli v. Walton*, Cardiff C. C., Aug. 25, 1855, *Shipping Gazette*.)

2122. Mere registration as owner of a ship held not to render the person so registered liable for repairs. Case ruled by decision of the Ex. Ch. in *Frost v. Oliver*, 2 E. & B. 260, which was considered to involve the same principle: (*Hackwood v. Lyall*, C. P., Nov. 20, 1855, *Shipping Gazette*; 17 C. B. 124; Macleachlan on the Law of Merchant Shipping, 103.)

2123. After a ship was sold and the purchaser registered as owner, the master, ignorant of the sale of the ship, and acting, as he supposed, for the former owners, obtained supplies which were used for the ship. Held, on the authority of *Frost v. Oliver*, 2 E. & B. 260, cited by Watson, Q.C., that the purchaser was not liable for the debt so contracted by the captain. Authorities cited by C. Pollock in argument: *The Cynthia*, 16 Jur. 749; *The Eliza Cornish*, 17 Jur. 73; Abbott on Shipping, 8th edit. 124; (*The Arabias*; *Mackenzie, &c. v. Pooley*, C. E., Jan. 18 of Feb. 1, 1856, W. Rep. 264.)

2124. Question relative to liability of shipowner for cost of stores supplied by orders of the master of a ship hired for a season by the master himself under a special contract: (American case: *Baker v. Huckins*, Supreme Judicial Court of Massachusetts, March Term, 1856, 9 M. L. R. 43.)

2125. Shipowner resident at Bideford, held not liable for stores supplied to the vessel at Newport by order of the master (who was a part owner) without communicating with his co-owner. Observations as to the recent decisions on this subject: (*The Eliza Jane*; *Moore v. Beard*, Newport C. C., *Shipping Gazette*, May 21, 1856.)

2126. Verdict against shipowner for reimbursement of cash advanced to master to pay a small shipwright's bill and obtain supplies to enable a ship laden with corn to sail from Odessa, although money had been previously sent out by the owner to furnish all that was required, and the captain had not kept correct accounts: (*The Alliance*; *Swan v. Wilkinson*, Secondaries Court, June 25, 1856, *Shipping Gazette*.)

2127. Non-liability of owners for supplies ordered by the master of a ship who was employed to work her on the principle of the "clear fifth," allowing the owner 20% for insuring the ship, and accounting to the owner every three months for the earnings of the vessel according to the above ratio: (*The Deborah*; *Johnson v. Ward*, C. E., Dec. 2, 1856, *Shipping Gazette*.)

2128. Shipowner's liability for repairs ordered by ship's husband, to whom he had sold a moiety of the ship: (*Preston v. Tamplin*, Harrison's Digest, 194 (1857); 2 H. & N. 363; 26 L. J. 346. Ex.; s.c. 3 Jur. N.S. 1247.)

2129. In case of bankruptcy of agents who had granted a bill for ship's stores and not paid it; verdict against ship-

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Ex parte SMITH, re SMITH AND LAXTON.

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owner for the amount: (*The Ken; Scott, &c. v. De Witt, C.P., April 23, 1857, Shipping Gazette.*)

2130. A ship's husband, being part owner, gave a bill to sailmakers for repairs done, and supplies furnished with authority of the other owners, and afterwards became bankrupt: verdict against shipowner for amount: (*Hunt and others v. Waters and others, Northern Circuit, Liverpool, March 25, 1858, Shipping Gazette.*)

2131. Shipowner's liability for stores or repairs. He must be sued on his own contract. Registration merely does not make him liable: (ships *Mersey and Bangalore; Jones v. Darbyshire, Northern Circuit, Liverpool, April 6, 1858, Shipping Gazette. See No. 2120 and 2132.*)

IV. LIABILITY FOR LOSS OR DAMAGE TO, OR SALE OF CARGO, &c.

2132. Verdict against shipowner for loss on sale of goods which were shipped by mistake in a vessel bound to Calcutta, instead of by one bound to Canton, the master of the latter ship having erroneously granted a bill of lading for the goods, though not on board: (*Evans and Co. v. Nicholson, C.E., Feb. 17, 1842. Rule for new trial refused, C.E., Nov. 11, 1842, Shipping Gazette.*)

2133. Shipowner held liable for loss of money abstracted from a box for which a bill of lading had been granted: (*Hyde v. Green, &c., Q. B., Shipping Gazette, July 15, 1845.*)

2134. Liability of shipowners for goods consumed by fire on board a ship at New York. Value to be made good. (American case: (*Lakeman, &c. v. Grinnell, &c., New York City Superior Court, Shipping Gazette, 1851.*))

2135. Verdict against shipowner for damage to wheat, where the ship had a very greatly protruded voyage, not being sufficiently manned, and the captain omitted to renew at an intermediate port certain plank which was found to be decayed. Question relative to the impropriety of keeping damaged cargo on board until payment of freight be made. Brougham's Selection of Leg-*Maxima*, p. 171, cited on behalf of defendant: (*The Conqueror, Zistina v. Knight, Galway Assizes, March 26, 1854, Shipping Gazette.*)

2136. Shipowner held liable beyond the value of the ship and freight for loss by wrongful sale of the cargo by the master at an intermediate port, to pay for repairs to the ship. Proceeds of the cargo received and held by the shipowner with a view to deduct freight: (*The Jesse Miller; Heydorn v. Bibby, C.E., March 1, 1855, Shipping Gazette.*)

2137. Shipowners held liable for loss on goods shipped at Marseilles for Hong Kong, arriving on a month later than the time stipulated (and so being out of season), through the vessel into which they should have been transhipped at Bombay being filled up with opium: (*Marah v. Pentasular and Oriental Steam Navigation Company, Supreme Court, Hong Kong, Aug. 3, 1855, Shipping Gazette.*)

2138. Shipowner held liable for damage to sugar from Barbadoes caused by being insufficiently dunnaged. Evidence as to height of dunnage requisite: (*The Grecian; Boyd v. Heyn, Antrim County Record Court, Shipping Gazette, Aug. 8, 1855.*)

(To be continued.)

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Aug. 1 and 18.

(Before Mr. Commissioner FANE.)

Ex parte SMITH, re SMITH AND LAXTON.

Disputed adjudication—Petitioning creditor's debt—Composition-deed.

S. and L. dissolved partnership in Nov. 1862, being largely indebted to several persons. In June 1863 a trader-debtor summons was issued against them by a joint creditor of the firm, in respect of which they filed an admission of the debt on the 16th. On the 22nd, S. executed a composition-deed under the 192nd section of the Bankruptcy Act 1861, and, having obtained the requisite amount of assents, duly registered the deed. On the 23rd a similar deed was executed by L., which was also duly registered.

S. and L. having neglected to pay, secure, or compound for the debt admitted to be due from them under the trader-debtor summons, committed an act of bankruptcy, which was complete on the 24th June, and were adjudicated bankrupts on the 14th July:

Held, that the petitioning creditor's debt was barred by the certificate of due registration, and insufficient therefore to support the adjudication.

Disputed adjudication. This was an application on behalf of John Benjamin Smith and Thomas Laxton,

who lately carried on the business of wine and spirit merchants under the style or firm of Smith and Laxton, disputing the adjudication made against them on the 14th July 1863, upon the ground that at the time of filing the petition there was no sufficient petitioning creditor's debt. The circumstances were as follows:—

Smith and Laxton dissolved the partnership which they had previously carried on on the 12th Nov. 1862.

On the 22nd June 1863 Laxton executed a deed of composition and release, which was duly registered under the 192nd section of the Bankruptcy Act 1861, and on the following day Smith executed a precisely similar deed, which was also duly registered.

*On the 14th July 1863 Smith and Laxton were adjudicated bankrupts upon the petition of Messrs. Cockburn and Co., who were creditors of the firm of Smith and Laxton at the time the deeds were executed, for goods sold and delivered to the firm, and in respect of which they had given a bill of exchange for 195*l.* 3*s.*, dated the 10th Nov. 1862, and drawn by Cockburn and Co. upon and accepted by Smith and Laxton.*

A trader-debtor summons had been previously issued against the debtors, who at the hearing on the 16th June previously admitted the debt, but neglected to pay within the seven days prescribed by the statute, whereby they committed an act of bankruptcy upon the eighth day, which would be on the 24th, and upon this act of bankruptcy the petition for adjudication was presented.(a)

The two deeds being identical, it will be sufficient to state the provisions of one only, which was as follows:—

*"This indenture, made the 23rd day of June 1863, between John Benjamin Smith, of, &c., of the first part; the several persons whose names and seals are hereunto subscribed and set in the schedule hereunder written, being severally creditors in their own right, or in copartnership of the said J. B. Smith, of the second part; and all other (if any) the creditors of the said J. B. Smith, of the third part; whereas, the said J. B. Smith is indebted to the said several persons parties hereto of the second part, and to other persons in divers sums of money, and being unable to pay his said debts in full, has proposed to pay unto the whole of his creditors a composition of 3*d.* in the one pound on the amount of their respective debts; and whereas, the said several persons whose names and seals are hereunto subscribed and set have agreed to accept the said composition, and to release the said J. B. Smith from their respective debts, and from all other sums of money (if any) which are now due and owing from him to them respectively, or to them and their respective partners. Now, this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the composition of 3*d.* in the one pound on the amount of their respective debts, as mentioned in the said schedule, in hand well and truly paid by the said J. B. Smith to the said several persons parties hereto of the second part respectively, the receipt whereof they do hereby respectively admit and acknowledge, and of and from the payment thereof do, and each of them doth, hereby respectively acquit, release and for ever discharge the said J. B. Smith, his heirs, executors and administrators; and also in consideration of the covenant hereinafter contained by or on the part of the said J. B. Smith, they, the said parties hereto of the second part, for themselves severally and respectively, and for their several and re-*

(a) Order of dates:—

Dissolution of partnership	12th Nov. 1862
Trader-debtor summons and admission of debt filed	16th June 1863
Deed of composition by Laxton	22nd " "
Do. do. by Smith	23rd " "
Act of bankruptcy by both in not paying, &c.	24th " "
Petition for adjudication	14th July "
Adjudication	" " "

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Ex parte HARRIS, re HARRIS.

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spective executors, administrators, partners and assigns, but every of them, so far only as concerns his own respective acts and deeds, and the respective acts and deeds of his own respective executors, administrators, partners and assigns, their and every of their executors and administrators, and not further or otherwise, do, and each of them doth, hereby acquit, release and for ever discharge the said J. B. Smith, his heirs, executors and administrators, and his and their present and future lands, tenements, goods, chattels and effects, of and from the payment of the sums of money set opposite to their respective names, and the names of their respective firms, in the said schedule, and of and from all other sums of money (if any) which at the time of the sealing and delivery of these presents, the same being sealed and delivered on and after the date of these presents by the said parties hereto of the second part, is or are due or owing by the said J. B. Smith to them respectively, or to them or their respective partners, and of and from all and all manner of actions, suits, cause and causes of action, debts, accounts, bonds, covenants, judgments, executions, claims and demands whatsoever, both at law and in equity, which they the said parties hereto of the second part, or any of them, their or any of their heirs, executors, administrators, partners, or assigns, or any person or persons claiming by, from, through, under, or in trust for them or any of them, now have or hath, or hereafter can, shall, or may have, claim, or demand against the said J. B. Smith, his executors or administrators, for or on account of any such sum or sums of money as aforesaid, or any cause, matter, or thing in any wise relating thereto. And the said J. B. Smith, for and in consideration of the premises, doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said several parties hereto of the second and third parts, and their respective executors, administrators and assigns, that he the said J. B. Smith, his executors or administrators, shall and will upon demand well and truly pay unto all and singular the existing creditors of him the said J. B. Smith, including the said parties hereto of the second part, unless the same shall have been paid to them on the day of the date of these presents, or their respective executors, administrators, or assigns, a composition of threepence in the one pound on the amount of the respective debts or sums of money now due and owing by him, either alone or jointly with any other person or persons to them respectively. In witness, &c."

The schedule referred to in the foregoing deed contained a list of twenty-two creditors, with the amounts respectively due to them, and the signatures of twelve of those creditors as executing the deed.

Messrs. Cockburn and Co. were not included in the schedule to the deed, and did not execute or assent to either of the deeds. They were, however, included in the schedule to the deed executed by Laxton, and it was admitted that each deed was duly executed by the majority in number and value of the creditors of each debtor, and was duly registered.

Sargood appeared for Smith, and insisted that the deeds having been duly registered, the dissentient creditors were bound. He cited

Ex parte Castleton, 6 L. T. Rep. N. S. 695; s. c. 31 L. J. 705, Ch.; and

Ex parte Walker, re Hardy, 6 L. T. Rep. N. S. 631, decided by the Lords Justices, as conclusive on the point.

Maynard (solicitor), for the petitioning creditors, contended that the petitioning creditors' debt being a joint debt of the firm of Smith and Laxton, and not against Smith or Laxton individually, it could not be said to be satisfied by the separate deed of each debtor proposing to pay to his private or separate creditors a composition of 3d. in the pound. The

petitioning creditors were the creditors of the partnership, and had a right to follow the joint assets by process of bankruptcy.

Sargood in reply.

Aug. 18.—Mr. Commissioner FANE now delivered the following judgment:—On the 14th July 1863 Messrs. Cockburn and Co., wine merchants, petitioned this court that Smith and Laxton should be declared bankrupts. The usual evidence was adduced, and on the same 14th July Mr. Commissioner Holroyd adjudicated them bankrupts. On the 16th Smith gave notice to the registrar that he should dispute the adjudication against him. On the same day Laxton gave a similar notice. On the 23rd June preceding, Smith had executed a deed by which, after reciting that he was indebted to certain persons therein named, and had offered to pay a composition of 3d. in the pound upon the amount of the debts, and that the persons whose names were subscribed to the deed had agreed to accept the composition and release Smith, it was witnessed by the deed, that in consideration of the 3d. in the pound being paid to the creditors, they discharged Smith from his debts to them. The deed was executed by a sufficient number of creditors, and was duly registered on the 30th June last. Similar proceedings took place as regarded Laxton. Under these circumstances the further administration of the affairs of Smith and of Laxton must be effected by those who are entitled to act under the deeds of composition and release. I therefore annul the adjudication of bankruptcy against them.

Adjudication annulled.

Monday, Oct. 12.

(Before Mr. Commissioner GOULBURN.)

Ex parte HARRIS, re HARRIS.

Practice—Annuling adjudication—Trust-deed—Evidence.

Where the evidence in support of any application before the court is upon affidavit, the evidence in reply should be by affidavit also.

A debtor who seeks to protect himself from proceedings in bankruptcy by means of a deed executed by him, and registered under the deed clauses of the Bankruptcy Act 1861, ought to furnish the names and addresses of his creditors, to enable a dissenting creditor to ascertain that all the conditions required by the 192nd section and general orders have been complied with. The production of the chief registrar's certificate is prima facie evidence only, and consequently insufficient for the purpose where the validity of the deed is impeached.

Annuling adjudication. This was an application on behalf of the bankrupt to annul an adjudication of bankruptcy made against him on the 17th Sept. 1863, upon the petition of Messrs. Wiseman, under these circumstances:—On the 5th Sept. Harris executed a deed under the 192nd section of the Bankruptcy Act 1861, whereby he purported to convey all his property to a trustee for the benefit of his creditors.

The deed purported to be executed by or on behalf of eight creditors, the execution by two of such creditors being as follows:—

Creditors' names and Addresses	Amount due.	Deed.	Witness.
Pro Joseph Acworth J. Solomonson ...	£120	(L.S.)	M. J. Nordon.
Pro Saml. Solomonson J. Solomonson ...	£49 10s.	(L.S.)	M. J. Nordon.

From the affidavits filed in support of the application, it appeared that the deed was executed by or on behalf of eight creditors out of fourteen, who represented more than three-fourths in value of all the creditors whose debts respectively amounted to 10l. and upwards, and that immediately after the execution of the deed by the bankrupt, the trustee took possession of all the

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Re H. L. SMITH AND P. SMITH, *ex parte* LLOYD AND ANOTHER.

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property comprised therein. It was further stated, that on the 8th Sept. a meeting of creditors was held at the office of Messrs. Honey and Humphries, accountants, which was attended by the solicitor of the Messrs. Wiseman, and it being stated that Harris had executed a deed for the benefit of his creditors, the creditors present expressed a wish that the deed should be immediately registered. Accordingly, on the 10th Sept., the deed was left at the office of the chief registrar for registration, and having been advertised in the *London Gazette* of the 11th, was duly registered and the certificate of registration obtained.

On the 9th Sept. Messrs. Wiseman presented their petition for adjudication against Harris, the act of bankruptcy being the execution of the above deed.

It was further stated in evidence that the eight creditors who assented to the deed signed it in the presence of J. Nordon, clerk to Mr. Padmore, the solicitor, who prepared the deed.

Dowse appeared for B. Harris in support of the application to annul. The adjudication was made on the 17th Sept., several days after the deed had been fully registered.

Sargood appeared, for Messrs. Wiseman, to oppose the application.—It did not appear that all the conditions of the 192nd section of the Bankruptcy Act 1861 had been complied with, or that the debtor had delivered to the chief registrar a full account of his debts, with an affidavit verifying the same, as required by the general order of May 22, 1862. In *Ex parte Maas*, 6 L. T. Rep. N. S. 337, Mr. Commissioner Holroyd had held that the onus of proof of these matters lay with the debtor; this ought to be shown, and the certificate of the chief registrar was *prima facie* evidence only of those facts. He proposed to cross-examine the parties who had made affidavits in the matter. [THE COMMISSIONER.—Where a party files a petition which he supports by affidavit, the usual course is to take the evidence by affidavit.] The present was a totally different application, and there would be no opportunity of shaking the evidence in support, except by cross-examination of the witnesses, who could not be compelled to make affidavits in opposition to that which they had sworn; oral evidence, therefore, should be admitted. [THE COMMISSIONER.—It appears to me that this course of proceeding would be very inconvenient. It would not be right to mix up the evidence by affidavit with oral testimony. I think the evidence should be taken by affidavit, and that I ought not to deviate from the ordinary practice of the court. I will give you whatever time you require to answer the affidavits filed by the other side, and the case may stand over to enable you to do so.] Then a difficulty would arise, because we could not compel a man to make an affidavit if he did not choose.

Mr. Commissioner GOULBURN.—I will not introduce a rule which appears to me fraught with the greatest possible mischief. By the Act of Parliament we are empowered to take evidence by way of deposition or by affidavit, but not partly by one mode and partly by the other. If the affidavits filed are properly open to reply, the proper course is to give the creditor an opportunity to reply to them, and the court is ready to grant that opportunity.

Sargood would not avail himself of the opportunity offered, but would base his opposition upon the facts as they appeared upon the affidavits already filed, and it would seem that the affidavits were insufficient to support the application, inasmuch as it was sworn that the witness saw all the eight assenting creditors sign the deed in his presence, whereas the fact was, that two of them executed it by proxy.

Dowse asked leave to file fresh affidavits.

THE COMMISSIONER did not think he ought to enable the debtor to contradict his own evidence.

Dowse in reply upon the case.

Mr. Commissioner GOULBURN.—I think the proper course will be, unless some very special reason is assigned, for the court to take the evidence either by affidavit or by way of deposition, as may be most convenient. This deed purports to be a one in which all the requisites of the 192nd section of the Act of Parliament to bind all the creditors have been observed. But I do not think that the certificate of the chief registrar is sufficient. In the language of Holroyd, C., in *Ex parte Maas*, 'I think that the debtor ought to furnish the names and addresses of the different creditors, and that he ought to be examined for this purpose, and also as to the securities given to them respectively. I do not know whether any securities have been given in this case, but if so that information should be supplied. The question appears to me to come to this:—What evidence to be adduced will the court consider satisfactory? With regard to the requisite amount of evidence, the point is, whether I am satisfied that the deed has been duly entered into and executed, or that the creditors did so execute this deed; and if I am satisfied of these facts, I may, if I think fit, annul the bankruptcy. Upon looking at the evidence I am not satisfied that these creditors did sign, for it appears that these two names of Joseph Acworth and Samuel Solomons are written down as the signatures of the parties themselves, and the witness has ventured to swear that eight out of fourteen creditors have signed the deed. I am not satisfied that they did so sign it. Therefore, upon the ground that upon the evidence before me I am not satisfied that this deed has been duly executed, or that the provisions of the Act of Parliament have been complied with, I shall refuse this application.

Application refused.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Saturday, Sept. '19.

(Before Mr. Commissioner FORBLAKQUE.)

Re H. L. SMITH AND P. SMITH, *ex parte* LLOYD AND ANOTHER.

Deed of assignment—Sect. 192 et seq., Bankruptcy Act 1861—General order of the 22nd May 1862—Partnership debts—Affidavit of debtor—Absence of one partner.

A. and B. were in partnership. A. lived in London, and B. in the West Indies. Both the parties had signed a deed under sect. 192 of the Bankruptcy Act 1861. A. alone had made an affidavit of the truth of the account of their debts, as required by the general order of May 1862. The signatures to the deed were attested by a gentleman in the West Indies, who described himself as conveyancer and attorney, but who was not on the rolls of the courts of England.

The registrar refused to receive the deed unless the commissioner ordered him to do so, not being in accordance with the rules made under the new Act of May 1862:

Held, that, ex necessitate, the attestation of the deed was sufficient, and, under the circumstances, the affidavit of one partner alone was sufficient.

The 192nd section of the Bankruptcy Act 1861, which prescribes the conditions upon which trust-deeds for the benefit of creditors shall be valid, enacts, by the 5th condition, that, "Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor whose debts amount to 10*l.* or upwards have in writing assented to or approved of such deed or instrument, and also stating

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[IRELAND.]

the amount in value of the property and credit of the debtor comprised in such deed."

Lucas moved, on behalf of the trustees under a deed of assignment executed by these debtors for the benefit of creditors, for an order to dispense with a joint affidavit by the debtors verifying the account of their debts, as required by the general order of the 22nd May 1862, on the ground of the absence out of the jurisdiction of the court of one of the debtors; also to further dispense with a separate affidavit from each debtor as to there being no separate debts due by either of the said debtors, and that the deed should be registered as to the execution by one debtor being attested by a practising solicitor in the island of Trinidad, in the West Indies, and not upon the English roll.

The facts were these:—The debtors H. L. Smith and P. Smith were brothers, who traded as merchants in the city of London, the business of which was conducted by the debtor H. L. Smith, and also in the town of Port of Spain, in the island of Trinidad, in the West Indies, the business of which was conducted by P. Smith, the other debtor. The debtor H. L. Smith visited Trinidad in the month of February last, and remained there until the month of May following, upon the business of his firm, and during that time he frequently and carefully inspected the partnership books, and from such inspection and information which he received from his copartner he learnt the liabilities of the Trinidad house, and was in a position to verify the partnership account required by the general order of the 22nd May 1862, on behalf of himself and co-debtor. Mr. H. L. Smith deposed that Mr. P. Smith had no separate debts which respectively amounted to 10*l.* or upwards, and that Francis Damian was a duly practising solicitor in the island of Trinidad, in the West Indies.

The learned counsel submitted that the 192nd section of the Bankruptcy Act 1861 pointed out what should be required before a deed could be registered, and that the general order of the 22nd May 1862 was something additional, which could not be insisted upon. He did not, however, intend to stand by that objection, as there was a case of *Re Springate*, decided by Mr. Commissioner Holroyd on the 10th Dec. last, where, on account of the debtor's indisposition, that learned commissioner ordered the chief registrar to be at liberty to register the deed, upon the account being verified by the affidavit of the debtor's attorney and his clerk, as appeared by their affidavit, and that the present was a much stronger case, viz. one partner, who knew all the circumstances of the case, to verify the account on behalf of himself and co-partner, and he read, in support of his application, an affidavit by the debtor Mr. H. L. Smith. With respect to separate debts, he submitted that all the order required was a just and faithful account; and surely, the affidavit of one debtor as to there being no separate debts, to the best of his knowledge and belief, which respectively amount to 10*l.* or upwards, due either by himself or his co-debtor, was sufficient, and he read an affidavit made by the debtor Mr. H. L. Smith to this effect. As to the execution by one debtor, residing out of the jurisdiction of this court, being attested by a solicitor not upon the English roll, it was, he apprehended, a compliance with the Act of Parliament, as it was totally impossible to have solicitors upon the English roll in all parts of the world.

Mr. Commissioner FONBLANQUE made the following order:—Upon hearing Mr. Lucas, counsel for the trustees, and upon reading the two several affidavits of Hamel Lewis Smith, both sworn this 18th Sept. 1863, and the account therein referred to, I do order that the chief registrar be at liberty to register the said deed upon the verification thereof by the said Hamel Lewis Smith as appearing by his said affidavits, and without requiring the account of the debts to be

verified by the oath of the above-named Philip Smith, and that the registrar also be at liberty to receive the affidavit of the said Hamel Lewis Smith as to there being no separate debts due by either of the said debtors, and that the deed may be received as attested by Francis Damian, of Trinidad.

Solicitors, H. and F. Chester, Newington Butts.

Tuesday, Oct. 13.

(Before Mr. Commissioner GOULBURN.)

Re J. SEWELL.

Preparation of accounts—Power to grant assistance to bankrupt to make out a statement under special circumstances—Sect. 143 of Bankruptcy Act 1861. Where creditors have refused an allowance to the bankrupt, and there are complicated accounts, the court will nominate an accountant to assist the official assignee and the bankrupt in the preparation of the statement of accounts, at the expense of the estate.

Bagley applied on behalf of the bankrupt for the appointment of an accountant to assist in the preparation of the accounts.

Harvey Linklater, for the assignee, concurred in the application.

At the first meeting of creditors there had been a resolution to appoint a manager, but no allowance had been granted to the bankrupt. There were complicated accounts, and counsel submitted that it was only reasonable under these circumstances that the bankrupt should have assistance.

Mr. Commissioner GOULBURN referred to sect. 143 of the B. A. 1861, which provides that, if it shall in any case appear to the court that there are special circumstances rendering it necessary that the bankrupt should be assisted in the preparation of his statement of accounts by some person other than the official assignee, the court may nominate some such person to assist the bankrupt in that behalf, and may allow to such person, out of the bankrupt's estate, such remuneration as to the court, upon the taxation of such person's bill of costs, shall seem just. He had always held that, where there were complicated accounts, and creditors had refused the bankrupt any allowance, that latter fact was always a feature to be taken into consideration on applications of this nature. Under the circumstances, he should hold that there were special circumstances rendering it necessary that the bankrupt should be assisted by an accountant; therefore the assignee and the bankrupt would agree and name an accountant, and if they could not agree he would name one.

[*Note*.—In *Re Woodbridge* (Oct. 8, 1863), a similar application was made for the nomination of an accountant to assist in the preparation of additional accounts. There were deficiencies to be accounted for to the amount of 3500*l.*, and although the bankrupt had brought a sum of 2000*l.* into court, no allowance had been granted to him by the creditors. Mr. Commissioner Goulburn deprecated the conduct of creditors in giving no allowance to the bankrupt, and nominated an accountant for the purpose of aiding in the preparation of the accounts.]

Ireland. (a)

COURT OF EXCHEQUER.

Reported by OLIVER J. BURKE, Esq., Barrister-at-Law.

M'CULLAGH v. M'GARRY.

Case stated by the justices—Weights and Measures Act, 25 & 26 Vict. c. 76—Practice—Right to begin—Order of counsel's address.

W. M. purchased a given weight of flax from M. C.

(a) From the Irish Jurist by permission.

IRELAND.]

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for 14l. 17s. 6d., and only paid therefor a sum of 14l. 14s. 6d., being three shillings less than he ought to have paid for same, and having declined to pay the said sum of 14l. 17s. 6d., he was summoned to appear before the justices of the peace of the B. Petty Sessions District, under the 25 & 26 Vict. c. 75 (*Weights and Measures Amendment Act*). The justices of said district, having heard the complaint, fined said W. M. ten shillings and costs 1l., to be paid within one fortnight. From this sentence an appeal in the shape of a case stated was brought:

Held, that the conviction of justices was wrong, inasmuch as the Act was conversant with weights and measures alone, and not with the prices of the articles purchased:

Held, also, that in the arguments of cases stated for the opinion of the court by the justices, the junior counsel for the app. opens the argument.

Case for the opinion of the court from the justices of the Ballybay petty sessions district, co. Monaghan, stated, "that at a petty session held in and for the petty session district for Ballybay, in the county of Monaghan, on Monday the 16th Feb. 1863, before the undersigned justices of the peace acting in and for the said county of Monaghan, one William Magarry, the deft., was summoned before us, charged in and by a certain complaint, namely, that the said deft., having contracted with complainant for the purchase of a quantity of flax by weight, and the true weight of said flax having been ascertained pursuant to the *Weights and Measures (Ireland) Amendment Act 1862*, and said quantity so ascertained having been delivered by the complainant to the deft. as such purchaser, he, the said deft., under a certain pretext, claimed and made a deduction or allowance from said weight, same not being for the weight of any sack, bag, cask, firkin, or other covering of said flax, and deft. paid said complainant, James M'Cullagh, short, whereby the said deft. has incurred a penalty of 5l., on the 17th day of Jan. 1863, at Ballybay, in said county of Monaghan, and the said parties respectively being then present with their respective attorneys, the said complaint was duly heard before us, and upon such hearing an order was made to the following effect, viz., deft. to pay a fine of 10s. and costs 1l., to be paid by deft. within one fortnight. It appeared in evidence that William Magarry had purchased a quantity of flax at 8s. 6d. per stone from M'Cullagh, the complainant; that Magarry, when paying for the flax, paid 14l. 14s. 6d. instead of 14l. 17s. 6d., being a sum less than the sum he ought to have paid by three shillings, and that the deft. declined to pay the full sum on the ground that same was due for what was called storage, which was an old custom in that part of the country, though in point of fact there was no storage at all to claim allowance for."

Fraser was proceeding to open the argument for the app., when

Dowse, Q.C. interposed, and claimed the right to begin on behalf of the resp., insisting that such was the practice in the Q. B. and Ex. in England, although it is different in the C. P. in that country.

Fraser cited *Ree v. Brophy*, 9 I. C. L., App. xi., in which the rule is laid down by the Q. B. in Ireland, "that in the argument of cases stated for the opinion of the court by justices of the peace under the 20 & 21 Vict. c. 43, s. 2, counsel address the court in the same order as in law arguments. There the junior counsel for the app. opens the argument; then the junior on the other side opens the resp.'s case, and is followed by his senior. The senior counsel for the app. replies upon the whole case." [Pigott, C. B. said that the court would follow the rule laid down by the Q. B. in Ireland.]

Fraser for the app.—The conviction by the

magistrates was bad, inasmuch as the offence charged by the summons was that of making a deduction from the weight of the article sold; whilst the evidence set out in the case showed that the deduction was not from the weight, but from the price agreed to be paid for the article sold, and that such deduction from the price did not come within the provisions of the 13th section of the *Weights and Measures Act, 25 & 26 Vict. c. 76*, whereby it is enacted that every article sold by weight shall, if weighed, be weighed in full net standing beam; and for the purposes of every contract, bargain, sale, or dealing, the weight so ascertained shall be deemed the true weight of the article, and no deduction or allowance for tret or beamage, or any other account, or under any other name whatsoever, the weight of any sack, bag, cask, firkin, or other covering, in which such article may be alone excepted, shall be claimed or made by any purchaser on any pretext whatever, under a penalty of not exceeding 5l.; and the preamble to part second of the statute recites that it is expedient to abolish all local denomination of weights, and so prohibit improper deductions in weighing, and otherwise to regulate the mode of weighing articles sold: be it therefore enacted, &c. No provision is made by this statute as to the paying or deduction of payments, but is merely conversant with vendors selling by false weights, while the justices deal with the vendee paying from and deducting from such payment. This is a penal statute, and must be construed liberally.

MacMahon (with whom was *Dowse, Q.C.*).—This case, if it be not within the letter, is within the spirit of the statute, and every statute ought to be expounded according to the intent of its makers: (4 Inst. 330; Plowden, 497 a.) The mischief to be corrected by the statute must be considered: (Co. Lit. 246.) The *Weights and Measures Act* was passed for the purpose of protecting both buyers and sellers. In the construction of statutes the ends contemplated are to be considered: (Comyn's Dig., tit. "Parliament," 319.) And in *Verse v. Sampson*, Hardres, 208, 13 Car. 2, it is said that what is within the intention of an Act, though not comprehended within the express words of it, is equivalent to what is within the express words, and as strong; and as to penal statutes, equity makes no difference between a penal statute and all others: (*Heydin's case*, 3 Rep. 3; Hardres 206-8.) In the case of *Bywater v. Brandling*, 7 B. & C. 660, Lord Tenterden says, in construing Acts of Parliament we are to look not alone at the preambles, or at any particular clause, but, if we find any particular expression not so large and extensive in its import as those used in other parts of the Act, and if upon a view of the whole we can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expression, notwithstanding the phrase of less extensive import in the preamble, or any particular clause.

Pigott, C. B. (reads the preamble of the statute 25 & 26 Vict. c. 76, part 2nd, and also the 15th section of said 2nd part).—It is perfectly plain that the whole scope and tenor of the Act are conversant with the proper ascertainment of the weight of the article sold, and with nothing else. The Act contains ample provision for protecting the buyer from any deduction in weighing the article sold by the seller as to weights and measures, and deals with the manner that weight is to be accurately ascertained; but it leaves both buyer and seller perfectly free to contract, or to make any deduction whatever that might suit them in the price of the article sold; the conviction, therefore, of the magistrates cannot be sustained.

Conviction of the magistrates quashed accordingly.

IRELAND.] In the Goods of JOHN LINDLEY—HOWARD v. CHAFFER. HOWARD v. ROBINSON. [V.C. K.

COURT OF PROBATE.

Reported by W. R. MILLER, Esq., LL.D., Barrister-at-Law

In the Goods of JOHN LINDLEY, deceased, intestate

Survivorship—Presumption.

Where the father of the deceased had not been heard of for twenty-six years, and was believed to be long since dead, and the deceased died recently, the Court allowed administration to the son's goods to issue without extracting a grant to the father.

Jace moved, on behalf of Maria Banfield, the sister of the deceased, for a grant of letters of administration of the goods of the deceased, without first taking out a grant to the goods of his father. It appeared by the affidavit that George Lindley, the father, had emigrated to America twenty-six years ago, having left his wife and the deceased, their only child, behind him. He arrived at New York, and went thence to Florida, whence he corresponded with his wife regularly for six years; but then his letters ceased, and though several were written by his wife, she got no answer, and he never was heard of since. His last letter complained of his bad health, the result of yellow fever and ague. The deceased John Lindley was by trade a compositor, and when he was thirty-two years of age, he also went to America, chiefly to search after his father. He remained there six years and then returned to Dublin, without having found any trace of his father. The deceased John Lindley died on the 26th May last, intestate, without wife or child; his mother was dead. The applicant was one of the next of kin, and the assets were very small, only 58*l.* 19*s.* 6*d.* in a savings bank. In the Goods of Astell, 31 L. J. 38, Prob., a similar order was made.

KEATINGE, J.—I will make the order. Your client may swear to the best of her belief that George Lindley died before the deceased.

Order accordingly.

RUSSELL v. RUSSELL.

Motion—Administration bond—Notice.

A notice of motion is required for a conditional order to assign an administration bond.

E. Beggagh moved that an administration bond should be ordered to be assigned. [KEATINGE, J.—Have you given notice of this motion?] No; I only ask a conditional order, and we have the consent of all the next of kin.

By the COURT.—In England I rather think it is the practice to make these orders behind the back of the sureties, but I do not approve of the practice. I always require notice to be given.

Saturday, July 4.

RUSSELL v. RUSSELL.

Administration bond—Assignment of.

The assignment of an administration bond refused, where it appeared that the two persons sought to be made liable had, for payment, signed the bond as sureties, but on going before the officer, who explained the liability to them, they declined to act, and were rejected by the officer; but afterwards a third person signed the same bond, and administration had issued.

Beggagh moved for an assignment of an administration bond.

T. Lowry, Q. C., for two persons who had signed the bond.—There was really no delivery here of the bond. These persons, it appeared by affidavit, were paid a couple of pounds each to sign the bond, which they did not understand the effect or nature of, until the officer explained to them the liability they were incurring. Then they declined to act, and in fact,

they were rejected by the officer, and never heard more of the matter until recently, when they discovered that a third person had been got to act as surety, and had signed the same bond. That was, besides, a material alteration in the bond.

Beggagh contra.—There was no alteration at all in the bond. There was only an additional surety, which is for the advantage of the two who signed first.

KEATINGE, J.—This bond—the original I have before me—was manifestly prepared for only two sureties. It is dated the 4th Aug. 1858, when the two signed. The third signed on the 24th Aug., and his signature and that date are in a different ink. I think a *prima facie* case has been made to satisfy me that I ought not to make the order asked for. These persons were induced to execute this bond as a mere matter of form, as if they were incurring no liability, and then, when it is explained to them by the officer, they were treated as no longer liable. The addition of the third name to the bond was evidently to save the stamp on a new bond. I therefore think that this is a fair case to excuse these sureties. I make no rule on the motion, and give no costs. No rule.

Equity Courts.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE, Esq., Barrister-at-Law.

March 11, 12, 13, 18 and 19, April 15, 16, 18, 20, and 22, and June 12.

HOWARD v. CHAFFER.

HOWARD v. ROBINSON.

Will—Construction—Liability of mortgagees—Charge on realty in aid of personality.

C. by his will gave all his real estate to uses to secure an annuity of 150*l.* to his wife, and subject thereto to the use of D. and E. for 800 years, in trust to raise money sufficient for the payment of such of his debts and legacies as his personal estate should be insufficient to satisfy, and subject thereto to D. and E. as tenants in common. He then bequeathed all his residuary personal estate to his two sons E. and F., and appointed them his executors. The executors paid all the debts, and all the legacies with the exception of two of 1500*l.* each, and applied the rest of the personality, which was amply sufficient to pay these legacies, to their own use. They afterwards mortgaged the real estate at various periods to different parties, representing that the trusts of the term were satisfied, and appropriated the money to their own use. They afterwards became bankrupt, and a suit was instituted by the unpaid legatees claiming payment out of the real estate in priority to the mortgagees:

Held, that the unpaid legatees were entitled to be paid out of the real estate and in priority to the mortgagees, inasmuch as it was proved that the mortgagees had constructive notice that the money was borrowed for a private purpose.

This was a bill filed by John Howard, an infant, by his next friend, raising the question whether certain mortgagees who had advanced money on the real estate of his deceased grandfather, at the request of the testator's executors and devisees, were aware at the time they did so of the object to which the money was to be applied. The testator Richard Chaffer, by his will dated the 27th March, gave all his real, copyhold and leasehold estates (except trust estates and leaseholds for terms not exceeding twenty-one years) to uses to secure an annuity of 150*l.* to his wife Sarah, since deceased, and subject thereto to the use of John Vevers, since deceased, and the said testator's son Benjamin Chaffer, for 800 years, upon

trust in the first place to secure the payment of the annuity of 150*l.* given to his wife, and to secure a residence for her during her life or widowhood as therein mentioned, and subject thereto upon this further trust, that the said John Vevers and Benjamin Chaffer and the survivor of them should by sale or mortgage demise the same, or a competent part thereof, for the whole or any part of the said term, or by such other ways and means as the said John Vevers and Benjamin Chaffer, or the survivor of them, should think proper, levy and raise money sufficient for the payment and satisfaction of so much and such part of the testator's just debts, funeral, testamentary and other expenses, and the several legacies or sums of money thereby or by any codicil given or bequeathed as his personal estate and effects not specifically bequeathed should be insufficient to pay and satisfy, and should apply the money to be so raised in payment and satisfaction of his just debts, funeral, testamentary and other expenses and legacies accruing. And the said testator thereby declared that the receipts of the said trustees or trustee of the said term should be valid discharges to purchasers, mortgagees and others, and the will contained a proviso for the cesser of the said term on the satisfaction of the trusts thereof. And the testator bequeathed the following legacies, namely: 75*l.* to his said wife, 1500*l.* to his daughter Ann, the wife of R. Howard, 200*l.* to his son William, and all books, maps and things used in his profession to his said sons Thomas Chaffer and Benjamin Chaffer. And the said testator gave the sum of 1500*l.* to the said John Vevers and Benjamin Chaffer upon trust that they and the survivor of them should invest the same in government or real securities, and pay the dividends and interest thereof to the testator's daughter Margaret, the wife of Robt. Temple, since deceased, for her life, for her separate use, without power of anticipation, and should after her decease stand possessed thereof in trust for the testator's sons William, Thomas and Benjamin and his said daughter Ann Howard, in equal shares. And the said testator gave all the residue of his personal estate and effects unto his said sons Thomas Chaffer and Benjamin Chaffer in equal shares, as tenants in common, and he appointed them executors of his will. The testator by a codicil revoked the legacy to Ann Howard, and in lieu thereof gave to the said John Vevers and Benjamin Chaffers the sum of 1500*l.*, which he directed to be raised and paid to them upon trust to invest that sum and stand possessed thereof upon certain trusts for the benefit of John Howard, son of Ann Howard, on his attaining the age of twenty-one years, and if he died before attaining that age, then for the testator's sons, Wm. Chaffer, Thos. Chaffer and Benjamin Chaffer equally.

Mr. Chaffer died in 1846, and his will was proved by his sons Thomas and Benjamin, leaving personal property much more than sufficient to pay his debts and legacies, all of which the executors paid with the exception of the two legacies of 1500*l.*, given to the plt. and Mrs. Temple. In 1857 the plt. filed the bill of *Howard v. Chaffer*, against the executors, to compel payment of the legacy, seeking to recover it out of the personal estate only, and the usual accounts were directed, but before anything further was done Thos. Chaffer and Benjamin Chaffer became bankrupts in April and May respectively, and on the 5th Aug. the bill of *Howard v. Robinson* was filed. It appeared that Thos. Chaffer and Benjamin Chaffer had made several mortgages, but the principal question turned upon two, namely, one for 1000*l.* to Messrs. Robinson and Birtwhistle, and another for 500*l.* to Sir James Yorke Scarlett. The former was dated July 1, 1853, and was made between Benjamin Chaffer of the first part, the said Thos. Chaffer and Benjamin Chaffer of the second part, and John Robinson and Wm. Birt-

whistle of the third part, and after reciting a mortgage by the testator to C. J. Tennant for 2000*l.*, and reciting the will and codicil, and reciting that the trusts of the said term of 800 years not having been fully performed, the said Thomas Chaffer and Benjamin Chaffer had applied to John Robinson and Wm. Birtwhistle to advance the sum of 1000*l.*, which they had agreed to do upon having the repayment thereof with interest thereon secured to them by the bond of Thos. Chaffer and Benjamin Chaffer, and by a conveyance by way of mortgage of a certain messuage, lands and hereditaments called Town-house, such said sum of 1000*l.* to be paid to the said Benjamin Chaffer as the surviving trustee of the same term, to be by him applied and held upon the trusts thereof, to which the said Thomas Chaffer had agreed, and reciting that the said Thomas Chaffer and Benjamin Chaffer had executed a bond thereafter stated; it was witnessed, that in consideration of the sum of 1000*l.* paid by the said John Robinson and William Birtwhistle to the said Benjamin Chaffer, as the surviving trustee of the said term of 800 years, by the direction of the said Thomas Chaffer, he, the said Benjamin Chaffer, in order that the said term of 800 years created by the said will of Richard Chaffer deceased might merge and be extinguished, so far as the same affected the said hereditaments and premises, did grant, and the said Thomas Chaffer and Benjamin Chaffer did grant and convey the hereditaments comprised in the said therein-recited indenture of mortgage unto and to the use of the said John Robinson and William Birtwhistle, freed and absolutely discharged of and from all the subsisting trusts of the said will of Richard Chaffer, and all charges thereby created on the same hereditaments, but subject nevertheless to the therein-recited indenture of mortgage, and subject also to the proviso contained in the indenture, that on payment of 1000*l.* and interest by Benjamin Chaffer and Thomas Chaffer, the estate and interest thereby limited should cease and be void. The receipt was signed by Benjamin Chaffer only, and the money received by him. Messrs. Robinson and Birtwhistle stated in their answer that they were not aware this money would be applied for paying a private debt of the Messrs. Chaffer.

The mortgage-deed to Sir James Yorke Scarlett was dated 7th July 1855, whereby, after reciting the will and other matters, and reciting that the debts of the said Richard Chaffer, and all the pecuniary legacies bequeathed by his will, with the testamentary expenses, had been duly paid by his executors out of the personal estate, and reciting that the trust legacies yet remaining unpaid had been raised or otherwise provided for without the said Thos. and Benjamin Chaffer resorting to any mortgage or other disposition under the trusts of the said term of the freehold hereditaments, rents and premises thereafter described, as the said Thos. Chaffer and Benjamin Chaffer did thereby declare; it was witnessed, that in consideration of the sum of 500*l.* to the said Thos. Chaffer and Benjamin Chaffer, or one of them, by and with the privity and approbation of the other of them (testified by their respectively signing the receipt for the same sum thereupon indorsed), paid by the said Sir James Yorke Scarlett, the said Thos. Chaffer and Benjamin Chaffer for themselves jointly and severally covenanted for repayment of the said sum and interest as therein mentioned; and it was further witnessed, that for the valuable consideration therein expressed to be paid as aforesaid, and for securing the repayment of the said sum of 500*l.*, the said Benjamin Chaffer, as surviving trustee as aforesaid, to the intent to surrender and extinguish the said term of 800 years created by the will of Richard Chaffer deceased, and then vested in the said Benjamin Chaffer so far as respected such of the hereditaments and premises comprised in or affected by the said term as

were thereafter described and expressed to be thereby granted or assured, and at the request and by the direction of the parties thereto of the first part, granted, assigned, surrendered and yielded up, and the said Thomas Chaffer and Benjamin Chaffer granted, assigned, released and confirmed, and the said Thomas Chaffer and Benjamin Chaffer, as executors as aforesaid, remised and released unto the said Sir James Yorke Scarlett certain houses and lands in Burnley, freed and discharged from the said term of 800 years and the trusts thereof, and of and from all annuities and legacies given by the said will and codicil, upon certain trusts for securing the repayment of the said sum of 500*l.* and interest. Both Thomas and Benjamin Chaffer signed the receipt. General Scarlett stated that he was told that all the debts were paid, and the legacies duly raised or provided for. In March 1856 Thomas and Benjamin Chaffer mortgaged six items of property, some of which they did not derive from their father, for 11,500*l.*, subject to previous mortgages. Subsequently they executed other mortgages, and the question now arose whether the plt. was entitled in priority to the mortgages.

Baily, Q.C. and *Kay* appeared for the plts.

Anderson, Q.C. and *Karslake* for the defts. *Robinson* and *Kirtwhistle*.

Glasie, Q.C., *Bazalgette*, Q.C., *Osborne*, Q.C., *Pole*, *Renshaw*, *Little*, *Sidney Smith*, *Eddis* and *Sandys* for the various other defts.

Baily, Q.C. in reply.

The following authorities were referred to in the course of the argument:—

- Humble v. Humble*, 3 Jur. N. S. 696;
Brandon v. Brandon, 7 De G. M. & G. 365;
Wilmot v. Jenkins, 1 Beav. 401;
Ex parte Chadwin, 3 Sm. 380;
Watkins v. Cheek, 2 Sim. & St. 199;
Johanson v. Kennett, 3 M. & K. 624;
Eland v. Eland, 4 M. & Cr. 420;
Robinson v. Lowater, 17 Beav. 592; 5 De G. M. & G. 635;
Forbes v. Peacock, 1 Phil. 717;
Carter v. Barnardiston, 1 P. Wms. 505-18;
Hutchinson v. Masareene, 2 Ball & B. 49, 54;
Barnett v. Sheffield, 1 De G. M. & G. 371;
Perry v. Holt, 2 De G. & J. 58;
Jones v. Smith, 1 Hare. 45;
Spackman v. Timbrel, 8 Sim. 253;
Page v. Adam, 4 Beav. 269;
Ormerod v. Hardman, 5 Ves. 722;
Phillips v. Mannings, 2 M. & Cr. 310.

The VICE-CHANCELLOR, after stating the facts of the case, said that the first question was, whether, as between the plt. and all the mortgagees generally, the plt. had any charge at all on the testator's real estate? Secondly, if he had, then, as between him and each mortgagee separately, whether his charge was prior to such mortgages? With respect to the first question, it was contended for the defts. that, even as against the Messrs. Chaffer, supposing they had never mortgaged the estate, had never been bankrupt, and were still in possession of the real estate, the plt. had no charge against them, because by the will the trusts of the term were to raise only so much as the testator's personal estate was insufficient to pay, and inasmuch as it was sufficient at the testator's death to pay the whole and leave a large surplus, therefore, even as against the Messrs. Chaffer, there could be no decree making the real estate liable—in fact, no trust to be satisfied—and the term never arose upon which any trust could be fastened, and the only decree which could be made would be a personal one against the Messrs. Chaffer, to make them personally liable, leaving the plt. to pursue his remedy by execution of the decree against any real or personal estate they might happen to be possessed of. If there was no authority on this question his Honour would

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have been of opinion that the contention could not be sustained. Thomas Chaffer and Benjamin Chaffer were the executors and residuary devisees of the real estate subject to the term, and it would be contrary to every notion of fair construction and justice to allow them to say to a legatee, "True, the personal estate is now insufficient to pay the legatees, and it has arisen by our having spent and disposed of it, and there is not a shilling left; but still it was originally sufficient at the death of the testator, and therefore, as there is no charge on the real estate, we sold it free from all the claims of the legatees." It was impossible to sustain that plea in any court, still less in a court of equity. The question was, what was the testator's intention? Did he intend that if the personal estate at his death was sufficient, but became dissipated by his sons, his legatees *Mrs. Temple* and the plt. should not be paid. He nowhere said so. He only said, "At the time of my death, so much of my debts and legacies as my personal estate shall be insufficient to pay," not specifying any particular time, and there was nothing in the trusts or context of the will to justify so narrow a construction. It was contended that it was just as much his intention to pay the legacies, and that the two sons should have the estate subject to such payment. What authorities were there? No case was cited in support of the defts.' construction. There was a case, however, directly in point, cited by the plt.'s counsel, of *Humble v. Humble*, and it was there held that the legatees were entitled to the benefit of the term in priority to the claims of the executors, even as against the devisees and their creditors. It was impossible by any ingenuity of argument to maintain that there was any distinction between that case and the present. There was the most remarkable similarity of circumstances, the only difference being that it was the case of executors instead of mortgagees, and the legatees were three instead of two in number, and Lord Langdale decided that, as against the devisees of the real estate, the legatees had a right, the personal estate being insufficient, from having been wasted, to have their charges raised on the real estate. It was suggested that that case could not be considered an authority, because it was not cited in the cases or text-books, or to be found in the registrar's book; but his Honour had been furnished with the office copy of the decree, which was exactly the same as it was stated to be in the report, and it was argued on the same grounds on this point as were raised here, and after having elaborately considered the case, his Lordship came to the conviction at which he (the V.C.) would have arrived had it not been for that authority. He had therefore no hesitation in coming to the conclusion, that as against the Messrs. Chaffer the plt. had a clear equity to resort to the trusts of the term, and the personal estate having been exhausted, the real estate in the hands of the Messrs. Chaffer was liable to the charge of the plt. With regard to the second question, which was quite a separate one as between the plt. and each separate mortgagee, it might be that the plt. might have a right over one, but no right over the others, but before entering into the separate cases it might be well to refer to the general principles about which there was no controversy. If a person took a conveyance, either by sale or mortgage, of real estate charged with legacies or scheduled debts, he was bound to see that the purchase-money was duly applied, and it was not sufficient for him to pay the money simply, but he must see it applied. But if there was a charge of general debts and legacies, then if he paid his money to the right person he was not bound to see to the application, or whether the debts were paid or not. He had no means of seeing what the debts were, and might safely pay to the party charged with the duty of raising and paying them; but if in that

case the party might safely pay his money, even then, if the money was borrowed, or he had good reason to suppose it was borrowed, not for the purpose of paying the debts and legacies, but for the private purposes of the person borrowing or raising it, then he made himself a party to a *devastavit*, and the estate in his hands was liable to the debts and legacies. In this case the debts and legacies were charged only on the term which became vested in Benjamin Chaffer by survivorship, and not on the reversion in fee devised to Thomas Chaffer and Benjamin Chaffer. The duty of raising the money and applying it was vested in Benjamin Chaffer only, and if he applied to any person to lend him money on mortgage, that person might safely lend it, provided he had no reason to suppose it was applied to other purposes. If he had, the term in his hands would still remain liable, but if the party lending the money lent it to Thomas and Benjamin Chaffer as devisees in fee for their own purposes on mortgage of their interest, he would have got a mortgage of that interest, but subject to the trusts of the term and payment of debts and legacies, and would not escape liability to creditors and legatees by paying into the hands of Benjamin Chaffer, and taking an assignment of the term from Thomas and Benjamin Chaffer, because he had reason to suspect that it was borrowed, not for the purposes of the term, but for their own private purposes. Taking the mortgages in order of date, the first was to Robinson and Birtwhistle. [His Honour referred to the facts.] The letter of the 2nd May 1853 was most explicit. It was an application by the firm to lend money to pay a debt of that firm, and all that subsequently took place was only as to value, and other matters. The money, when handed over, was paid into the bank; borrowed for the purpose and so applied, and that was not disputed; and it was clear that Robinson and Birtwhistle took the Town-house estate, subject to the equity in favour of the plt. and the unpaid legacies to which it was liable in the hands of Thomas and Benjamin Chaffer. The mortgage of July 1853 was clearly a consequence and the result of the letter of the 2nd May, when Robinson and Birtwhistle were asked by the firm to lend the firm 1000*l.* to enable them to discharge a debt due to the bank for their private purposes, and not to execute any trust of the will. All the *res gestæ* were in consequence of the first application, and the whole transaction went on uninterruptedly, without even a temporary suspension, till its completion. In their answer they certainly denied they *knew* it, and this was true in the sense that, although they did know it in May, in July they did not know it. But, assuming it to be true in the literal sense, beyond all doubt they had the possible means of knowing and supposing that it was intended to apply the money for a private purpose, and that was sufficient. Stress was laid on the terms of the deed and payment to Benjamin as surviving trustee; but it was obvious that Holmes, having no instruction from any one, knew, as a lawyer, that unless the legacies and debts were paid, the security of the mortgagees would be subject to those claims, and if the money was paid to Thomas and Benjamin as trustees of the term, to pay debts and legacies, the mortgagees would not be responsible, and therefore he took care to make it appear on the face of the deed, that the mortgagees might be safe, forgetting that, notwithstanding the general rule and the clause in the will, they would not be safe if there was reason to believe the intention of the borrower was to apply it for a different purpose. No intention was expressed in the deed. Holmes did not communicate his views to them. It was a conveyancing device (not using the words offensively) to give the appearance of propriety, and that it was lent to Benjamin only as trustee of the term, whereas on the face of it it was lent to both, and

instead of for the term, in fee, the term being merged. Had Robinson and Birtwhistle lent the 1000*l.* to Benjamin, as trustee of the term, for the purpose of executing the trusts, and the bond had been given as an additional security, the transaction would have been unobjectionable, supposing there was no ground for believing that the money was to be otherwise applied. The recital that the trusts were performed arose from the fact that Holmes had been, before 1851, employed about the property for the bank, and knew from a letter from Benjamin Chaffer that all the debts, &c., had been paid, except the two legacies, in which he was told parties had a life-interest. The merger of the term was a peculiar feature in the deed: it was an artificial mode of carrying out the matter, and the fact that Robinson and Birtwhistle knew the purpose for which the money was borrowed, could not be got rid of, and therefore the money in their hands was liable to the same equity in favour of the plt., as it was in the hands of the Messrs. Chaffer. With regard to General Scarlett, his statement was that of an honest man. He made no inquiry, and the will and codicil being recited in his deed he was affected with notice of them, and although it did not appear for what purpose the term was merged, it was a loan to a remainderman on the assertion that the trusts of the term were complied with and the debts paid, which was a fact, and it was stated that the legacies were duly raised and provided for; he therefore had notice of them and lent the money at his peril. It was unfortunate that he did not employ a solicitor. In *Johnson v. Kennett*, 3 M. & N. 624, the V. C. of England's decision was reversed by Lord Lyndhurst, and that was approved of by Lord Cottenham in *Eland v. Eland*, 4 M. & Cr. 420, which established this, that when an estate was charged with debts and legacies, a purchaser or mortgagee was safe, notwithstanding that all debts had not been paid, provided the fact of the charge was not known to him; if it was, he was bound to see to the application of the money. Sir James Scarlett was contented with a vague statement. He lent to both the Chaffers, and (not assuming Mr. Helm to be incapable to conduct the matter) he took with notice, and subject to the plt.'s equity. With respect to Messrs. Worrell's mortgage, it was clear that the 11,500*l.* was lent to both the Messrs. Chaffer for their own purposes. The contention was, that although the money was lent to them, and not to Benjamin only, inasmuch as it was lent to Benjamin, Thomas joining with him, it was represented that all the trusts of the term were satisfied, and there was a merger of it that was sufficient to free the mortgagees from all liability. And *Storrey v. Walsh*, 18 Beav. 559, was cited; but that was quite distinguishable from the present case, and the principle laid down was therefore inapplicable. The plt. was therefore entitled to priority over them, but only so far, of course, as related to the property of the testator comprised in the mortgage. The same observation applied to the mortgage to the bank, with the additional circumstance that in this case Messrs. Alcock and Holmes, who were habitually solicitors of the bank, were employed, and inasmuch as the Messrs. Chaffer did not employ any others, Messrs. Alcock and Holmes must be considered as acting for them also. They knew the circumstances, having acted in the matter in 1851, and that was constructive notice that the legacies were not paid. With regard to the mortgage to Messrs. Brennand, the expression "free from all subsisting trusts," used in the deed, was a most singular one, and probably a slip, because the whole deed was contrary to any such supposition. Brennand said that he knew the legatees were minors, and the legacies not paid, and finding that Robinson and Birtwhistle had lent 1000*l.*, he took it for granted that all the trusts were satisfied. It also appeared

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that Buck and Eastwood were the solicitors acting in this matter, and therefore it was clear that Brennan took his mortgage subject to the prior charge in favour of the plt. The argument was, that the estate had borne its burden, and must not bear it twice. If it meant that the two sums of 1500*l.* had ever been raised out of the estate, it had not. Probably what was meant was, that it was a charge on the personal estate, and that, although since wasted, it had been (originally) sufficient. If an estate was left to trustees on behalf of a family liable to pay legacies, and the money was paid into the hands of the trustees without any knowledge of an intention of misapplication, and the trustees wasted it, then it had borne its burden, and that was the only sense in which it could be considered to have done so. Another argument was, that the two legacy receipts produced during the argument amounted to an appropriation of those sums, a settling apart in satisfaction of the two legacies. It being necessary that the executors should pay duty not only on the residue, but all legacies, the common printed form was required to be filled up, and the words being "received or retained in trust," "received" was struck out, and the words "retained in trust" were left. If the legatee had been paid, the receipt would have been signed by him as in this case, "John Howard, descendant of the child, &c.," but the receipts were signed by the executors. It was said that Thomas Chaffer signed as a witness; but independently of the fact that a witness was unnecessary, it was clearly signed by him as executor, and therefore it was not an appropriation in the hands of Benjamin Chaffer as trustee of the term: the two suggestions did not arise upon any *factum*. There must therefore be a declaration that the plt. and Mrs. Temple and her children were entitled in priority according to the relative values of the estates mortgaged and the principal and interest of their legacies, and the costs must be provided for by a first charge. There must be a decree for sale of the term to raise the amount, the mortgages being charged *pro rata* on each property, with a declaration that Thomas Chaffer and Benjamin Chaffer were personally liable in respect of the *devastavit*. The costs of the suits of the plt. and Mrs. Temple must be added to their legacies and raised out of the estate. The executors must have their costs in the usual way subject to the bankruptcy.

Solicitors: *Elsdale and Byrne*; *Scott, Tahourdin and Scott*; *Miles*; and *Jeyes*.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES R. DAVIDSON, Esqrs., Barristers-at-Law.

March 2 and 3.

(Before the LORDS JUSTICES.)

BLAKE v. PETERS.

Will—Gift in fee—Executory devise over—Restriction on cutting timber—Waste—Forfeiture.

The testator gave freehold, copyhold and leasehold estates, and personal estate, to his sister absolutely, subject to a condition that, unless she made disposition thereof by will or otherwise, it should go to J. W. P., his heirs, executors and administrators; but in the event of his death without male issue, then over; but he restrained J. W. P. from felling timber on pain of forfeiting his estate and interest. The sister occupied the estate for many years, together with other property purchased by herself, and she, by her will, disposed of the whole, certain portions of which she gave to L. for life, and then to the same J. W. P., his heirs, executors and administrators, but with a like executory devise over, and a like prohibition against his cutting timber, and a proviso that he should keep the lease-

holds fully estated with three lives. J. W. P. cut timber largely, and committed other waste, and upon his death without leaving male issue, the persons interested under the executory devise over filed this bill to make his estate liable for the waste committed:

Held (agreeing in the decision of Kindersley, V.C.), that, although, when there was such a devise as in the present case, the devise might cut timber so that he did not commit destructive or equitable waste, yet that, in the event of the executory devise over taking effect, the persons interested under it would be entitled to an account against his estate for all timber beyond what was required for necessary repairs, and that, although the instrument creating the disposition declared that the breach of the prohibition should be on pain of forfeiture, still forfeiture was not the only remedy of the executory devisees. Accounts and inquiries were therefore directed.

Per Turner, L. J.: There is nothing repugnant in annexing such a condition to an estate in fee for the benefit of an executory devise, if it be annexed during the life of the first devisee only.

This was an appeal by those of the defendants in the suit who were interested in the estate of John Weston Peters, deceased, against a decree of Kindersley, V.C., under the following circumstances:—

John Eason, of Bridge Farm, South Petherton, in the county of Somerset, by his will dated the 17th June 1816, gave and devised to his sister Elizabeth Eason, his estate and interest in certain messuages or tenements, lands, tithes and hereditaments, freehold, copyhold and leasehold, and all his personal estate, to be at her absolute disposal, subject to the condition that in case she should die without making any disposition of such real and personal estate by deed, will, or otherwise, he gave the same to John Weston Peters above mentioned, his heirs, executors and administrators; but in case he should happen to die without leaving male issue at the time of his decease, or should not occupy the farm called Bridge Farm, he gave the same real and personal estate after his decease to the persons to whom other estate particularly mentioned was given, with a gift over; provided always, that the said John Weston Peters and John Louch, a person to whom a prior estate was given, should not cut down or fell any timber trees on any of the estates, except for necessary repairs, on pain of forfeiting their respective estates and interest in the premises.

The testator died soon after the date of his will, without having altered it in any manner, and upon his death his sister Elizabeth Eason took possession of his real and personal estates, she having during his lifetime renewed several of the leases; she had also purchased other real estate as well as leasehold property.

On the 16th Oct. 1828 Elizabeth Eason made her will, whereby she executed the power of disposition given her by the will of her brother John Eason, and gave certain lands in the occupation of John Louch to him for life, upon a like condition that he should not cut or fell any timber upon the estate, except for necessary repairs, with remainder to John Weston Peters, his heirs, executors and administrators; but in case he should leave any son or male issue living at his decease, or an eldest or only son, to him or them for the whole estate and interest therein, with a charge of 500*l.* in favour of the said John Louch upon the farm called Bridge Farm. But in the event of John Weston Peters dying without leaving issue male living at his decease, and of his not occupying Bridge Farm, or in case he should fell or cut down, or should cause to be felled or cut down, any timber on the property, or should plough or break up the said farm,

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or hereditaments, the same should, immediately upon the happening of either of the said contingencies, pass to the persons under the ultimate limitations contained in the will of her brother, the said John Eason. There was then a proviso that the persons entitled to the estate should keep up the fences, &c., with a gift over to William Pearce Jilliard in fee, subject to the like executory devise as in the case of John Weston Peters. And in the event of the said John Weston Peters dying without issue, then the gift over to him was to be absolutely void; and there was a gift over in favour of one — Metford, and the same executory devise over in favour of the plt. in fee, with the same restriction as to — Metford's cutting timber, provided always, that the said John Weston Peters should from time to time during his life keep the leasehold and copyhold estates (describing them) fully estated with three lives, subject to all the liabilities concerning the same. The testatrix made eight codicils to her will, in which were contained similar limitations and conditions with respect to the estates.

The testatrix died on the 13th July 1830, and upon her death John Weston Peters took possession of the property, and continued in such possession until his death, which occurred in July 1858, during which time he cut large quantities of timber over and above what was required for necessary repairs and, sold it, allowing the buildings to become dilapidated; and, as was alleged, took away various parts of such buildings and appropriated them to his own use; but this was contradicted. He likewise allowed certain of the leases to expire without effecting any renewal of them. The executor of John Weston Peters was one Uriah Parsons, and he, soon after his testator's death, instituted a suit of *Parsons v. Peters* for the general administration of his estate, in which accounts and inquiries were directed, and especially as to the claim upon and the liabilities of his estate, under which the present plt., as the person entitled next in remainder under the executory devise, came in and made certain claims as to the acts of waste committed or suffered by John Weston Peters, and filed this bill against Elizabeth Peters his widow, to make his estate liable for such waste, the bill setting forth at length the particulars of such alleged acts. The deft. contended that John Weston Peters took under the will of John Eason, and not of Elizabeth Eason, and had full power to commit waste, being in fact the owner of the estate, subject only to the executory devise; but the contention of the plt. was, that John Weston Peters was in fact only tenant for life, and therefore liable for all such acts as a tenant for life would be liable to, besides such acts being in direct contravention of the terms of the wills, under both of which he took.

Kindersley, V. C. (after referring to the different wills and stating that the object of the bill was to make the estate of John Weston Peters liable to the amount of price or value of certain timber cut by him upon the estate of which he was the owner, and of which the present plt. had become seized, and also to make it liable in respect of other waste in the property, and for the value of certain leasehold premises, on the ground that by reason of the omission to renew the leases, those leaseholds had been lost) said that the first question was, how far the gift by John Eason to his sister Elizabeth Eason, of an absolute estate in fee-simple, followed by a proviso by way of executory devise, was valid. Assuming it to be invalid, it was invalid against her, because it was an absolute estate given to her; but if she chose to adopt it, it was a valid limitation, and by her will she had adopted it. John Eason had died in 1816, and after his death Elizabeth Eason took possession of the property so devised, and purchased other property, and she made both estates subject to the devises of her will. The testatrix appeared to think that the gift to John

Louch would not take effect, but that the limitation to John Weston Peters would, and the result was, that, adopting the validity of the devise to John Weston Peters, she proceeded in effect to give him the property in fee subject to limitations over by way of executory devise in several events, and therefore, on the death of Elizabeth Eason in July 1830, John Weston Peters became entitled to the estate in fee, subject to a valid executory devise over in the event of his not leaving issue male living at his death; and Elizabeth Eason also imposed upon him and others taking under her will, but at all events upon him, a prohibition against cutting and selling timber, except for the necessary purpose of repairs, and she also imposed upon him from time to time the obligation to keep the leasehold and copyhold estates fully estated with three lives, by renewal of the leases, subject to the same limitations as in the original leases, some of which were ecclesiastical. The question was, where an estate was limited to A., but to go over in the event of A.'s dying without leaving issue male living at his death, whether it was competent for the testator, who by his will created the estate, to impose on the devisee the obligation not to cut timber. If there was a gift of a fee-simple absolute, there was nothing to prevent the devisee cutting timber, and therefore such a prohibition would be simply void. On the other hand, if an estate were devised to A. for life *simpliciter*, and without any clause making him unimpeachable for waste, he must be taken to know that he could not cut the timber. But in this case it was not a gift of the fee-simple indefeasible, because in a given event the estate was to go over to some other person. If he left male issue, the estate became at his death absolute; if he left no such issue, it went over; and it might be considered settled, that where an estate in fee-simple was given, defeasible by an executory devise over in the event of the tenant dying without leaving issue, the law would not impose on such tenant a prohibition as to cutting timber, provided he did not go to the extent of equitable waste; but independently of an express direction in the will creating the estate, the law interposed in such a case to prevent equitable waste. Lord Eldon in one case, however, intimated an opinion, that in the case of such a devise as the one in question, a court of equity would interpose to restrain cutting timber at all, the tenant being put upon the same footing as a tenant for life; and Lord Hardwicke expressed a somewhat similar opinion; but now, notwithstanding those high authorities, it was considered settled, that when there was such a devise as there was here, it was competent for the devisee to cut timber, provided that in doing so he did not commit destructive or equitable waste. The single question now remaining, supposing that to be the view which the court took, was, whether the testator might not impose an obligation, and might not say, "Although I may give what is not, technically speaking, an interest for life, still, inasmuch as I mean that, on a certain event happening, this estate shall go over to some one else, I intend that the timber shall be preserved for the benefit of the person to whom the estate is to go over." Although there was no decisive expression upon the subject, there was no reason why the testator might not impose such an obligation, more particularly as the court would impose upon a tenant, although he might be owner in fee-simple, a restriction against equitable waste. It might be said, that such an obligation was inconsistent with the nature of an estate in fee-simple, but not when in a given event the party was intended to be put in the position of a tenant for life only, and in another event in the position of a tenant in fee simple. There was therefore no absolute repugnance in a provision of this kind against cutting ornamental timber, nor was it inconsistent with the prohibition against committing equitable waste. It appeared reasonable that

a testator should have power to impose such a prohibition. John Weston Peters's estate must therefore be declared liable to make good the timber which had been cut, except for necessary repairs on the premises. His Honour directed inquiries and accounts upon the subject of the timber, the necessary repairs done by J. W. Peters, the alleged removal of portions of the premises, and whether he had kept the property fully estated.

The defts. interested in the estate of John Weston Peters appealed from the whole decree, but all the questions in dispute were arranged excepting that upon the liability of his estate to make good the value of the timber.

Glasco, Q. C. and Sandys supported the decree on behalf of the plts.

Martindale appeared for defts. in the same interest.

Baily, Q. C. and Karlslake appeared for the defts. appealing.

The following authorities were cited in the court and before the V. C.:

- Richardson v. Moore*, 27 Beav. 629;
- Lansdowne v. Lansdowne*, 1 Madd. 116;
- Duke of Leeds v. Lord Amherst*, 14 Sim. 357; s. c. 16 Sim. 431; s. c. 20 Beav. 239;
- Colegrave v. Manby*, 2 Russ. 238;
- Re Yalden*, 1 De G. M. & G. 53;
- Kingham v. Lee*, 15 Sim. 396;
- Holmes v. Goodson*, 8 De G. M. & G. 152;
- Galliver v. Faux*, 1b. 167;
- Re Skingley*, 3 Mac. & G. 221;
- Hudleston v. Whelpdale*, 9 Har. 775;
- Ormonde v. Kymersey*, 5 Madd. 369;
- Gregg v. Coates*, 23 Beav. 33;
- Re Money's Trust*, 10 W. R. 399;
- Bennett v. Colley*, 5 Sim. 181; s. c. on appeal, 2 M. & K. 225;
- Stansfield v. Habbergham*, 10 Ves. 272;
- Henderson v. Cross*, 29 Beav. 216;
- Turner v. Wright*, John. 740; 2 L. T. Rep. N. S. 277; s. c. on appeal, 2 De G. F. & Jon. 234; and 2 L. T. Rep. N. S. 649;
- Richards v. Richards*, 12 L. J., N. S., 460, Ch.;
- Jones v. Jones*, 5 Har. 440;
- Wright v. Wilkin*, 3 L. T. Rep. N. S. 507; s. c. 7 Jar. N. S. 441; and
- Wright v. Atkins*, Lord St. Leonards on Powers (8th edit.), 599, 656.

Glasco, Q. C. was heard in reply.

Lord Justice KNIGHT BRUCE said that, in his opinion, forfeiture was not the only remedy for the breach of the condition which had been committed, but that the executory devisees were entitled to be repaid out of the estate of the preceding tenant the value of the timber cut down by him beyond what he was entitled to cut down under the limitations of the will. He thought that the preceding tenant, although he was technically a tenant in fee, was as much bound by the expression of intention in the will of the testatrix, as if he had been merely a tenant for life impeachable of waste.

Lord Justice TURNER was of the same opinion. He thought the forfeiture for which the will provided was nothing more than a security for the performance of the condition which it was the duty of the devisees to perform, even if no such forfeiture had been provided, and that the giving an additional remedy (in the shape of forfeiture) did not take away the remedy which would legally follow from the condition *per se*. His Lordship was further of opinion that there was nothing repugnant in annexing such a condition to an estate in fee for the benefit of an executory devisee, when the condition was annexed only during the life of the first devisee.

Solicitors for the plts., Sandys and Knott.

Solicitors for the defts. appealing, Wilde, Rees, Humphrey and Wilde.

Wednesday, July 22.

(Before the LORD CHANCELLOR.)

Re ALT, ex parte CROWTHER.

Bankruptcy Act—24 & 25 Vict. c. 134, s. 153—Construction of agreement.

Application for an award of damages under the 153rd section of the Bankruptcy Act of 1861.

This was an appeal from an order of Mr. Commissioner Goulburn, to whom an application had been made under the 153rd section of the Bankruptcy Act of 1861 to award the app. Charles Crowther damages by reason of the nondelivery by the bankrupt Thomas Alt, a seed crusher, of certain bags. The case turned upon the construction of a contract made between the parties. The bankrupt traded under the firm of Thomas Alt and Son, and imported large quantities of linseed from Calcutta in bags, which, when emptied, were called "gunny bags." These were articles of commerce, sold by the seed crusher separate from the seed, though not usually delivered until the seed was used. The following was the contract entered into between Crowther the app., who was a merchant and sack manufacturer, and the bankrupt:—

"Mr. Charles Crowther,

"Oil Mills, Deptford, May 31, 1862.

"Sir,—We beg to inform you that we accept your offer of 8½ net cash for all the double Calcutta gunny bags we may have to receive during the next twelve months, say from 1st June 1862 to 1st June 1863, taking them as they may arrive, damaged or sound, of which please take a note, and hand us your acknowledgment of this.—Sir, your obedient and humble servants,

"THOMAS ALT and SON."

Between the dates mentioned in this contract, and before the bankruptcy, the bankrupt himself or his brokers (Messrs. Laing and Meredew) received 16,317 of such bags, of which 5381 were delivered to Mr. Crowther.

Of the remaining 10,936, about 9000 were sold in the market by the brokers before the bankruptcy, with the seed; and about 1900 had been delivered at the bankrupt's premises before the bankruptcy, which took place on the 14th Feb. 1863. Of these latter some 1300 were empty and the rest full.

The app. claimed 249l. 7s. 3d. as the amount of damages and loss sustained by him by reason of the nondelivery of the bags, the value of these articles having risen since the date of the contract, and fallen since the bankruptcy. The section under which the learned commissioner was called upon to act is as follows:—

"If any bankrupt shall at the time of adjudication be liable by reason of any contract or promise to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury either before itself or in a court of law, and to give all necessary directions for such purpose, and the amount of damage when assessed shall be proveable as if a debt due at the time of the bankruptcy, provided that, in case all necessary parties agree, the court shall have power to assess such damages without the intervention of a jury or a reference to a court of law."

The parties having agreed that the court should assess the damages without the intervention of a jury, the case came before the commissioner on the 29th June last, when his Honour was of opinion that the words "we may have to receive" found in the contract could not mean that the bags, as soon as they arrived, were to be sold distinct from the seed. The broker had no power to sever the bags from the seed; and under the circumstances his Honour was of opinion that there was no contract to deliver these particular

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bags, and he therefore disallowed the claim. The present appeal was then brought.

Bacon, Q. C. and Bagley appeared for the app.

Sargood for the assignees.

Bacon in reply.

THE LORD CHANCELLOR.—The bankrupt in this case is a seed crusher or extractor of oil, carrying on his business in mills erected for that purpose. The creditor appears to be a dealer in bags, sacks and packages, and the question turns entirely upon a contract in writing which was entered into between these parties. The contract was dated in May 1862. It has been urged that the word "bag" in the contract means empty bags; I think it cannot be said for a moment that it means full bags, therefore I must put a reasonable interpretation upon the language, and it being assumed that the subject of the contract was empty bags, the contract will run thus:—"We accept your offer of 8½d. net cash for all the double Calcutta empty gunny bags we may have to receive during the next twelve months." The contract therefore is limited to the empty gunny bags which the bankrupt "may have to receive." That is not an uncommon expression, particularly when connected with a future period of time, and the real meaning of the idiomatic expression is this "all we may happen to receive during the next twelve months." The real transaction then was this. It appears that the bankrupt contracted for the purchase of a large number of bags of seed. He being unable to pay for them, they were never delivered at his premises, but remained in a warehouse under the control of his brokers, and subject to the payment of their charges. The bankrupt being unable to pay, calls upon the brokers to sell, and the brokers sell the seed, bags and all. The app. requires the bankrupt to pay for these bags, in order that they may be delivered to him, or lays claim to damages from the bankrupt if he does not do this. He further says, that the bankrupt is under the obligation to bring him all the bags which were on his premises full of seed at the time of the bankruptcy as if he had actually emptied them. I cannot put any such interpretation upon the contract. It is clear that the parties contemplated only those bags which it was reasonable to suppose would, and which, if the bankrupt had continued, certainly would, have become empty bags, upon the bankrupt's premises, arising from the user of their contents in the ordinary course of the bankrupt's business. I think they contemplated only such bags as should be emptied by the bankrupt in the ordinary course of his business. This is the reasonable, and I must consider was the true, meaning of the word employed. I cannot explain this contract by any rational interpretation, so as to make it apply to bags which the bankrupt never possessed in the character of empty bags. If he had endeavoured by any stratagem—such as taking the bags and emptying them upon a neighbour's premises—to conceal any empty bags, then I might have said that such empty bags would have come within the meaning of the contract. But these bags were never emptied; they were *bonâ fide* disposed of by the bankrupt, and they do not appear to me to come within either the words or the intention of the contract; therefore, my opinion is, that as to the 1300 bags, they clearly do come within the meaning of the contract, but that with regard to the 9000 which in reality never became the bankrupt's property at all (for the bankrupt not having paid for them or their contents, they are within neither the letter nor the spirit of the contract), that the app. is not entitled to prove in respect of any damages for their non-delivery. I am quite satisfied, from what I have seen of the examination, that the assignees were led into the contention by the mistaken answer of the app. in his examination, who said at first that he made no

claim except as to the 9000 bags. I shall therefore declare that he is entitled in respect of the 1300 bags, but not in respect of the others.

Solicitors for the app., *Hilgier and Fenwick*.

Solicitors for the assignees, *Lawrance, Plews and Boyer*.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and J. EDWARDS, Esqrs.
Barristers-at-Law.

July 17, 18 and 20.

ROLFE v. GREGORY.

Constructive trust—Laches—Retention of debt.

*A testator bequeathed to B. and C. 600*l.* owing to him by D., to pay the interest to his daughter for her life, remainder to her children, and appointed them his executors. B., who was the daughter's husband, alone proved the will, and having had pecuniary transactions with D., the latter retained this debt in satisfaction of his demand. Within one day of the expiration of twenty years, the daughter and her children filed a bill to have the money paid to them:*

Held, that the daughter, by her laches in not sooner filing the bill, had lost her right to the interest for her life, but that D. was a constructive trustee for the children.

This bill was filed by Sarah Rolfe and her children, she being entitled under the will of her father to 600*l.* owing to him by the debt, and which he had retained on account between him and Francis Rolfe, the husband of the plt., who was executor of the will, the questions being, whether Rolfe acted in this matter as executor or in his individual capacity, and whether Gregory knew of the gift being specific to the plt., or only that Mr. Rolfe was executor. The testator William Bore died in 1842, and by his will, dated the 24th March 1842, after directing his executors to pay his debts, funeral and testamentary expenses, and giving some small legacies, gave to Francis Rolfe and William Baker all his real estate, which he directed to be sold and the proceeds laid out at interest, and also the sum of 600*l.* in the hands of Charles Gregory and interest, in trust to pay the dividends to Sarah, the wife of Francis Rolfe, testator's daughter, for her life for her separate use, with remainder to her husband for life, with remainder to their children equally; and in case of Sarah Rolfe dying in the minority of the children, for their maintenance, with a bequest of the residue to Sarah Rolfe absolutely. This will was proved by Francis Rolfe alone, and the bill alleged that Gregory knew the contents of it, and particularly that the 600*l.* was given to Sarah Rolfe for her separate use. The bill was not filed until the 17th April 1862, being one day within the twenty years of the handing over the note, but Mrs. Rolfe swore that until 1858 she did not know of the retention. A demurrer had been put in to the bill and allowed, with leave to amend, and it now came on as to the hearing.

Glasse, Q.C. and Welford appeared for the plt.

Baily, Q.C. and Jessel for the deft.

Glasse, Q.C. in reply.

The following cases were cited:—

Andrew v. Wrigley, 4 Bro. C. C. 136;

McLeod v. Drummond, 17 Ves. 152;

Hill v. Simpson, 7 Ves. 152;

Keane v. Roberts, 4 Mad. 332;

Watkins v. Cheek, 2 Sim. & St. 199, 248;

Wilson v. Moore, 1 M. & K. 127, 348;

Cubbridge v. Boatwright, 1 Russ. 549.

The VICE-CHANCELLOR, after referring to the facts of the case, said, it was clear on the accounts, that as to the 200*l.* paid by the two cheques, which was a question of fact, the whole transaction was on their

private account, and had nothing to do with the executorship or the testator's estate, as it appeared that the 600*l.* was dealt with quite in a different way, and Rolfe was paid not as executor but in his private capacity, and in a way utterly unconnected with the testator's estate, and Gregory was released from the debt, although, for some reason which did not appear, the rate of interest was changed from 20*l.* to 10*l.* per cent., probably to benefit Rolfe, the interest being so high, as had evidently been done in a previous part of the account. It not being disputed, therefore, as to part of the 600*l.*, that it was brought into the private account, there was no doubt on the face of the account that it was also the case as to the remainder. Although no money of the testator in the hands of the executor passed from him into the hands of Gregory, the 600*l.* of the testator's money due to his estate was not allowed to, but retained by, Gregory, which was the same thing as a payment to him on the arrangement between him and Rolfe, which was a breach of trust, and known to be so, by Gregory. It was contended that this mode of dealing left the parties where they were and that therefore Gregory remained a simple contract debtor to the estate and the debt would be barred in six years. That was not the law; it was quite different: it was this: If a party concurred with an executor or trustee (here an executor) in that which on the part of the executor was a breach of trust, and by that act the party so concurring either actually received *de novo* into his hands a part of the testator's estate, or having it in his hands, was allowed to retain it by the executor, he put himself under a liability as a trustee for the persons to whom it was given by the will either specifically or generally. It was stated by Gregory in his answer that he did not know that the 600*l.* was specifically bequeathed to Mrs. Rolfe and her children, but he knew that Rolfe was the executor, and that the 600*l.* was due to the executor as executor, and not in his individual character. It made no difference if it was not a specific gift, but only part of the general assets, and legatees unpaid would be entitled to come and say that Gregory had so dealt with it that he had participated in the breach of trust and been allowed to retain the 600*l.* as his own and was a trustee for them. That was determined in the case of *Wilson v. Moore*, by Sir John Leach. It made no difference whether the 600*l.* was paid by Rolfe to Gregory, or retained by him—it was assets of the testator in his hands. It turned out that this very 600*l.* was specifically given to Mrs. Rolfe and her children, and applying the principles of equity, although Gregory did not know that fact, and if a bill were filed within five or ten years, there could be no doubt that the Statute of Limitations did not apply. In such a case of constructive trust it was necessary, in order to bar the claim, that twenty years should elapse; the court would not assist a plt. upon a less period. As to the children, there was no question either on the statute or of the rule of the court, as to stale demands, for they being infants, the only doubt was whether, as to Mrs. Rolfe, Gregory had not a right to claim the interest of the 600*l.* during her life, because she did not come sooner. She was, *quoad* this property, in the eye of the law a *feme sole*, as it was left to her separate use, and she knew, as she admitted, from the testator's death, that it was a specific debt in Gregory's hands, and she must have known either that he had paid it, or that it remained in his hands. She did not seem to be aware of the arrangement between him and her husband until 1858, Rolfe stating that he was ashamed to tell her, and being ill, it was wrung from him by circumstances. She then found the account, and gave it to her solicitor. She also knew that her husband had been twice bankrupt, and took no steps with respect to this 600*l.* Taking all these cir-

cumstances together, he must adhere to the view he took when he allowed the demurrer—that twenty years within a day having elapsed, although Gregory must bring the 600*l.* into court to be invested for the children, he was entitled to the interest during Mrs. Rolfe's life. As to the costs, if the bill had been filed by the children alone, Gregory must have paid them, but under the circumstances, so far as they were the costs of Mrs. Rolfe, they must be set off by Gregory against the others; and as to the other debts, who refused to join, they could have no costs.

Solicitors for the various parties, *Lambert and Co.*; *Sills and Gordon*, and *Randall, Martin and Randall*.

Tuesday, July 28.

FAULKNER v. LLEWELLIN.

Specific performance—Agreement to lease a house—“Fit for habitation”—Redemption of land-tax—42 Geo. 3, c. 118, s. 126.

B. agreed with C. to take a lease of a house which C. was building when it was “complete, finished and fit for habitation.” B. took possession, but afterwards found various objections to it, contending that it was not properly finished. The matter being referred to an expert, he reported that, although there might be some objections, yet the house was “complete, finished and fit for habitation.” A decree for specific performance of the agreement was granted.

The Crown having redeemed the land-tax since the above contract was entered into, C. claimed a proportional additional rent under the 126th section of the 42 Geo. 3, c. 118:

Held, that the section did not apply.

The bill in this case was filed for the specific performance of a contract to grant a lease, dated in Dec. 1859, the question being whether a house, No. 35, Duke-street, St. James's, was “complete, finished and fit for habitation.” It appeared that the contract was entered into before the house was built, the plt. having agreed with the Commissioners of Woods and Forests to take a lease of a parcel of land on which the house in question and others were to be built, and that the deft., having taken possession in Dec. 1860, on the 17th Jan. 1861, let a portion of it to a tenant, and had since let lodgings to various persons. Notwithstanding this, the deft. contended that the house was not complete and fit for habitation, and made numerous objections on that score, and refused to execute the lease, in consequence of which this bill was filed, and an action brought for occupation rent, when the deft. got the common order to elect, and his Honour held that, on a year's rent being brought into court, the action should be stayed; and this was done. The land-tax, amounting to 3*l.*, having been redeemed by the Crown, the plt. also claimed that amount of additional rent under the 126th section of the 42 Geo. 3, c. 116, which enacts, “that where any tenant or lessee, at a rack rent, for any term or number of years, or at will, or any manors, messuages, lands, tenements, or hereditaments, shall be bound by agreement to pay the land-tax charged thereon during the continuance of any demise, and such land-tax shall have been or shall be redeemed by or on behalf of the bodies politic or corporate, or companies, or other person or persons beneficially entitled to the rent reserved or made payable on such lease or demise, the amount of the land-tax so redeemed shall, during the continuance of such lease or demise, be considered as rent reserved or made payable thereon; and the same shall be payable on the same days, and the same powers shall be had, used and enjoyed for the recovery thereof as for the recovery of such rent when in arrear.” With respect to the objections as to the in-

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completeness of the premises, the matter was referred to chambers, and under the powers now vested in the court, Mr. Wigg, an expert, was employed, who reported that, although certain things should be done, yet, on the whole, the house "was complete, finished and fit for habitation." Upon this report the case was finally argued.

Baily, Q.C., Hobhouse, Q.C. and G. Simpson appeared for the plt.

Glasse, Q.C. and Jolliffe for the deft.

Baily, Q.C. in reply.

THE VICE-CHANCELLOR, after stating the facts of the case, said that he would state his opinion generally as to the objections. It appeared to him that twelve out of the sixteen were frivolous, the only substantial ones being as to the drainage, papering, water supply and settlement, the last being a serious one. As to the papering, it appeared that, like many new houses, it had been put on too soon. As to the drainage, Mr. Wigg said that it would have been better if there had been a cesspool. As to the water supply, that the cisterns were too small, having regard to the use deft. made of the water, namely, that letting lodgings, his lodgers required a great quantity, for they might use baths, &c. As to the settlement of the wall, that appeared to be, and was stated by the deft. to be, a serious matter; but Mr. Wigg stated it to be slight, and no more than was frequently found in houses substantially built, and on the whole he had found that the house was complete, finished and fit for habitation. Then came the question as to the time when it could be so considered, upon which depended the question of the deft.'s execution of the lease. It appeared that the settlement had taken place since he took possession, probably caused by the bringing in of furniture, &c., but if the objections made were to prevail, not one in twenty of the houses in London would be fit for habitation. On the whole, his Honour thought the time ought to be the 17th Jan. 1861, when he let to his first lodger, and the plt. got his lease from the commissioners. A claim was made that it had been agreed that the deft. should have possession six weeks rent free, but that was denied, and there was no evidence to substantiate it. Then came the question as to land-tax. After the agreement, and before the execution of the ground lease by the commissioners, the land-tax was redeemed by the Crown, and the plt. contended that the 126th section of 43 Geo. 3, c. 16, applied to the present case. He thought it did not. The plt. no doubt, as between him and the Crown, was affected by the section, but not as between him and the deft. If the plt. had redeemed it, would have applied, but in the case of the Crown it did not. There must be declarations that the agreement should be specifically performed; that the house was complete and fit for habitation on the 17th Jan. 1861; that the plt. should execute a lease for twenty-one years from that date, according to the terms of the agreement, the deft. to execute a counterpart, such lease to be settled by the judge in chambers, in case the parties differed. The deft. to pay the cost of such lease and counterpart and costs of suit, to be taxed in the usual way; the deft. to receive credit for 250*l.* paid into court.

Solicitors for the plt., *Miller and Sons.*

Solicitors for the deft., *Robinson and Tomlin.*

July 28, 29, 30 and 31, and Aug. 1.

MOSS v. SYERS.

Joint-stock company (limited)—Right to issue preference shares—Omission to file printed bill.

By the articles of association of a joint-stock company (limited), authority was given to borrow money on such terms as they might think fit; and also, by the resolution of a special meeting to be convened by

not less than fourteen days' notice, to increase the capital of the company by the issue of new shares; and also, by resolution passed by three-fourths of the shareholders at an extraordinary meeting, to alter or to make new provisions. A resolution was passed at a special meeting to issue preference shares:

Held, that there was not power under the articles of association to create or issue preference shares.

A written bill in the above cause was filed, but owing to an omission on the part of the plt.'s solicitor, the printed bill was not filed at the expiration of the fourteen days, and the written bill, pursuant to the 9th Consolidated Order, rule 4th, was taken off. The plt. applied ex parte for leave to file a printed bill:

Held, that the application could not be made ex parte; but, after notice, the written bill was ordered to be restored, and leave given to the plt. to file a printed copy of the bill nunc pro tunc, he paying the costs of the application.

This was a motion for an injunction to restrain the defts. the directors of the Strand Music Hall Company (Limited) from issuing preference shares and from accepting or receiving calls in respect thereof. The company was incorporated the 4th of July 1862, and by the 35th clause of their articles of association it was enacted that the company might in special meeting authorise the borrowing of such sum or sums of money, and on such terms and conditions as they might think fit, and might also by the resolution of a special meeting, to be convened by not less than four days' notice to be sent by the general post to every shareholder, stating the object for which such meeting was to be held, increase the capital of the company by the issue of new shares, which shares should be of such nominal value, and subject to such conditions as to the payment of calls in proportion of profits, as might be determined on by the resolution creating the same; and by the 55th clause it was provided that the company might, from time to time, by resolution passed by at least three-fourths of the votes of the shareholders present personally at an extraordinary meeting, alter or make new provisions in lieu of or in addition to any regulation of the company, whether contained in those articles or not. The directors called a meeting for the purpose of issuing preference shares, and the chairman declared that resolutions to that effect had been carried. The plt. and others disputed this, but the case, at the suggestion of the V.C., was argued on the question, whether, under the articles of association, preference shares could be issued.

Glasse, Q.C. and Locock Webb appeared for the plt. *Roxburgh and Fry* for Mr. Syers.

Osborne, Q.C. and Street for Mr. Stevens.

Baily, Q.C. and George Murray for Mr. Magnus.

Speed and Sleigh (cf the common law bar) for other parties.

The following cases were cited:—

York and North-Midland Railway Company v. Hudson, 16 Bear. 490;

Edwards v. Shrewsbury and Birmingham Railway Company, 2 De G. & Sm. 537;

New Brunswick and Canada Railway Company v. Muggaridge, 4 Drew. 686.

THE VICE-CHANCELLOR said, that although various questions might arise at the hearing, he should confine himself to this question at present. It appeared to him that there was not power under the articles of association in the directors or the company to create or issue shares of a preferential nature entitling the holder to payment of dividends in priority to the other shareholders. The language of the only section (the 35th) which bore upon this question was, that the directors might increase the capital by issuing new shares which should be of such nominal value as might be deter-

mined on. That was the only clause which authorised this being done, but it did not authorise the issuing of preferential shares. It was said that under the 53th clause the directors of the company had power to alter any of the regulations, and if so altered as to give the power, then it might be done, and that it had been done, in fact, by the resolution which authorised the issuing of the preference shares. That was not so. If this was a meeting held for the purpose of altering the regulations and giving power to the directors or the body at large which did not necessarily previously exist, there must have been due notice of what was intended to be done to make it binding, and that had not been done. All the proceedings at the meeting might have been perfectly regular, and his Honour did not mean to restrain the company from holding any meetings they thought fit to call, or to do what they pleased, nor did he mean to express any opinion as to what might be done with respect to any other form of issuing shares; but he would grant an injunction to restrain till the hearing or further order the directors from creating or issuing any share or shares entitling the holders or holder thereof to the payment of dividends in priority to any other shareholders.

July 30.—Subsequent to the above-mentioned injunction being granted, it was discovered that a written copy of the bill having been originally filed, the fourteen days after such filing expired on the 29th, and under the 4th rule of the 9th Cons. Ord. it was the duty of the clerk of the records and writs to take the written bill off the file, no printed bill having been filed, which he accordingly did. An application having been made by the plt. to his Honour to permit a printed bill to be filed notwithstanding such omission within the time limited, on the ground that the solicitor's clerk had from pressure of business taking him away into the country forgotten to inform his employer that he had not filed the printed bill, his Honour made the order, but afterwards, considering that notice should have been given to the defts., he desired that the matter should be mentioned to the L. C., who thought that notice should be given, which was accordingly done; all the defts. now appeared and opposed the motion to file the printed bill, as the fourteen days had elapsed, contending that under the general order in question the defts., on the written bill being taken off the file, were entitled without any further order to recover costs of the suit against the plt.

The VICE-CHANCELLOR said, that after he had made the order on the *ex parte* application, Mr. Murray, one of the record and writ clerks, had an interview with him; after consideration he was of opinion that the order ought not to have been made on an *ex parte* application, and he directed that an application should be made to the L. C., who took the same view. At the same time he had directed that all things should remain in the office *in statu quo*. The 6th section of the 15 & 16 Vict. c. 86, which introduced the practice of printed bills, referred to cases of pressure, such as *me equas*, injunctions, cases of infants, &c., and that great injustice might be done unless it was allowed at once to file a written bill, not waiting for the printing, and it therefore enacted that a written bill might be filed, provided that within fourteen days a printed one was filed, and in consequence of that Act the General Orders of the 7th Aug. 1852, and the order on this subject became the 4th rule of the 9th Consolidated Orders, and it was the duty of the officer, without waiting for any application by any one, to take the written bill off the file on the expiration of the fourteen days. The defts. were then entitled to all the costs of the suit. That was a very stringent order, and showed how strictly the L. C., who signed and assisted in framing these orders, felt the necessity of imposing the undertaking of filing the printed bill within the fourteen days, by the severe penalty attached to its

nonperformance, which remarkably enough was for the benefit of the defts., who did not appear to have suffered from the omission; but there was the express direction, so that the moment the written copy was taken off the file, the defts. acquired a right to have the costs of the suit paid to them. If the matter were *res integra*, he should hesitate a great deal before he would decide that this court had a right to deprive the defts. of that right; but on the other hand, it had jurisdiction to dispense with the exigency of the severity of the general orders in special cases. He was, however, relieved from deciding the question by the opinion of the M. R. and the Lords Justices in the case of *Ferrand v. The Corporation of Bradford*. He had been furnished with a copy of the order in that case as drawn up, and it appeared that, the fourteen days having expired, the exigency of that order was dispensed with, and the order affirmed. The question, therefore, was, whether there was a slip here, as in that case, or whether the circumstances here justified the court in saying that, notwithstanding that decision, the authority did not apply. There the omission was caused by the illness of a senior clerk, which created such a pressure on the rest of the office, that one of the junior clerks, whose duty it was to have filed the printed bill, forgot to do it, and that was considered such a slip as a court of justice would relieve against. Here the clerk, whose duty it was, stated that he was obliged to leave London on the very day, on business of his employer, and forgot to intimate to him that it had not been done until after the expiration of the fourteen days and the motion had been made and the injunction granted. It appeared to him that that was just the same kind of slip as had been made there. A certain pressure occurred, and it was forgotten. In one sense it was culpable—the merely forgetting; but in the other it was venial, being under pressure of circumstances, and therefore the court must come to the same conclusion as the M. R. and the Lords Justices in the case referred to. The only difference was, that here the order for the injunction was made meanwhile, and it was said to have been made when, in fact, there was no suit, and therefore the court had no jurisdiction, and the order was a nullity. However that might be, the court would leave to the defts. the responsibility of acting upon it, if they thought fit; but the question now was, whether the court was to order a printed bill to be filed *nunc pro tunc*, it being unnecessary to determine what was the effect of the omission, whether the order for the injunction was a nullity or not, that not being any reason why a printed bill should not be filed. Whichever way it could be regarded, the order must be the same as in *Ferrand v. The Corporation of Bradford*; that is, notwithstanding the expiration of the fourteen days, the written bill which had been taken off the file might be restored to the file, and a printed copy received and filed to be dated on the 28th July. With respect to the costs, it was not a motion of course, but on the merits, and the court must be satisfied to deprive the defts. of the right which they had. They clearly had not only a right to be served, but to appear and be heard, and the court was actually taking from them their right to costs, they not knowing what the merits were until they appeared. The plt. therefore must pay the costs of this application.

Solicitors: Robinson, Webster and Robinson; Walker and Twyford; and Eyre and Lawson.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW,
Esqrs., of Lincoln's-Inn, Barristers-at-Law.

Wednesday, July 15.

WROE v. SEED.

Executors—Costs—Executors ordered to pay the costs of an administration suit—Duties of executors.

Executors and devisees in trust to sell and pay legacies to the testator's nephews and nieces in classes, and to distribute the residue also among the testator's nephews and nieces, were empowered to postpone sale and conversion for five years, and ordered to pay the income to the persons entitled in the meantime. For five years before the bill was filed they held the estate in their hands, without suggesting any difficulties as to the ascertainment of the classes of legatees, kept no accounts, paid only a small part of the legacies, and to the residuary legatees neither principal nor interest, gave no information, and when applied to for accounts, sent no reply.

Although illiterate men, and the estate large, they were ordered to pay the costs of the suit for administration, with the exception of costs of proving the pedigree.

This was a motion to vary the chief clerk's certificate. After hearing it opened on the 15th April, his Honour directed the motion to stand over, and to come on with the cause on further consideration. This was accordingly now done.

The bill was filed by some of the residuary legatees under the will of Thomas Wroe for the administration of his estate. The will was dated in 1849, and the testator, after certain specific bequests of realty, devised all other his real estate and all his personal estate to the defts. Edward Seed and Peter Wroe (whom he also appointed executors), their heirs, executors, administrators and assigns, upon trust that they and the survivors, &c., should, as soon as conveniently might be after his decease, sell and convert into money all such parts of his personal estate as should not consist of money or securities for money, and also his real estate. He declared that "notwithstanding the said trusts for sale and conversion it should be lawful for his trustees or trustee to postpone the sale or conversion of any part of his said real and personal estates for such period, not exceeding five years from the time of his decease, as such trustee or trustee should deem expedient;" and that until such sale and conversion the income should be paid to the person who would be entitled to the moneys if such conversion had actually taken place.

The moneys were to be held upon trust, after payment of debts, expenses and legacy duty, the investment of a sum of money in the purchase of an annuity, and various pecuniary legacies to nephews and nieces of the testator and the children of divers nephews and nieces, "to pay and divide the residue of the said moneys in manner following; that is to say, one-seventeenth share thereof unto and equally amongst the children of testator's nephew John Wroe, their respective executors, administrators and assigns, and the remaining sixteen-seventeenth shares thereof unto and amongst all the testator's nephews and nieces (except John Wroe) and their respective executors, administrators and assigns."

Testator died on the 20th June 1856. For a period of twelve months prior to the 1st June 1861, the plts. made repeated applications for an account and distribution of the residue, but none was ever rendered, nor was any payment made.

On the 1st June 1861 the plts.' solicitors sent a letter addressed to both defts., giving them notice, that unless they had the accounts they required within one

week, or a written assurance that such accounts should be delivered within one week after such assurance, they should give instructions to prepare a bill, and should ask the court to compel the defts. personally to pay the costs of the suit. To this no answer was returned, and on the 4th July the solicitors wrote again, stating that they had received instructions from their clients to commence proceedings, and that they wrote that letter for the purpose of affording to the defts. a further opportunity of complying with the wishes of the parties, and with the intention thereafter of throwing upon them each, personally, the costs of the suit rendered imperative by their refusal and neglect to render proper accounts. No reply was returned to this letter.

The bill was filed on the 30th July 1861.

The usual inquiries and accounts were directed, and the chief clerk found that the executors had received personal estate, not specifically bequeathed, to the amount of 25,657*l.* 10*s.* 5*d.*, and had paid and were entitled to be allowed sums to the amount of 23,813*l.* 15*s.* 9*d.*, leaving a balance due to them of 1843*l.* 14*s.* 8*d.*

The particulars of the receipts and payments appeared in an account marked A, in which the chief clerk had disallowed ten items of disbursement, amounting together to 1177*l.* 10*s.* 11*d.*

The motion was to vary the certificate by allowing three of these items, and also by disallowing two items (amounting together to 32*l.* 15*s.*) of one of the surcharges on the account, which the chief clerk had allowed, to the extent altogether of 1233*l.* 15*s.* 8*d.*

The first of the three items disallowed was a sum of 212*l.* 5*s.*, which Edward Seed claimed to retain for services rendered by him to the testator in collecting the rents of his cottage property, and for constant care and attention bestowed on the testator himself and in the management of his property, both by himself and by Peter Wroe. He said that both defts. were repeatedly told by the testator that they were to charge for their services.

The second item was a sum of 161*l.* 7*s.* 3*d.* retained by the other deft. Peter Wroe under similar circumstances.

The third item, 100*l.*, was a sum claimed by both defts., for travelling and other expenses incurred in collecting the rents of the testator's estate and in finding out the various legatees.

The two sums allowed upon the plts.' surcharge were in respect of a half-year's rent of some property of the testator, received about the time of his decease. The deft. Wroe admitted having received these sums, but alleged that he advanced sums equal to them in amount to the testator before his death.

The grounds upon which the motion was refused will be found stated in his Honour's judgment.

Molins, Q. C. and Cadman Jones were for the plts. They referred to

Springett v. Dashwood, 2 Giff. 521;

Kemp v. Burn, 7 L. T. Rep. N. S. 666; and the cases there cited.

Bacon, Q.C. and W. W. Streeton were for the defts.

THE VICE-CHANCELLOR.—The first question is as to the motion to vary the certificate. An attempt has been made on the part of the defts. to show an agreement on the part of the testator to remunerate them for their services; and beyond that, the case is mixed up with a sort of claim by way of *quantum meruit*. The case seems to have been very carefully considered by the chief clerk, and he has come to the conclusion that there was not sufficient ground on which these executors could be entitled to any such allowance as they have charged against the estate. There was no doubt, in his opinion, that there was nothing to entitle them to the sums which they claimed to deduct from the balances in their hands. It

appeared to me, after I had heard the bulk of the evidence upon the motion, that the case had totally failed; but I desired that the case should be heard on further consideration, before I disposed of the motion to vary the certificate, because, upon the question of costs, it is a material consideration in all cases that there may be circumstances of such laudable conduct on the part of debtors, who are executors, as will justify the court in dealing tenderly with them with regard to a demand of this kind, as to which there certainly is conflicting evidence. Therefore I suspended my opinion upon the subject until I had heard the cause on further consideration and had listened to anything which Mr. Bacon might add on the subject of the motion to vary the certificate. Now, having heard the whole case, and having learned what the conduct of these executors has been, I am sorry to say that it seems to me to be a case of gross misconduct. The will gave certain legacies, and then disposed of the residue. The legacies given by the will were given to persons described by the testator as classes, nephews and nieces, and the children of nephews and nieces. I asked whether or not the executors had in their answer stated any reason or suggested any difficulty in immediately upon the death of the testator ascertaining the persons who composed these classes? There is no statement anywhere that can be read—at any rate none has been read, and I have been unable to find any—which suggests that there was any difficulty at all in finding the persons who were entitled as legatees under the will. It is very justly contended on the part of the executors that they could not dispose of the residue until something was done as to the payment of the legacies: but even if there had been a difficulty in ascertaining the classes, I discover in this will peremptory directions by the testator with reference to those who were entitled to the residue of his estate; and although he allows five years, in the discretion of his executors, for giving the capital to the residuary legatees, he allows not a day that I can see for the payment of the interest. Therefore, upon the death of the testator, the residuary legatees had a right to have all the legacies provided for, and at least to have the income of their legacies paid. Has that been done? So far from it, I find that, at the distance of five years from the death of the testator, the residuary legatees, who had obtained not one farthing, made two applications before the bill was filed, and they received most unsatisfactory answers. It is said, on behalf of these executors, that they are illiterate men, and that they cannot keep accounts. One of them gives a most extraordinary description of his capacity to keep accounts. He shows that he has a capacity to keep his own accounts, but not a capacity to keep trust accounts where he is to account for the property of other people. Now, if a testator appoints a person to discharge the duties of an executor, inasmuch as he is sworn to discharge his duties as executor, his first duty plainly is, if he cannot keep accounts, to provide some one who can; because in this court the first and primary duty of every executor or trustee having money in his hands to be received and to be paid is, that an account should be kept to be produced to those interested in the account when it is properly demanded. This case is so gross that up to the time when the bill was filed no account that could be shown had been made out. The bill was filed in July, and it is stated that, in the month of April preceding, an attorney's clerk was employed to make out an account, but he could make out nothing that could be presented, and nothing that is now relied on. Here were executors with a very large estate; 11,000*l.* of it is said to have been in advance, ready to be distributed at the death of the testator. What conduct can be

more grossly improper than that of executors, who were to pay legacies and to distribute the residue, with a direction to pay the income of the residue immediately, but who did not pay the capital, who can suggest no difficulty as to knowing who the legatees were, who, five years after the testator's death, had legacies unpaid, the residue almost wholly undealt with, no account ready that can be produced, and no account taken until this bill is filed, and who, when this bill is filed, bring forward demands against the estate and on their own behalf, which the court has found it to be its duty wholly to disallow. The questions to be disposed of with regard to them now are, the question of the costs of this litigation, and that of the interest on their balances. One part of the conduct of these executors, which their counsel has endeavoured to show was laudable and discreet, was, that each of them took 1000*l.* to his own house. One of them says he kept this sum in gold, and applied it for no purpose. They say that they kept these sums for the purpose of paying legatees if they should expectedly or unexpectedly come to demand any money. That is gross misconduct. It is highly culpable and gross misconduct for any executor who has a legacy immediately payable to take into his own house money for the purpose of paying it, and to keep it five years, there being no difficulty in ascertaining who the legatee is, producing it only in consequence of a decree made against him by this court. On these sums of 1000*l.* each so improperly kept in their own hands these executors must be charged with interest at 5 per cent. There remains the consideration of the interest on the balances in their hands. The balances have been ascertained, I understand, by the chief clerk. Yearly interest on those balances at 5 per cent. according to the regular course of the court must be paid; I say at 5 per cent., because, although some of the residuary legatees are parties, all are not before the court, and the court is bound to regard the interests of those who are not here to protect themselves. They are entitled to look to the court for protection, and for the receipt of what is justly due to them, and that can only be granted by directing payment of interest at 5 per cent. Inasmuch, however, as the testator seems to have employed a country bank, and there was a sum in the bank at his death, whatever interest has been received—and the amount is easily ascertainable—the executors will have the benefit of. But because an executor finds the money of his testator deposited to a large amount in a country bank, that is no reason why, having legacies to pay and being directed immediately to distribute the income of the residue, he should keep the money there for a long course of years. I say a long course of years, because it seems that five years expired before the bill was filed. Whatever interest they received in respect of that money they will be entitled to. That seems to be the strict justice of the case. Some grounds for indulgence have been stated, but really I do not see anything in any of them that affords any palliation. It is no excuse that these executors are men in humble life, because honesty is as much a duty, and I hope a practice, in humble life as it is in a much higher station, and whether his station be high or low an executor who misconducts himself in this court must be dealt with exactly in the same manner. These are defaulting executors and executors who have misconducted themselves, and they must pay the costs of all the litigation except so much as has been occasioned by the entering into the pedigree. I have some doubt even about that, because it is quite consistent with anything that appears on the pleadings that these executors may have known this pedigree all along; but I cannot enter into that, and I think I am bound to pursue the ordinary and proper course, which will be to relieve them from the cost of proving

Q. B.]

THE DUKE OF MARLBOROUGH v. OSWALD—RUTTINGER v. TEMPLE.

[Q. B.]

this pedigree, and they must be allowed their costs in the ordinary way as between solicitor and client of this investigation. I allow these costs on this principle, that if there was any difficulty in ascertaining the classes of residuary legatees, their duty was to have filed a bill, and to have it done under the direction of the court, and under the direction of the court the pedigree might have been ascertained, and they would have been entitled to costs as between solicitor and client.

Solicitors for the plts., *W. Tindal Perkins*, agent for *Taylor, Jeffery and Little*, Bradford.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barriers-at-Law.

MICHAELMAS TERM 1863.

Monday, Nov. 2.

THE DUKE OF MARLBOROUGH v. OSWALD.

Agreement—Farm letting—Clause of forfeiture.

An agreement for the letting of a farm contained a clause that the deft. was "to perform each year for the plt. at the rate of one day's team work with two horses and a proper driver for every 50l. of rent." The plt. gave the deft. notice requiring him to send on a certain day a cart and two horses to the railway station, and perform one day's team work by drawing coal for the plt.'s use. Upon an objection that the clause only applied to agricultural work: Held, that it was not so restricted.

This was an action of ejectment on the ground of forfeiture, to recover possession of a farm. The cause was tried at the last assizes for Oxfordshire, before Byles, J., when a verdict was entered for the plt., with leave reserved to move to enter a nonsuit or a verdict for the deft.

It appeared that the deft. held a farm as tenant under the Duke of Marlborough, under an agreement which contained a clause that the deft. was to perform each year for the plt. at the rate of one day's team work with two horses and one proper driver for every 50l. of rent. The plt. by notice required the deft. to send on the 25th of last May a cart and two horses to the railway-station, and perform one day's team-work by drawing coal for the plt.'s use. This he refused to do, and there being a clause of forfeiture, the present action was brought.

Huddleston, Q. C., now moved for a rule nisi as above mentioned, and he contended, first, that the meaning of the clause was, that the work to be done should be agricultural work, and that the work required in the present instance was not such as the plt. could require the deft. to perform; secondly, that as the clause only required the deft. to perform "at the rate of one day's team work," the plt. had no right to require him to use a cart; that the only obligation of the deft. was to supply two horses and a proper driver, and that if the plt. required the use also of a cart or other carriage, he ought himself to have provided it, and that therefore the demand being bad, there was no forfeiture incurred in refusing to comply with it.

The COURT were of opinion, that as to the first objection the clause did not confine the work to be done to agricultural work only, and that, as to that, there would be no rule, but granted a

Rule nisi on the second point.

Tuesday, Nov. 3.

RUTTINGER v. TEMPLE (Administratrix, &c.)

Illegitimate child—Maintenance after mother's death.

There is no legal obligation on the part of the personal representative of the deceased mother of a bastard child under sixteen, to pay out of the assets for the expenses of its maintenance incurred after the mother's death.

This was an action to recover 36l. 12s. 1d. for the funeral expenses of the deft.'s deceased daughter, and the cost of the maintenance, &c., of an illegitimate child, of which the daughter was the mother.

The declaration contained two special counts, on an alleged agreement, by which the plt. undertook to bring up the child after the mother's death, and the deft. undertook to take out administration in respect of some property belonging to the deceased, and to pay over the money and interest she might receive to the plt.'s agents. The plt., however, failed to prove the issues upon these counts, and the only question raised at the trial was upon the common counts.

The deft. paid 12l. into court, which was admitted to be for the funeral expenses only. The verdict was found for the plt. for 24l., with leave reserved to move to enter the verdict for the deft.

The facts were, that the deceased had cohabited with the plt. up to about March 1862, when there was a separation. The deceased, some time subsequently (May 1862) was delivered of a male child in Queen Charlotte's Lying-in Hospital. At the time of her death (15th May 1862) she was entitled to some property, and an arrangement was come to between the plt. and all the members of deceased's family, with the exception of her two brothers, that the plt. should bring up the child, and the deft. take out administration, and pay over the proceeds of the deceased's property to certain persons for the plt. This arrangement not having been performed on the part of the deft. this action was brought.

In Hilary Term a rule nisi was obtained to enter the verdict for deft.

Parry, Serjt. now showed cause.—The sole question is, whether the administrator of the mother of a bastard child under the age of sixteen is liable for the maintenance of a child after the mother's death. By the 4 & 5 Will. 4, c. 76, s. 71, the mother of a bastard child is bound to maintain it until the age of sixteen, so long as she shall be unmarried or a widow; but if she marry, the obligation to maintain the child is cast on the husband: (sect. 57.) [BLACKBURN, J.—How does that enactment compel the administrator of the mother to maintain the child after the mother's death?] The mother would be indictable for not supplying necessaries to the child. [BLACKBURN, J.—No doubt, when she has the custody of the child; but here the expenses sued for were incurred after the mother's death.]

1 Black. Com. 448, was then cited.

The *Solicitor-General* (Woollett with him)—The deft., as administrator, was not liable. Her duties were to collect the deceased's estate, pay her debts and distribute the residue according to the Statute of Distributions. Here there was no debt or obligation incurred in the mother's lifetime, which the administrator was liable to satisfy, and no provision is made by the Statute of Distributions for the maintenance of an illegitimate child.

Mortimore v. Wright, 6 M. & W. 482, was cited.

COCKBURN, C. J.—The rule must be made absolute. The 4 & 5 Will. 4, c. 76, s. 71, imposes on the mother of an illegitimate child the liability to maintain the child, but that liability is a personal one. It is much to be regretted that no provision is made in the case where the mother of an illegitimate child dies

leaving means sufficient to provide for the child, that the estate left, or some part of it, should be applied to its maintenance. In the absence of such statutory obligation, I do not gather from the authorities that any liability exists at common law whereby the administrator of the mother is liable to provide for or to pay for the expense of the maintenance of the child out of the assets. This was merely a personal obligation, but it might have been a different question if the payment had been made by the plt. in the mother's lifetime. Here the assets come to the administratrix, who is bound to distribute them according to the Statute of Distributions, which makes no provision for the maintenance of an illegitimate child. The administratrix in this case, therefore, cannot be held liable, and the rule must be made absolute.

WIGHTMAN, BLACKBURN and MELLOR, JJ. delivered similar judgments. *Rule absolute.*

COURT OF COMMON BENCH.

Reported by W. MAYD, Esq., Barrister-at-Law.

MICHAELMAS TERM 1863.

Tuesday, Nov. 3.

COPLEY v. HEMINGWAY.

Taxation—Costs.

By sect. 7 of the Directions to the Masters, Hilary Term 1853, it is directed that in all actions of contract, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued, where the sum recovered or paid into court shall not exceed 20l. (without costs), the plt.'s costs as against the deft. shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed:

Held, that the rule applies equally to the deft. as to the plt.

This was an action for not unloading a vessel, and it appeared that the deft. had objected to the case being tried in the Sheriff's Court, on the ground that it involved a question as to the custom of the port of London, viz., whether the deft. was liable if he could not get his vessel alongside the wharf on account of the state of the tide. A summons was accordingly taken out, and the judge at chambers made an order that the action should be tried before the sheriff, and as this order was made in vacation, the judge's decision could not be reviewed, and the trial took place before the sheriff, and resulted in a verdict for the deft. The master taxed the costs according to the lower scale of allowance given in the "Directions to the Masters, Hilary Term 1853."

Practice now moved for a rule to show cause why the master should not review his taxation on the ground that the 7th clause of "the Directions to the Masters, Hilary Term 1853," only referred to the plt.'s costs, and not to the deft.'s. The 7th clause is as follows:—"In any actions on contract, other than cases wherein, by reason of the nature of the action, no writ of trial can by law be issued, where the sum recovered or paid into court, and accepted by the plt. in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20l. (without costs), the plt.'s costs as against the deft. shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed." &c. The heading to the schedule is as follows:—"General allowance for plts. and defts., &c." He also contended that these directions did not apply at all in this case, as, being an action for unliquidated damages, with no count for demurrage, it was not triable before the sheriff. [BYLES, J.—But the case has been tried, and the deft. has appeared.] Yes; we could not set aside

the judge's order, as it was made and the action tried in vacation. [BYLES, J.—It would be very hard if the plt. had to go to trial and receive his costs on the lower, but pay on the higher scale.] He could go to the Superior Court if he liked. He cited

Mason v. Tucker, 28 L. J. 271, Ex.

ERLE, C. J.—I am of opinion that there should be no rule in this case. The costs were taxed on the lower scale. By section 7, if the plt. succeeds his costs are to be taxed on the lower scale; and taking this in connection with the schedule of fees, which applies both to the plt. and deft., I think that the deft.'s costs ought also to be taxed on the lower scale. Then Mr. Prentice says that this was not properly triable before the sheriff; but the judge made an order that it should be so tried, and the deft. appeared and got a verdict and went before the master to tax his costs, and he does not move to set that order or verdict aside. I think, therefore, that the costs were properly taxed.

WILLIAMS, J.—I am of the same opinion. The question is, how are these costs to be taxed supposing the action was properly tried?

BYLES, J.—I am of the same opinion. The schedule contains costs for both parties, and then comes sect. 7, which applies that rule of costs to cases which might have gone before the sheriff or not. With respect to the rights of the parties, plt. and deft., I entirely agree with what has been said by my Lord: the schedule gives equal costs to both.

KEATINGE, J. concurred.

Rule refused.

COURT OF EXCHEQUER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law.

May 26, and June 2, 4 and 5.

COOKE v. WARING.

Keeping diseased sheep—Negligence—Scienter—Action—Evidence.

In an action for negligently keeping sheep diseased with the scab and dangerous to be at large, with knowledge on deft.'s part that they were so diseased and dangerous, &c., whereby, and by reason of which wrongful negligence of deft., the said diseased sheep became intermixed with healthy sheep of the plt., and infected them with the disease, scienter is essential to the support of the action. There can be no negligence if there was no knowledge on deft.'s part at the time of the supposed negligence in keeping them that the sheep were then diseased; and in the absence of evidence of such knowledge a nonsuit was rightly directed: So held by Pollock, C. B., Bramwell and Channell, BB.

Also, per Pollock, C. B.—Evidence, from which a conclusion may be drawn either one way or the other, ought to have no influence with the jury; because a fact which is indifferent to the issue to be tried, and is consistent with the finding either one way or other, is not evidence to go to the jury to dispose of the issue.

Declaration.—For that deft. wrongfully, negligently and improperly kept certain sheep diseased with the scab, and dangerous to be suffered to go at large, he (deft.) during all that time well knowing that the said sheep were so diseased with the scab and dangerous to be suffered to go at large, whereby and by reason of the wrongful negligence and improper conduct of deft. in that behalf, the said sheep of deft. intermixed with certain sheep of plt. in a sound and healthy condition of body, and the said healthy sheep of plt. became diseased and infected by the said diseased sheep of deft., and many of the sheep of plt. died from the said disease and were lost to plt., and the residue of the said sheep became and were diseased and rendered of little value to plt., and plt. claimed 1000l.

Ex.]

COOKE & WARING.

[Ex.]

Plea, not guilty, and issue thereon.

At the trial before Channell, B. and a special jury, at the last spring assizes at Shrewsbury, it appeared that plt., a miller and cornfactor near Shrewsbury, also occupied a large farm at Diddlebury, and that deft. was an extensive cattle dealer living about six miles from the plt.'s farm, and occupying about 100 acres of land in Diddlebury, under the same landlord as the plt., for the purpose of depasturing cattle or sheep purchased by him at different fairs, and that a great portion of this last-named land adjoined the plt.'s farm. At the time in question plt. had about 600 sheep on his farm, all perfectly sound and healthy, and until the present occasion he had never had any diseased sheep on his farm. It was proved by plt. and other witnesses on his behalf, that in May 1860 about a dozen sheep belonging to deft. and diseased with the scab had come from some part of deft.'s land, and were found by plt.'s bailiff in a field of plt.'s, intermixed with plt.'s sheep. The bailiff immediately separated them from plt.'s sheep, and then finding they had the scab, he locked them up in plt.'s coach-house and sent notice to deft., who paid no attention to the notice, and therefore, after keeping them locked up for two days, the bailiff turned them adrift on to the road, away from plt.'s field and sheep. Within a short time most of plt.'s sheep became diseased with the scab, and the flock dwindled from 600 in number down to about 267. As soon as plt. discovered that his sheep were infected, he saw deft. and complained to him of his conduct in allowing sheep diseased with scab to be at large, whereupon deft. said he "could not help it, they had been 'at tack' at Mr. Parsons', and had caught it at Mr. Brindley's, at Boncroft." A witness named Fawtrel also proved meeting deft. looking for his sheep, some three or four days after the sheep were found in plt.'s field, and that he told deft. where they were, and that they had the scab, to which the deft. replied, "he had had them at Parsons', and they had got to Brindley's, at Boncroft, and caught it there." The deft. called no witnesses, and the learned judge being of opinion that there was no evidence either of negligence or *scienter*, directed a nonsuit to be entered, with stay of execution, to give plt. an opportunity to move to set the nonsuit aside. A rule was accordingly subsequently obtained to set aside the nonsuit, and for a new trial on the ground that the learned judge wrongly determined that there was no evidence to go to the jury of *scienter* or negligence, and that negligence was necessary to be proved as well as knowledge; against which rule

Pigott, Serjt., H. Matthews and Gough now showed cause, and contended that there was no evidence of any kind to show negligence, and negligence was necessary to maintain the action. It may be necessary to take more care of a scabby sheep than a sound one, but that is a question of degree. There is no similarity between a diseased animal and a vicious one, or one *fera natura*, and the cases as to the latter class of animals are not applicable. There is a broad distinction. In keeping an animal that will injure mankind a man does a voluntary act. To support the declaration it must be held unlawful to keep scabby sheep. [BRAMWELL, B.—Is it *prima facie* evidence of negligence that a man's scabby sheep are found at large, he knowing them to be scabby?] The sheep may have gotten over a defective fence of the plt.'s. It was not shown how they got in or whence they came. [CHANNELL, B.—I took the evidence to be clear that the sheep had come from some part of deft.'s land.] In some cases the act of the animal becomes the act of the owner—*e. g.*, if a roving animal, as a horse or cow, trespass in search of grass, a wrong and a trespass being shown, the owner is responsible in trespass. Scabby sheep have no propensity to communicate disease, but a ferocious dog has a propensity to bite, and, by analogy to the case of a ferocious

dog, plt. should not only prove the *scienter*, but that the sheep had before infected other sheep. They cited and referred to the following authorities:—

Withers v. North Kent Railway Company, 27 L. J. 417, Ex.;
Doe v. Langfield, 16 M. & W. 497;
Hill v. Balls, 2 H. & N. 229; 27 L. J. 45, Ex.;
May v. Burdett, 9 Q. B. 101; 16 L. J., N. S., 64, Q. B.;
Card v. Case, 5 C. B. 622; 17 L. J., N. S., 124, C. P.;
Jackson v. Smithson, 15 M. & W. 563; 15 L. J., N. S., 311, Ex.;
Rastell's Entries, 616;
Smith v. Pelah, 2 Str. 1264, per Holt, C.J.;
Cox v. Burbidge, 32 L. J., 89, C. P.;
Anderson v. Buckton, 1 Str. 192;
Orr v. Fleming, 21 L. T. Rep. 219, H. of L.;
Hogan v. Sharp, 7 C. & P. 755;
Vaughan v. Taff Vale Railway Company, 3 H. & N. 679; 28 L. J. 41, Ex.; in error, 5 H. & N. 679; 29 L. J. 247, Ex.; 2 L. T. Rep. N. S. 394;
Blyth v. Birmingham Waterworks, 25 L. J., 212, Ex.;
Thomas v. Morgan, 2 Cr. M. & R. 502.

Huddleston, Q. C., J. O. Griffiths and Harrington, contra, in support of the rule.—There was clear evidence of *scienter*. If there were any evidence of *scienter* the case should not have been withdrawn from the jury. Deft.'s not being called increases the weight of the plt.'s evidence. Having sheep in that condition with knowledge, it was negligence to let them out of his safe keeping. Either a wild or a domestic animal, kept with knowledge of ferocity, is kept at the peril of the keeper; so with animals affected with a disease infectious to other animals by contact, the owner is bound to keep them secure, and negligence will be presumed if they are found at large. If there is any analogy between diseased animals and animals of a ferocious nature, then the cases show that a keeping with knowledge, and an injury following, will give a ground of action. There is no ground for the distinction in the way in which the injury is inflicted on another animal by either a diseased or a ferocious animal. It is physical agency with different effects in either case. They cited commented on and distinguished the cases cited by deft., and cited in addition

Reg. v. Vantandillo, 4 M. & S. 73.

Cur. adv. vult.

June 5.—POLLOCK, C. B.—We are of opinion that the rule to set aside the nonsuit and grant a new trial should be discharged. It appears to us, from reading the case, that there is no evidence of a *scienter* which called upon the learned judge who tried the cause to leave the case to the jury. There is some evidence that the deft. was aware of the condition of the sheep after the mischief had been done; but there is no evidence that he was aware of it before; the conclusion might be drawn either one way or the other, and it ought to have had no influence with the jury, because a fact which is indifferent with respect to an issue to be tried, and is consistent with the finding either one way or the other, is not evidence to go to the jury to dispose of the issue. The issue is to be disposed of by evidence, and not on surmise or suspicion. I am therefore of opinion that the *scienter* being essential to the support of the action, and there being no evidence of a *scienter*, my brother Channell was perfectly right in nonsuiting the plt. for want of evidence; and the rule for a new trial must be discharged.

BRAMWELL, B.—I am of the same opinion. The ruling was correct, because there was no negligence, if there was no knowledge on the part of deft. And it is extremely difficult to disintegrate two considerations

[Ex.]

KING AND OTHERS v. WALKER.

[Ex.]

and to say that either of them ought to be taken up separately. I think there was no evidence of the deft.'s knowledge that the sheep, at the time when he must be supposed to have been guilty of the negligence in the keeping of them, were in the state in which they were, because all the evidence is, that four days after the supposed act of negligence, he makes use of an expression which recognised that he knew they had then got the scab, and he states at the same time his belief as to the way in which they got it, or probably got it. Now, really, when one bears in mind that these sheep could not have been on the land, if at all, but for the very shortest possible time, it is too much to say that the statement of deft., that on a particular day he knew they had it, is evidence that he also knew, four days before, that they then had it. I really think, not only in point of law, but which in truth is the same thing, in point of good sense, there is no evidence to show that he knew the sheep were scabby at the time of the supposed negligence on his part; consequently, there is no evidence of negligence which my brother Channell could have left to the jury. Therefore, the ruling was perfectly correct.

CHANNELL, B. concurred.

Rule discharged.

Plt.'s attorney, A. D. Smith, 27, Great James-street, Bedford-row, agent for J. Walker, Wellington, Salop.

Deft.'s attorneys, Walker and Son, 13, St. Swithin's-lane, agents for J. T. Bayley, Wednesbury.

May 25 and 26, and July 6.

KING AND OTHERS v. WALKER.

Pleading—Action on valued policy—Allegation of total loss—Plea of fraudulent concealment—What admitted by the plea—Evidence of abandonment.

In an action by shipowners against an underwriter on a valued time policy, the declaration alleged that the ship was, by the perils of the seas, damaged beyond 3 per cent. and wholly lost; to which deft. pleaded only a plea of fraudulent concealment from him by plts. at the time the insurance was effected, of the fact, then well known to plts., that the ship was unseaworthy at that time. It appeared that upon the ship's putting into St. Simon's Bay, Cape of Good Hope, in a damaged condition, the captain, who was part owner, had her surveyed and transmitted the survey, with the probable amount of repairs, to his co-owner in England, which was communicated to the underwriters; and that on a second survey being had it was found the repairs would exceed her value when repaired, whereupon the captain sold the ship and sent the cargo on; and of this second survey and sale notice was also sent home to the underwriters. The plea of fraud was not proved, and a verdict was found at the trial for plts. as for a total loss, with leave to defts. to move to reduce the verdict to one for a partial loss, and a rule having been obtained for that purpose, it was

Held, first, that the plea did not admit that there was a total loss, even in the case of a valued policy. A plea never admits more than must have been proved if the allegation, supposed to have been admitted, had been traversed; and had it been traversed plts. would be entitled to recover upon proof of a partial loss only, and therefore nothing more than a partial loss was admitted.

Secondly, that on the above facts, there was no evidence of abandonment, and that in fact there was no abandonment.

This was an action on a valued time policy of insurance, effected with the Mutual Marine Insurance Association for the port of Stockton, on the ship *William Willmott*, for one year, from 1st March 1859 to 1st March 1860, and was brought by plts., the owners of the ship, against deft. a member of the committee of management of the said

association, to recover 60*l.*, deft.'s proportion of 600*l.* in which sum the ship was insured by the association.

The declaration set out the policy, in which the ship was valued at 2000*l.*, and then alleged that "during the said year and during the continuance of the said risks insured against, the said ship was, by the force and violence of the winds and waves and by the perils of the seas, damaged beyond 3 per cent. and wholly lost; and at the time of the said loss, the said ship remained and was insured in the sum of 600*l.* by the said association for the period and on the terms of the said policy mentioned. Usual averments that all conditions were fulfilled, &c., entitling plts. to payment by deft. of 60*l.* Breach, nonpayment of the same and claim.

Plea.—That deft. became an insurer and so promised as aforesaid after the said ship had sailed, and whilst she was upon a certain voyage, and that he became such insurer, and so promised as aforesaid, through and by means of the fraudulent concealment by plts. from deft. of certain facts and information which, at the time of deft.'s becoming such insurer and so promising as aforesaid, were known to plts., and were then material to be known by and ought to have been communicated to deft., but, of which deft. then had no notice or knowledge, to wit, "that at the time when the said ship so sailed upon the said voyage she was unseaworthy, &c., and that at the time of deft.'s becoming such insurer and so promising, &c., the said ship was unseaworthy." Issue thereon.

The action was tried at the last Liverpool spring assizes, before Keating, J. It appeared that within the year insured, viz. on 27th Sept. 1859, the vessel was, by stress of weather, driven into St. Simon's Bay, Cape of Good Hope, considerably damaged and with an extensive leak in the fore part. The captain (who was also part owner) had a survey made, and the surveyors recommended discharging part of the cargo at the fore end to get at the leak; and on 18th Oct. the captain wrote to his co-owner in England, informing him of the damage, and that he was doing his best to get the ship made tight again in the cheapest manner and the shortest time, and inclosing a copy of the survey, and that he then estimated the sum required for repairs at 400*l.* This letter the co-owner and ship's husband forwarded to the secretary of the club on the 29th Nov. in a letter, in which he said: "Inclosed I beg to hand you a letter received from Captain King, with copy of survey, which will explain to you all the information I can give. He seems to have received extensive damage, finding her hold and deck beams broken. Please forward it, when read, to Mr. Hatton," &c. On the 18th Nov. Captain King wrote again from St. Simon's Bay to the ship's husband, that he had had another survey on the state of the ship, the cargo being nearly all out, and he found the vessel very much shaken and damaged, and stating the repairs the surveyors recommended; that he had advertised for tenders for the repairs, and had received three— at 278*l.*, 223*l.*, and 228*l.* 15*s.* respectively; that the surveyors said the ship could not go home with partial repairs, but that she would not be worth the sum it would cost to repair her; and that, in his own opinion, it would be better for the interest of all parties to sell her and send the cargo on. This letter the ship's husband forwarded to the club secretary on 39th Jan. 1860. Ultimately the captain sold the ship for 280*l.* gross, and wrote home directing notice of the sale to be given to the underwriters. It was admitted at the trial that when sold the ship was not worth repairing. The deft. not being in a condition to prove the plea of fraud at the trial, that plea was given up; but it was objected on his behalf that as the ship continued to exist as a ship and was not a mere wreck, the case could only be one of constructive total loss, and to make out that there must be abandonment

and notice of it by plts. to the underwriters. To this plts.' counsel replied, first, that on the pleadings, there being no denial of the loss, it must be taken that deft. had admitted a total loss, and that all things concurred to entitle plts. to recover for a total loss; and, secondly, that abandonment and proper notice of it had taken place. A verdict was found for plts., as for a total loss, with leave to deft. to move to reduce the verdict to one for a partial loss.

A rule nisi was accordingly obtained to set aside the plts.' verdict and enter it for a partial or average loss only, pursuant to leave, or why a new trial should not be had for misdirection, on the ground, in either case, first, that there was no evidence of a total loss, either absolute or constructive; and, secondly, that deft. was not precluded from contending that the loss was a partial or average loss only.

S. Temple, Q.C., Hindmarsh, Q.C. (T. E. Chitty with them) showed cause against such rule on the part of the plts.—The only plea being one of fraudulent concealment of unseaworthiness, deft. thereby admitted a total loss, and so evidence of it was unnecessary: (Rules of Pleading, Trinity Term 1853.) But if necessary, then it had been sufficiently proved. Lord Mansfield's dictum in *Gardiner v. Croasdale*, 2 Burr. 904; 1 W. Bl. 198, that where judgment is allowed to go by default plt. must nevertheless prove the nature and extent of his damage, evidently refers to the case of an open policy, and not as here to a valued one, which makes all the difference, and brings the case within the principle of *Thelluson v. Fletcher*, 1 Dong. 315. [WILDE, B.—The contention against you will be, that if in the case of a valued policy you allege in the declaration a total loss, and the deft. suffers judgment by default, the plts. are in no better position than if it had been traversed. The plts. must incur the same expense to prove a total loss as if it had been denied by the plea.] That will no doubt be said. In *Irving v. Manning*, in the H. of L., 6 C.B. 391, the amount in a valued policy was held to be liquidated damages, and if that be so it cannot be necessary to prove the total loss with a view to the damages; and what was said in that case as to the necessity of proving a total loss, had reference to cases where it was actually traversed, or the policy was an open one. To say, because a pleading was divisible it was therefore not admitted in the absence of a traverse, was a fallacy. If it be traversed, the party averring may succeed upon proof of a part, though he fail as to the rest. Heretofore, under the old system of pleading, on a payment into court on a valued policy, a deft. pleaded that there were no damages *ultra*, which was a traverse in effect of a total loss, and under the C.L.P.A. the plea that the sum paid in was sufficient to satisfy the damages implied a similar traverse. Again, a constructive total loss was clearly proved, and if it was necessary also to prove notice of abandonment, the letters from the captain, which had been sent to the club secretary, were a sufficient notice.

James, Q.C., Kemplay and C. Russell, contra, supported their rule.—Looking at it as an open policy, there was only one cause of action, namely, the damage flowing from the perils of the sea. There had been damage for which the assured was entitled to recover to the extent he could prove before a jury, who would inquire into the extent of damage, and give their verdict accordingly. Then, the only difference between a valued and an open policy was, an agreement of the parties in the former as to the price, which, in case of loss, was substituted for the finding of the jury, and, in the absence of fraud, the value already ascertained could not be re-opened. That agreed value must be taken like the value ascertained by the jury, and the proportion which the loss bears to such agreed value, is what the plts. are entitled to. That was decided by *Irving v. Manning* (*ubi sup.*), and 1 H. of L. Cas.

287. [WILDE, B.—Suppose a ship worth 5000*l.*, but valued in the policy at 10,000*l.*, is lost, the assured recovers the 10,000*l.*, which is double its value; but if a vessel valued at 2000*l.* is insured for 1000*l.*, the owner being his own insurer for the rest, then if he lose a mast worth 100*l.*, he would recover 100*l.*. But, according to your argument, he would have a right to come on the underwriter for 200*l.*] Yes, that is the way in which the averages are ordinarily adjusted. [WILDE, B.—That is the fallacy in your case. The principle of insurance law is, that no man can get more out of the underwriters, except in the case of a total loss, than the actual amount of the loss sustained.] The real question is one purely of pleading. What has deft. admitted by not traversing the loss? Nothing but the one cause of action, the damage from perils of the sea. The words "and was wholly lost" are immaterial, and only go to quantity of damage. An omission to traverse a material allegation is an admission of its truth, but the omission of an immaterial allegation goes for nothing. There was no total loss, nor were the letters of the captain, who was a part owner, any notice of abandonment raising a constructive total loss; but even if they amounted to notice, the notice was too late. They cited

Arnould on Insurance, 358, 2nd edit.;
Knight v. Faith, 15 Q. B. 649; 19 L. J. 509, Q.B.;
Roux v. Salvador, 4 Scott, 1; 8 Bing. N. C. 266;
Mitchell v. Edie, 1 T. R. 608;
Gernon v. Royal Exchange Insurance Company,
6 Taunt. 383;
Gardiner v. Croasdale, 2 Burr. 904; 1 W. B. 198;
Foley v. Tabor, 2 F. & Fin. 663, per Erie, C.J.;
Lindsay v. Leathley, 2 Ib. 696;
Nantes v. Thompson, 2 East, 385;
Rucker v. Palgrave, 1 Camp. 557;
[BRAMWELL, B. referred to *Goram v. Sweeting*, 2 Wm. Sand. 199.]

At the conclusion of the argument the case stood over for arrangement, on a suggestion from the court, that plts. should consent to have the damages estimated as for a partial loss, or leave it to the court to decide whether deft. might be allowed to amend; the Court intimating their opinion that evidence of abandonment was defective. Ultimately, however, the following judgment of the court (*viz.* Pollock, C.B., Bramwell, Channell and Wilde, BB.) was delivered.

July 6.—BRAMWELL, B.—In this case, which was an action on a valued policy, the declaration contained the ordinary allegation of loss, and the plea was one simply of fraudulent concealment. There was no traverse of a total loss, but a plea of fraud. The first question was, whether such a plea admitted a total loss. We are of opinion that such a plea does not admit that there was a total loss, even in the case of a valued policy. It is not necessary to go very elaborately into it, but a plea never admits more than must have been proved if the allegation supposed to have been admitted had been traversed. If this allegation had been traversed, the plts. would be entitled to recover upon proof of a partial loss only, therefore nothing more than a partial loss is admitted, and consequently that point fails the plt. Then the other and remaining question in the case was, whether there was evidence of abandonment, and we are of opinion that there was not. The matter was much discussed *pro* and *con.* at the time. The proceedings, as far as we could judge them on the part of the assured, appeared to be fair, but undoubtedly he had so acted as not to bind himself by any intimation of his abandoning, and we are of opinion that the underwriters were not bound; in fact, there was no abandonment. The result is, this rule must be made absolute to enter the verdict for a partial loss.

Rule absolute to enter a verdict for a partial loss.
Attorneys for plt., Harle and Co., 20, Southampton-

[Ex.]

THE ATTORNEY-GENERAL v. SILLIM AND OTHERS.

[Ex.]

buildings, Chancery-lane, agents for A. J. and W. Moore, Sunderland.
Attorneys for defts., *Shum and Crossman*, 3, King's-road, Bedford-row.

MICHAELMAS TERM 1863.

Tuesday, Nov. 3.

THE ATTORNEY-GENERAL v. SILLIM AND OTHERS.

Bill of exceptions—New trial—Practice—New rule.

The judge will refuse to sign a bill of exceptions where he dissents from the view taken by the parties of the sense in which he used the words addressed to the jury. In such case the remedy is to move for a new trial, on the ground that the verdict was against evidence. After a bill of exceptions tendered, the court would not entertain a motion for a new trial on a point of law.

The court has no power under the C. L. P. A. to enlarge the time for moving for a new trial.

The C. L. P. A. not giving an appeal from the revenue side of this court:

The judges have, consequently, made a new rule, extending the provisions of the C. L. P. A. to the revenue side of the Court of Ex., so as to give an appeal in revenue cases.

This was the case of the *Alexandra*.

The information, containing ninety counts, filed by Her Majesty's Attorney-General, with a view of obtaining on the part of the Crown a condemnation of the vessel, as well as imposing penalties or imprisonment upon certain persons concerned in the equipping, fitting out, or furnishing of the ship contrary to the provisions of the Foreign Enlistment Act. The jury found a verdict for the defts., the Attorney-General tendering a bill of exceptions to the ruling of the Lord Chief Baron, before whom the case was tried.

The *Attorney-General* (with whom were the *Solicitor-General* and *T. Jones*) now applied to their Lordships to enlarge the time for applying to the court for a new trial, beyond the usual four days, in case it should happen that the Lord Chief Baron should refuse to sign the bill of exceptions tendered at the trial.

The *Attorney-General* said:—It will be in the recollection of your Lordship that at the trial you laid down views which you thought ought to govern the jury as to the construction of the Foreign Enlistment Act. Your Lordship did so in a manner which we thought perfectly intelligible to all persons. There was no difference whatever in the understanding of your Lordship's ruling on the part of the counsel for the Crown, and we had no reason to suppose it was otherwise as regards the counsel for the defts., or that it was generally understood in any sense other than that in which we understood it. At the end of the trial we expressed a wish to offer exceptions to that ruling, and were told that it was not necessary at all to stand upon the usual form. Your Lordship said, "I will accept any bill of exceptions you choose to tender;" and accordingly after the verdict we wrote out the principal points which we understood your Lordship had laid down, but your Lordship said that we were not bound by what passed on that occasion, and that the matter could be easily settled. The case involved a point of very great importance, and it was most fit and desirable that exceptions should be tendered, in order that the case might be argued before a court of error, and, if necessary, before a still higher tribunal. We are most anxious that the question should be so raised and determined, and we no reason to doubt that the other side is equally so, but hitherto there have been difficulties in arriving at any form of exception which we can rely upon as certain to receive the signature of your Lordship. We sincerely hope that these difficulties

may be overcome. We are in communication with the counsel on the other side, who have in their possession the form of agreement we propose, and we trust that an exception in writing may be arrived at with them, or, if that should not happen, that your Lordship, on being applied to, will settle such a form of a bill of exceptions as will raise the real question to be determined in a way satisfactory to both parties and useful to the public.

POLLOCK, C. B.—I think it right to state that I see no prospect whatever of any change in the view I took as to my duty in deciding upon the bill of exceptions. A correspondence has passed between myself and the late Attorney-General which probably you may have seen. You were not present during the whole of the trial. So far from my laying down the law, as the bill of exceptions tendered to me assumed, I took particular pains to avoid anything of the kind. I had originally, during the argument of Sir Hugh Cairns at one part of the trial, entertained an impression—I called it no more—that all the expressions in the Foreign Enlistment Act, "equipping," "fitting out," and so on, probably meant the same thing, and were to be referred to the verbiage of an Act of Parliament, just in the same way as the words "ship" or "vessel" which are commonly used in statutes, and are no doubt intended to mean the same thing. But the late Attorney-General in his address referred to a case in an American Court, with an appeal to a superior court where the decision below was affirmed. It was, I think, a case in which the vessel was completely prepared in every respect, with the exception of being armed. When I came to sum up I mentioned that case to the jury, and commended so far as to say I adopted it. I left it to them, and pointed out what had fallen from the counsel as to the law on the subject, not what I considered was the law. I then finally left the question to them, in the alternative using the very words of the Act of Parliament. If you think, I said, this vessel was "armed," or "equipped," or "fitted out," or "intended to be armed," or fitted out or equipped, your verdict must be for the Crown; if not, it must be for the defts. Now, the Attorney-General presented to me a bill of exceptions, by which I was said to have told the jury that the vessel must be armed, and that if it was not armed there was no offence. I not only did not tell the jury so, but if you read the shorthand writer's notes of the trial, I think you will say no person can have any doubt that I left the question as I have just stated it. But, probably, the object you have in view may be obtained by a motion without any reference to a bill of exceptions. It is true no point was reserved at the trial so as to give you a right of appeal in the event of the rest of the court concurring with me in the direction I gave to the jury. But this is a matter of so much importance I do not know whether I can pledge the whole court in this respect; but certainly it would be very much to be lamented, however unanimous this court might be, if we did not give you what we have the power of doing, an appeal to a Superior Court.

The *Attorney-General*.—I understand you have no power by Act of Parliament to give an appeal unless there be a difference of opinion among your Lordships.

POLLOCK, C. B.—That is not so. We have the power of granting an appeal, and I must say, as far as I am concerned, however unanimous and strong the Court may be in point of law, if you wish an appeal, you will certainly have my voice in favour of granting it.

BRANWELL, B.—I understand the difficulty to be that the C. L. P. A. does not apply to a case of this kind. You are apprehensive that Pollock, C. B. will decline to sign the bill of exceptions in the form in which you have tendered it, and if you move for a new trial on the ground that he directed the jury

[Ex.]

THE ATTORNEY-GENERAL *v.* SILLIM AND OTHERS.

[Ex.]

wrongly, and he reports that he did not so direct them, we could not grant a rule for a new trial under these circumstances. That is the sort of difficulty in which you are placed.

The Attorney-General.—We have merely on the bill of exceptions adopted the *litera scripta* which we have here. I am not aware that even a learned judge is able to interpret his own words on an application for a new trial in a sense different from that which they really mean.

BRAMWELL, B.—We ought not to depart from the ordinary practice of taking the judge's interpretation of the words in which he directed the jury.

POLLOCK, C.B.—I will read the shorthand writer's notes as to what I left to the jury:—"The question is," I said, "was there any intention in the port of Liverpool or any other port that the ship should be in the language of the Act of Parliament, equipped, fitted out, or armed with the object of taking part in any contest." I also said, "If you think that the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then there is sufficient matter for your consideration; but if you think the object really was to build a vessel in obedience to orders, and in compliance with a contract, leaving it to those who brought it to make what use they thought fit of it, then it appears to me that the Foreign Enlistment Act has not in any degree been broken. I leave you to find that by your verdict."

The Attorney-General.—Your Lordship said that you would not bind the Attorney-General to what passed on that occasion,—that he could not alter the thing then. The version which the then Attorney-General had given at the time of the Lord Chief Baron's ruling was not contradicted.

POLLOCK, C. B.—The question now is, what course you can take consistent with the views of the court. If you wish to move for a new trial on the ground that the jury ought not to have found the verdict that they have, the court will entertain that application; but if you mean to reserve to yourself the power of making a motion for a new trial on a point of law, having tendered a bill of exceptions containing that or some other point, I do not think the court will consent to that course.

The Attorney-General.—My application is now simply to have the time for moving for a new trial enlarged, so that both sides may agree as to what your Lordship said to the jury as to the interpretation of the statute. We believe that the finding of the jury was following upon your interpretation of the statute.

POLLOCK, C. B.—Nothing of the kind.

The Attorney-General.—Then both sides are under a misapprehension, and it is their common wish to raise the point by a bill of exceptions, if possible. We ask you to enlarge the time beyond the four days; and if in the meantime we do not get your Lordship's signature to the bill of exceptions, I will move for a new trial.

BRAMWELL, B.—We have no power under the Act to allow more than four days except by your making the motion for a new trial and then adjourning it, but that would not answer your purpose.

The Attorney-General said that, as this was only the second day allowed for moving, by the fourth day they would have considered whether the case could be brought within the C. L. P. A., and mention the case again, or take further steps in the matter.

Nov. 4.—*The Attorney-General* (with whom was the *Solicitor-General* and *T. Jones*) said that he attended their Lordships this morning in consequence of the suggestions thrown out by them yesterday, which had received the careful attention of the counsel for the Crown. They found that it was in their Lordships' power, if they thought fit to exercise it, by an act to be done this day, to so apply the C. L. P. A.

as to give an appeal in a case of this description on the revenue side of the court. The 26th section of the Queen's Remembrancer Act (22 & 23 Vict. s. 21), said it should be lawful for the Lord Chief Baron and two or more barons of the Exchequer from time to time to make rules and orders as to process, practice and pleading on the revenue side of the court as might seem to them necessary, and also by such rules and orders to adapt any of the provisions of the C. L. P. A., and any rules of pleading and practice on the plea side to the revenue side as might seem to them expedient for making the process, &c., on both sides as nearly as might be uniform. The learned counsel said he thought that their Lordships could under that section make an order which would meet the present case.

POLLOCK, C. B.—Why cannot your motion be made to-morrow, or indeed at any time?

The Attorney-General said it occurred to him that it might possibly be too late to-morrow.

POLLOCK, C. B.—I am inclined to think that under that section the court could make such an order as you suggest at any time.

BRAMWELL, B., said the revenue rules, made under the section in question, were originally prepared in the Queen's Remembrancer's Office, and he had himself a good deal to do with them. The omission of the right of appeal in revenue cases was intentional on the part of those who prepared the rules, who thought it was not expedient to give such power. He was, however, not aware of the omission at the time, as his attention was not called to it, but he now thought that what was a good rule in an ordinary civil case must also be a good rule in cases on the revenue side of the court. If, however, they thought such a rule should be inserted, they should not adopt it without consideration and on the spur of the moment, lest in doing so they might reverse something which had previously been done by the court.

The Attorney-General said it had of course been his duty to consider whether any public inconvenience would arise in other cases by making such a rule, and his strong impression was that there would not, and that the rule was very desirable.

POLLOCK, C.B.—I quite agree with you, and on the present occasion I should be disposed to concur in any mode, short of a violation of principle, which would give effect to your desire for an appeal. I own, after the experience I have had in this court, that I see no reason why there should not be an appeal in a revenue case as in other cases. At all events there ought to be power in the court to grant an appeal if applied for, and they thought fit it should be given.

PIGOTT, B. entirely concurred in the view taken by his Lordship, which he thought consonant with the spirit of modern legislation, which gave the petition of right and costs against the Crown.

POLLOCK, C. B.—As the court concurred in the view of the learned counsel, he thought the better course would be for the court to adjourn earlier than usual for the purpose of seeing whether the rule should be made. As his learned brother said, the matter ought not to be decided in a hurry, and if the learned counsel attended to-morrow morning, they would tell him whether the alteration in the rules would be made. He presumed that if they granted the application the Attorney-General would simply move for a new trial on all the grounds which might occur to him.

The Attorney-General.—If your Lordships make the rule no doubt I shall do so.

POLLOCK, C. B.—I think that would be the better course to adopt, because it will enable you to make every objection which can reasonably be urged to what passed at the trial, and to whatever it may be thought had misled the jury.

EX. CH.] GANN v. FREE FISHERS, &C. OF WHITSTABLE. GANN v. JOHNSON AND OTHERS. [EX. CH.]

The Attorney-General.—I am much obliged to your Lordships.

POLLOCK, C. B..—Unfortunately I was in communication with the late Attorney-General alone on this subject, and with no other law officer of the Crown; and if he had not resigned I had some intention of suggesting to him the propriety of abandoning the bill of exceptions, and moving on any point which he thought presented a fair ground for a motion. Now that the impediment is likely to be removed, and a revenue case be placed on the same footing as any other proceeding, undoubtedly a motion for a new trial would be far better than a bill of exceptions, which covers various old technicalities which, under a better and more enlightened system, may be got rid of.

The learned Barons retired from the court shortly before three o'clock, and after being absent a short time, again took their seats on the bench, when Mr. Walton, the senior master of the court, and the Queen's Remembrancer, read, by the direction of Pollock, C.B., a new rule which they had framed under the 22 & 23 Vict. c. 21, s. 26, extending the provisions of the C. L. P. A. to the revenue side of the court, so as to give an appeal in revenue cases. This will meet the case of the *Alexandra*, and enable the Crown to obtain the appeal which the Attorney-General has sought.

EXCHEQUER CHAMBER.

Reported by W. MAYN, Esq., Barrister-at-Law.

APPEAL FROM THE COMMON BENCH.

Friday, Nov. 28 and Feb. 5.

(Before *POLLOCK, C.B., WIGHTMAN, BLACKBURN and MELLOR, JJ., and CHANNELL, B.*)

GANN (app.) v. THE FREE FISHERS AND DREDGERS OF WHITSTABLE (resps.); and *GANN v. JOHNSON AND OTHERS*.

Grant from the Crown of oyster fisheries and anchorage toll—Division of manor.

The Crown may grant to a subject the soil of the seashore below low-water mark, together with a toll for anchorage of vessels, and where such grant has been acted upon from time immemorial, such right can be sustained, and where the right so granted to take toll belonged to a manor, such right cannot be upset by the statute of Edw. 4, nor is it destroyed by a division of the manor.

In this case the question for the opinion of the court was, whether "The Company of Free Fishers and Dredgers of Whitstable, in the county of Kent" had a right to make a charge for anchorage upon every vessel anchoring on certain land below low-water mark, the soil of which the company claimed.

It appeared that by deeds of lease and release of the 11th and 12th Oct. 1791, the manor of Whitstable and the royalty of fishery or oyster-dredging within the said manor were conveyed to Edward Foad and James Smith in equal moieties as tenants in common in fee. By deeds of lease and release, bearing date respectively the 24th and 25th Oct. 1792, it was amongst other things recited and limited as follows: "And whereas within the limits of the said manor of Whitstable there is and for many hundred years now last past hath been a fishery for the growth and improvement of oysters, extending from the seabeach for a considerable distance into the sea, and which fishery during all that time hath been managed and carried on by and at the expense of a certain company of free dredgers, called the 'Whitstable Company of Dredgers,' who have held the same from time to time as tenants under the lord of the manor, and claim to

be entitled to hold the same as free fishers on payment of such several rents as hereinafter mentioned." The manor was limited to Edward Foad and two others in fee, and the royalty of fishing or oyster-dredging and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandise within the said manor, &c., to Thomas Foord in fee, on behalf of the company.

By the Act 33 Geo. 3, c. 42, the Free Fishers and Dredgers of Whitstable were incorporated, and they have ever since carried on the fishery.

By indentures of lease and release, bearing date respectively the 4th and 5th June 1793, and made between the said Thomas Foord of the one part, and the said company of free fishers and dredgers of Whitstable, in the said county of Kent, of the other part; after reciting the said indenture of release, the indentures of the 11th and 12th Oct. 1791, a mortgage by the said Edward Foad to George Rigen, and the said abstracted indentures of the 24th and 25th Oct. 1792; and reciting that the purchase so made by the said Thomas Foord of the said royalty fisheries and hereditaments was by him contracted for on the part of the company of free fishers aforesaid, and the sums of 800*l.* unto the said Edward Foad, and of 1530*l.* unto the said James Smith, making 2230*l.*, which were the consideration moneys in the said indenture of release of the 25th Oct. 1792, mentioned to have been paid by the said Thomas Foord for the purchase of the said premises, were the moneys of the said company, and no part thereof of the said Thomas Foord, which he did thereby acknowledge; it was witnessed, that in consideration of the premises and of 10*s.*, he the said Thomas Foord did grant, release and confirm unto the said company, and to their successors and assigns, all that the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the manor of Whitstable, and the ground and soil of the said fishery extending as thereinbefore was mentioned, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of goods or merchandise within the said manor, or for the admission of freemen and other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water court of free dredgers there, and all such like payments, and all manner of forfeitures, articles and things which of right belonged unto and were the property of the lord of the said manor, by reason of the wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-bank aforesaid, and all and singular other the premises which in and by the said recited indentures of lease and release of the 24th and 25th Oct. 1792 became vested in the said Thomas Foord, his heirs and assigns, or in any person or persons whomsoever in trust for him and them, and all the reversion, &c., and all the estate, &c., and all the deeds, &c., to hold the same unto and to the use of the said company of free fishers and dredgers, their successors and assigns for ever.

The oyster fishery extended about two miles from the shore, and some distance below the ordinary low-water mark; and the company, as far back as 1775, claimed a toll of 1*s.* from every vessel anchoring or grounding within the space covered by their deeds of conveyance, which claim had been enforced on three different instances.

The deft. was the owner of a vessel called the *Amoret*, and on the 29th Sept. 1860 the vessel cast anchor at Whitstable, on the land covered by the water of the sea and below low-water mark; but the spot

where she anchored was within that portion of the manor of Whitstable and fishery which was claimed by the plts. under the above deeds as their soil and freehold. The claim of the plts. was a charge of 1s. for anchoring on their soil.

The defts. contended in the court below, "that the soil of the sea where the vessel was anchored, being below low-water mark, was vested in the Crown, and could not be held by a subject; that the company had no right to claim any payment for such anchorage; that if the right to demand a payment for anchorage was ever vested in the lord of the manor of Whitstable, that right was extinguished when the manor was divided into two parts; and also that the defts. was under the Cinque Ports charter, proved at the trial, exempt from the said claim.

The Court of C. B., however, decided that the Company of Free Fishers of Whitstable had established their right to the anchorage by the conveyance and by long usage, there being evidence in the case from which the jury were warranted in inferring that the anchorage in question had been enforced as far back as the time of legal memory, and that the soil of the seashore, to the extent of three miles from the beach, being vested in the Crown, it was competent for the Crown to grant the soil of the shore in question and the right of taking an anchorage with it, and it was against this decision that the defts. appealed.

Prentice (Hawkins, Q. C. with him) appeared for the app.

Lush, Q. C. (G. Denman with him) for the resps.

The following authorities were referred to in the course of the argument:—

Kent's Com. 427;

Mayor of Colchester v. Brooke, 7 Q. B. 339;

Phear's Treatise on Rights of Water, 44;

Callis on Sewers, 49;

The Attorney-General v. Burridge, 10 Pri. 350;

Warren v. Prideaux, 1 Mod. 350;

Mayor of Nottingham v. Lambert, Willes, 111;

Lord Pelham v. Pickersgill, 1 T. R. 660;

Mayor of Exeter v. Warren, 5 Q. B. 773;

Jenkins v. Harvey, 1 Cr. M. & R. 887;

Jeake's Charters of the Cinque Ports;

Hale's de Portibus Maris;

Chitty's Prer. of Crown, 134;

Scriven on Copyholds. *Cur. adv. vult.*

Feb. 5.—MELLOR, J. now delivered the judgment of the court.—During the argument of this case we intimated an opinion that the defts. could not claim exemption from the payment of anchorage due under the charter of Edw. 4, inasmuch as such anchorage due, if legal, must have had its origin in a grant from the Crown of the bed of the sea, before the time of legal memory, and consequently anterior to the charter under which the exemption was claimed. As to the other question which was raised by the case, it was scarcely disputed that it must be decided in favour of the plts. The only question which was argued at length is a very important one, and the law with regard to the authorities to be found in our books is not very direct or clear. Mr. Prentice contended that, although the bed of the sea, where the claim arose, was at one time the property of the Crown, and might properly have been granted to a subject before Magna Charta, yet that it could only have been lawfully granted subject to the paramount right of navigation, of which anchorage is a necessary incident, unless it could be shown that the grantee, as a consideration for the grant, had offered some countervailing advantage to the Crown for the benefit of the public. That before Magna Charta the king could have granted not only the shore of the sea to a subject, but also the bed of the sea itself, and what Hale, C.J. calls the *districtus maris*, we think cannot now be doubted. The authority of Lord Hale as to this matter has on several

occasions been recognised and adopted by judges of the greatest eminence. There may be, and we think there is, a distinction between the shore, or *litus maris*, and the bed of the sea, with reference to the modes in which a subject may have acquired proprietary rights therein, as well as in the nature and extent of the rights so acquired. It may, we think, be admitted that there is a paramount right of navigation in the sea, in arms of the sea and in navigable rivers; and that any grant by the Crown of any portion of the bed of the sea or of the soil, and arms of the sea and navigable rivers, must be subject to this paramount right; and although a subject may, by prescription, have a wear in the sea, yet if it be a nuisance to the passage of ships it may be abated. In Hale's *De Jure Maris* it is said, "The people have a public interest, a *jus publicum* of passage and repassage with their goods by water, and must not be obstructed by a nuisance, or impeded by exactions;" and the law as to the right of navigation is laid down by Holroyd, J., in *Blundell v. Caterhall*, 5 B. & A. 294, in these terms: "By the common law, all the king's subjects have a general right of passage over the sea with their ships and boats, and other vessels, for the purpose of navigation, commerce, trade and intercourse, and also in navigating rivers; and the right, also, of common fishery there, but may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription." These rights are noticed by Lord Hale; "but whatever former rights they had in the sea or in navigable rivers, it is a very different question whether they have, or how far they have, independent of necessity or usage, public rights upon the shore (that is, between the high and low water mark), where it is not sea, or covered with water, and especially when it has, from time immemorial, been, or has since become, private property." Now, although in this passage the reference to the rights of the public in the shore is confined to the point between high and low water mark, and where it is not sea, still it gives, we think, the rule with reference to the right of anchorage as an incident to navigation in such portions of the bed of the sea as have been granted to the public. Any person navigating a vessel may, if required by reasonable necessity arising from stress of weather or similar causes, drop an anchor in any part of the bed of the sea; but we do not think that such a right is inconsistent with a claim to an anchorage due in any case in which a navigator, of his own will, and without necessity, anchors in the bed of a *districtus maris* like that in question. It is true that, in the anonymous case reported in the note to page 57, 1 Camp. Rep., Wood, B. is said to have directed the jury "that a navigable river is a public highway, and all persons have a right to come there in ships and to unload, moor and stay there as long as they please; nevertheless, if they abuse the right so as to work a private injury, they would be liable to an action." This certainly appears to be accurately expressed; whether it means a right to unload or to shore in a navigable river as absolute and independent of any licence or compensation in respect thereof. Anchorage is defined by Lord Hale to be "a prestation or toll for every anchor cast there, and sometimes though there be no anchor, and this does, in truth, properly and *prima facie* arise from or in respect of property in the soil, and is an evidence of it; but yet is not so always, but grows to it in respect of the franchise." In *The Mayor of Colchester v. Brooke*, 7 Q. B. 355, Coltman, J., in directing the jury, is reported to have said, "It may be law according to the ancient custom of the place, that the party may be liable, if he takes the ground, to make a reasonable payment to the owner of the soil. If the ground belonged to him he might very properly have enforced the payment of the vessel taking ground,

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such payment being sanctioned by ancient custom." If the parties establish, as we think they do, that the soil in the bed of the sea, in a creek or haven, arms of the sea, or *districtus maris* might have been granted to a subject, it seems to follow that any dropping of an anchor not occasioned by reasonable necessity, but voluntarily, in the bed of the sea so granted, will entitle the owner to compensation for the breaking of the soil. If that be so, the objection is one of principle to the compensation being fixed and determined, and made uniform by custom or grant, as in the case of stallage or piceage in a market to which all the public have a right to resort, but if they require to erect stalls, must make compensation to the owner of the soil. Toll paid to the owner of the port is perhaps not strictly analogous to the due claimed by the pils., inasmuch as the duty of repair may be deemed to be a consideration for it. So in the case of toll *through*, which is a sum demanded for passage on a highway, a consideration is necessary; but toll *traverse*, which is a sum demanded for passage over the private soil of another, appears to be a claim of the same character with the demand in the present case. In *The Mayor of Nottingham v. Lambert*, the judgment of the court is based upon this distinction, and accordingly a prescription to take toll for passing along the navigable river Trent through the manor of Nottingham was held bad, "for how can a duty be imposed on all the subjects of England only for enjoying that privilege which is their inherent birthright, and which every subject had a right to before? If, indeed, they receive any particular benefit, as going over a bridge, coming on a quay, wharf, port, or the like, this indeed may alter the case." Had the claim under consideration been in respect of passage over the locus in question, it is clear that the prescription could not have been supported; because it appears to us the defts. have received a particular benefit by anchoring there, and that there is nothing unreasonable or against common right in sustaining the principle in the present case. We think that, after so long a period of enjoyment, it is the duty of the court to hold it valid unless we can see some valid reason against it, either upon principle or authority. We are therefore of opinion that the plt. is entitled to the customary payment, and that the judgment of the court below was right, and must be affirmed.

Judgment affirmed.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABY, of Doctors'-common.

June 12 and 13, and July 15, 1862.

(Before CRESSWELL, J.O.)

N— v. N—.

Judicial separation—Cruelty—Charges of unnatural connection and of infection.

Weight given by the court to the wife's evidence of unnatural connection had, or attempted to be had, with her by the husband, and to evidence tending to prove the existence of gonorrhoea, and of its wilful communication by husband to wife.

This was the wife's petition for judicial separation.

The petition alleged:—1. Marriage on the 14th day of July 1860. 2. That after said marriage your petitioner lived and cohabited with her said husband at Sunbury, in the county of Middlesex, the residence of her parents, and that the said petitioner and her said husband have had issue of their said marriage one daughter, born on the 15th March 1861, and that the said petitioner is now again pregnant by her said husband (it was stated in evidence that the second child was born on 4th April 1862). 3. That on

divers occasions since their marriage the said G. G. N. has in divers ways at their said residence treated your petitioner with cruelty as hereinafter set forth. 4. That the said G. G. N. frequently swore at and abused your petitioner in foul and offensive language, and on several occasions the dates whereof your petitioner is unable to set forth threatened to take your petitioner's life. 5. That on an occasion happening about the month of Feb. 1861 the said G. G. N. threw your petitioner down violently on the bed, and in order to terrify your petitioner seized a razor and drew it across her throat as if to cut it. 6. That the said G. G. N. constantly kept loaded pistols in his bedroom, and that on an occasion happening about the month of Sept. 1861 he presented a loaded pistol at your petitioner, and said, "By God I'll shoot you." 7. That about a month before the birth of your petitioner's said child the said G. G. N. kicked your petitioner out of bed, and about a week before the said birth violently assaulted your petitioner and threw her down. 8. That on another occasion, happening about the month of July 1861, the said G. G. N. violently assaulted and struck your petitioner in the breast. 9. That on two several occasions, happening about the months of May and June 1861, the said G. G. N., in spite of your petitioner's remonstrances, attempted to have sodomitical intercourse with your petitioner, and thereby seriously hurt her. 10. That some time in or before the month of Aug. 1861 the said G. G. N., knowing himself to be infected with the venereal disease, communicated the same to your petitioner.

The resp.'s answer denied the alleged acts of cruelty and alleged condonation, on which issue was joined and taken.

The case was tried by the court itself.

Dr. *Phillimore*, Q. C. and Dr. *Spinks* for the petitioner.

Macaulay, Q. C. and *R. Prichard* for the resp.

As to the 9th paragraph, the petitioner stated in evidence to the following effect:—"In May and June 1861 I was cohabiting with my husband; there was something peculiar about my husband's intercourse at that time; towards the beginning or end of May he had improper intercourse with me. I remonstrated and entreated him to desist; he said it was usual between man and wife. On three occasions he made the attempt; the second time he did desist through my expostulations, because I was suffering so much from the first occasion; on the third occasion I had to use all my strength to prevent him." On cross-examination as to whether she and her husband had not been in the habit of trying strength against each other, she said, "On one occasion we did try strength, and I was the strongest then."

The resp. denied on oath that he had done or attempted to do any such thing.

The substance of the evidence on the 10th paragraph is sufficiently given in the following judgment, which is reported principally for the remarks therein on the subject-matter of these two paragraphs. *Cw. adv. vult.*

July 15.—CRESSWELL, J.O.—This is a suit for a judicial separation. The petition and evidence raised some questions of a very disagreeable nature, and I could have well wished to be relieved from the necessity of discussing them. Many people are of opinion that the publication of matters disclosed in this court cannot but be prejudicial to society. In some cases that is probably true; but, on the other hand, I am satisfied that a calm consideration of the state of feeling that results from matrimonial quarrels, and of the utter disregard of public opinion and of the shame and disgrace which must attach to them, often manifested by both parties, must produce a beneficial influence upon all who are not blinded by their vindictive feelings. In this case the wife seeks for a judicial separation, and it appears, by the evidence of

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Mr. Parker (of whose veracity there can be no doubt), that the same object which would be obtained by such decree might, and probably would, have been accomplished by private arrangement, but for some dispute about pecuniary matters over which the court has no control. The case having come before the court, the petitioner must have known that she was liable to be asked questions respecting ante-nuptial conduct, which must for ever hereafter deeply affect the social position of herself and her mother. On the other hand, the resp., for no very intelligible purpose, save that of injuring his mother-in-law (for he expressly stated that he had no complaint whatever against his wife), caused a public disclosure to be made of his wife's ante-nuptial frailty, and imputed to her mother connivance at her daughter's dishonour—an ungenerous course which, I should imagine, would impress upon himself a stain at least as deep as that by which he sought to degrade them. The marriage was solemnised in July 1860; the final separation took place in Sept. 1861. In the interval several acts were done by him which the court might have thought sufficient to establish a charge of cruelty, but the parties continued to cohabit as man and wife, and therefore all such acts down to September last were condoned, and the case turned upon a revival by some subsequent act. In that month, as was deposed by the wife, he took up a pistol and threatened to shoot her; she looked firmly in his face, and he then lowered his hand and did not fire, and that she was so much alarmed that she resolved to leave him. The resp. did not deny the act, but alleged that it was not done in anger, but that both had been in the habit of firing his pistols, that on the occasion in question they had been romping together (which did not appear to have been unusual with them), and that the threat was uttered in jest. The wife, on cross-examination, stated that she never told any one of his threat, but that her alarm and other things caused her to refuse to live with him again as his wife; but when pressed she would not swear positively that she had not afterwards slept with him, or that she had on the same day, after the alleged threat, gone out for a drive with him. A week after, Mr. Parker, the resp.'s solicitor, was sent for, and during an interview of several hours the subject of a separation was discussed, many charges were made against the resp. by the petitioner and her mother, but it did not appear that the pistol was mentioned, and I am not satisfied that any threat was uttered by the husband in such manner as to show that future cohabitation would be unsafe, nor in such a manner as to cause in the wife a reasonable apprehension of violence; I cannot, therefore, come to the conclusion that the former acts of which he was accused were thereby revived. But there were two other charges of such a nature that it is necessary to take special notice of them. The first is, that in the month of May 1861 the resp. committed an unnatural crime on her person; that she did not complain of it, labouring under the erroneous belief that he had a right so to treat her if he pleased. Now it is remarkable that the petition charged an attempt to commit, and not the commission of such a crime; the resp. denied the act and the attempt to commit it. There was not on either side any corroborative evidence, nor could it well be expected that any could be adduced. In all cases where a crime is imputed, the presumption of innocence must prevail until guilt has been proved, and in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require more cogent evidence to overthrow the legal presumption of innocence. The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty, where there is simply oath against oath without any

further evidence, direct or circumstantial, to support the charge. I cannot therefore come to the conclusion that this charge was proved. Another charge was that the resp. had communicated to the petitioner a loathsome disease. A medical man who was consulted about a week after the separation deposed that he then examined the petitioner and found her labouring under gonorrhoea in a violent form, and that she must have had it some time; that she was suffering much pain, and that such pain was generally experienced in ten or twelve days after the disease showed itself. The petitioner, when examined as a witness, deposed that she never had sexual intercourse with any one but her husband; she did not state when she first had any of the symptoms observed by the medical men, nor was the existence of such symptoms assigned as a reason for refusing further cohabitation with her husband. The only corroborative evidence given by the petitioner was, that she had seen him use a syringe with powdered alum and water or water alone. The laundress employed to wash for the family deposed that in May or the beginning of June she observed marks on the linen, of resp., which might be supposed to indicate that he was suffering from gonorrhoea in a virulent stage, and that she soon afterwards noticed similar marks on the linen of the petitioner. Now they did not separate until September, nor was any assertion made that connubial intercourse did not continually take place between them until that time, which is utterly inconsistent with the supposition that both were during that period, viz. from June to September, affected by disease. The resp. was never subjected to medical examination, and he positively denied the existence of such disease. It was not made the subject of complaint during the long interview with Mr. Parker, and when Mr. Kingsford attended her before the separation nothing was said that intimated to him the existence of any such cause for her illness. Upon this evidence I cannot feel satisfied that the disease ever existed, and therefore I cannot find the resp. guilty of this act of cruelty. If I had been of opinion that she suffered from real and not simulated gonorrhoea, two questions would remain—first, whether it was wilfully communicated, as to which the court has nothing to guide it but mere conjecture; and secondly, had it been condoned? If I were to assume it to be proved by the evidence of the laundress that both had the disease in June, the wife to be sufficiently awake to the subject to notice the use of the syringe, I must also assume that she knew the nature of the disorder, and then I must hold that it was condoned by subsequent cohabitation. In the result I have arrived at the conclusion that there has been no uncondoned act of cruelty upon which a decree of judicial separation can be founded. There appears to have been much in the conduct of both parties upon which they may well reflect with deep regret. As far as this court is concerned, they must continue to reside together. They are both young, and if they sincerely desire to control their tempers and amend their habits, many years of happiness may still be in store for them; that depends upon themselves: from this court they are dismissed.

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Wednesday, Sept. 23.

(Before Mr. Commissioner GOULBURN.)

Re FREDERICK SCOTSON.

Petition by a person in a lock-up house—Notice to gaoler—Sect. 95.

A notice to the gaoler given by a prisoner in the custody of the sheriff and detained in a lock-up house:

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Re WM. SABERTON—Re WM. KNOWLES.

[BANK.]

Held to be a notice by a debtor in prison or gaol within the meaning of the Act of Parliament.

This bankrupt applied to be released from custody under the 112th section of the B. L. C. Act 1849. He was described as formerly of Spring-gardens, agent, and now a prisoner for debt in the custody of the sheriff of Surrey, and of No. 57, George-street, Blackfriars-road, in the county of Surrey.

Dowse, for the detaining creditor, opposed the application and called attention to the 95th section of the Bankruptcy Act 1861, which provides that "every debtor who shall present a petition for adjudication whilst a prisoner in any prison or gaol, shall by writing give notice to the keeper of such gaol or prison of his intention so to do, and shall in his petition state that such notice has been given." The learned counsel submitted that, as the bankrupt had petitioned as a prisoner for debt, the petition should be dismissed because he was not in the custody contemplated by the Act of Parliament. The bankrupt was in Mr. Seal's lock-up house, and not in gaol or prison.

Mr. Commissioner GOULBURN observed that the question was whether a man in a sponging house could be held to be in gaol or prison within the words of the 95th section of the Bankruptcy Act 1861.

Dowse.—A debtor must be within the walls of a prison to be included in the language of the Act. He referred the commissioner to the construction clause (sect. 229), which provides that the word "prisoner" shall mean any person in actual custody within the walls, rules, or liberties of any prison in England for any debt, damages, costs, sum or sums of money, or for any contempt by reason of nonpayment of any sum or sums of money, or costs." He was now merely in the house of a sheriff's officer.

Marsden (solicitor), for the bankrupt, contended that this debtor being in the custody of the sheriff must be held to be a prisoner.

Mr. Commissioner GOULBURN said the question was whether this man could petition as in prison? It was a very grave question.

Mr. Registrar HAZLETT.—Where was Col. Dickson?

Dowse.—He was rendered into custody before his petition.

The COURT, after some further argument, with some hesitation, overruled the objection, and the bankrupt's release was ordered. *Application granted.*

Saturday, Oct. 24.

(Before Mr. Commissioner GOULBURN.)

Re WM. SABERTON.

Parochial rates—Sect. 156.

One year's parochial rates due at the date of bankruptcy may be paid in full.

This was an application by Mr. Rushbrooke, from the office of Messrs. Sole and Turner, for an order on the assignees for the payment of certain parochial rates in full, namely, the special district rate and the highway rate. He called the attention of the court to the 156th section of the Bankruptcy Act 1861, which provides that the court out of the estate and effects of the bankrupt shall order payment of all such parochial rates as may be due from him at the time of his being adjudicated a bankrupt, provided such rates have become due during the twelve months immediately preceding the bankruptcy. The bankrupt was a farmer at Ely, in Cambridgeshire, and his estate was valued at 20,000*l.*, just sufficient to pay his debts.

After referring to *Reg. v. The Justices of Huntingdon* and other authorities, as to whether a highway rate and a special district rate were parochial rates,

Mr. Commissioner GOULBURN made the following order:—"Upon the application of Messrs. Sole, Turner and Hardwick, solicitors for the assignees, that the sum of 4*l.* 4*s.* due at the time of the bankruptcy in respect

of the special district rate made April 22, 1863, on the bankrupt's dwelling-house, and also, that the sum of 36*l.* 18*s.* 6*d.*, also due at the time of the bankruptcy in respect of a highway rate made the 10th May 1863 on Sheppey premises (which said sums are claimed by the Ely Local Board of Health), may be paid out of the estate and effects of the above-named bankrupt, doth give its sanction to the aforesaid sums of money being paid by the assignees out of the estate and effects of the said bankrupt."

Thursday, Oct. 27.

(Before Mr. Commissioner GOULBURN.)

Re WM. KNOWLES (an Arranging Debtor).

Deed of arrangement—*Examination of trustee and assenting creditors by dissentient creditor*—Sect. 197 of the Bankruptcy Act 1861.

The Court, before appointing a sitting for the examination of the trustee and assenting creditors under a deed executed in pursuance of the deed clauses of the Bankruptcy Act 1861, will require a prima facie case for inquiry to be made out by affidavit.

This was a sitting appointed by the registrar under the 197th section of the Bankruptcy Act 1861, for the examination of the trustee and other parties to a deed of arrangement executed by the debtor.

The facts are these:—

On the 20th June last the debtor finding himself unable to meet his engagements, after conferring with one Davis, a creditor, executed an assignment to him of all his estate and effects in trust for the benefit of creditors. The deed was duly executed under the provisions of the 192nd section of the Bankruptcy Act 1861. By the list of creditors it appeared that the debtor had only five creditors, four of whom assented to the deed in writing. On the 8th July the trustee Davis was summoned to appear before Mr. Commissioner Fane on the 15th July to be examined in respect of the said deed, and the trustee and three creditors being examined, the Court ordered Mr. Phillips, the creditor applying for the meeting, to pay the costs of and occasioned by it, to be taxed in the usual manner.

Additional information having been obtained, application was made to the registrar, who, upon being made acquainted with the nature of the new matter, appointed a second meeting for the examination of the trustee and creditors for this day.

Sargood appeared on behalf of Knowles the debtor and Davis the trustee to support the deed. He felt it his duty to take the opinion of the court as to whether it would allow these parties to be examined, summonses having been issued without any affidavit showing a case for the inquiry. The applicant Phillips had already had an examination of four persons on the 15th July, on summonses issued on affidavit of facts. The debtor and two of the same witnesses were again brought there without any justification. One of these persons was the trustee under the deed, to whom the applicant, Mr. Phillips, had been ordered to pay the costs of the previous inquiry, but which were not yet paid. Admitting the right of the creditor to require such an examination, he would call attention to the observations of the L. C. as to the duty of the court to institute an inquiry, and to exercise a judicial discrimination before issuing a summons; but that could not have been exercised here, as there were no facts alleged, and the summons had been issued by the registrar. Upon this subject the L. C. had thus expressed himself, in the case of *Re Thin, ex parte Alexander*, 8 L. T. Rep. N. S. 748: "I should be very glad if this power should in future be exercised only by the court, and if the commissioner, instead of acting in a mere ministerial way, should think it his duty to require some evidence upon oath to be laid.

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Re WILLIAM KNOWLES.

[BANK.]

before him, upon which a *prima facie* case warranting suspicion or supposition may be justly granted. It is an intolerable thing that a power of examination of this kind should exist, by which the liberty of the subject may be invaded, that a man should be tortured by questions in a court of limited jurisdiction—a court sitting only for the benefit of persons who have adverse interests to him, and compelled to answer these questions without the protection that other courts give to persons in his position." His Lordship concluded by saying, "I think it is a power which ought to be exercised with more care and circumspection, and with more of judicial discretion than has been hitherto apparently observed."

Ernest Reed, who appeared for the summoning creditor, said that he was one of the five creditors referred by his learned friend for 125*l*. He had taken proceedings to recover that sum, when he was met by an intimation from the debtor that he should never have one farthing of it, and forthwith a deed of assignment was prepared and shown to Mr. Phillips, as an answer to his claim. By that deed the debtor assigned to a person named Davis all his property.

Mr. Commissioner GOULBURN.—What was the ground of this application?

Ernest Reed.—That the deed was a fraud, and that the debts of some of the assenting creditors were fictitious.

Sargood.—That was the ground of the first application, which failed.

Ernest Reed said that this second application was supported by fresh facts, which he had stated to the registrar when he applied for this sitting. One of the alleged debts of 270*l*., was pretended to be due to the debtor's mother-in-law, who was keeping a small shop, and certainly not in a condition to lend that large sum. That debt, in the course of the first private examination, was supported by entries in a book, which she swore had been in her possession since 1858, and the sums advanced to the debtor had been regularly entered. Two others of the five creditors also made statements as to their debts, which at the first examination were believed to be fair, but since then one of these parties had turned round and admitted that his debt was fictitious, and that he had purchased an old bill stamp, and that it had been done for the purpose of overtopping the other creditors. Then, as to the entries of the mother-in-law in her book since 1858, he would show that they were all made shortly before the execution of the deed, and for the sole purpose of defrauding his client.

Mr. Commissioner GOULBURN said, that all these facts should have been stated by affidavit, and then the court would say whether or not upon this altered state of facts it ought to issue the summons. A fresh application had better be made to him in that form.

Ernest Reed said that the trustees' debt was also concocted. He had three witnesses to prove the facts he had stated.

The COMMISSIONER said that these summonses had been issued improvidently. The summons must be dismissed, and the summoning creditor must pay the costs of the trustee.

Ernest Reed submitted that, as the sitting was directed by the registrar, it was issued properly. They were there by appointment of the registrar, who had directed the sitting. If it was said that the meeting was granted improvidently, it was the act of the officer of the court, and it was for him, if for anybody, to pay the costs of the meeting, and not his client, who was prepared to sustain his charge of fraud and perjury against the debtor and his trustee. There were five witnesses prepared to prove the truth of his statement. The debtor had enjoyed the protection of the court since June last, although he had joined in fraud and conspiracy to cheat his client Phillips.

Mr. Registrar HAZLITT said that he had suggested an affidavit when the application was made for the meeting; but Mr. Reed thought that would let the witnesses know beforehand what they had to answer.

The COMMISSIONER.—So you are to accuse a person twice over of fraud and perjury, and not let him know what he was charged with. Did Mr. Reed know of any case in bankruptcy in which a creditor had challenged the debt of an assignee and called for his examination?

Reed could not then name a case, but if any party charged a false debt to be proved, the court would give him an opportunity for investigation. He asked that the summons should be enlarged in order that the facts might be put upon affidavit as suggested by the court.

Mr. Commissioner GOULBURN said he differed from Mr. Reed as to the principles which ought to govern courts of justice. This was a proceeding arising out of the 197th section of the Bankruptcy Act 1861, which stated that from and after the registration of a deed or instrument such as they were now referring to, the "debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorised to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy." That was the provision under which this summons had been granted. Now the first suggestion of the L. C., in *Re Thin, ex parte Alexander*, was that it was necessary to guard this power from abuse. The court therefore could not allow repeated examinations of the trustee under a deed upon a charge of fraud, falsehood and perjury, and to allow one and all the creditors to be summoned and examined on these charges. That would not be permitted in a bankruptcy. Who ever heard of a creditor coming to a Court of Bankruptcy and charging the assignee with fraud, falsehood and perjury? But supposing such a charge had been made and the assignee examined and acquitted, who ever heard of the court going a second time into such an investigation? If the charges were true, they ought to be dealt with criminally. No man was to be put in jeopardy twice by the same offence. But here subsequent facts coming to the view of the creditor, from which fraud and falsehood are inferred, then it is said a second sitting must be had and we must have these people called up again to prove these facts, which are not to be put on affidavit, that the parties charged may know what they are about, but, said the learned counsel, these parties shall be again examined privately and separately in an upstairs room. He did not know whether his learned friend had ever heard of the Inquisition and the proceedings of that tribunal. The examinations proposed here were some-

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what similar, and if they were allowed they would be a disgrace to the court. This summons did seem to have issued improvidently, and the application for it ought not to have been granted and ought to be dismissed. Then the question was whether the trustee ought to be paid his costs for coming here a second time. When assignees were brought before the court they had their costs as a matter of course, but under the circumstances they would abide the further decision of the court.

Reed intimated that he would get the matters he had referred to placed upon affidavit at once.

The COMMISSIONER said he was not sure whether there ought not to be a rule to show cause.

Reed.—Probably we shall consider whether we shall not at once take these parties to the Guildhall before a magistrate and proceed criminally.

The meeting was then directed to be adjourned for facts to be placed on affidavits to be served on the trustee.

Order accordingly.

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METROPOLITAN COURT OF THE ARCHDIOCESE OF DUBLIN.

Reported by R. W. MILLER, Esq., LL.D., Barrister-at-Law.

Wednesday, May 13.

(Before Dr. RADCLIFF, Q.C., V.G.)

THE REV. ROBERT FITZGERALD MEREDITH (clerk promovent); THE BISHOP OF LIMERICK, ARDFERT AND AGHADOE (impugnant).

Benefice—Joint owners—Right of presentation—*Duplex querela*—Composition to appoint by turns—*Jus patronatus*.

In 1836 a parish was, pursuant to 7 & 8 Will. 4, c. 43, duly divided into three separate parishes, A, B, and C. The patronage of the original parish belonged to six persons as joint owners, whether as parsoners, joint tenants, or tenants in common, did not appear. By a deed of the 10th June 1851, executed by the several persons then entitled, as representing the said six persons as patrons, reciting the intention to make partition of the advowson, donative, and right of presentation to those three parishes, the said several parties mutually covenanted with each other, that those representing two of said patrons, and their heirs and assigns, should for ever have the advowson, donative and presentation to A, and those representing two others to B, and those representing two others to C, as tenants in common for their share and proportion; and the deed contained mutual covenants by said several persons, that said respective persons should hold their share of said rectories, &c., freed and discharged from all right, &c., of the other parties and for further assurance. But no express grant was contained of any of the benefices. By a presentation of the 11th Oct. 1861, the persons to whom A. had been so allotted presented the promovent to it. The other patrons did not join in that presentation: Held, that the deed of June 1851 did authorise the parties to whom it was allotted to present without the concurrence of the others, and that the effect was in reality a composition to appoint by turns, though not applying to each benefice.

Seemle, that the covenants and agreements in the said deed did amount to a legal release of the right of the other patrons:

Held, also, that after service by an inhibition from the metropolitan on the bishop, the bishop could not

act on a second presentation served on him after, though dated and executed before such service.

If the church were litigious, the bishop himself should issue the writ "*jus patronatus*."

A conditional order for a monition had, in Feb. 1862, been obtained by the promovent directed to the impugnant, commanding him to admit the promovent to the rectory of Ballyguishlane, in the county of Kerry and diocese of Limerick, and to cause him to be instituted and inducted into the possession thereof. The parish of Castle Island, of which there were in 1836 six patrons who were joint owners, was, by the Lord Lieutenant and Privy Council, duly divided, pursuant to 7 & 8 Will. 4, c. 43, into three separate parishes, one of which is the parish of Ballyguishlane aforesaid, and by a deed of the 10th June 1851, the several persons entitled to the patronage of Castle Island agreed to give the patronage of Ballyguishlane to Col. Drummond, Mrs. Drummond, Mr. Fairfield and Mr. Townsend, their heirs and assigns for ever [these parties represented two of the original patrons]; and the right of patronage to the other two parishes was, in like manner, agreed to be held by those representing the other two respective sets of patrons, and a presentation of the 11th Oct. 1861, signed only by Mrs. Drummond and Mr. Townsend (Col. Drummond and Mr. Fairfield being dead), but not signed by the other patrons, presented the promovent as clerk to Ballyguishlane. The bishop refused to act on this; and after the service of the monition and inhibition on the bishop, another presentation, dated before such service was served on the bishop, signed by the same persons as had signed the other presentation and several others of the patrons. The bishop, by a petition on the acts, set forth his reasons for not acting on said first presentation, and to this the promovent filed an answer. These, and the other facts in the case, will be found fully stated in the judgment.

Dr. Ball, Q.C. and Dr. Elrington, for the bishop, showed cause against the order for the monition, and argued that the parties representing the six patrons ought to have signed the deed of June 1851, as having the legal estate in the advowson; and, not having done so, the presentation signed by those representing only two could not confer the right. Also, that as there was a second presentation on the 11th Feb., signed by those representing four of the six patrons, the bishop had the right of selection of the two clergymen so presented. The deed of partition only gave an equitable and not a legal right; and though it might operate by estoppel to oblige all to present the nominee of one, yet the bishop should see that all joined. The church was litigious, and a writ of *jus patronatus* ought to have been issued:

1 Burn's Ecc. L. 22;

Westfaling v. Westfaling, 3 Atk. 465;

Attorney-General v. Bishop of Lichfield, 5 Ves. 828.

Dr. Battersby, Q.C. and Dr. Walsh, Q.C., for the promovent, contended that the deed of June 1851 was a perfect deed of partition; or, at all events, a good composition; and even if nothing passed under it, it operated as an estoppel, and no one could claim against it. The church was not litigious; and if the *jus patronatus* were necessary, the bishop himself should have issued it.

Deg. cap. 3, P. 1, p. 16;

Watson, 113.

Cur. adv. vult.

May 23.—Dr. RADCLIFF, Q.C.—This is a proceeding by way of what is called technically a *duplex querela* instituted by the Rev. Robert Fitzgerald Meredith, clerk, who complains to the Metropolitan of the Province, of the Bishop of Limerick having, without sufficient cause, refused and delayed to institute him into the rectory and parish of Ballyguishlane, in the county of Kerry and diocese of Limerick, to which he alleges

(a) From the *Irish Jurist*, by permission.

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he was duly presented by the true patron thereof. If the promovent has been aggrieved in the manner stated by him, his proper remedy is by means of a *duplex querela*. It is an ancient remedy, though seldom resorted to, the patrons alone being entitled to proceed by an action of *quare impedit*. The promovent having made an affidavit pursuant, save in one respect, to the 57th Irish canon, applied for a monition, at the commencement of the proceedings. The defect in his affidavit was, that he failed to depose, as required by the Irish canon, that two months had elapsed since he first tendered his presentation to the bishop, which is the common law rule of the Church, but which period has been abridged by the 95th English canon to twenty-eight days in England. The bishop, however, waived the point, which, if raised, would have been merely technical, and the monition accordingly issued on the 24th Feb. 1862, requiring the bishop, according to the usual form, to institute the promovent to the benefice in question within the time thereby limited, and in case of his failure to do so, citing the bishop to appear and show cause why (the right having devolved on the archbishop through such denial and refusal of justice) the promovent should not be instituted and inducted by the Archbishop of Dublin, and also inhibiting the bishop from doing anything to the prejudice of the promovent. The bishop appeared to the monition, and, by a petition on the acts exhibited on the 17th April, alleged his reasons for not having instituted the promovent, and which are solely founded on what the bishop was advised are legal defects in the presentation. To this petition the promovent on the 3rd May exhibited an answer, and on these pleadings, with the documents and letters thereby referred to, the case was fully and ably argued and discussed. It appears that, prior to 1836, the parish of Ballyguishlane formed part of the large union of Castle Island, the patronage whereof belonged to persons whose titles are set forth in a certain instrument dated 27th Nov. 1835, which has not been produced here. By an Act of the Lord Lieutenant and Privy Council, dated 4th Jan. 1836, that union was, pursuant to the provisions of 7 & 8 Will. 4, c. 43, and with all necessary consents, divided, and three separate and distinct parishes thereby erected, one being the parish in question. The patronage of each separate parish remained as before in the patrons of the entire union, but whether as parsoners, joint tenants, or tenants in common, does not distinctly appear, by reason of the non-production of the instrument of the 27th Nov. 1835. Nothing further appears respecting the three parishes so erected up to the 10th June 1851, when a deed called articles was executed by and between the parties representing all the patrons, which recited the Act of Council in which said instruments of 27th Nov. 1835 are shortly recited, and also recited that the parties thereto, by reason of the deaths of some who were living in 1836, and otherwise, were the patrons, but gave no information respecting the title, whether the patrons held as parsoners or as tenants in common—for the recitals would seem to negative a joint tenancy—but I would rather infer from the deed that the title was one of coparceners, whose heirs and assignees would be entitled to all the privileges conferred by such a title. The deed then recites the desire of the parties thereto, as far as in their power, to make such partition of the advowson, donative, presentation and right of patronage to the rectories and parishes as is hereinafter particularly expressed; and it is witnessed that in pursuance thereof, and in consideration of the mutual covenants therein contained, they of the third and other subsequent parts covenanted with Lady Headley of the first, and Henry A. Herbert of the second part, that they, their heirs and assigns, should have and enjoy for ever the advowson, donative,

presentation and right of patronage of the rectory and parish of Castle Island (being one of said three parishes), as tenants in common, and not as joint tenants, for their share and proportion of said rectories and benefices, freed and discharged of and from all right, title, share, claim of advowson, and donative, presentation and right of patronage and demand of them, the said other parties and patrons. There is a similar provision and covenant by Lady Headley and Mr. Herbert, and the two other patrons, respecting Ballyguishlane, and also similar provisions and covenants, to give the patronage of the third erected benefice to the other patrons, their heirs and assigns. There are mutual covenants for further assurance, and also that each set of patrons would, if required, concur in nominating and presenting an incumbent to their respective parishes. But there is no express legal conveyance made of the respective parishes to the respective patrons, though in all other respects the rights of all the parties are fully provided for, and protected by this deed under the hand and seal of every person interested. The main question in this case is what is the legal effect and operation of this deed. The advocates of the bishop contended that it amounted to an equitable contract that each set of patrons should nominate or present to the benefice allotted to them, but, to give it legal effect, all the patrons should join in the presentation, whilst the advocates of the promovent contended, first, that it operated as a valid composition or partition; and secondly, that it amounted to a release of all the other patrons to each set of patrons of the particular benefice allotted to them respectively, so as to vest the legal right in them alone. The law seems to be clearly settled that coparceners and tenants in common might enter into a composition to present by turns, coparceners having the privilege to make such composition by parol, being one heir, and having the right to present by turns if they do not agree. But tenants in common (*viz.*, those who have an equal right to the advowson, but by several titles or several rights) cannot make such composition to present by turns without deed; and if no such composition or partition be made in writing or by deed, all must join in the presentation. See *Dyer Rep.* 29 a, where the rule is laid down, in 28 H. 8, and has been recognised in several subsequent cases, and is stated in *Co. Litt.* 186 b. The coparcener, or tenant in common, having the turn under composition, might, by the common law, present in his or her own name alone, and maintain an action of *quare impedit*: (*Bishop of Salisbury v. Phillips*, 1 Salk. 43; s.c. 1 Raym. 535; *Watson*, 68.) And in 1 Raym. the case was strongly argued on the same principles as by the advocates of the bishop here, that a similar deed was only good by way of estoppel; for in case of land it would not amount to a partition. But such argument did not prevail. There were, do doubt, formerly difficulties in the proceeding in such cases, from the effect of usurpations driving patrons to writs of right; for even if parsoners had agreed to present by turns, though it was a partition as to the possession, so that each might maintain an action of *quare impedit*, yet they must, at common law, have all joined in a writ of right: (*Corbet's case*, 1 Rep. 87, b.) These difficulties were removed in England by 7 Ann. c. 18, and in Ireland by 1 Geo. 2, c. 23, ss. 6 and 7. Sect. 6 providing by declaratory enactment that usurpations shall not displace the estate of a patron, or turn it to a right, so as to prevent the patron from proceeding by *quare impedit*. And sect. 7 provides that if coparceners, joint tenants, or tenants in common, be seized of any estate of inheritance in the advowson of any church or vicarage, &c., and a partition is or shall be made between them to present by turns, that

thereupon every one shall be taken and adjudged to be seised of his or her separate part in his or her turn; as, if there be two, and they make such partition, each shall be said to be seised—the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn. In like manner, if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn, by which the difficulty of all being obliged to join in a writ of right was removed, as noted by the editor of the Reports: (1 Rep. 87 b. n. z. 1.) There is no change made in the law by this Act respecting what shall constitute a partition, thus leaving such matters as at common law, the partition by coparceners being capable of being made by a parol composition to present by turn, save so far as might be affected by the Statute of Frauds; and partition between tenants in common to be made as before by a composition in writing or by deed to present by turns. If, therefore, in this case the agreement had been made to present by turns (whether the patrons were parceners or tenants in common would be immaterial, as the agreement is by writing and deed under hand and seal) there could not have been a question raised respecting the right of patronage being vested in those patrons alone to whom the parish in question had been allotted. But it has next been contended for the bishop that the deed of the 16th June 1851 is not a composition to present by turns, and therefore not a partition within the 1 Geo. 2, and is of no avail for want of a legal grant. On this point there seems to be no difference between coparceners and tenants in common; and if coparceners could make a valid partition or composition by giving more than one turn to one of themselves, so might tenants in common. That coparceners might do so seems plain (Watson, 68; Co. Entries, 468); and if they could, by deed or agreement, have two turns allotted to one, there is no principle or reason to prevent more than two turns being allotted to one. So if one coparcener could be deprived of one turn, and if all the turns of presentation could have been allotted to the other two, there would be no principle or reason to present in the case of there being two advowsons an allotment of the presentation to one benefice to one coparcener, and the second to the other coparcener. If such could have been good in the case of coparceners by deed, it would also be valid in the case of tenants in common. There is nothing unreasonable in such a partition as is here. A large living is divided into three; and instead of all the six patrons agreeing to present in turns, they agree that two of them shall present for ever to one benefice, two of them to another, and two of them to another, just as in the case above suggested, and it seems to fall within the rule laid down in respect of the partition of one advowson; and though here they might have granted a separate benefice and advowson to each set of patrons, they were not bound to do so if they could effect their object by a composition respecting the turns of presentation without conveying the estate or title to the advowson. But this is a composition in reality to present by turns, though the turns do not apply to each benefice—one being allotted to two patrons, one to two others, and one to two others. I therefore think that by virtue of the deed of the 10th June 1851 Colonel and Mrs. Drummond, Mr. Fairfield and Mr. Townsend, parties thereto of the third and sixth part, became entitled to present a clerk to Ballyguishlane without being joined in the presentation by the other patrons. Being of this opinion, it is unnecessary for me to consider the second branch of the argument urged for the promovent, that the covenants and agreements in the deed of 1851 amount to and constitute a legal release of all right and title of the other patrons, though, if it were

necessary to decide that point, I should incline to that view. If the covenant that such persons shall hold, &c., “freed and discharged of and from all right, title, and claim of the other” be a release, it would seem to vest all in the above-named patrons, even if only tenants in common: (Co. Litt. 270, b.; *Brooksbe's case*, 1 Cro. El. 174; *Bennett v. Bishop of Norwich*, 1b. 600.) But if the title be in coparcenery, as it seems to be, a release by one would be clearly valid and binding in law. It remains to consider if the promovent has made out his right to relief. Since the execution of the deed of 1851, the right to present to Ballyguishlane has, by the death of Mr. Drummond and Mr. Fairfield, been vested in Mrs. Drummond and Mr. Townsend alone. On the death of the Rev. Mr. Sandeas, who was the incumbent in Aug. 1861, the promovent obtained a presentation, dated 11th Oct. 1861, purporting to be that of six true and undoubted patrons of the benefice, one of them an infant represented by two gentlemen as guardians under the Court of Ch. But it was only signed by Mrs. Drummond and Mr. Townsend. This presentation was submitted to the bishop, who very properly refused to institute thereon for want of the other signatures. The promovent states in reply to the act on petition of the bishop, that to remove the bishop's objection he caused a copy of the deed of 1851 to be submitted to him to satisfy him that Mrs. Drummond and Mr. Townsend were solely entitled to the advowson without the concurrence of the other parties; but that the bishop, notwithstanding, refused to act on the presentation, or to institute him without a presentation of said six patrons. The monition was served on the 24th Feb., and, from the correspondence with the bishop's chaplain, it appears that he waived all formal objections, and the case is to be decided on the effect of the deed of 1851. A second ground of objection on the part of the bishop was suggested by his act on petition that another presentation, dated 15th Feb. 1862, was made in the name of all six patrons, but signed by Mrs. Drummond, Mr. Townsend, Lady Headley and Mr. Herbert; and that the church is and has been in litigation; and that no writ of *jus patronatus* has ever been issued out from a bishop. But inasmuch as such presentation, though made and dated 15th Feb., was not laid before the bishop till after 24th Feb. when he was inhibited from doing anything to the prejudice of the promovent, such presentation could not materially, if at all, affect the decision of this case. Besides, the church was not litigious by tenants in common presenting several clerks, as was shown by the cases cited in argument and those collected in Deg. part 1, c. 3, p. 19. Even if it had been rendered litigious before the inhibition had been served, the bishop should have issued his *jus patronatus*, if such were necessary, of his own accord; and such not having been issued, affords no answer in a proceeding of this nature: (Conset. p. 6, s. 9, p. 351.) Here, then, is a case of a clerk duly presented by the true patrons without any claim by any other patron, without any intervention of any other clerk, and without any personal objection to Mr. Meredith, to whom institution has been refused on the ground merely that other parties have not signed this presentation. I must therefore decree and declare that the bishop has not shown sufficient cause why the promovent should not be instituted and inducted into the living in question, and the institution hath devolved on the Archbishop of Dublin; but as the bishop has acted with great fairness in waiving technical points on which he might have relied, I make the decree without costs.

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COURT OF COMMON BENCH.

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

Friday, Jan. 16.

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Construction of the rule requiring a warrant of attorney given by a person in custody to be attested by an attorney attending at his request.

The deft. applied that a judgment obtained upon a warrant of attorney signed by him seven years previously while in the custody of the sheriff might be set aside upon the ground that same had been fraudulently obtained by a person who falsely represented himself as the assignee of the judgment on foot of which he had been arrested, and for which there had been comparatively no consideration, admitting that he had no personal interest in the application. The Court, upon the grounds that there had been some consideration for the judgment, that a long period of time had elapsed; that the original judgment-creditor and the party who obtained the judgment in question were both out of the country, and that the applicant had no personal interest, refused to set it aside.

The deft. applied that the above judgment might be set aside upon the ground that there was not an attorney present on his behalf when he signed the warrant of attorney conformably with the requirements of the 93rd General Order 1854, alleging that the party who obtained the warrant from him on the day previously, dictated to him a letter to an attorney named by him, and whom he, the deft., had never seen, requiring him to attend the next day, which he did, and witnessed the deft.'s signature without explaining to him the nature of the consent. It was sworn upon the other side that at the time he said he knew the contents of it:

Held, that the 93rd General Order had been complied with, and that the judgment could not be set aside upon this ground.

The deft. applied that the above judgment might be set aside upon the further ground that the warrant was not attested conformably with the latter portion of the 93rd General Order, 1854. The attestation was as follows: "Signed, sealed and delivered, &c.,—his attorney:"

Held, that the attestation was sufficient, and that the judgment could not be set aside upon this ground.

Seem, that a statutable mortgagee is a purchaser for value.

St. John Armstrong applied to the court that a judgment obtained upon a warrant of attorney signed by the deft. might be set aside, and the warrant declared to be of no force, on the ground that same was obtained by fraud while the deft. was in the custody of the sheriff of the county of Dublin, and also on the ground that the 93rd of the General Orders 1854 had been disregarded. The motion became necessary by reason of the assignee of the judgment which had been registered as a mortgage against deft.'s lands filing a claim in the Landed Estates Court, in which proceedings had been had to sell deft.'s property. Having stated the affidavits on which the motion was grounded, the deft.'s counsel intimated that there were affidavits intended to be used on the other side, which had not been filed in this court, but had been filed in the Landed Estates Court, and that he did not object to copies of these affidavits being used. [MONAHAN, C. J.—There is a difficulty in the way of our making an order on affidavits which are not filed in this court.] The motion was directed to stand over until affidavits should be filed in the Court of C. B.

Jan. 19.—St. John Armstrong renewed his application. The deft.'s affidavit stated that one Parker

Molloy obtained a judgment against him upon foot of a bill of exchange, which was a renewal of another bill exchange, for which he never received more than 51^l, the residue having been paid to a person named Richardson; that on the 9th March 1854 deponent was arrested upon foot of said judgment, and that in Sept. 1855, while in Kilmainham, the present plt. Nolan came to him and told him the judgment had been assigned to him, and that deponent would be discharged from custody if he executed a bond and warrant of attorney for 431^l; that Nolan dictated to him a letter to an attorney, Carolan, requiring Carolan to attend the next day to witness the execution of the bond; that on the following day Carolan and Nolan attended; that deponent had never seen Carolan before; that Carolan was nominated by Nolan; that Carolan did not explain to deponent the nature of the warrant; that upon the statement that said judgment had been assigned, and no part of it paid, deponent executed the bond; that judgment was marked thereon and registered as a mortgage against deponent's lands, which had been sold in the Landed Estates Court; that the assignee of this last judgment, Hunter, never required payment of it, but had filed a claim in the Landed Estates Court, which Judge Hargreave directed to stand over, pending the present application; that deponent was discharged from custody in Aug. 1856, and between the 6th and 15th of that month was first made aware of the fraud practised upon him by meeting Hunter in the street and hearing from him that Parker Molloy's judgment had never been assigned to Nolan; that Parker Molloy had left this country before the judgment was obtained by Nolan, and that Nolan had left this country in 1858; that deponent did not believe that 151^l, the alleged consideration money for assigning the judgment, was ever paid by Hunter to Nolan, or that Nolan would have ever made over said judgment for such a sum, except with a private understanding; that deponent had no personal interest in the present application, but had a number of pious creditors who were interested in setting aside said judgment. In *Hutson v. Hutson*, 7 T. Rep. 7, Lord Kenyon says, "There is great weight in the observation that the deft. under the pressure of an arrest ought to be considered incapable of waiving the benefit of this rule, and that, at all events and in all cases, he should be protected by the advice of an attorney, expressly attending for him." There was at that time in force a rule similar to the 93rd general order. (a) Carolan was virtually an agent of Nolan. The deft.'s attorney must be present when the warrant is signed; the plt.'s attorney or plt.'s attorney's agent will not do for the purpose:

Mason v. Skiddell, 8 Dowl. P. C. 207;

Barnes v. Pendrey, 7 Dowl. P. C. 747;

Cocks v. Edwards, 2 Dowl. P. C., N. S., 55.

The last-mentioned of these cases decides that lapse of time is no bar to the application. *Hornby v. Wilson*, 1 Ir. Jur. N. S. 204, was decided in this court. The attestation to the execution of this warrant of attorney is deficient:

Hibbert v. Barton, 10 M. & W. 678;

Pocock v. Pickering, 16 Jur. 760.

In this last case the attestation was, "Signed, sealed and delivered in the presence of me, H. C., who, at the request and in the presence of the said J. H. B.,

(a) 93rd rule, which, for the purposes of this case, is identical with 1 & 2 Vict. c. 110, s. 2, upon which the English cases turned, is as follows:—"No such warrant given by any person in custody of a sheriff or other officer shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant, before the execution thereof, which attorney shall subscribe his name as a witness thereto, and declare himself to be attorney for the deft., and that he subscribes as such attorney."

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J. C. and J. H. P., have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them and each of them the nature and contents thereof." That was held insufficient, and Coleridge, J. says, "The same attorney is now to become the witness, and in discharging this distinct duty, he is to do three things: first, he is to subscribe his name as witness; secondly, he is, in the attestation, to declare himself to be the attorney for the person executing; and thirdly, he is also, in the attestation, to state that he subscribes as such attorney." [MONAHAN, C.J.—What was decided there was that one of the requirements of the Act, that the attesting attorney should state he is the attorney for the party, was not complied with.] Upon the ground that the plt. was the deft.'s attorney in the matter; upon the broad ground put by Lord Kenyon in *Hutson v. Hutson*, and because the 93rd General Rule was not complied with, this judgment ought to be set aside. The registering of it was an execution. [CHRISTIAN, J.—No, it was not: an *elegit* would be.]

E. Litton contra.—Eight years have elapsed. The persons who could have deposed to the facts have left the country. All that has been urged might have been discussed before, and was discussed, with the exception of the narrow legal ground. We are assignees by deed. The deft. states that he has no interest in the application, and only seeks to have the funds in the Landed Estates Court distributed amongst his *bona fide* creditors. If the case made be true, the deft. could have been discharged from prison, but grounds of fraud affecting the judgment obtained by Parker Molloy cannot be relied on in this motion. Hunter has made an affidavit, stating that he had "no such conversation" with the defts. as is alleged. I admit the word "such" looks like special pleading. It is too late to inquire into the consideration for this judgment. *Bligh v. Brewer*, 3 Dow. P. C. 266, is an authority on this as well as upon the subsequent point of the deft. having an attorney present at the execution of the warrant. [MONAHAN, C.J.—If it be true that Nolan untruly stated that he was the assignee of Molloy's judgment, how can you argue we are to assume there was a good consideration for the second judgment?] In the schedule in the Landed Estates Court, they put opposite to it, "Nothing due;" whereas it is now contended that it is a nullity. [CHRISTIAN, J.—That is a very queer way of alluding to it, if it be contended that it is a nullity.] As to the second ground upon which the application is made, that the attorney be expressly named by the deft., does not mean that he be originally named by him: (Ferguson's Prac. 1145; *Taylor v. Nicholls*, 6 M. & W. 91.) This case decides that the warrant is not vitiated by the fact that the name of the attorney who attests it on behalf of the deft. was first suggested by the plt.'s attorney if he was expressly adopted by the deft. Carolan, who is a disinterested party, has made an affidavit stating that it is not true that the purport of the warrant was never explained to the deft. at the time, and stating also that the deft. "said he knew the contents of it." [CHRISTIAN, J.—The 93rd rule does not require the attorney to explain the warrant or to read it; but to attend to do so, if necessary; the party may dispense with that by telling him he already understands it.] So says Parke, B., in *Taylor v. Nicholls*. [MONAHAN, C.J.—It is positively averred that Carolan did not explain the nature of the warrant. Can you make out that what he did was an explanation?] The best answer is that of Baron Parke, that the rule does not require this. [CHRISTIAN, J.—The explanation must be given or dispensed with.] "Inform" would have no sense if that which was already

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known was to be the subject-matter of information. The deft. is prevented from making this case after putting the judgment on the records of a court: (*Dobson and Love v. M'Daid*, 1 Ir. Law Rep. 236.) Then, the attestation is sufficient: there are the three particulars, that Carolan is the attorney, that he has been requested to attend, and that he witnesses as an attorney.

St. John Armstrong in reply.—[MONAHAN, C. J.—Show us that *Taylor v. Nicholls* was ever overruled or was ever questioned?] The requirements of the rule cannot be dispensed with. The C. L. P. A. 1863, s. 145, is a re-enactment of 9 Will. 3, c. 10, s. 8; and in *Montgomery v. Byrne*, 2 Ir. Com. Law Rep. 230, it was held that the requisites of that statute could not be dispensed with, because a public policy was to be supported. This case is analogous in that respect. It is the duty of the party obtaining the warrant to see that all the requisites of the statute are complied with. [CHRISTIAN, J.—That meant that the parties could not dispense with the rules of pleading?] BALL, J.—Is the principle that any one may waive a privilege introduced for his own convenience overruled by statute? MONAHAN, C. J.—The question is this: is it the true construction to hold that the Act is not complied with by the mere presence of the attorney? CHRISTIAN, J.—Read any passage overruling *Taylor v. Nicholls*. MONAHAN, C. J.—Or show any case inconsistent. [Barnes v. Pendrey. [MONAHAN, C. J.—Your client wrote the day before, requiring Carolan to come to him, and so the case differs from *Barnes v. Pendrey*.] Will the interval of a day make any difference? [KEOGH, J.—It seems to me the material thing is that seven years have elapsed.] We did not know till lately that the judgment was assigned to Hunter. We were never put in motion properly before. A statutory mortgagee is not a purchaser for value. [CHRISTIAN, J.—I think it was decided by the L.C. that a statutory mortgagee is a purchaser for value.]

M'Auley v. Clarendon, 8 Ir. Ch. Rep. 568;
Eyre v. M'Dowell, 7 Ir. Jur. N. S. 41.

[MONAHAN, C. J.—*Eyre v. M'Dowell* decided that the statutory mortgagee takes only what interest the mortgagor has at the time of the registration; but it is a different question if this man is not the *bona fide* assignee of this judgment.] The attestation is deficient, according to *Pocock v. Pickering*.

Cur. adv. vult.

Jan. 22.—MONAHAN, C.J.—This application is made upon three distinct grounds. The deft.'s affidavit states that he was indebted to Parker Molloy and was arrested by him; that the present plt. came to him in Kilmainham, and told him he would be discharged from custody on giving a bond for 43l.; that he represented to him that Molloy's judgment had been assigned to him, and dictated to him a letter requiring Carolan to attend the next day to witness the execution of the bond; that Nolan and Carolan attended the next day; that he signed the bond and warrant; that he had never seen Carolan before, and that Carolan was nominated by Nolan, and that Carolan did not inform him of the nature of the warrant; that judgment was marked thereon and registered against his (deft.'s) property which had been sold in the Landed Estates Court; that the deft. met Hunter after his discharge and learned from him the true facts regarding the judgment; that on the original bill of exchange he got no more value than 5l., the residue, 22l., having been paid to one Richardson; but Richardson is not to be found, and this affidavit is the only evidence of that. But it appears that, upon the renewed bill, the deft. did not avail himself of the defence of want of consideration. He never took proceedings to set aside Molloy's judgment until Nolan had left the country. The first

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ground made is, that the judgment was fraudulently obtained, inasmuch as the other judgment had never been assigned. This would only be ground for allowing the party to plead. But it appears that he is a mere amateur; that his property will not bring him any benefit, and that he makes this application out of a love of abstract justice in favour of his puiſne creditors. We do not think we should set aside this judgment, when there was some consideration for it, at this distance of time, and when Nolan and Molloy are both out of the country, in favour of an amateur. The second ground made is, that there has been a non-compliance with the 93rd General Rule; if so, the length of time is no bar to the application, because the proceedings are a nullity. [His Lordship read the rule.] This rule requires two things, totally distinct in their nature, to be done, as is remarked by Coleridge, J., in a very learned judgment, in *Pocock v. Pickering*, 18 Q.B. 789: first, an attorney must be present on behalf of the person about to execute—this has nothing to do with the manner of the attestation; secondly, the manner of the attestation is pointed out. It is argued that, as to the first of these, though there was an attorney present, he was not present on behalf of Gumley nor named by him. Several cases were referred to upon this, and particularly *Cocks v. Edwards*, 2 Dowl. P. C., N. S., 55; *Mason v. Sliddell*, 8 Dowl. P. C. 207; and *Barnes v. Pendrey*, 7 Dowl. P. C. 747; which require particular scrutiny to distinguish from this case. *Cocks v. Edwards* shows that the rule must be construed strictly. In *Mason v. Sliddell* the agent of the plt.'s attorney was applied to for time by the deft., and the matter was free from fraud. It was arranged that the deft. should execute a *cognovit*. The agent explained to the deft. the necessity of his having an attorney to attest the execution, and the deft. named the agent, and the *cognovit* was executed by the deft. and witnessed by the agent. The man knew perfectly well what he was doing, and yet it was held that there had not been a substantial compliance with the rule. *Barnes v. Pendrey* is the nearest to the present case. The reason given in that case why it was held that there had not been a compliance with the rule was because the name of the attorney was not known or mentioned, and the deft. could not have understood anything about him. The attorney could not have been considered an attorney named by the deft.; but it was expressly held that the employment of the attorney by the plt.'s attorney, provided the latter were named by the deft., would not vitiate the instrument. We were referred by Mr. Litton to *Bligh v. Brewer*, which is also reported in 1 Cr. M. & R. 651. In that case the deft. agreed to give a *cognovit*, and the clerk of the plt.'s attorney informed him it would be necessary to have an attorney, and named one who would attend if the deft. had no objection. The deft. afterwards went to the office of the attorney so named, and prevented him from reading over the *cognovit*, stating that he already knew its contents. It was held that the rule had been complied with, and Parke, B. says, "In this case everything which the rule demands has been complied with. The rule requires three distinct things: first, that there shall be an attorney attending on the behalf of the person in custody; secondly, that it shall be a different person from the plt.'s attorney; and thirdly, that he shall be expressly named by the deft., and shall attend at his request." In *Taylor v. Nicholls*, 6 M. & W. 91, the plts. were the trustees of the deft.'s marriage settlement, and the deft. agreed with the plt.'s attorney to execute a warrant of attorney for a portion of the trust-fund which he had been allowed to take into his hands. The warrant was prepared and read to the deft., and the plt.'s attorney told him it was necessary some attorney should be present on his behalf. The deft. replied that he had no wish to have any particular

attorney. The plt.'s attorney mentioned the name of an attorney. The deft. assented and went to the attorney's office. The attorney asked the deft. if the warrant had been read over to him, and if he understood it. He replied that it had been read, and that he fully understood it. The rule was discharged, and Parke, B. says: "The attesting attorney must be 'expressly named' by the deft. But we cannot therefore suppose that it was intended that the deft. must expressly pronounce at length the Christian and surname of the attorney; but he must be *expressly* named by him, in contradistinction to his being *impliedly* named or adopted. There is not a word to lead to the conclusion that he must be *originally* or *spontaneously* named by the party, or to exclude the suggestion of a name by a third person. What then is there to exclude the suggestion of a name by the plt.'s attorney? I cannot import such words into the Act, when no such prohibition is expressed in it." How does this apply to the present case? No doubt Nolan suggested the name of Carolan, but it was adopted by the deft. He was free to do so or not, and he adopted in the best possible mode of adopting, viz., by writing to Carolan to come. The deft. does not swear that he did not know what was the meaning of the warrant, and it is sworn that he said he knew the contents of it. There is no allegation that Carolan was a stalking-horse of Nolan. This case comes, therefore, within the *authority* of the two last cases, so far as the attestation is to be proved *alimunde*, i. e. by affidavit. The third ground made is that the warrant is not attested. Unless the attestation be duly done there is no doubt but that the judgment must be set aside. [His Lordship read the attestation.] This is an allegation: "I am the attorney for the deft., and I subscribe my name, &c." What is the objection? The execution is subscribed by Carolan as a witness. He does declare that he subscribes as attorney; and under that is "Frederick Carolan." Mr. Armstrong cited *Libbert v. Barton*, 10 M. & W. 678. The words were, "Witnessed by me, William Pemberton, as the attorney of the said William Barton, attending at the execution hereof at his request, and expressly named by him." That was held insufficient because the words were, "Witnessed by me as the attorney." The court thought that was not a statement in fact that he was the attorney, because he said, "as." The word "as" spoiled it. It would not be decorous in this court to overrule that case, especially as it has been followed in the well-considered case of *Pocock v. Pickering*, 18 Q.B. 789. Lord Campbell and Coleridge, J., were upon one side, and Erle, J., on the other. That would not justify us in going against that case if the present were similar. The attestation there was, "Signed, sealed and delivered, being first duly stamped, in the presence of me, H. C., who at the request and in the presence of the said J. H. B., J. C., and J. H. P., have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them and each of them the nature and contents hereof." The two judges held that this did not amount to a statement that this man was the deft.'s attorney. But here it is in terms, "Signed, sealed and delivered, &c., his attorney." If one went about to prepare an attestation in the form required by the Act of Parliament, it would be in this form. In *Gay v. Hall*, 5 Dow. & Lowndes, 422, the attestation was as follows: "Signed, sealed and delivered by the said H. H., in my presence, and I declare myself to be the attorney for the said H. H., and that I subscribe as such attorney, G. O., solicitor." Patteson, J., says: "The attestation is confined to the words of the statute; it does not say anything about his being expressly named

[CHAN.]

PEARSON v. CRANSWICK—*Re* RAWLINGS, *ex parte* RAWLINGS.

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by the deft., or attending at his request. I am of opinion that the attestation in this case is sufficient." So we are of opinion that in all common reason this attestation does contain a statement that this man is an attorney and attending on the deft.'s behalf. There is no foundation for the application, and it must be refused with costs.

Application refused.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Monday, April 20.

(Before the LORDS JUSTICES.)

PEARSON v. CRANSWICK.

CRANSWICK v. PEARSON.

Will—Bequest—Joint tenancy.

The testator gave the interest, dividends and annual produce of certain funds to trustees, upon trust to pay the same equally to his three daughters, M., A. and S., during their lives and the lives of the survivors and the survivor of them, during their and her natural life, for their respective separate use, and directed that the respective receipts of his said daughters should be sufficient discharges for the said income, and from and after the decease of the survivor of them, in trust for the issue of the said three daughters who should attain the age of twenty-one years. One of the daughters having died leaving issue, a question was raised as to the parties entitled to the interest which she had enjoyed, and the M. R. held that the daughters of the testator took under the bequest as joint tenants, and not as tenants in common; and upon appeal,

Their Lordships affirmed that decision.

This was an appeal by the children of Mary, now deceased, who was one of the daughters of the testator, Mr. Leonard Foster, against a decision of the M. R. which is reported *ante*, p. 215. The will upon which the question depended is sufficiently stated at that place, and it is needless to do more than refer to it.

Selwyn, Q. C. and Humphrey supported the appeal, contending that the children of Mary became on her death absolutely entitled to her share of the trust-funds.

Baggallay, Q. C. and Bevir appeared for one of the surviving daughters, and

Southgate, Q. C. and Marten for the other survivor, and contended that, under the will, there was a joint tenancy in the three sisters, and that the survivors were now entitled to the interest of the whole of the funds.

The following were the authorities referred to:—

Armstrong v. Eldridge, 3 Bro. Ch. Cas. 215;

Jones v. Randall, 1 Jac. & W. 100;

Eales v. Lord Cardigan, 9 Sim. 384;

Doe v. Abey, 1 M. & S. 428;

2 Jarm. on Wills (2nd edit.) 213, 214 and 623; and

Roper on Legacies, 1397.

Lord Justice KNIGHT BRUCE said:—I think that there was fair room for argument upon this will, in some respects singularly worded, whatever the cause may have been of that particular wording; but it appears to me that the M. R. has rightly viewed the intention, and that the intention to be collected from the testator's words, is that not any one of the three daughters was to take a transmissible interest, but that when one of them died, the whole income was to go to the two survivors; when another of them died, the whole income was to go to the third survivor; and that on the death of the third survivor, and not before, the

children mentioned in the will were to take. Certainly there is much awkwardness in the mode of expression, but I am of opinion that that mode of construction, if not clearly certain, has much more probability than any other construction that was put upon it. Therefore I cannot agree to disturb his Honour's judgment.

Lord Justice TURNER said:—I also agree with the conclusion at which the M. R. has arrived in construing this will. The trust here is to pay and divide the residue of the said interest, dividends and annual produce "unto and equally between my said three daughters Mary, Ann and Sarah." Now, if it had rested there, the effect would have been to have given Mary, Ann and Sarah absolute interests. It is an unlimited trust to pay the dividends to them. It is necessary, therefore, to define the interests which they were to take, and accordingly we find these words, "for and during the term of their natural lives;" and the will does not stop there, but it goes on thus: "and the lives of the survivors and survivor of them during their and her natural life." Now, what the effect would have been if the will had stopped with the expression "during the lives of the survivors and the survivor of them," it is not necessary to say, for these words are followed by the words "during their and her natural life." The interest during the lives of the three having been disposed of by the words "for and during the term of their natural lives," there is nothing to which the words "during their and her natural life" can apply, except to that part which applies to "the lives of the survivors and the survivor of them." I think that the true meaning of the testator was, that those words "for and during" overrode the whole sentence—for and during the term of their natural lives; that is, so long as the three shall live, and for and during the life of the survivors and survivor of them, during their and her natural life. It appears, therefore, to me that the case can be well decided on the construction of the particular words of the will, and certainly the words of limitation as to the separate use which follow rather tend to confirm than to displace that construction, because the testator has made the receipts of his daughters discharges for the whole of the interest, thereby clearly showing his intention that the daughters should take the whole interest. I, therefore, agree with the M. R.'s conclusion, and think that this appeal ought to be dismissed.

The deposit to be returned, and the costs of all parties to be paid out of the estate.

Solicitors for the different parties: *Eyre and Lawson; Torr, Juneway and Tagart; Mason, Son and Sturt.*

Thursday, July 30.

(Before the LORD CHANCELLOR (Westbury).)

Re RAWLINGS, *ex parte* RAWLINGS.

Bankruptcy—Act of 1861, s. 129—Assignees—Removal of—Neglect to render accounts within prescribed period—Omission to attend meetings.

A creditor's assignee having omitted to render to the official assignee his accounts within the time prescribed by the 129th section of the Bankruptcy Act of 1861, and having neglected to attend on two occasions the sittings of the court under the bankruptcy, was held on appeal to have been rightly ordered to pay the costs of an adjournment occasioned by his non-attendance, and to have been properly removed from the assigneeship.

This was an appeal motion by Samuel Bagley Rawlings, the bankrupt, and John Brown, the creditors assignee of his estate and effects, to rescind or vary an order of Mr. Commissioner Goulburn, made under these circumstances:—The adjudication in bankruptcy was dated 27th Oct. 1862, and made on the petition of William Lucy and Henry Charles Lucy. On the

13th Jan. last the app. Brown was appointed creditors' assignee. The 18th Feb. 1863 was appointed for the bankrupt to pass his last examination, but his accounts not being satisfactory, he was ordered to furnish a cash account, goods account, and deficiency account for the six months prior to the petition for the adjudication, and his final examination was postponed until the 19th March. On that day there was a further meeting, but on account of the illness of the bankrupt there was a further adjournment until the 2nd April. On that day a meeting took place, when the learned commissioner, not being satisfied with the accounts produced, ordered a further deficiency account to be prepared, and an adjournment for that purpose until the 7th May. On the 7th May a further meeting was held, at which Mr. Brown, the trade assignee, was not present, and it appearing to the commissioner that further investigation should take place in regard to the transactions of the bankrupt as well before as since his bankruptcy, a further adjournment for the application for the order of discharge was made until the 11th June, on which day it was also ordered that the trade assignee should show cause why he should not pay the costs occasioned by the adjournment, and also should show cause why he had not complied with the 129th section of the Bankruptcy Act 1861, in omitting to file his accounts, which he had omitted to do until the 2nd July, more than five months after his appointment, the period fixed by the statute being three months. On the 11th June the order appealed from was made, whereby it was ordered that the trade assignee should pay all the costs occasioned by his default in not appearing on the 7th May. And the order stated that it appearing that the said assignee had wilfully failed to observe many of the directions contained in the Bankruptcy Act 1861, and had also been guilty of neglect in the performance of his duty in that behalf, in neglecting to render to the official assignee the debtor and creditor account within the time and in the manner prescribed by the 129th section of the Bankruptcy Act 1861, and had also neglected to attend on two occasions the sittings of the court under the bankruptcy, or to give the court any information touching the estate of the bankrupt, the court, in pursuance of the 139th section of the Bankruptcy Act 1861, did further order that the said creditor's assignee be removed and a new choice of another creditors' assignee be made.

In the event of an appeal from the order it was further ordered, that due notice thereof should be given as well to the official assignee as to the solicitors of the petitioning creditors, the Messrs. Lucy, and the order adjourned the sitting, for the bankrupt to pass his last examination and make application for his order of discharge, until the 3rd Aug. The bankrupt and the trade assignee then brought the present appeal.

Bacon, Q. C. and *Reed* appeared for the apps.

Bagley for the official assignee.

Swanston for the petitioning creditors.

THE LORD CHANCELLOR.—I cannot interfere with the order of the commissioner. I will first advert to the case of the bankrupt. I regret that he has come here with this application, because it is a useless one, one that cannot profit him, but rather one that is likely to augment the hardship which, in a certain sense, I feel he has suffered. The order of the commissioner was made on the 11th June, upon the 27th June the bankrupt presented this petition of appeal. Now, if this petition of appeal had been heard almost directly, the utmost that could have been done upon it would have been to have directed an early day for passing his last examination. To give him his discharge when he had not passed his last examination was out of my power. To appoint an early day for the examination would still have rendered it necessary to give

the notice required by the statute. It was therefore unavailing; it was, I must say, idle to come here, upon the bankrupts' application, when it was quite clear that it was not reasonable to expect that any day could be appointed for his examination that would precede the time to which the commissioner had adjourned it by more than six or seven days. It was, I think, incumbent upon the commissioner to postpone the examination of the bankrupt, although I fully agree that, upon the evidence submitted to the court, it appeared that his accounts were finally rendered in the manner in which they were by the 17th of April. I must observe, without, at the same time, meaning to imply that I have arrived at any conclusion upon the subject, that it is always a suspicious thing to creditors where they find the assignee and the bankrupt in league together; and more especially is it suspicious when they find the bankrupt producing accounts which are not satisfactory, and the petitioning creditor is obliged to perform the duty of the assignee, that of making objection to those accounts, and where they find the commissioner upholding that objection, and the principal opponent of the creditors upon all occasions is the assignee and the friend of the bankrupt. It was not likely to give the creditors any satisfaction in the proceedings of the assignee when they found that the assignee was not ready with his accounts, although the bankrupt had finally, after three adjournments, produced the accounts required of him. It was, in that state of things, impossible for the commissioner to have proceeded with satisfaction to the final examination of the bankrupt until he had the accounts of the assignee. The assignee, by his conduct, therefore, has placed the bankrupt in the unfortunate predicament of having had his final examination postponed from the 17th April up to the present time. The assignee, by the course he has adopted, has apparently given countenance to the suspicions of the creditors that he has acted in league with the bankrupt. Accordingly, I find one solicitor appearing here for the assignee and the bankrupt, and the object of the assignee throughout the argument has been as much the protection of the bankrupt as it has been the vindication of himself. These are not proceedings that ought to be encouraged. If any hardship is done, it arises almost necessarily out of the suspicion which is justly warranted by that course of conduct. Now that a further account was required of the bankrupt, I do not at all wonder. The accounts showed from the first a loss of 3600*l.* odd. The nature and reason of that deficiency were justly required to be stated. His second account begins by taking credit to himself for a deficiency, a loss upon a former trading of 2900*l.*, a former trading carried back, be it remembered, to the 1st Jan. 1862. A more unsatisfactory account could not well be conceived; yet, what is the conduct of the assignee? He attempts to justify the bankrupt and opposes the petitioning creditor, whereupon the petitioning creditor says, "I must require an explanatory statement of the cause of that loss." At length he gets it; he gets it in spite of the opposition of the assignee. On the 17th April the bankrupt might have passed his examination; but then, what is the conduct of his friend and protector, the assignee? The assignee was appointed in January—it was his bounden duty to have rendered an account at the end of three months. I am told by the learned counsel that the three months is a nominal period. I must dissent from that statement. Three months has been put into the statute with an earnest desire of endeavouring to obtain that which I am afraid the inveterate practice of the Bankruptcy Court will wholly defeat, namely, some accuracy, some certainty and some regularity in their proceedings. That the time is not a mere nominal period, is

evinced by the whole language and tenor of the section; because the duty of the assignee is to render the first account at the end of the first three months, and thenceforth at the expiration of every succeeding three months. And I desire to have it understood, that I will not have this thing treated as nominal, and that if an assignee treats that as a merely nominal matter that he may disregard with impunity, I will not interfere where I find a commissioner exact and vigilant in enforcing obedience to the statute. But the assignee here had no excuse for his conduct, for he had not only failed to render an account, but he had in his possession at that time what must be regarded as a considerable amount of money with reference to this estate, for he had received before the expiration of the first quarter more than 400*l.*, and if he could not have rendered a complete account, he could at least have rendered an account showing the amount of money in his hands. And it was his bounden duty, even if he had rendered no account, to have come with the money in his hands and to have handed it over to the proper officer for the receipt of that money. The duty of the assignee is prescribed carefully, and intentionally prescribed, by the statute. There is an obligation thrown upon him that at the end of three months he shall render to the official assignee, in the presence of the registrar, a debtor and creditor account. I do not treat the neglect in the present case as intended with any motive of dishonesty. Very far from it, but it is neglect which has the same consequences; it is part of that neglect which is universal, and until that neglect is punished and careful supervision is established, there will be nothing like justice done to creditors in bankruptcy. Well, now, the 18th April was the end of the three months. Upon the 18th July came another three months, and in the intermediate time the assignee produced accounts which, upon the face of them, are made out with that degree of carelessness that it is impossible to put trust in them. Sums of money that were received two months after the earlier entries are postponed, in entering them in the account, to antecedent entries, so that one would infer, from the appearance of the account, that the book was a sort of hap-hazard thing; putting down, by memory probably, in the month of June what had been received in February, beginning with receipts in May, to be followed by receipts in February and March. Such a mode of exhibiting book-keeping and showing entries, is a mode that can give no sort of confidence in the account. The account is very properly objected to. And in this manner time is idled away till we come to the expiration of the first six months, and then (and not till then) this account is rendered and the moneys received four months previously are handed over to the official assignee. Now, I will not interfere with an order discharging the creditors' assignee, however respectable he may be, who has thus neglected his duty, and who has been vigilant and anxious and zealous in nothing that I can see, except in shielding the bankrupt and opposing the applications of the creditors to get better accounts from their debtor. There is one particular part of the order which I think is not warranted by any antecedent decision, namely, making the assignee pay the costs of the meeting he had failed to attend. But I must take it in conjunction with everything else. This is not an appeal brought before me merely from the circumstance that the costs of that meeting were fixed on the assignee. It appears that the first meeting came to nothing; there was no account, there was no assignee. The second and third meetings came to nothing, because there was no account of the assignee. The meeting of the 7th May came to nothing; in point of fact, if there had been any addition made to the order, the addition that ought to have been made (except for the manifest combination between these parties) would

have been to have made the assignee pay the bankrupt's costs which he incurred by coming up to attend the meeting for his examination and discharge, a meeting that could not be held from the default of the creditors' assignee. I shall therefore in no case interfere with a commissioner's order, especially in a matter of the regulation of proceedings, unless I have the incorrectness of that order demonstrated to me. There has been a neglect of the statutory provision in two particulars, and they are most important, and this has been by conduct on the part of the assignee which I think justified the creditors in not putting faith in him, however respectable he may be. I conceive, therefore, that the commissioner was well warranted in the conclusion at which he arrived, and I shall refuse both applications. The official assignee may receive the costs necessarily incurred by him out of the deposit; the rest of the deposit to be returned.

C. Swanston applied for the costs for the petitioning creditor, but which were refused.

Solicitors for the app., *W. Hunt*; for the official assignee, *Aldridge and Bromley*; for the petitioning creditor, *Underhill and Field*.

July 29 and Nov. 4.

(Before the LORDS JUSTICES.)

Re THE BRITISH PROVIDENT LIFE AND FIRE ASSURANCE COMPANY, ex parte ORPEN.

Winding-up—Transfer of shares after call made—Liability of transferor.

This was an appeal by the official manager against the decision of *Kindersley, V. C.*, that the resp. Mr. Daniel Orpen, who was the holder of shares in the company at the time when a call was made by the directors, and who transferred these shares to Mr. Sheridan, the managing director of the company, after the call was made, but before it became payable, had thereby made a valid transfer of them, and that the resp.'s name must be struck off the list of the contributors of the company, now being wound-up in his Honour's chambers. His Honour's decision is reported at 8 L. T. Rep. N. S. 596.

The case was argued by *Karslake* for the official manager; and by *Day* (of the common law bar) and *H. C. Phear* for Mr. Orpen; and

Karslake was heard in reply.

Lord Justice KNIGHT BRUCE (after saying that the case had been very ably argued upon both sides), stated that in his opinion a compromise might very properly be arranged so as to put an end to the whole of this litigation, and suggested that Mr. Orpen should pay the amount of the call which had been made at the time when he transferred his shares, though it was not then payable, together with interest upon the amount of the call from the time when it ought to have been paid. He understood that the call amounted to 100*l.*, upon which the interest would be about 25*l.*, and upon payment of these two sums he thought that the order of *Kindersley, V. C.* should stand, and Mr. Orpen's name be removed from the list. He also thought that the costs of both parties to the appeal here and before the V. C. should be paid out of the estate.

These terms were ultimately agreed to by the parties, and the order was made accordingly.

Solicitor for the official manager, *William James Scott*.

Solicitors for Mr. Orpen, *Blakely and Beswick*.

Wednesday, Nov. 4.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte GRAHAM, re GRANT.

Bankruptcy—Unpaid dividends — Application for payment by equitable assignee of the debt—150th Rule of Oct. 1852—Costs of official assignee.

Under a bankruptcy in 1783 a creditor proved, and in 1791 he received a first dividend upon his debt. In 1798 he assigned the debt to a trustee with a power of attorney, in trust for G. In 1820 and 1824 two more dividends were paid to G.'s representative. In 1835 a fourth dividend, and subsequently four others, making up 20s. in the pound, were declared, but were not paid owing to a want of representation of G.'s estate, administration of which was granted in 1861.

Upon application by the administrator to have the dividend warrants delivered to him, the official manager opposing, on the grounds, first that the representative of the trustee was not present, and secondly, because the securities on which proof was granted to the creditors were not produced, or examination had, pursuant to the 150th order of 1852: It was held, that the title of the administrator was not affected by the absence of the trustee, considering the remoteness of the transaction, and the want of any probable suggestion of dealings or receipts which would invalidate the integrity of the proof.

Further, inasmuch as the 150th order does not in express terms extend to the assignees of a creditor, however reasonably it might be held so to do, and it appearing that examination would be useless, the official manager having no evidence to add, and the administrator knowing nothing, it was

Held, that the exigency of the rule was satisfied by the circumstances, and that production of the proofs might be waived.

The official assignee having failed to furnish the commissioner with a proper statement of figures, and a mistake having consequently occurred in the terms of the order, he was disallowed his costs of the appeal.

This appeal from an order of Mr. Commissioner Holroyd, was brought by the official assignee on behalf of the sole remaining creditor of the estate, besides the resp.

In April 1783 James Grant, then in partnership with Peter Grant, was adjudged a bankrupt. On the 27th Dec. in the same year, Peter Grant also was adjudged bankrupt. Amongst the debts proved against the joint estate was one of 1572*l.*, being 1500*l.* for principal and 72*l.* for interest due to Richard Oswald. The securities deposited by him for this debt consisted of a promissory note signed by the two Grants, certain bills of lading, in lien whereof the Grants had deposited in Oswald's hands a bill of sale of one-fourth part or share in a ship called *The Dalvey*, and a policy of assurance upon the same ship.

In June 1790 and Jan. 1791 a first dividend of 6*d.* in the pound on the joint estate, in two instalments of 3*d.* each, was declared and paid. Some years afterwards James Grant purchased the debt of Oswald. In 1816 James Grant died, having appointed three executors, two of whom proved. Of these one died in 1823, and Charles Grant, the survivor, in Aug. 1830. Administration *de bonis non* of James Grant's estate was, on the 14th June 1861, granted to the resp. Alfred William Begbie, a relative of the Grants, who had passed the greater part of his life in India.

In June 1820 a second dividend of 3*s.* 8*d.* was paid, and in May 1824 a third dividend of 1*s.* These two dividends on the debt of 1572*l.* were duly received by Charles Grant, the executor, and were accounted for by him to the residuary legatees under James Grant's

will. In 1835, after Charles Grant's death, two more dividends were declared, a sixth of 9*s.* 6½*d.* in 1836, a seventh of 4*s.* 8*d.* in Jan. 1840, and an eighth and final dividend on the 9th Oct. 1840, making up 20*s.* in the pound. These dividends having been declared whilst there was no legal personal representative of James Grant's estate to claim them, remained unpaid.

On the 1st March 1842 an order was made by one of the commissioners, directing the assignee to pay out of the joint estate a sum of 352*l.* 12*s.* to R. Oswald in respect of interest on his debt, the amount of which was still taken at 1500*l.* for principal, and 72*l.* for interest.

Shortly after obtaining letters of administration, Mr. Begbie applied to the court to have the warrants of the unpaid dividends delivered to him, and for payment of the interest. Messrs. Smith, Alliston and Smith, the successors in business of Mr. Shawe, supported Mr. Begbie's claim, but were unable to produce the deed of assignment, which had been mislaid. They testified to this effect, but that Mr. Smith remembered the assignment having been produced to (and examined by) him, by Messrs. Shaw and Leblanc in 1820. The official assignee objected to the claim being admitted on this evidence, and subsequently the deed was discovered. It was then found to be an indenture dated the 10th Feb. 1798, and made between John Anderson, the only surviving executor of the will of Richard Oswald of the first part, James Grant of the second part, and Richard Shawe of the third part. It recited the advance by Oswald to the Grants of the sums of 1500*l.* and 800*l.* on their joint and several bonds respectively, and that the Grants further became indebted to Oswald in the sum of 1700*l.* by virtue of these bills of exchange; the bankruptcy of James Grant, under which Oswald proved in respect of the sums of 1500*l.* and 800*l.* and interest, amounting together to 2407*l.* 18*s.* 10*d.*, and claimed the said debt of 1700*l.*, and that James Grant obtained his certificate; also the bankruptcy of Peter Grant, and similar proof under that commission. It also recited a common money bond dated the 15th Aug. 1783 for securing payment by George Grant, the payee of the bills of exchange, and James Grant, or either of them, to Oswald of 1700*l.* and interest; and another bond dated the 8th May 1784, whereby James Grant became bound to Oswald in the sum of 4000*l.* The condition of this bond recited that Oswald had, since the 18th April 1782, lent to James and Peter Grant the sum of 1500*l.* on their promissory note, and that, on the 11th May, Oswald had also advanced to them the further sum of 800*l.* upon their joint and several bond; also, that Peter Grant was one of the acting executors and trustees of Sir Alexander Grant's will, and that the house of the Grants were agents for the said trust-estate; that the 1500*l.* was borrowed by Peter Grant for the use and benefit of Sir Alexander Grant's estate, and that the 800*l.* was borrowed on the same account, but that no other security or satisfaction than the said last-mentioned bond and note of them the said Peter and James Grant, together with a lien upon a quarter part of the ship *Dalvey*, had then been given to Oswald. It then recited the two bankruptcies, and that Oswald had proved his debt under one commission, and intended to prove it under the other; and that the said Richard Oswald had also received the sum of 500*l.*, or thereabouts, on account of the sale of the ship *Dalvey*, and for such quarter part therein, and that there was then due and owing to Oswald on the said therein in part recited securities, the sum of 2000*l.*; "and in order to prevent any loss to the said R. Oswald for any deficiency that might arise to him on account of the said securities after application of what the said R. Oswald might receive from the said Sir A. Grant's estate," it was declared that the bond should be void on payment by James

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Grant, his heirs, executors, or administrators, to Richard Oswald, his executors, administrators, or assigns, on the 8th May 1787, of the sum of 2000*l.*, or such other sum of money as should then appear to be due to the said R. Oswald on the several accounts therein mentioned, with interest at 5 per cent. After reciting this bond, the deed proceeded to recite the death of Oswald, and the appointment of the executor; the receipt of the two dividends of 3*d.* each, and that James Grant had proposed to deliver to John Anderson bills to the amount of 5000*l.*, in full satisfaction of all moneys due under or by virtue of the two bonds, and to allow Anderson to return to George Grant any sums which he had advanced in part payment of the 1700*l.*, or as a security for the principal and interest, or any part thereof, without prejudice, however, to any question that may arise between the said George Grant and James Grant touching the said transaction, on condition that he, the said John Anderson, should assign the said bonds and the future dividends to become payable on the said sums of 835*l.* 18*s.* 10*d.* and 1572*l.* proved under the commission against James Grant, and also the future dividends on the same sums proved under the commission against Peter Grant, unto the said Richard Shawe, in trust for the said James Grant. It then witnessed that, in consideration of 5000*l.* paid by James Grant to Anderson, Anderson assigned to Shawe the said debts proved by Oswald, and all dividends, &c., in trust for James Grant, his executors, administrators and assigns; with a power of attorney to Shawe to demand, sue for, recover and release of and from the assignees of the estate and effects of James Grant and Peter Grant and all other persons, all and every the said debts and dividends.

In this state of circumstances, on the 20th April last, the order was made which was now appealed from.

It recited that, whereas, Mr. Begbie, as administrator, &c., had applied to the court to order payment to him of the sum of 1165*l.* 17*s.* 4*d.*, the amount of dividends declared and unpaid in respect of the debt of 1572*l.*, and of the sum of 352*l.* 12*s.*, which, by the order of the 1st March 1842, was directed to be paid on account of dividend upon the interest due upon the sum of 1500*l.*, part of the said sum of 1572*l.*: Now, upon hearing, &c., and upon reading the proof of debt, and the several orders declaring the dividends, Mr. Begbie's affidavit, the certificate of Messrs. Smith, written at the foot of the same, and upon reading the assignment of the 10th Feb. 1798.: and it appearing from the said assignment, and being admitted, that the said R. Oswald, after making the said proof, received the sum of 500*l.* from a realisation of a security therein mentioned prior to the year 1798, and that dividends to the amount in the whole of 20*s.* in the pound were afterwards declared on the said proof, without deducting the said sum of 500*l.* therefrom, and that the receipt thereof was not taken into account when the said order of the 1st March 1842 was made, in consequence whereof the sum of 352*l.* 12*s.* was thereby erroneously apportioned and directed to be paid to the said Richard Oswald, or his representatives, instead of the sum of 235*l.* 1*s.* 4*d.*, being an excess of 117*l.* 10*s.* 8*d.*; it was ordered that the said two several sums of 500*l.* and 117*l.* 10*s.* 8*d.* be deducted from the said unpaid dividends and interest, and be carried back to the credit of the estate of the said bankrupt; and it was ordered that the dividend warrants for the unpaid dividends and interest, subject to such deductions, should be renewed and delivered by the official assignee to Mr. Begbie.

Bacon, Q. C., and Bagley, supported the appeal. Their objections were, first, that Mr. Shawe, the trustee of the deed of assignment, or his representative, was no assenting party to this order, and in his absence Mr. Begbie was not entitled. His assent was

necessary before the warrants could be delivered, because there was nothing to show that he or Oswald might not have received the whole of the debt from Sir A. Grant's estate, as seemed probable from the recital in the bond, there being no doubt of the solvency of that estate. Secondly, the order was correct in deducting the 500*l.*, but it should have gone further. Oswald received the first dividend on the whole of the 1572*l.*, although he knew he had already been paid 500*l.*, and his assignee received the second and third dividends on the same amount. From any claim of Mr. Begbie, therefore, in respect of these dividends, these three sums with interest must be deducted. On the first point, they referred to the 150th rule of Oct. 1852, which requires the production of a creditor's securities to the official assignee before his dividend warrants are delivered, or, in default of production, on examination; and to the case of *Ex parte Gray*, 4 D. & Ch. 778. The second point being conceded,

The LORD CHANCELLOR inquired whether a proper account had been handed to the Commissioner, and, on receiving an answer in the negative, his Lordship said, that whenever he found default made on the part of the official assignee in furnishing proper statements of figures to the court, he should consider a great deal before he allowed the official assignee the costs which had been occasioned by his negligence.

Daniel, Q. C. and Sargood, for the resp., supported the sufficiency of Mr. Begbie's title, and urged the uselessness of any further examination.

In reply to questions from his Lordship, the official manager stated in court that he believed inquiry would lead to nothing, and that he had searched without being able to find further materials.

Bacon, Q. C. was heard in reply.

The LORD CHANCELLOR.—This application which has been brought before the court rests upon two objections; one to the claim altogether, the other to the figures in the order, that the full amount of deduction has not been made. That the official assignee should have brought forward these objections I think was quite right; first of all, because he has acted at the instance of a creditor having a material interest in the subject, and therefore, as between the two creditors, it was right that he should come and bring this matter before the court. I think, also, it is desirable in a matter of such great antiquity, that the question should be decided by the court; but at the same time I regret very much that the official assignee did not take care, as it was his bounden duty to do, that all the facts and circumstances of the case were more fully presented to the commissioner; and, upon the subject of figures, if there be an error in the order, I must consider that the error has arisen from the official assignee not having given full information to the commissioner. Now first, upon the subject of the objection to the claim, I think it is unfounded. In a matter of such great antiquity as this, I am not to forbear from recognising the title of a person, because of the possibility of objection to it. I must go upon the ground, if I can find it, that the objection is probable, and may be reasonably shown to be well founded. I cannot listen to suggestions of the possibility of things of which I find no trace. Now, the nature of the present claim is of this kind:—A Mr. Oswald proves a debt for money lent (principal and interest) amounting to 1572*l.* That proof is made in the year 1783; the deposition appears to be quite regular; there is appended to the deposition a statement by the creditor of his securities; there appears to be a promissory note of the bankrupts; further, there appears to be a bill of sale of one quarter part of a ship; further, there appears to have been an assignment of chattel property, which the deposition states had been afterwards resumed by the bankrupts; and further there appears to be a policy of insurance which, as the ship arrived safely in

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port, of course was of no value. The debt is proved at the date I have mentioned and, in the year 1791, a dividend of sixpence in the pound is received upon that debt. Afterwards, in the year 1798, a transaction of this kind appears to have taken place, which is evidenced by the production of the deed, which, at this distance of time of course proves itself. It seems that Mr. Oswald, or rather the executor of Mr. Oswald (a Mr. Anderson) assigned this debt and the proof of it, to a gentleman of the name of Shawe, a solicitor, in trust for Mr. James Grant, one of the bankrupts. Mr. Shawe, who was the attorney of James Grant, received in the ordinary form a power of attorney to collect and receive the dividends payable upon the debt. Now the principal part of the argument has been founded upon this, that I ought not to recognise a claim by the representative of James Grant, the beneficiary, because of the possibility of dealings having taken place by Shawe, or of moneys having been received by Shawe, which would be incompatible with the integrity of the proof. I am not of opinion that I can upon that ground make any objection to the title of the party, who, on the face of the instrument, appears to be beneficially entitled; and this is rendered quite clear and satisfactory to my mind by this circumstance, that there is no available source suggested, or capable of being traced, according to the information afforded to me, by anything like evidence, from which Mr. Shawe, in his character of trustee or rather of attorney of James Grant, could by possibility have received any money in reduction of the amount of the debt proved. This, therefore, is one of the objections to which the observation I have made applies, that I must not listen to the suggestion of possible obstacles, but can only judicially listen to those suggestions which are probable and founded upon something like evidence to sustain them. Mr. Shawe, it appears to me, was a mere formal party, having a power of attorney which ended by his death, and whose office and capacity could not, as far I see, by any possibility, have enabled him to have done anything, or to have received anything, that would affect the integrity of this proof. Now what subsequently took place appears to be this: Mr. James Grant died and Mr. Charles Grant was his representative. Mr. Charles Grant, as his representative, received two dividends, in June 1820 and in May 1824. Now in a transaction of this antiquity, by all principles of law, and by all analogies furnished by the rules of law in other cases, I must give great force and effect to the length of enjoyment. The receipt of these dividends is an enjoyment of the proof; it is a participation in the fruits of the proof; and I find, too, that the title of the party receiving is recognised in the bankruptcy, first in 1820, and then again in 1824. I must apply the common rule of presumption, that all things must be taken to have been rightly done, and now at the expiration of more than forty years from the first receipt, and of nearly forty years from the second receipt, it would be an unreasonable thing to call upon the party to prove that there is no possibility of objection to a thing that was done, and therefore must be taken to have been rightly done, namely, the receipt of these dividends in June 1820, and again in May 1824. But it does certainly appear upon the face of the assignment that was made in the year 1798, that a sum of 500*l.* had been realised by one of the securities, namely, the bill of sale of one-quarter part of the ship; and that appearing on the face of the instrument, this also appears, that it was the entirety of the money realised by that security, save only the observation that was made by Mr. Bagley upon the words, "or thereabouts," to which I cannot attach any particular value. I

must hold that the sum of 500*l.* was the full extent of that security. Then I am pressed in argument by the circumstance that no statement was made to the assignee of the bankrupts' estate of the fact of the receipt of this money. It appears to have been received prior to the date of the first dividend, and it will be observed that a very great interval of time took place between the date of the first dividend and the date of the second. The date of the first is Jan. 1791; and the date of the second is June 1820, an interval of nearly thirty years. I cannot, therefore, but hold it very probable, and very reasonable to assume, that there was little likelihood of dividend, and that when the dividend was received in June 1820, the fact of this payment, as evidenced by the deed, had been forgotten, and was probably not known to Charles Grant, the representative of James Grant, Shawe having been dead for a considerable time, and the deed being probably laid underneath masses of paper in the depositories of Shawe and Le Blanc. I cannot infer from that fact any ground of suspicion that should reasonably induce me to distrust any other portion of the case. These being the facts, as I have no doubt about the *bona fides* of the claim, and as I cannot listen to the suggestion of the possibility of its being affected by some possible act of Shawe the trustee, I am then pressed by this, that the language of the 150th rule must be abided by. But the language of the 150th rule is not applicable to the present case at all. That applies to the original creditor who proves, and although it would be very reasonable not only to apply it to that creditor, but also to apply it to the assignee standing in the shoes of that creditor, yet I take it that the facts of the case, as now proved, are quite sufficient to satisfy the exigency of the rule. The rule requires the commissioner to inquire and examine. I find before me evidence which I will take to be the only evidence that would follow upon that inquiry and examination, and the official assignee admits that he can add no more. It was the bounden duty of the official assignee to have added to it if it were possible so to do. The counsel for the official assignee at the bar admits that it is idle to examine Mr. Begbie, for personally he can know nothing. I therefore find, in fact, the duty of inquiring and examining exhausted and the result of that inquiry and examination is now before me. Then, under these circumstances, am I to refuse to give credit to what was done in the year 1820 and to what was done in the year 1824? Am I to cast doubt upon the document which is now produced, the deed of 1798, which appears to give a reasonable and fair account of the whole of the transaction? The consequence of the examination is simply this, that I am to inquire what ought to be the present interference of the court to set right the error that has been committed by reason of the receipt of the 500*l.* not having been previously discovered. The 500*l.* I must take to have been received prior to the 8th of May, 1784. The result is, that immediately it was received it ought to have been deducted from the amount of the proof. The consequence, therefore, is, that I must declare the 500*l.* to be considered as being deducted from the amount of the proof, immediately after the date of the proof. I shall declare that the 500*l.* ought to be taken as having been received by Mr. Oswald, the creditor holding the security, immediately after the date of the proof, and that his proof for 1500*l.* ought to have been reduced accordingly. I declare that all the dividends which have been received upon the sum of 500*l.*, which will be one-third part of all the dividends hitherto received, ought to be accounted for and made good by the present claimant (Mr. Begbie), with interest thereon at the rate of 5 per cent., and that the aggregate amount of such one-third part of the dividends and of the interest so calculated

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thereon, ought to be deducted from the sum of money now claimed by Mr. Begbie upon this proof, and that the difference after that deduction ought to be paid to him.

After some discussion, his Lordship said he would say nothing about costs on either side, but the deposit might be returned to the app.

Solicitors for the app., *S. F. Langham and Son.*

Solicitors for the resp., *Lawrance, Pless and Boyer.*

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA MITCALFE and G. T. EDWARDS, Esqrs.,
Barristers-at-Law.

July 31, Aug. 1 and 3.

Re BRITISH PROVIDENT LIFE AND FIRE ASSURANCE SOCIETY, re GEORGE LANE.

Winding-up Acts—Sale of his shares by a director to the company—Necessity for previous authority of the shareholders—Contributory.

By the articles of association of a joint-stock company power was given to the directors to purchase the shares of any holder, but not without the authority of a general meeting previously held. One of the shareholders, who was also a director, transferred his shares to the company through their manager, purchasing annuities from the company for a larger amount than the sum agreed to be given for the shares, and paying the difference. At a general meeting subsequently held, a balance-sheet was produced, containing an account and the report founded on it, which did not, however, very clearly convey the idea of this transfer, was adopted. From this time the director ceased to have anything to do with the company, and five years afterwards a winding-up order was made:

Held, that he was liable as a contributory.

The question on this summons was whether Mr. George Lane was liable as a contributory in the winding-up of this society. It appeared that Mr. Lane had become the holder of 100 shares, for which he executed the deed of settlement in April 1855; he afterwards took a transfer of 200 more shares from a Mr. Robertson, and the transfer was returned to the registration office. Mr. Lane afterwards wishing to retire from the company, agreed with Mr. Sheridan, the managing director, that he should sell his shares for him at 10 per cent. commission, and after some correspondence between them, Mr. Sheridan informed him that they were disposed of, and the result was that Mr. Lane executed a transfer to the company of his shares for 300*l.*, at the same time agreeing to purchase two annuities, one for his own life and the other for the life of his wife, for 400*l.*, from the society, and Mr. Sheridan's commission being 30*l.* Mr. Lane gave a cheque on his own bankers for 130*l.*, for which Mr. Sheridan gave him a receipt in these terms: "Mem.—Mr. George Lane has this day paid to me the sum of 400*l.* by cheque, for the purchase of two annuities, &c. Signed, John Sheridan." Mr. Sheridan made various entries in the books, and told Mr. Lane that he required nothing more of him. It also appeared that the cheque for 130*l.* was paid into the company's bankers, the Royal British Bank, and Mr. Lane delivered the scrip to Mr. Sheridan. After some payments had been made in respect of the annuities, a new set of directors being appointed, recognised the transaction, and gave Mr. Lane a promissory note at four months for the arrears due to him, and a cheque which was paid. Mr. Lane alleged that since 1856 he had never attended any meetings, or had notice of any until the winding-up order was made and he was put on the list of contributories.

Baily, Q.C. and Karslake appeared for the official manager.

Shebbears for the creditors' representative.

Glassey, Q.C. and Henry Shebbears for Mr. Lane.

Baily, Q.C. in reply.

The following authorities were referred to in the course of the argument:—

British Provident Life and Fire Assurance Company, ex parte Grady, 8 L. T. Rep. N. S. 98;

Shortridge v. Bosanquet, 16 Beav. 84, and 6 H. of L. Cas. 297;

Brotherhood's case, 8 Jur. N. S. 926;

Clarke v. Dixon, 4 Jur. N. S. 832;

Hullett's case, 2 J. & H. 306.

The VICE-CHANCELLOR said he thought Mr. Lane should be put upon the list of contributories. This case having occupied some time, he had looked carefully into the matter, and it was with a certain degree of reluctance and regret that he came to such a conclusion. [Here his Honour referred to the facts of the case.] The books contained statements as to the cheque drawn by Mr. Lane, which were not the fact, and this could only be explained by saying that, as to this company at least, nothing that ever was stated was according to the fact. Being required to keep a register of shareholders, it was never kept at all; for there being a book in which the name of every original shareholder had been regularly entered with the shares he held, not a single entry had been made since. A general meeting was held on the 10th April 1856, and it must be assumed that the balance-sheet then produced was the same as the printed one. It did not show the condition of the company; but it was said that it contained an item of 450*l.* as "annuity purchase-money," and that this comprised the 400*l.* paid by Mr. Lane. There was also an item of 300*l.* "deposits on shares returned," and this was contended to refer to his shares; but a more effectual way of concealing from the shareholders the true state of matters could not well have been devised. What shareholder could have an idea of the purchase of shares by the company from such an entry, although there appeared to have been a periodical called the *Post Magazine*, which might have conveyed information to some shareholders? On the facts, the question was, whether the transfer from Lane to the company was valid, so that from the date of the transfer he ceased to be a shareholder or still remained one. First, he would consider the matter as if it were *res integra*. When persons took shares in a joint-stock company, whether as original shareholders or by transfer from some other person, they proceeded upon this footing. There were articles of association or some instrument which constituted the rules and regulations by which the company was governed, and which was the form of constitution of the society, and they knew they were embarking in an adventure in which, unless it was a limited company, every shareholder staked the whole of his property. They knew this from the nature of it, and that it was impossible that such a business could be managed unless it was delegated to a few persons, and that they themselves would have nothing to do with it. A shareholder must shut his eyes, receive the dividends and pay the calls. He knew that the Articles of Association were, or ought to be, framed to protect him from fraud, and subject him and each shareholder (while he was such) to liabilities, and that he had a right to insist on the observance of all these. If there was any transaction with respect to the concerns of the company, in which one shareholder concurred, which was, and which was known by him to be, a violation of any of these provisions, every other shareholder had a right to say, as to him, that the transaction was invalid. What clauses were there here on which a shareholder had a right to rely? The 13th provided for holding an annual general meeting, and there was no question as to the time so as to make it illegal. The 14th applied to an extra-

ordinary general meeting, which, by the 15th, proprietors and holders of policies to a certain amount had a right, on six months' written notice, to require to be called on certain conditions. By the 16th the business to be transacted must be notified, and by the 17th, thirty members were required to be present holding certain shares, and policy-holders to a certain amount. The 130th clause, which was important, prohibited the shareholders from a right to inspect the books, unless five shareholders holding a certain number of shares applied; but the 156th and 157th were most material. The 156th was, that where any holder of shares was desirous to sell to the directors his shares, he must give notice at the office, and the board of directors should purchase for the benefit of the society, and at such price as they should think advisable, and immediately on the completion of such purchase, either to the society or trustees for the society, the board of directors should make such alteration in the register of shareholders as was necessary to make it appear that such holder was no longer entitled to such shares; and after such alteration as aforesaid the board of directors should, at any time, at the request of such holders, give to them a certificate, signed by three directors, of the entry and alteration, to be called a certificate of discharge, and that no holder was entitled to sell or receive such certificate until he had paid all calls, &c. So far there was a distinct authority to the directors to become the purchasers, for the company, of shares; but then came the 157th, which provided that, "notwithstanding anything thereinbefore contained, it should not be lawful for the board of directors, under the powers given to them by the 156th clause, to sell or to purchase any shares without the authority and sanction of a general meeting of proprietors or members of the society, previously in that behalf obtained." Suppose an analogous clause to that were inserted in a marriage settlement—that the trustees might invest the trust-funds in the purchase of real estate—but, notwithstanding that power, they were not to exercise it without the consent of the husband and wife; would a court hesitate one moment in declaring an exercise of that power bad without such consent? How important was such a clause, and how carefully and regularly ought it to be observed, and how could any shareholder be deprived of the right so given to him? It was not a mere formality, but a matter of substance. It was the same as if, instead of the power being thus given first, and then restricted, it had been, that in every case of purchase by the company, the consent of a general meeting should be necessary. Every shareholder was entitled to the benefit of that protection unless he had concurred in the violation of it. What evidence was there of such meeting? None; indeed, there was the evidence of Mr. Knight, supported by the books, that there never was any such, and Mr. Lane himself, up to Dec. 1856, when the negotiation was first entered into, did not suggest that there was any such. There was, therefore, sufficient to satisfy a judge that none had been held. Mr. Lane was not only a shareholder, but a director, and diligently attended to the management, and was so disgusted and dissatisfied with it that he naturally wished to retire, but he knew, or ought to have known, the rules, and the knowledge of the 156th and 157th sections must be imputed to him as a shareholder, and *à fortiori* as a director. It was also contended that the report adopted at the meeting of the 10th April 1856, which contained this transaction, was binding, but that was made subsequently, and the words of the 157th clause were, "previously in that behalf obtained." As to acquiescence, the report was enough to blind any one to the real state of the case; it could never have conveyed the idea of a transfer. With regard to the length of time, as was observed by Lord Cranworth, length of

time did not cover invalidity, although there might be an *ex post facto* consent. As to Mr. Lane being restored to his former position, probably he could get his shares back, but all this was no argument against innocent parties. An argument raised by Mr. Shebbeare was of such considerable weight that, had there not been other grounds, on that ground alone he (the V. C.) would have considered Mr. Lane liable, namely, under the 126th section of the 7 & 8 Vict. c. 110; that, knowing it was a sale to the company, and that Sheridan was the managing director, and that Sheridan in that character would not act as agent of the company, he received a bonus, which he could not do, and therefore the transaction was invalid. That alone was sufficient to show that the transaction could not be upheld, because he enabled Sheridan to pocket 30l. It might be said, "What was the harm if Lane paid it?" But Sheridan made the company pay 300l., Lane only receiving 270l. So far, if there were no authority upon the cases, Mr. Lane would be liable; but there were two cases upon which he was clearly liable, namely, *Shortridge v. Bosanquet* and *Grady's case*, in this very society. But neither of those cases was adverse to the grounds of the present decision. The L. C. proceeded on the same footing, and when he used the word "formality" he could never have meant a mere trivial matter, but exactly the contrary, showing what he meant by using the word "presume." The decision here was not in the least opposed to *Grady's case*, and he was persuaded that if it had been before the L. C., he would have taken the same view under the circumstances. He was therefore obliged to come to the conclusion that Mr. Lane's name must be put upon the list. Costs of all parties out of the estate.

Solicitors: *Scott*, Skinner-street; and *Peckham*, Serjeants'-inn.

Friday, Nov. 6.

Re MICHELL, otherwise ELDER'S TRUSTS.

Practices—Proceedings in chambers—Costs of adjournment into court—Domicil.

Where proceedings in chambers were adjourned into court at the instance of one of the parties interested, the court refused to decree the costs of the adjournment to be paid by the party at whose instance the adjournment was made, though his counsel would not argue the question upon which the opinion of the judge had been desired.

The opinion of Lord Kingsdown, given in his judgment in Moorhouse v. Lord, as to the necessity of a settlement of many doubtful points in the law of domicil, referred to.

This was an adjourned summons. A question had arisen in chambers as to whether the domicil of one John Thompson was Scotch or Anglo-Indian. The facts, so far as it is necessary to relate them, with reference to the question involved, were as follows:—John Thompson was a posthumous child born in Scotland, where, a few years after his birth, his mother married again, and came to reside in England. John Thompson, who left Scotland with his mother, went to India at the age of eighteen, as a clerk in the East India Company's service, and died in India. The questions that arose were, first, whether the facts of Mr. Thompson's coming in his infancy with his mother, who was his guardian, and with his step-father, to reside in England, would have the effect of changing his domicil from Scotland, the domicil of origin, to England; and, secondly, whether his service with the East India Company in India would give him what is termed an Anglo-Indian domicil. The chief clerk had decided that Mr. Thompson had acquired an Anglo-Indian domicil, and as this decision did not meet with the approval of one of the parties interested, it had been

agreed to adjourn the matter into court for argument, and for the purpose of obtaining the opinion of the judge.

C. Hall, for Mr. J. P. Bailey, who was one of the parties interested in the administration of the trusts, and on whose behalf the question had been adjourned into court, said that, after looking into the facts, he found that he could not argue against the establishment of the Anglo-Indian domicile. He referred to the decision of the H. of L., in *Moorhouse v. Lord*, 8 L. T. Rep. N. S. 212, and more particularly to the judgment of Lord Kingsdown in that case.

Anderson, Q. C. and Glasse, Q. C., for other parties interested, supported the finding of the chief clerk.

W. Pearson, on behalf of an infant, asked for his costs, as it had been contrary to his client's wishes that the case should be adjourned into court; and as the question upon which the adjournment had been made had not been attempted to be argued, the expense consequent upon the adjournment ought never to have been incurred, and should therefore be borne only by the party at whose instance the adjournment had taken place.

The VICE-CHANCELLOR said:—In this case a question has occurred as to the domicile of John Thompson. The chief clerk, in the proceedings in chambers, had expressed his opinion in favour of the Anglo-Indian domicile; and the matter would have been so decided, but Mr. Hall's client exercised the right which every suitor of the court possesses, of having the opinion of the judge upon the question. Assuming that it never came before me personally, and the chief clerk being of opinion that the domicile was Anglo-Indian, it is agreed to adjourn the matter into court, and upon this some correspondence appears to have taken place between the solicitors to the different parties interested as to the unnecessary expenditure which the adjournment created. If the question had been suggested to me I should have considered that, inasmuch as the recent case of *Moorhouse v. Lord* has somewhat modified the old rule of the civil law, and probably for the better, it was a question that should be argued, if by counsel, in court. Lord Kingsdown, in his judgment in *Moorhouse v. Lord*, alludes to the many vexed points of the law of domicile, which he considers it would be highly desirable to have settled, and he also apprehends that, unless in addition to residence there is an intention to change the domicile, no change of domicile is made. The law is certainly not on so satisfactory a footing as one might wish it to be. In the present case I do not understand that any objection was made on the ground of expense before the matter was brought into court. I see no special reason to depart from the usual rule in such cases as to costs. Mr. Hall having investigated the question, and coming to the conclusion that the view for which his client contended was not one that could be maintained, waives the point. In all similar cases this is looked upon as a part of the proceedings in chambers, and therefore the costs ought not to be thrown upon any particular party; they are part of the costs in chambers. The chief clerk's certificate must be affirmed, and the question decided in favour of the Anglo-Indian domicile.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-Inn, Barristers-at-Law.

MICHAELMAS TERM, 1863.

Wednesday, Nov. 4.

HEMINGS v. PUGH.

Demurrer—Allegations of agency and receipt of money by agent.

Demurrer to a bill, alleging that the deft. had received various sums of money as agent for the plt., the

particulars and amount whereof were unknown to the plt., and not alleging any fiduciary relation between the parties, allowed.

This was a demurrer.

The bill as amended alleged that the deft. had received various sums of money as agent for or on account of the plt., the particulars and amount whereof were unknown to the plt., and that it became and was the duty of the deft. to render an account of such receipts, and to pay such sums to the plt.; that the deft. had neglected to pay such sums or to render any account thereof to the plt.; and that the plt. had made repeated applications to the deft. for an account and payment of such sums of money, but that the deft. had not complied therewith. The plt. charged that the deft., on being pressed to examine his books, papers, accounts and other documents, for such receipts as aforesaid, did pay to the plt., on the 9th day of November 1862, the sum of 9l. 3s. on account of the sums which he, the deft., had, as he stated, and as the fact was, on a partial search discovered that he had received, as aforesaid, for the plt.; and that the deft. then informed the plt. that he the deft. would make further search in his books, papers, accounts and other documents for the particulars of other sums which he had received as aforesaid for the plt., but the deft. had neglected so to do, and sometimes alleged that he had not time to make such search, and sometimes that he could not find such books, papers, accounts and other documents, and sometimes that he had put the same away, and that such putting away was evidence to him that nothing would thereby be found due to the plt.

The bill also alleged that the deft. had since, namely, on the 8th May 1863, and after and in consequence of being informed that this bill had been prepared, paid to the plt. a further sum of 20l. 15s. 6d., as being the sum which he, the deft., had, as he then stated to plt., and as the fact was, on a further partial search, discovered that he had received for the plt. as aforesaid, but that the deft. had neglected to make further searches which would show the other sums he had received on account of, and which ought to have been paid to, the plt.

The plt. charged that if the deft. would produce such books, papers, accounts and other documents, and make such other discovery as he ought to have done, a considerable sum of money would have been found to have been received, as aforesaid, by the deft. for or on account of the plt., and which the deft. had failed to pay to the plt. as he ought to have done; and such sum was then due from and ought to be paid by the deft. to the plt., but that the amount thereof was unknown to the plt., and could not be ascertained except from the deft. and his said documents.

The plt. insisted that the deft. ought to have produced and left such books, papers, &c., in the offices of the clerks of records and writs, as thereby and therefrom the truth of the matters aforesaid would appear.

The bill prayed for an account, and that the deft. might make a full discovery of every sum of money received by the deft. for or on account of the plt.; also that the deft. might produce and leave with the clerks of records and writs all books, papers, accounts and other documents containing any entries of any sum charged by the deft. to any person as paid to the plt., and wholly or partially paid to the deft. by any such persons, or otherwise received by the deft. for or on account of the plt.; and further, that the deft. might pay to the plt. what, on taking such account, might be found due from the deft. to the plt. in respect of the receipts by the deft. for or on account of the plt., the plt. being ready and offering to make all just allowances.

Malins, Q.C. and Martindale supported the demurrer.—They argued that the case made by the bill amounted to no more than an averment of agency;

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and that the plt.'s claim was a mere legal demand, which a court of equity had no jurisdiction to entertain. They referred to

Mackenzie v. Johnston, 4 Madd. 373;

Phillips v. Phillips, 31 Beav. 258; 5 L. T. Rep. N. S. 108, 655;

Foley v. Hill, 1 Ph. 399 : s. c. 2 H. L. Cas. 28.

Horsely (Bacon, Q.C. with him), in support of the bill, contended that the plt. was entitled to the relief prayed for, and referred to

Shepard v. Brown, 7 L. T. Rep. N.S. 499;

Smith v. Leveau, 1 Hem. & Mill. 123.

The VICE-CHANCELLOR.—I think this demurrer must be allowed. The bill contains a mere averment of the receipt of money by an agent; but that is not enough, and has never been held to be enough, to sustain a bill. I observe that Wood, V. C., in noticing the cases of *Dimiddie v. Bailey*, 6 Ves. 136, and *Phillips v. Phillips*, 9 Hare, 471, seems to have treated them as authorities in which the court decided it would not interfere where the receipts and payments were all on one side. But I do not understand that to be the law of the court. There is an abundance of cases in reference to the relation of principal and agent, where the receipts and payments were wholly on one side, and in which the court has maintained jurisdiction. The case of agency steward to a landowner is one in which the circumstance of receipts being all on one side occurs, and in which there are no mutual payments and receipts, and yet it is a case in which the court has in the "ancient" times, as Mr. Martindale observed, of Lord Eldon, of Lord Thurlow and Lord Rosslyn, repeatedly exercised jurisdiction. In my opinion, it has jurisdiction still, for I consider it to be the law of this court that, where an agency partakes of a fiduciary character, the jurisdiction attaches, and that the court will decree an account, although the items of it are all upon one side and there are no mutual dealings between the parties. That law has not been shaken by the case of *Phillips v. Phillips*, although there are undoubtedly expressions in the judgment which, if taken in the unqualified way in which they are reported in that case, seem to be not reconcilable with the principles I have stated. In this case no fiduciary character is averred. There is the averment of agency, and there is the short and bald statement that moneys were received by the deft. But that is not sufficient (although coupled with other averments) to enable the plt. to maintain this bill, and the demurrer must be allowed.

Solicitor for the plt., *George Dixon*.

For the deft., *Drake*.

Thursday, Nov. 5.

RACKHAM v. DE LA MARE.

Will—Construction—Death of legatee for life without issue in the lifetime of the testator—Proviso—Intestacy.

Testator directed that one-sixth part of a fund and the income thereof should be held upon trust for the benefit of his daughter Harriet during her life, and from and immediately after her decease for all and every her children and child, who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry under it, in equal shares as tenants in common; and the will contained a proviso that if any one or more of testator's sons or daughters should die without having any child who under the trusts as aforesaid should become absolutely entitled to a share in the said trust-funds, then and in every such case, as well the original shares thereinbefore given, as also the share or shares by virtue of that clause surviving and accruing to each and every of his said sons and daughters whose issue should so fail, and his or her children or child, should vest in, accrue

and belong to the survivors or survivor, or others or other of his said sons and daughters, in equal shares, if more than one, during their respective lives, and after their respective deaths the said shares to be respectively transmitted to such their respective children or child as thereinbefore expressed with respect to their original shares. One of the daughters of the testator died in the lifetime of her father without issue :

Held, that, as to the share of H., there was an intestacy.

This was an administration suit. Francis Rackham, the testator, by his will dated the 14th Dec. 1836, after directing that his just debts and funeral and testamentary expenses should be paid as soon as conveniently might be after his decease, and giving certain legacies, devised all his freehold and copyhold hereditaments to his trustees and their heirs, upon the trusts thereinafter expressed. He then made a specific devise of household furniture and chattels, and bequeathed and devised all the residue of his personal estate unto his said trustees upon trust, as soon as conveniently might be after his decease, to convert the same into money, and after payment of his debts, expenses and legacies, to invest the residue and produce thereof as therein directed. He declared that his trustees should stand seised and possessed of his said real and personal estate and of his residuary personal estate, and of the trust-moneys to arise thereby, upon trust to pay to his wife the rents, issues and profits and dividends during her life; and from and after her decease, then as to the real estate, as soon as conveniently might be, to sell and absolutely dispose of the same, and to invest the proceeds of the sale thereof in like manner as he had thereinbefore directed with respect to the moneys to arise from his residuary personal estate. The testator then gave and bequeathed all his trust-estate (subject to his wife's life-estate) as follows: As to one equal sixth part or share thereof, during the life of his daughter Charlotte, the wife of James De la Mare, to pay the interest, dividends and annual proceeds for her own sole and absolute benefit, but not by way of anticipation; and after her death in trust for all and every her children and child, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age, or marry under it, if more than one, in equal shares as tenants in common, and their respective executors, administrators and assigns; and if there should be but one such child, the whole of the said share to be in trust for such one child, his or her executors, administrators and assigns. As to one other equal sixth part or share, the testator declared his will to be that the same, and the dividends, interest and annual proceeds thereof, should be held upon trust for the benefit of his daughter Harriet Rackham during her life and her children or child after her decease, similar to the trusts thereinbefore declared concerning the first-mentioned sixth part or share for the benefit of his daughter Charlotte De la Mare, and her children and her child. After declaring the trusts of the other sixth parts or shares, the testator then bequeathed the other sixths of his trust-moneys upon trust for the benefit of his other children.

The will contained the following clause: "Provided always, that if any one or more of my said sons and daughters shall die without having any child who under the trusts as aforesaid shall become absolutely entitled to a share of the said trust-moneys, stocks, funds and securities, then and in every such case, as well the original share hereinbefore given, as also the share or shares by virtue of this clause surviving and accruing to each and every of my said sons and daughters whose issue shall so fail, and his or her children or child, shall vest, accrue and belong to the survivors

or survivors, or others or other, of my said sons and daughters in equal shares if more than one, during their respective lives, and after their respective deaths the said shares to be respectively transmitted to such of their respective children or child as hereinbefore expressed with respect to their original shares. And if all my said sons and daughters save one shall die without having any such child as aforesaid, then all the said trust-moneys, stocks, funds and securities shall go to such one son or daughter during his or her life in such manner, and after his or her death to such his or her children or child as is hereinbefore directed with respect to his, her and their original shares of the trust premises."

The testator died in July 1842. Charlotte De la Mare survived her husband, and died in June 1861, leaving nine children surviving, all of whom, with the exception of two, had attained the age of twenty-one years. Harriet Rackham died on the 28th April 1841, in the lifetime of the testator, without having had any issue. Charlotte Rackham, the widow, died in Nov. 1861.

One of the questions arising upon the construction of the will was, whether the share of Harriet Rackham had or had not lapsed in the testator's lifetime.

Greene, Q. C. and Edwin Ward, for the plt., the heir-at-law, and one of the next of kin of the testator, argued in favour of an intestacy.

Malins, Q. C. and A. Smith, for defts. in the interest of the surviving children, contended, on the construction of the whole will, that the testator's manifest intention was, that all his property should go to the survivors or survivor of his children. The language of the proviso must be held to take effect in the event of the death at any time of any one of the testator's children without leaving a child who should become absolutely entitled. On the death of Harriet Rackham, although in the lifetime of her father, this event had actually occurred, and her share must, therefore, on the death of the widow, survive to her brothers and sisters. They relied upon the rule as laid down in the case of

Willing v. Baine, 2 Eq. Cas. Abr. 545; s. c. Kel. 12; 3 P. Wms. 113;

and further cited

Doe v. Scott, 3 M. & Sel. 300;

Darrel v. Molesworth, 2 Vern. 378;

Humphreys v. Howes, 1 Russ. & Myl. 639;

Hawkins on Wills, 243;

2 Jarm. on Wills, 3rd edit. 714.

Bacon, Q.C., Beale and Charles appeared for other defts.

THE VICE-CHANCELLOR.—The cases cited have no application whatever to a proviso of this kind. It appears to me that the proviso in question applies only to the case of sons and daughters, or their children who should survive the testator, and be in the enjoyment of the property under the will. This is a case of construction, and one of the first rules of construction is to endeavour to discover the intention of the testator as indicated by his language. The rule of construction contended for by Mr. Malins and Mr. Smith is no doubt a very convenient one, because it carries out the testator's intention and preserves to the objects of his bounty that which he intended they should have. But in this proviso the intention of the testator appears to be, that the shares of the sons and daughters who should die without issue should "accrue" to the survivors, and the use of that very word shows that he had in contemplation the event which actually did take place, and that he was disposing of property which, after his death, might be subject to accrue. The result of this construction is to create an intestacy, and though this is a thing the courts always struggle against, yet they can only be guided in coming to their decision by the language of

the will. In this case Harriet having died without issue in the lifetime of the testator, it is clear that the one-sixth part given to her by the will belongs to the heir-at-law and next of kin of the testator, and there will be a declaration to that effect.

Solicitor for the plt., *Thomas Angell*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

July 15 and 17.

NEVE v. PENNELL.

HUNT v. NEVE.

Equitable mortgage—Consolidation of charges—Priority—Registration Act, 7 Anne, c. 20.

A mortgagee holding several securities over different parts of his mortgagor's property has a right in a suit for foreclosure to consolidate his charges. Nor is this right affected by the fact that the parties are dealing with equitable estates only.

An agreement, not under seal, is a proper subject for registration under the stat. 7 Anne, c. 20.

When both of two instruments purported to have been registered at a given hour of the day, that which bore the lower number in the registrar's book was held to have been registered before that which bore a higher number.

By an agreement under seal, dated the 10th Oct. 1840, between Sir W. Middleton of the one part and H. Palmer of the other part, Sir W. Middleton covenanted to grant to Palmer or his appointees, leases of several pieces of land at Dalston, together with the messuages to be built thereon, for a term of ninety-nine years from the 25th Dec. 1856, at a stated yearly rental to become first payable on the expiration of the eleventh year of the term, and thenceforward on the expiration of each successive year, and increasing year by year up to a maximum of 337l. 10s., the rental to be apportioned on the terms mentioned in the agreement, but so as that the rent to be reserved on each messuage should not exceed one-fifth of its improved value, with a provision that when the yearly rent thus payable should amount to 337l. 10s., the residue of the land, if any, then unbuild on should, as houses were built on it, be let to Palmer or his appointees at a peppercorn rent. Palmer, on his part, covenanted to pay the rents and to build a certain number of houses on the land within the first twelve years of the term. There was the usual right of re-entry to the lessee on breach of any of the covenants.

By like articles of agreement of the 15th March 1847 and the 13th April 1847, other pieces of land at Dalston were covenanted to be demised by Sir W. Middleton to Palmer, at a rental of 50l. and of 300l. respectively.

The whole benefit of these agreements became, previously to the year 1852, vested in Hughes, and leases of houses built on the property were from time to time granted by Sir W. Middleton to his nominees.

In the early part of 1857 the rental reserved upon the leases so granted reached the stipulated maximum of 687l. 10s., so that from that time Hughes and his nominees were entitled to have leases of any houses which might afterwards be built, at a peppercorn rent.

About the same time Hughes deposited with Neve the title-deeds of this Dalston estate to secure a sum of money which he had borrowed from him.

By an agreement not under seal between the same parties, dated the 27th June 1857, it was agreed that Neve should retain the title-deeds of the Dalston estate, together with the title-deeds of other property belonging to Hughes, all of which were set out in the schedules to the agreement, and should have a charge on the lands

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comprised in such deeds, as collateral security for a sum of 4000*l.* then lent by Neve to Hughes on his bill of exchange, Hughes agreeing, when called on, to execute a proper mortgage of such lands to secure the repayment of the 4000*l.* and interest.

Hughes then executed a formal mortgage (dated 6th April 1858) to Neve of all the lands comprised in the agreements of the 10th Oct., the 15th March and the 13th April, to secure the sum borrowed by him on the deposit of the title-deeds of the Dalston estate in March 1857, and a further sum, amounting in the whole to 10,000*l.*, but not including the sum of 4000*l.* secured by the agreement of the 27th June 1857. This deed was registered in the registry for Middlesex on the 24th April following. Not long after this Hughes ran away to Australia, and was shortly afterwards declared a bankrupt.

By a deed of assignment of the 4th Nov. 1856 Hughes had mortgaged to Hunt, who was one of his clients, the Dalston estate, and the benefit of the building agreements, to secure 4450*l.* and interest, and he at the same time handed to him a bundle of deeds, which purported to be the title-deeds of that estate, but which, on being examined after Hughes' departure, turned out to have no relation to that property.

Memorials of the agreement of the 27th June 1857, and of the assignment of the 4th Nov. 1856, were registered by Neve and Hunt respectively, on the 29th July 1858.

It appeared by the indorsement on these agreements that both were registered at eleven o'clock, but the former of the two was numbered 764, the latter 768; the practice at the registry office being to indorse all deeds presented for registration between two given hours as having been registered at the commencement of the current hour. Neve now filed his bill in the first suit, for foreclosure of all the lands comprised in the agreement of the 27th June, or to be repaid the two sums of 10,000*l.* and 4000*l.* due on his several securities.

Hunt thereupon filed a cross-bill to establish the priority of his charge over the mortgage for 10,000*l.*, or at any rate over the charge of 4000*l.* created by the agreement of the 27th June. The two suits were heard together.

Sir H. Cairns, Q. C., Giffard, Q. C. and Wickens for the plt. in the first suit.

Roll, Q. C. and A. E. Miller, for the plt. in the cross-suit, contended—first, that Neve at the time of his transactions with Hughes in 1857, or at any rate at the time of registering the agreement of the 27th June, had notice express, or at any rate constructive, of the assignment to Hunt. The point as to express notice was abandoned after the *vivâ voce* cross-examination of Neve. As to constructive notice they referred to

Jolland v. Stainbridge, 3 Ves. 478;

Wyatt v. Barwell, 19 Ves. 435.

Secondly, that neither the mortgage for 10,000*l.* nor the agreement to secure 4000*l.* were proper subjects for registration, as not coming within the terms of the Act 7 Anne, c. 20, s. 1, providing "That a memorial of all deeds and conveyances" which should be executed after the 29th Sept. 17C9, "and whereby any houses, manors, lands, tenements and hereditaments" in the county of Middlesex, "might be in any way affected in law or equity," should be registered. The agreements between Sir W. Middleton and Palmer conferred, so long as the lands were not built on, no legal or equitable estate, but only a right of suit. Hunt's mortgage, therefore, being prior in date, took priority of both these securities. Thirdly, that, at any rate, Hunt's mortgage took priority over the 4000*l.* charge. The Act (sect. 6) provides that the registrar shall indorse on every deed or conveyance a certificate, mentioning "the certain day, hour and time" on which the

memorial is registered. "Hour and time" must be taken to be a pleonastic expression equivalent to hour, and as both deeds are registered as of the same hour, they take priority according to date. There was this distinction between the English Registry Acts and the Irish (6 Anne, c. 2), that the latter (sect. 3) expressly gave priority to deeds "according to the priority of registering the memorial." They cited

Bushell v. Bushell, 1 Sch. & Lef. 90;

Latouche v. Lord Dunsany, 1b. 137.

Fourthly, that the agreement of the 27th June 1857 was not under seal, but simply a memorandum of deposit, and ought not therefore to have been registered:

Sumpter v. Cooper, 2 B. & Ad. 223;

Wright v. Stanfield, 27 Beav. 8;

Moore v. Culverhouse, 27 Beav. 639,

was different from this case, for in that there was an actual assignment of interest in equity. Fifthly, that in order to entitle a prior incumbrancer to consolidate his charges as against his mortgagor, he must have the legal estate:

Jones v. Smith, 2 Ves. jun. 372;

Holmes v. Turner, 7 Hare, 367;

Watts v. Symes, 1 De G. M. & G. 240;

Vint v. Pudget, 2 De G. & J. 611;

Tassell v. Smith, 2 De G. & J. 713;

Selby v. Pomfret, 4 L. T. Rep. N. S. 314.

All the cases seemed to turn on the point, where was the legal estate, and were all as between mortgagor and mortgagee—not, as here, between a mortgagee and a puisne incumbrancer without notice. Sixthly, that in this case Hunt was actually prior in point of time, and could by no possibility have notice of either of Neve's charges. It was inconsistent with the principles of equity that the priority given by the operation of the Registry Act should carry with it all the consequences of priority in point of time.

Fagg v. James, 8 L. T. Rep. N. S. 5.

Giffard in reply.

The VICE-CHANCELLOR (after commenting with approbation on the line that had been taken on the part of the defence, and observing that it was impossible on the evidence to maintain that there had been any complicity between the plt. and Hughes in the numerous transactions in question), said, that the first point to be considered was, whether a person having a set of mortgages on property of various descriptions, some part of which was not so valuable as another, had a right to stand on all his securities, although he came for foreclosure and not for redemption. Coming to this court with a bill for redemption, he would have a right to have all his securities tacked; could he also, when seeking to foreclose, do so as to the whole mortgaged property, except on satisfaction of all his claims? Assuming for the present that Hunt's charge of 4000*l.* was out of the way—for it was not contended by the plt. that if there were any intervening security he would be able to override that—assuming also that the plt.'s mortgage for 10,000*l.* took priority by virtue of registration, it seemed clear that this case fell within the principles laid down in *Watts v. Symes* and *Selby v. Pomfret*. The principle was this, that any person holding a mass of securities from one mortgagor had a right, however that mortgagor might deal with the equity of redemption in one or more of the securities, to insist that a portion of these securities should not be redeemed without the redemption of the whole; and that, not only against the mortgagor, but equally against those who claimed under him, unless they could claim exemption from the operation of this principle as holders of legal estate without notice of incumbrance. On this view it did not appear necessary that there should be a legal estate; those who claimed under the mortgagor claimed the equity only, and certainly the mortgagor, with whom they were thus equally affected,

could not pick and choose out of the various securities, redeem the most valuable and leave his creditor with an insufficient security on the property of less value; on the contrary, he must fulfil the whole of his obligation before he could redeem any portion of the security. This seemed to be the principle established by the late decisions. In *Watts v. Symes* there was no legal estate, and that case also overrules some that preceded it, which seemed to hold that the doctrine only applied where the suit was for redemption. Now, an objection was taken by Mr. Miller, that Hunt, the mortgagee for 4450*l.*, was in quite a different position from those incumbrancers against whom the doctrine just laid down had been enforced in previous cases. There the parties had been dealing with property which they knew to be already incumbered, and must therefore be bound by all the equities which affected that property; Hunt, on the contrary, was, in point of time, the first incumbrancer, his priority having been destroyed by the provisions of the Registry Act. But where parties were dealing with property situate in a register county, they were bound to have their deeds registered, so that by non-registration a deed was "to be adjudged fraudulent and void:" (7 Anne, c. 20, s. 1.) And the consequences to which this argument, if carried to its extent, would lead, were such as the Registration Act was expressly intended to meet, namely, that a first incumbrancer, omitting to register, might step in and claim to take advantage, for this very reason, of a subsequent mortgagee who had made the proper search to ascertain whether his security was good, and had then registered his deed. On the next point he had no doubt, namely, that the mortgage for 10,000*l.* was a proper subject for registration, as affecting an interest in lands, and that being registered before the mortgage to Hunt, it took priority over that security. It was contended that, under the agreement of 1846, Hughes took only a right of suit, and that no interest in the lands was vested in him; but the view he took of that transaction was, that it was equivalent to a sale of leaseholds upon certain conditions, and was therefore properly susceptible of registration. The most important point, however, arose on the agreement of the 27th June 1857. Now it was true that the Registration Act in its earlier clauses referred in terms (with the exception of the provisions relating to wills and judgments) only to deeds and conveyances; but on looking at sect. 7 it seemed that the words "more writings than one for making and perfecting any conveyance or security" were at any rate wide enough to comprehend instruments not under seal, even if they were not expressly intended to bring them within the operation of the Act. For upon the reason of the thing it would be contrary to the spirit of that Act to hold that lands could be affected by an instrument not under seal, and which would therefore be a secret incumbrance, because it was not to be registered. *Sampter v. Cooper* was not a case in point, for there it was a simple deposit of deeds without any memorandum, and therefore there was nothing to register, and so it was remarked by the learned judge who decided that case. He thought that there was no difference between the present case and that of *Moore v. Culverhouse*. The only remaining point was, as to the time of registration. Now, upon looking at the instruments, he found that each was marked as having been registered at eleven o'clock; but then the one was numbered 764, and the other 768. He must hold that these numbers were meant for something more than mere convenience of reference. There was no evidence sufficient to prove that the latter deed had been presented for registration before the former, and in the absence of such evidence he must hold that the registrar did his duty properly, and placed first on the register the deed which was first presented. On the opposite view, a person taking a deed to be registered

at eleven o'clock would obtain no priority over one who presented his deed at a quarter before twelve, and it would be necessary for each person to wait at the office until the hour during which he had presented himself had expired, in order to ascertain that no other incumbrance on his property had been presented for registration. There would be the usual decree for foreclosure in the first suit, and the second suit would be dismissed.

Solicitors for plt., *Kingsford and Dorman*.
Solicitors for deft., *Lawless and Nelson*.

July 15, 16 and 20.

DE BRASSAC v. MARTYN.

Lease—Agreement for—Specific performance—
Laches.

The term in an agreement for the lease of a house expired after bill filed for specific performance, but before the hearing of the cause.

Bill dismissed without costs on the ground that plt. should have moved the court to advance the cause.

A court of equity can give damages only in a case where it can decree specific performance.

This was a bill filed for the specific performance of the agreement after mentioned. It also prayed for the delivery of possession to the plt. of the house, furniture and effects therein comprised; for an account of the damages sustained by the plt. by the refusal of the deft. to perform the agreement; for an occupation rent to be ascertained, and for payment of such damages and rent by deft. The following was the agreement:—

"An agreement made the 9th Dec. 1861 between Dr. Martyn, of, &c., of the one part, and Viscomte de Brimont Brassac, of, &c., of the second part. Dr. Martyn agrees to let, and Viscomte de Brimont Brassac agrees to take, the dwelling-house and premises situate and being No. 33, Thurloe-square, South Kensington, together with the furniture and things therein, such being more particularly described in an inventory thereof, from the 1st Feb. next until the 15th Sept. 1862, and will pay for the said house and premises for the said term the sum of 450*l.*, to be paid as follows, viz., 100*l.* on the signing hereof, 100*l.* on possession of the said house being given, 100*l.* on the 24th June next, and 150*l.* on the 20th Aug. 1862. The Viscomte de Brimont Brassac agrees to the conditions as follows, viz., to use the house and premises as a private residence only; no trade, profession, or business of any kind whatever to be carried on in the said dwelling or garden thereof, neither will the Viscomte de Brimont Brassac carry on or allow to be carried on, during the within-named tenancy, at the said house, the business of a club, lodging-house, or gaming-house, or allow any placard or board to be hung from or attached to the walls, roof, or railings, or from any part whatever of the said residence; no erection to be made in the garden; and in other and all respects to abide by and keep to the covenants of the lease under which the said Dr. Martyn holds the said premises, so far as the same are applicable to a tenancy of the nature and extent hereby created. Viscomte de Brimont Brassac further agrees to allow Dr. Martyn to have painted on the walls of the said house, at the corner of it facing north, his said Dr. Martyn's name, announcing his removal to whatever locality he the Dr. may select for practising as a physician. Dr. Martyn agrees to pay the original rent and all rates and taxes, excepting gas, which may become chargeable upon the said premises during the said term. And lastly, Viscomte de Brimont Brassac agrees to deliver up possession of the said dwelling-house, garden and premises at the expiration of the within-mentioned tenancy, together with the furniture, fittings and things therein, in as good state and condition as they are now in, reasonable wear and tear and accidental damage by fire only excepted. Viscomte de

Brimont Brassac agrees not to underlet the said house and premises without the permission in writing of the said Dr. Martyn, such permission not to be withheld without good cause to be shown for withholding it. The parties hereto agree to the foregoing terms and conditions of this agreement."

The first sum of 100*l.* was duly paid.

On the 1st Feb. the deft. had removed from the house, and possession was given to plt.'s agent; but the second sum of 100*l.* was not paid on that day, the plt. averring that this arose from inadvertence, he being then in France.

The plt. was one of the French commissioners for the Exhibition of 1862. The house was to be occupied by him in connection with his duties as such.

About the end of Jan. 1862, however, events occurred which he expected would prevent him from residing in England during the time of the Exhibition lasting, and he consequently wrote to his agents in London, asking them to arrange with the deft. terms of release from his agreement. The deft.'s agent, on the 5th Feb., made a proposal to release the plt. on his paying 100*l.* in addition to the sum already paid. This was refused by the plt.'s solicitor on the 8th Feb. In a letter, dated that day, they said that rather than do so their client would try to underlet the house, completing his arrangement with the deft.; and on the 10th Feb. the deft.'s agent wrote a letter as follows: "I will do my best to get the viscount a tenant with as little delay as possible, when I am in a situation to act. Dr. Martyn, in the meantime, complains of his position in this unsatisfactory business. The Dr. expects the viscount to complete his bargain, and to avoid similar trouble in future, suggests that the remaining 350*l.* be paid down at once; this being done, no difficulty whatever will be thrown in the way of reletting the residence to the viscount."

On the 15th of the same month the plt.'s solicitor arranged to have the house placed on the list of a house agent as to be let, and on the same day they called on the deft.'s agent to offer him the sum of 100*l.*, but he was absent.

On the 17th Feb. a formal tender was made to the agent, and then refused by him. Deft. also refused to allow the house agent to show the house, on the ground that the agreement was at an end, by reason of the breach of the agreement by the plt. in not paying the 100*l.* on the 1st Feb.

Considerable correspondence then took place between the parties and their solicitors, the plt. insisting on obtaining possession of the house, or the return of the 100*l.* which had been paid as a deposit. On the 15th Feb. the deft. had resumed possession of the house, and he refused to give up possession to plt. or to return the deposit.

In the early part of March the plt. was enabled to return, and he did actually return, to England. The deft. still refusing to accede to plt.'s terms, the latter on the 26th March filed his bill praying as before stated.

On the 26th March, just before the bill was placed on the file, the deft. offered to return the deposit of 100*l.*, but still refused to give up possession of the house.

On the 6th June the deft. put in his answer.

Rolt, Q.C. and *Woodrooffe*, for the plt., asked for a decree in the terms of the prayer of the bill.

Sir H. Cairns, Q.C. and *Brooksbank*, for the deft., contended that the plt. not having performed his part of the agreement on the 1st Feb., as thereby stipulated, was not entitled to the relief prayed. Time was of the essence of the contract. They cited

Parkin v. Thorold, 16 Beav. 59;
Hearne v. Tennant, 13 Ves. 287;
Westley v. Cottle, Turn. & Russ. 78;
Doloret v. Rothschild, 1 Sim. & St. 590;

Cosgrave v. Till, 1 Russ. 376.

The plt. had been guilty of laches in not pressing on his suit. He might have applied to have had it advanced:

Macbryde v. Weekes, 22 Beav. 533.

Rolt, Q.C. in reply.

July 20.—The VICE-CHANCELLOR said, that it was clear, on the face of the agreement, that time was not of the essence of the contract. It was an important element, and might have been made of the essence of the contract by the deft. giving notice to that effect to the plt. Whether that was so or not after the letter of the 10th Feb., it was quite clear that the deft. insisted on the agreement being performed, and could not now be heard to say that time was essential. The plt. being, therefore, entitled to specific performance when the bill was filed, had allowed the time fixed by the agreement of the lease to run out before the cause had come on in its regular turn to a hearing, and now asked for damages; but the court could only give damages where it could decree specific performance. Where the latter was sought, it was the duty of the plt. to do his best to obtain what he professed to be entitled to. Here the plt. appeared to have had no desire to obtain specific performance after the bill was filed. He therefore did not press on the suit, which did not come to a hearing till after the expiration of the period for which a lease was to be granted. *Sir Thomas Plumer*, in a case under similar circumstances (*Nesbitt v. Meyer*, 1 Swan. 223), had held that specific performance ought not to be granted. This decision had been acted upon by Lord Cranworth in *Walters v. The Northern Coal Company*, 5 De G. M. & G. 629. In *Wilkinson v. Torkington*, 2 Y. & C. Ex. Cas. 726, the court had refused to decree specific performance of an agreement for a lease for a term which had expired before the hearing; but had given a decree for an account as the only relief to which plt. was then entitled. The only relief to which the present plt. was entitled was the return of the 100*l.* paid on entering into the agreement. To that the plt. was entitled, and might have had at the time of filing his bill, and therefore he could not have the costs of suit. At the same time the conduct of the deft. did not entitle him to costs. The court, if an application had been made to it, might have been induced to advance the cause. The case of *Hook v. Livesey*, 1 Mer. 381, fully warranted such an application, and the plt. ought to have made it.

Minute of decree:—Return the deposit of 100*l.* within a fortnight, but inasmuch as no steps had been taken by plt. to advance or otherwise expedite the hearing of the cause, the court did not think fit to make any order as to damages or costs.

Solicitors: *Robinson and Preston*; *Keane*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.
 Barristers-at-Law.

Wednesday, Nov. 4.

PILGRIM AND ANOTHER v. HIRCHFELT.

Attorneys—Alteration of firm—Signed bill in the name of the new firm—Business done by the old firm—6 & 7 Vict. c. 73, s. 37.

Where attorneys bring an action upon their signed bill, which bill contains some items which they are not entitled to recover, the action may be maintained for the residue.

A. and B. were partners as attorneys, and as such transacted business for C., a client. They then

Q. B.]

MARSTON v. PHILLIPS—MAYER v. UNDERHILL.

[Q. B.]

took D. into partnership, and A. went out of the firm, which, however, still retained his name. The new firm also transacted business for C., and a signed bill having been delivered in the names of A., B. and D., and an action brought to recover the whole amount due in respect of the business performed by both firms, and the plts. having at the trial abandoned all the items due to the old firm of A. and B. alone:

Held, that they were entitled to recover the residue in that action.

This was an action brought by a firm of attorneys against the deft. to recover the amount of their bill of costs. It was tried before Mellor, J., at the sittings after last Trinity Term, when a verdict was returned for the plts., with 52*l.* damages.

It appeared that the firm originally consisted of two gentlemen, Messrs. Atkinson and Pilgrim, and that subsequently a Mr. Phillips joined it, and Mr. Atkinson left it, but the name of the latter gentleman has continued in the copartnership. A portion of the bill sued upon (10*l.*) was incurred when the firm consisted of Messrs. Atkinson and Pilgrim alone, and the rest after it was joined by Mr. Phillips. The bill was headed and signed as "Atkinson, Pilgrim and Phillips." At the trial those items which were incurred in the time of Atkinson and Pilgrim alone were abandoned, and a verdict was returned for the remainder. The deft. pleaded (*inter alia*) that there was no signed bill.

Overend, Q. C. now moved for a new trial, on the ground of misdirection, and contended that, as there were illegal items included in the bill, namely, all those for business done when the partnership consisted of Atkinson and Pilgrim alone, the entire bill was a nullity as far as the present action was concerned:

Walter v. Lacey, 1 Man. & Gr. 54;

Pigot v. Cadman, 26 L. J. 134, Ex.;

Imney v. Marks, 16 M. & W. 843.

[COCKBURN, C. J.—We quite concur in the ruling in *Walter v. Lacey*. It would really be a monstrous thing if, because a party by mistake inserts an item which he cannot recover, his whole bill is to be abortive. It is absurd to say that, because the deft. succeeds in striking off one item, the plt. cannot recover any others.] It might on the other hand be that there is only one item recoverable out of an immense number.

COCKBURN, C. J.—The statute has been complied with. There has been a signed bill of charges; and as the objectionable items were abandoned, the plts. were entitled to recover for the remainder.

Overend then moved upon facts disclosed since the trial, upon which

The COURT granted a *Rule nisi*.

MARSTON v. PHILLIPS.

Trover—*Interlocutory judgment but no satisfaction*—*Second action against another party.*

Although, in an action of *trover*, if the plt. obtains satisfaction, he cannot afterwards bring *trover* in respect of the same chattel against a party to whom the deft. has transferred it; yet, if he has not obtained satisfaction, he may do so.

A. sued B. in *trover* for a chattel, and signed interlocutory judgment, but proceeded no further. B. then sold the chattel to C., whereupon A. waived his interlocutory judgment, and brought *trover* against C. for the said chattel:

Held, he had a right to do so.

This was an action of *trover* to recover the value of a cab; tried before Byles, J., at the last assizes for Monmouthshire, when a verdict was returned for the plt., with 32*l.* damages.

It appeared that the plt. had in the first instance brought an action of *trover* in respect of the

same cab, the subject of the present action, against a person of the name of Joiner, in which action interlocutory judgment was on the 12th April 1861 signed for want of a plea, but no writ of inquiry issued to assess the damages, and nothing further was done until the 24th March 1862, when Joiner (the deft. in that action) sold the cab to the present deft. The plt. then, on the 9th April in the same year, waived the interlocutory judgment and subsequently brought the present action.

Smythies now, pursuant to leave reserved, moved to enter a verdict for the deft., and he contended that the interlocutory judgment in the first action having given the plt. a right to damages for the cab, he could have no right in respect of the cab itself, and that the property in the cab was then in the then deft., and was well sold by him to the present deft. [COCKBURN, C. J.—If the plt. has had satisfaction in the first action, he has no right to anything more, but here he has had no satisfaction.] There was a judgment for damages, the amount of which may have been assessed by a jury. [WIGHTMAN, J.—There were no damages recovered.] If that were the test, he may, after signing his interlocutory judgment, have brought *detinue* for the cab itself. [COCKBURN, C. J.—The court might have interposed its equitable jurisdiction to have restrained him.] But the principle of law is, that a man is not to be entitled to damages for a thing and to the thing itself.

Beckland v. Johnson, 15 C. B. 145;

Adams v. Broughton, 2 Stra. 1078; s. c. Andrews, 18.

COCKBURN, C. J.—I think there should be no rule in this case. The authorities go to this length only, that if the plt. obtains satisfaction either in fact or in law, he shall not be allowed to recover in any other action the damages which he has already obtained: he is not to be permitted to obtain the chattel itself after having received damages in respect of it. The effect of such satisfaction is to vest the chattel in the deft. But here there has been no satisfaction; all that the plt. obtained was an interlocutory judgment. He may certainly have gone on and obtained final judgment, in which case he would have been in a situation to have issued execution for his damages; and if this were not so, very mischievous consequences might ensue, for a dishonest deft. might pass away the chattel to another, and so entirely defeat the plt.; therefore we are not inclined to carry the principle further than is absolutely necessary, and it is not necessary here.

WIGHTMAN, J.—I am of the same opinion, and if I were required to decide otherwise, I certainly should desire some direct authority for the purpose. No case in point, however, has been cited by the learned counsel in support of his views, but on the contrary, there are several cases where there has been a judgment for certain damages, which are distinguishable from this case, where there was only a judgment which enabled the plt. to obtain damages.

MELLOR, J.—Although I have not a very strong opinion upon the point, I agree with my learned brothers. (a) *Rule refused.*

Thursday, Nov. 5.

MAYER v. UNDERHILL.

Bankruptcy—*Deed of arrangement*—*Liability to sureties.*

Semble, that a debtor who executes a valid deed of arrangement under sect. 192 et seq. of 24 & 25 Vict. c. 134 (Bankruptcy Act), is not discharged from liability to his surety who is subsequently compelled to pay a debt from which the debtor would be discharged by the deed as against the creditor.

(a) Blackburn, J. had gone to chambers.

Action for money paid for the use of the debt.

Plea, discharge under a deed of arrangement made under the Bankruptcy Act 1861.

At the trial, in London, before Cockburn, C. J., the facts were, that the plt., on the 27th Oct. 1862, accepted a bill of exchange for the accommodation of the deft.; that the deft. discounted it with bankers at Wolverhampton, who passed it away to Glynn and Co., of London. Whilst the bill was outstanding the deft. executed a deed of arrangement with his creditors, under the Bankrupt Act 1861 (24 & 25 Vict. c. 134), s. 192, which was signed by the requisite number of his creditors. Some time subsequently the plt. was called upon to pay the bill, and having done so, he now sued the deft. to recover the money he was so compelled to pay. It was not disputed that the deed was valid, but the question was, whether the plt. was a creditor within the meaning of sect. 192, so as to be bound by it. The verdict was directed to be entered for the plt. for 550*l*.

Mellish now moved, pursuant to leave reserved, to enter the verdict for the deft., and contended that the evident intention of the Bankrupt Act was to discharge persons who entered into deeds of arrangement in conformity with its provisions from all liability in respect of debts as well to sureties as to other creditors.

COCKBURN, C. J.—Sect. 192 was intended to meet the case of outstanding creditors who do not sign the deed, but are bound by it in the event of the requisite number signing; and if so, the clause only extends to such creditors as could have executed the deed; but in this case not only had the plt. not paid the bill at the time of the execution of the deed, but he might never have been called on to pay it. Your better course is to take the case to the Ex. Ch. at once.

WIGHTMAN, J.—I do not see under what words a surety can come in; for, until he has paid, he is not a creditor of the person for whom he is surety.

Rule refused.

REG. v. HODGSON.

Certiorari—Practice—Time for obtaining.

The preliminary step for applying for a certiorari at chambers to quash a conviction was taken on the 22nd Aug., the six months from the date of the conviction not expiring until the following day. Subsequently the learned judge at chambers dismissed the summons, indorsing it, "no order—without prejudice to any application to the court."

Held, that an application to the court within the first four days of the following term was too late.

H. Matthews moved for a *certiorari* to bring up a conviction of the deft. Hodgson, dated 23rd Feb. 1863, under the Salmon Fisheries Act (24 & 25 Vict. c. 109), s. 20, with a view to the same being quashed on the ground that the justices before whom the case was determined were interested parties.

It is unnecessary to enter into the main facts, as the contest before the court resolved itself into the question whether this application was in time.

The 13 Geo. 2, c. 18, s. 5, enacts that no writ of *certiorari* shall be granted, &c. to remove any conviction, &c., had, or made by or before any justice or justices of the peace, unless such *certiorari* be moved or applied for within six calendar months next after such conviction, &c., and unless six days' notice thereof be given in writing to the justices, that they may show cause (if they shall think fit), against the issuing or granting of such *certiorari*.

On the 15th Aug. six days' notice was served, in pursuance of the above enactment, on the convicting justices; and on the 22nd the parties attended at the judge's chambers to apply for a *certiorari*, and the affidavits to be used were left with the judge's clerk, as the judge was not in attendance on that day, it

being vacation time, during which period attendance was given on Tuesdays and Fridays only. On the 25th the learned judge, on the application being made, refused to grant a *certiorari*, indorsing the summons, "no order—without prejudice to any application to the court."

It was now contended that the leaving of the affidavits with the judge's clerk at chambers on the 22nd was a making of the application on that day, and if so, that it was made within the six months, which did not expire until the 23rd Aug., and that by the indorsement on the summons "without prejudice to any application to the court," the present motion was, as it were, an adjournment of that application at chambers on the 22nd Aug. [WIGHTMAN, J.—Not so: the indorsement "without prejudice to any application to the court" is a very common one, and does not mean that. When a judge at chambers refers an application to the court he indorses the summons "I refer this to the court." Here, on the contrary, the judge indorses "no order."]

By the COURT.—This is an independent application to this court, and it is too late. It is clearly made after the six months. The deft. is now in the same situation as if he had made no application at chambers, for the judge made no order, and dismissed the summons.

Rule refused.

Tuesday, Nov. 10.

GEE AND OTHERS v. PACK.

Guarantee for balance—Composition-deed—Surety's liability.

*A surety gave a promissory note for 300*l*., "to secure an advance now or hereafter on a banking account with P. and L." Subsequently P. and L. executed a deed for the benefit of creditors, and the bankers received 16*s*. in the pound on the entire amount of their claim:*

*Held, that the surety was entitled to the benefit of the deduction of 16*s*. in the pound on the amount claimed from him by the bankers.*

Demurrers to pleas.

From the pleadings the facts appeared to be, that the plt.s were bankers at Boston, Lincolnshire, and that Messrs. Pack and Linton had opened a banking account with them, and had requested the plt.s to advance them money on the said banking account, and to allow them to overdraw their said account, which the plt.s refused to do without security, and thereupon Messrs. Pack and Linton and the deft. delivered to the plt.s as such security the following promissory note:—

"300*l*. "Boston, July 3, 1857.

"On demand we jointly and severally promise to pay Messrs. Thomas Gee and Co., or order, 300*l*. with interest on same, to secure an advance now or hereafter on a banking account with Messrs. Pack and Linton, value received.

"For self and Parker,

"GEORGE ROBERT PACK."

"RICHARD SAMUEL PACK."

After this Pack and Linton were allowed to overdraw their account, until they were unable to meet their engagements, when they executed a deed of assignment for the benefit of their creditors, including the plt.s, whereby their estate and credits were vested in trustees upon trust (among other things) to realise and out of the proceeds to pay and satisfy the creditors rateably and proportionably on the amount of their debts. The plt.s accordingly received from the trustees 16*s*. in the pound, upon the entire of the claim against Pack and Linton. The amount of the banking account balance, after crediting the 16*s*. in the pound, exceeded 80*l*., which the deft. by his plea admitted himself liable to pay, and the question at issue was, whether the deft. was liable for

the whole balance of the banking account, after deducting the sum received under the trust-deed, or whether he was entitled to deduct 16s. in the pound upon the 300*l.* for which he was security.

The plts.' point:—That the security was given to secure (so far as it would extend) the whole sum in advance on the banking account, and not any specific portion of it, and was not affected by payments or dividends received on account, unless the amount due was reduced to below 300*l.*, and then only to the extent to which it was reduced.

Rew, for the plts., in support of the demurrers.—The real question is, for what was the security given? Was it a security for whatever ultimately might be due to the plts. on the accounts, or was it a simple security for 300*l.* only? This was not given to secure any particular part of the banking account, but it was intended to cover the whole; and if so, it is submitted that the deft. is not entitled to deduct 16s. in the pound from the sum which the plts. claim. In

Baikes v. Todd, 8 A. & E. 846;

Paley v. Field, 12 Ves. 435; and

Ex parte Brook, 3 Rose, 334,

the principle of the decisions was, that the debt due to the creditor was to be considered, as against the surety, the amount only specified in the instrument; and so in *Bardwell v. Lydall*, 7 Bing. 489, where the deft. guaranteed the payment of any debt which L. M. might contract with the plt. from time to time as a running balance of account to any amount not exceeding 400*l.* L. M. became indebted to plts. in 62*5*l.**, upon which he paid them 8*8*7*d.* in the pound, under a composition-deed, leaving the sum of 356*l.* unpaid, for which the plt. sued the deft., and it was held that they were entitled to deduct from it 171*l.* 13*8*4*d.*, the amount of the dividend of 8*8*7*d.* in the pound on the 400*l.*

Lusk (L. Kelly with him), contra, was not called upon.

COCKBURN, C. J.—There is no real distinction between this case and *Bardwell v. Lydall*. The guarantee in this case is to secure an advance, now or hereafter, on a banking account to the extent of 300*l.* That means that the surety guarantees the balance of the account to the extent of 300*l.* whenever the bankers choose to demand payment. If that is the construction, this case is on all-fours with *Bardwell v. Lydall*, and the same principle applies, and the deft. here is entitled to have the benefit of the 16s. in the pound on the amount of the 300*l.* The judgment will, therefore, be for the deft.

WIGHTMAN, J.—I agree with my Lord in the construction he has put upon this instrument, and if that be right, *Bardwell v. Lydall* is not distinguishable.

BLACKBURN, J.—I am of the same opinion. I have no doubt that bankers may bargain with a surety in such a way as to be entitled to the benefit contended for by Mr. *Rew*, and if there had been such an arrangement here, and the promissory note given in pursuance of it, the plts. might have recovered the whole of their claim. But as the case stands no substantial distinction has been shown between this case and *Bardwell v. Lydall*, and consequently that case governs this.

MELLOR, J.—The only apparent distinction in this case is, that the instrument is in the form of a promissory note; but that is very like the case of a bond with a defeasance, in which it has been held that the surety is entitled to the benefit of the composition.

Judgment for the deft.

[See *Thornton v. McKewan*, 32 L. J. 69, Ch.]

Attorney for the plts., *Kearsey*.

Attorney for the deft., *Ware and Westall*.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUXLEY SMITH, Esqrs.,
Barristers-at-Law.

Thursday, Nov. 5.

THE LONDON AND NORTH-WESTERN RAILWAY v. WEBB.

C. L. P. A. 1854—Injunction.

The court will not grant a writ of injunction under sect. 82 of the C. L. P. A. 1854, when by so doing the deft. would be called upon to do an illegal act.

In this case, which was an action on covenant, the plts. demised certain land joining this railway to deft., he covenanting not to build within six feet of a certain viaduct of the plt. The deft. subsequently underlet the land for the term of twenty years, without inserting in the lease the claim relating to his not building on the land within the distance from the railroad above-certified. The tenants, upon coming into possession, commenced building within the limited distance, whereupon the plts. brought an action against the deft. for breach of covenant, who suffered judgment to go by default.

Wood now made an *ex parte* application to the court under sect. 82 of the C. L. P. A. 1854, for a writ of injunction to restrain the deft. from continuing the building.

By the COURT.—It being in the discretion of the court to grant or refuse an application of this kind, it will not do so when by granting it the deft. would be called upon to do an illegal act, which would be the case here.

Application refused.

Friday, Nov. 6.

ELDRIDGE v. STACEY.

Landlord and tenant—Distress—Getting over fence to enter—Abandonment of distress.

A broker is justified in climbing over a fence surrounding a house, and entering by an open door, for the purpose of distraining.

Whether or not a distress has been abandoned after entry, is a question for the jury.

This was an action for a trespass and wrongful distress, tried before Bramwell, B., at the summer assizes at Croydon. It was proved that the broker entrusted with the warrant to distrain, finding the outer door shut, went through an adjoining house, climbed over a wooden paling separating the gardens of the houses, and finding the back door of the plt.'s house open, entered and distrained. He was forcibly ejected on the same day. Twenty-one days afterwards he returned and broke open the front door and re-entered; whereupon this action was brought. Bramwell, B. directed the jury that the broker was justified in getting over the fence and in entering by the open door, and that, having been ejected, he was justified in breaking open the door in order to re-enter, unless the distress had in the meanwhile been abandoned, which last was a question for them to determine. The jury found a verdict for the deft.

Laxton moved for a new trial on the ground of misdirection, and of the verdict being against the weight of evidence. The broker was not justified in getting over the fence, and even if he was, the lapse of time between his being ejected from the house and his return was conclusive evidence that the distress had been abandoned.

Brown v. Glenn, 16 Q. B. 254; 20 L. J., N. S., 205, Q. B.;

Ryan v. Shilcock, 7 Ex. 402; 21 L. J., N. S., 55, Ex. Co. Litt. 161 a, "Enclosure."

The COURT were of opinion that the entry was legal in the first instance, and that it was a question for the jury whether or not the distress had been abandoned.

Rule refused.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

June 3 and 4.

ROGERS v. HADLEY AND ANOTHER.

Action upon written contract—Fraud—Admissibility of parol evidence to explain contract—Principal and agent—Equitable plea.

Plt. by his declaration alleged that by a written agreement defts. bought certain bark of him at 6l. per ton, and although plt. had performed his part of the agreement, and defts. had had the benefit of it, and possession of the bark, and had paid to the plt. the deposit and other sums, &c., yet they had not paid the residue of the purchase-money; with the common counts.

Defts. pleaded a denial of the agreement, fraud, never indebted, payment, and also as an equitable plea, that plt. was employed to sell, and did sell, the bark as agent of Sir J. C., and on his behalf, at the then last year's prices, plus the expenses of carting and ricking the bark in the then present year; and he then represented to defts. that such expenses could not then be correctly ascertained, but that the same added to the price averaged between 5l. and 6l. per ton; and upon such representations of plt., and at his request, and on his agreeing that defts. should be liable to pay only such prices and expenses when ascertained, defts. were induced to and did make the agreement, and were then requested by plt. to pay the said prices and expenses to Sir J. C. That after making the said agreement defts. discovered that the expenses added to the said prices averaged only 5l. 2s. per ton; and that, before action, they paid to Sir J. C., who then had notice of the premises, the whole amount due for the bark at the said prices, together with the said expenses so ascertained as aforesaid, and Sir J. C. accepted the same in full discharge and satisfaction of the same, and of all liability of defts. in respect of the said bark and expenses; of all which plt. had notice before action:

Held, that the real contract between plt. and defts. was not in writing, and that the written memorandum was not signed for the purpose of evidencing any contract, and so defts. were entitled to judgment on non assumpsit; that if there were a contract in writing intended to bind the parties, it was avoided by fraud, which defts. had not estopped themselves from pleading; that under the plea of payment, payment to Sir J. C. was a defence; and that the facts stated in the equitable plea disclosed a good answer to plt.'s claim; and that parol evidence was admissible in support of such plea:

And, per Pollock, C. B.: It is not necessary, under such a plea, to prove that the facts are as stated in the plea; it is enough to say that they were so represented by p't.

Action to recover the residue of the purchase-money of a quantity of bark alleged to have been purchased by defts. of plt. under a written contract. To a declaration on the contract, and on the common counts, defts. pleaded: 1. That it was not agreed as alleged. 2. Fraud and covin. 3. Never indebted. 4. Payment. 5. Set-off. 6. An equitable plea stating the real facts of the transaction.

At the trial before Hill, J., at the Gloucester summer assizes 1861, a verdict was taken for plt. for the damages in the declaration, subject to the opinion of the court on the following

SPECIAL CASE.

Early in 1857 Sir James Campbell was deputy-surveyor of the Forest of Dean, and as such had about 930 tons of bark in the forest not harvested or stacked for sale on the part of the Crown. In May

1857 plt., a bark and timber dealer and commission agent at Lydney, was authorised by Campbell to dispose of the bark as agent for the Crown, setting it at the then last year's prices of bark, adding the expenses of harvesting and stacking, and receiving from the Crown 5 per cent. on the price as commission. Afterwards, and before 21st July 1857, by verbal arrangement between Campbell and plt., plt. became the purchaser of the bark on his own account at the last year's prices; the harvesting and stacking to be at plt.'s expense, and plt. to be allowed a discount on the price if paid in ready money, and the price to be wholly paid before removal of the bark by plt. Plt. expected also, though not proved to be part of the contract, to be allowed under the name of discount, and in addition to discount for ready money, a sum equal to the commission he would have been entitled to if he had sold as agent. Plt. took possession of the bark, and it was harvested and stacked before 21st July 1857.

On the 21st July 1857, plt., after previous communications with defts. thereon, represented to them that he was employed by Campbell to sell the bark on behalf of the Crown at the last year's prices, adding expenses of carting and ricking, and that he did not then know the amount of such expenses, but that they would not, together with the said prices, exceed 5l. 5s. per ton, and that Campbell would send defts. a correct invoice of the bark, with the amount of such prices and expenses. Plt. offered the bark to defts. on those terms, and requested them to sign a bought note stating the nominal price at 6l. per ton, with a discount of not less than 2 per cent., and stated to them that they should not be called upon to pay more than the actual amount of such prices and expenses, and they would not be incurring any risk by signing such note, as they were dealing with the Crown, and not with a private individual. Defts. thereupon, and on the faith of such representations and statements, and in pursuance of the said request, agreed to buy the bark from plt., as agent of the Crown, on the said terms, and signed the following note:—

"Gloucester, July 21, 1857. Bought of Mr. Rogers, the entire of the bark (harvested in good merchantable condition) now ricked in Dean Forest, as and where it now stands, at 6l. per ton, forest weight of 20 cwt. per ton; 20 per cent. deposit to be paid in cash on July 25, 1857, the remaining cash (purchase-money) to be paid within fourteen days from that date. We to be allowed a discount of not less than 2 per cent. on the purchase-money.—J. and I. HADLEY."

At the same time a corresponding sale note (*mutatis mutandis*) was signed by plt., who at the same interview requested defts. to pay the deposit into the Newnham Bank, to the credit of Campbell.

A few days afterwards plt. sent to defts. the following invoice:—

"Lydney, 1857.

"Messrs. J. and I. Hadley to Wm. Rogers, Dr.
July 21. To 930 tons 13 cwt. forest £ s. d.
bark, crown weight, at 120s. 5583 18 0
Payment. £ s. d.
July 25. Deposit 1116 15 6
Aug. 3. Balance in cash."

And by letter, inclosing the invoice, plt. informed defts. he was about to go to Denmark, and again requested them to pay the deposit to the account of Campbell, at the latter's bankers at Newnham. Defts. accordingly, on the 25th July, sent to the said bank their cheque, payable to Campbell or order, for 1094l. 11s. 1d., being the deposit, less 2 per cent., and informed plt. thereof by letter dated the same day.

On 3rd Aug. 1857 deft. J. L. Hadley, met Campbell by appointment.

Between 21st July and 3rd Aug. communications

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had passed between plt. and defts., in which plt. had treated the sale of the bark as a sale made by him as principal, and at the actual price of 6*l.* a ton; and at the meeting on 3rd Aug. between deft. J. L. Hadley and Campbell, deft. told Campbell that the sale was made by plt. as agent for the Crown, and that the price inserted in the bought and sold notes was a nominal price only, and that by the real arrangement the defts. were to pay only the last year's prices, and the expenses of carting and ricking. At the said meeting, and before the payment hereinafter mentioned, Campbell informed deft. that the price of the bark at last year's prices was 4270*l.* 12*s.* 10*d.*, and that the expenses of carting and ricking were 490*l.* 14*s.* 5*d.* and handed to him a memorandum showing the said amounts.

Afterwards at the said meeting, or subsequently on the same day, deft. J. L. Hadley paid to Campbell, by cheque of defts., 3666*l.* 16*s.* 2*d.*, making with the sum previously paid, 4761*l.* 7*s.* 3*d.*, and thereupon the following receipt was written and signed by Campbell at the bottom of the said memorandum :

	£	s.	d.
	4270	12	10
Expenses	490	14	5
	4761	17	3
27th July 1857	1094	11	1

by Newnham bank

Aug. 3 3666 16 2 ditto, being balance due to me for bark fall of 1857. JAS. CAMPBELL.

The said 490*l.* 14*s.* 5*d.* was, in fact, the whole amount of expenses of carting and ricking paid by Campbell, and at the time of the said payment by the said J. L. Hadley, defts. had not been informed of the further expenses, to the amounts of 22*l.* 10*s.*, 10*s.* and 12*s.* 7*d.* hereinafter mentioned, and deft. J. L. Hadley, at the said time, believed, in consequence of information received by him as aforesaid from Campbell, that the said sum included all expenses, and that defts. would have nothing more to pay for the bark or expenses.

There were, in fact, some other expenses of carting and ricking not included in the said 490*l.* 14*s.* 5*d.*, viz. 22*l.* 10*s.*, 10*s.* and 12*s.* 7*d.*, which plt. was liable to bear under the said arrangement between himself and Campbell. The 22*l.* 10*s.* was for hire of tarpaulings, and was paid by plt. after the said 3rd Aug., nor did he or Campbell, on said 3rd Aug., know the amount payable for the same. The other two sums, for hauling and carriage of the tarpaulings, were paid by plt. before 3rd Aug. It did not appear they had ever come to Campbell's knowledge, and no part of the said three sums had been repaid to plt.

Defts., after 3rd Aug. 1857, took possession of the bark and removed it, and plt. still contending that he sold as principal, and that the price in the bought and sold notes was the price actually agreed and intended to be paid, commenced this action for 822*l.* 10*s.* 9*d.*, as the difference between 4761*l.* 7*s.* 3*d.* paid by defts., and the price of the bark in the bought and sold notes. After action brought interrogatories were administered by defts., in answer to one of which plt. stated he did not claim anything for expenses of carting and ricking, but that he claimed 822*l.* 10*s.* 9*d.* as the difference as aforesaid. Plt. did not, in the answer to said interrogatories, allege that he had not been paid expenses not included in the said 490*l.* 14*s.* 5*d.*

The statement of the case was to be without prejudice to plt.'s right to contend that oral evidence was not admissible to vary the terms or effect of the bought and sold notes of 21st July 1857; and if the court should be of that opinion, the statement herein of what passed when the notes were signed was, so far as it should be held to be inadmissible, to be considered as struck out. It was also to be without prejudice to

defts.' right to contend that the weight of the bark delivered was less than 930 tons 13 cwt., the quantity on which the plt.'s claim was calculated, and if in the opinion of the court it should be material for any purpose to ascertain the actual weight, the same should be ascertained, in default of agreement between the parties, by further inquiry before the arbitrator." The question for the opinion of the court was, whether plt. was entitled to recover.

Pigott, Serjt. (with him *J. J. Powell*) for plt.—There was a good contract in writing, and no fraud found sufficient to avoid the contract at law. For that purpose it should be a fraud on which the contract is based. But if there were, defts. have estopped themselves by acting on and ratifying the contract after the real facts were known to them, and so waived the fraud. At all events, plt. is entitled to recover the 22*l.* 10*s.* and the two other small sums for expenses. He cited

Graves v. Ashwin, 3 Campb. 426;

Wake v. Harrop, 4 L. T. Rep. N. S. 555; 6 H. & N. 768; 30 L. J. 273, Ex.; in error, 7 L. T. Rep. N. 96; 1 H. & C. 202;

Rayner v. Grote, 15 M. & W. 359; 16 L. L., N. S., 79, Ex.;

Bickerton v. Burrell, 5 M. & S. 383;

Mallieu v. Hodgson, 16 Q. B. Rep. 689; 20 L. J. 339, Q. B.;

Campbell v. Fleming, 1 A. & E. 40; 3 L. J., N. S., 136, K. B.

Macnamara (with him *Huddleston*, Q. C.) contra.—It was the verbal and real contract, and not the written and nominal one, on which defts. acted. Defts.' position was altered by the representations of plt., and therefore plt. is thereby estopped. Having dealt with defts. as agent of Campbell, the latter would have a right to sue, and plt. is not at liberty, after settlement by defts. with Campbell, to sue for an alleged unperformed part of the contract. Equitable, if not legal, fraud was shown, and the sixth plea was a good equitable defence. The plea of payment was good to the money counts of the declaration. He cited

Coppin v. Walker, 7 Taunt. 256;

Lewis v. Nicholson, 21 L. J. 311, Q. B.; 18 Q. B. 603;

Pickard v. Sears, 6 A. & E. 475; and cases in note to *Duchess of Kingston's case*, 2 Sm. L. C. 424-460;

Hadley v. Rogers (on demurrer), 7 Jur. N. S. 733.

Pigott, Serjt. replied.

POLLOCK, C. B.—We are all of opinion that the defts. are entitled to our judgment; in other words, we are of opinion that the plt. is not entitled to recover. Our judgment proceeds very much upon the principles which have been so clearly presented in the argument of Mr. Macnamara. The same result may be presented, I think, to the mind of a lawyer in perhaps more than one way; but it has presented itself to my mind very much, if not almost entirely, in the way in which Mr. Macnamara has argued it. I consider that, by the law of England, fraud cuts down everything. I believe that is the common mode of expressing it. The legal result of that is known to every lawyer in Westminster-hall. The law sets itself against fraud to the extent of breaking down almost every rule, sacrificing every maxim, getting rid of every ground of opposition which may be presented of a technical character, in order to prevent fraud from succeeding, and allowing no technical rule or difficulty of any kind to interfere to prevent the success of right and justice and truth. So much does the law of England abhor fraud, that the maxim, than which none is more universal or more stringent, that you cannot aver against the record, is forgotten when fraud is shown. The moment it is ascertained that a matter is founded on fraud, there is an end of it: be it a record, be it a bond, be it an instrument in writing, be it what it may, it fails as

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soon as fraud is shown. That, I think, is the true principle which, on examining a question of this nature, we ought always to keep in view, and not permit ourselves to be fettered by the *dictum* of any judge, or even by the decision of any court which may have apparently sanctioned maxims that would stand in the way of that principle. Fraud may be presented either in a very simple case, or in one of much complication. The rule that applies to a case simply of fraud, where there has been a contract imposed upon a man by fraud, and which he may adopt or not as he pleases, is a very simple rule, viz., that if he adopt it he cannot afterwards repudiate it. It is at his option to say, "I will not give my sanction to the contract; I repudiate it;" but he cannot, in the common phrase, play fast and loose; he cannot at one time say, "I will adopt it," and then, when he has done so, say, "I will hark back and repudiate it." But that doctrine, which is no doubt sanctioned by authority, both positively by the *dicta* of judges and by the decisions of the courts, does not apply, in my judgment, to a case like the present. My brother Wilde, in the course of the argument, has very properly observed that this is not a case where it is proposed to alter, by parol, a real contract entered into between the parties; it is not a case where they have agreed to something, and then they propose to prove by parol that they agreed to something more or something less; but it is this, there was but one contract between them, and that is what I consider the arbitrator to have found; but the defts. were requested to put their names to a paper, not as evidence of the real contract between the parties, but, no doubt, to serve some ulterior purpose; to comply, I should think, with some official regulation, it being at the time, for some reasons, difficult or impossible to make up the account so as to arrive at the real sum. This was found to be done with the express object, not of recording a contract, but of obtaining a document, and one must presume that it was in order to comply with some official regulation which required a document of that description to be filled up, to pass through the Government office. Then, the result of that is that there was a real contract which was not in writing, and there was a paper prepared which was to comply with some form, which it was stated at the time did not contain the real price, but merely a nominal price. If there was a fraud, it appears to me, according to all the authorities (it is quite unnecessary to go through them), that you may just as well give evidence of it as of duress, illegality, or mistake. One of the best examples of that was put by my brother Bramwell in the course of the argument; *e. g.*, a man who is called upon to witness a deed or an agreement puts his name in the wrong place, and becomes, apparently, the contracting party; the real contracting party in a similar way blunders by putting his name where the attesting witness's name ought to be. There is apparently, therefore, one party contracting, the other attesting the contract. No doubt that may be explained by parol, and it may be shown that the paper is a mere blunder and a mistake, and that it was not the contract the parties entered into. What is the state of things here? The defts. paid a large sum as a deposit, 20 per cent., amounting to upwards of 1000*l*. At first it was supposed, and it was urged in argument, that this payment had been made after knowledge of the claim made by the plt. in his own right; but I think my brother Wilde's remark on the nature of the communication given in the invoice of the 24th of July, viz., that it amounts to nothing and gives no more information to the defts. as to the real state of things at the time than the production of the original bargain would have done, disposes of that supposition. The invoice was in accordance with the bargain, and would not at all arouse defts.' suspicions that they were to be dealt with as if the real price were 6*l*. per ton and Mr.

Rogers were the real seller. Then comes a still stronger communication no doubt, which, however, was of a character that induced the arbitrator not to describe it in any other terms than by the somewhat moderate expression, that the plt. treated the matter as if he was the principal, and as if the price was really 6*l*. per ton. Upon that the suspicion of the defts. being aroused, they communicate with Sir James Campbell, who thinks the best thing he can do is, as it was left to him, to deliver the bark and receive the price; he delivers the bark as a delivery from himself, takes from defts. the amount appearing to be due, and gives a receipt in his own name, and that brings the transactions between Campbell and defts. to a close. The plt. then commences this action, and the defence set up is: "I made in reality no such bargain with you as you have stated in your declaration. The arbitrator found that to be true. Then there is another plea: 'I have paid you.' And if you look at the real position of the plt. and the defts., it is true they have paid all that they ought to pay under the real bargain between them. Inasmuch as there was a part payment of 20 per cent., the Statute of Frauds has nothing whatever to do with the matter, nor was it necessary for the contract between them to have been in writing. The defts. further say by their equitable plea that, under the circumstances there set out, they were not bound to pay, and I think that plea is proved, or as much of it as was necessary to make out the defence. It is not necessary, under that plea, to prove that the facts are as stated in the plea; it is sufficient to say that they were so represented by the plt. At last my brother Pigott was obliged to say, 'I claim a sum of 22*l*. for some expenses.' The answer to that is, first, that after the plt. had sworn that he was not suing for expenses, he cannot now claim them in this action. Again, as my brother Channell pointed out in the course of the argument, no claim can be made for expenses until Sir James Campbell has ascertained what they were. It is clear that he had not ascertained them when the action was brought, for he only claimed a certain amount, and defts. paid every farthing that was claimed. It appears to me that the plt. has not made out a title to any part of his demand, and that our judgment, therefore, ought to be for the defts.

BRAMWELL, B.—I am of the same opinion. Where parties have put down in writing the agreement between them—or rather, I ought to say, when they have *professed* to put down in writing the agreement between them—they cannot add to it, or subtract from it, or vary it in any way, as otherwise they would defeat that which was their primary intention in putting it down in writing; but, where parties write and sign something, and (if one can understand such an absurd condition of things) they say, "This is not the record of any agreement between us; we really do not mean what we say: we put it down for some fanciful reason or other," it is not binding. No doubt a jury ought to be most reluctant, where such a state of things exists, to say it is not binding between them. But if it be not, it matters not whether their names are put there intentionally or by mistake; the same reasoning would apply: "We never intended that this should contain the terms of an agreement between us." That seems a little startling, and somewhat of a novelty, perhaps, but there are plenty of cases justifying such an opinion, such as all those cases where deeds have been delivered as escrows. In *Pym v. Campbell*, 6 E. & B. 370, 25 L. J. 277, Q. B., for instance, where an agreement was signed by both parties, which appeared on the face of it to be a perfect and final instrument, but the defts. beyond all doubt, at the time he signed it, meant, "this is not to come into operation until such and such an event happens;" and the

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Court of Q. B. held, that he was at liberty to do that, and to show that the paper in truth was not the record of an agreement between himself and the plt. Supposing my view of the matter to be correct, as I think it is,—I confess I am not certain of its application to the present case, because undoubtedly these parties must have signed this paper for some purpose or another, and I do not find it stated that it was done for any official purpose; yet, at the same time, it is expressly stated by the arbitrator, that the real agreement between them was a different one, and that it was not intended this writing should be the record of any transaction between them. If that is so, it was a very foolish thing for them to do, but it was no more than if the plt. had said to the defts., "I should like to have some written paper between us, representing that you sold me such an estate for 5000*l.*," and that I bought it." There would be no agreement between them actually of that nature, and consequently such a writing would not be a memorandum of the agreement, so that I am inclined to think, on the finding of the arbitrator, that this agreement is not binding in that point of view. But assuming that defts. are not at liberty to set up that defence, then what follows? "We assume," they say, "that we cannot contradict or vary this agreement, but we are at liberty to say this, You told us you were acting as the agent of Sir James Campbell." Supposing the defts. are bound by this document, and are not at liberty to get rid of it by any such process of reasoning as I have used, then they claim to have a right to say that which is not inconsistent with its terms, viz.: "You told us you were acting as agent for Sir Jas. Campbell, and if that be true, Sir Jas. Campbell would have a right to intervene as principal and settle the transaction on such terms as might seem good to him and to us." It cannot be disputed that, if Sir Jas. Campbell had been the real principal, he might have interfered and settled the business upon such terms as he and the defts. chose to arrange. But, in point of fact, Sir Jas. Campbell was not the real principal, and the only way in which, consistently with this view of the case, the defts. can avail themselves of it, is by saying there is an estoppel. My brother Pigott says, "You have no right to say it is an estoppel, because you were told before you took the bark what the truth was, and then, instead of relying on the estoppel, you might have avoided the contract, and got back what money you had paid, and have maintained an action against me for the fraud or wrong statement; but, having notice of the truth, you think fit to take my bark, and therefore you must pay me;" to which the defts. retort, "There would be great injustice in that, as we have already parted with our 1000*l.* If you had offered to return that sum and said, the truth is Sir James Campbell is not my principal, here is your 1000*l.*, and then we had said, No, you shall keep the 1000*l.* and we will take the bark, there might have been some ground for it." Which then of these contentions is right, the plt.'s or the defts.'? It seems to me that the defts.' should be. My brother Pigott says, it is a concession on the part of the plt. not to claim the whole price of the bark less the deposit, which was confessedly paid by plt.'s directions; he says, though all the rest has been paid, the plt. might claim the whole. Is it to be endured that the defts. are to be put in the situation of being forced to bring a cross-action to get the money back which they have paid, or take the goods they have been induced to purchase by an undue representation (I do not use the word "fraud"), and pay for them at the will and pleasure of the owner? If my brother Pigott's argument is right, the plt. might have said, "Those goods are mine; I sold them as the agent for Sir James Campbell: they are my goods, and you shall pay me my price." Supposing

there had been no writing by the parties at all, and the plt. had said to the defts., "I am agent for Sir James Campbell; I am selling these goods on his behalf; 5000*l.* is the price: pay me a deposit of 1000*l.*;" and after the 1000*l.* had been paid he had said: "Well, I told you what was not true; the goods are mine; you shall not have them unless you pay me 6000*l.*" If the argument of the plt. is right, there is nothing to prevent that. It is said the plt. may say, "I have informed you of the fraud; you have no right to the goods except you take them on my terms." Suppose a man says, "I sell as agent for A.," and you have a set-off, which he is willing to allow to a certain extent; and on that representation half the price is paid down, is the seller to be at liberty to say, "I have got one half the price; you can only get it back by a cross-action. There is not a word of truth in what I said of the goods being A.'s?" I am inclined to think, assuming that the agreement is binding between the parties, and that the writing must be taken as a correct record of an agreement between them, that the defts. are at liberty to say, "You told us you were the agent of Sir James Campbell, we have settled with him, and consequently you have no claim upon us." There is, I think, another defence under those circumstances. It is manifest to my mind, upon this statement, that the goods were actually delivered to the defts. by Sir James Campbell, and not by plt. Then there is nothing in the documents here to show that Sir James Campbell had not a right to undo his contract with the plt. It was a verbal arrangement only; there was no writing, no payment on account, no part delivery, and it was open to Sir James Campbell to undo that arrangement and deliver the goods to the defts. If that is the case, the plt. has not delivered the goods to the defts. How far that would be available under the first count, without a plea denying readiness and willingness to deliver, I am not so sure. However, upon the count for goods bargained and sold, it would be available upon the authority of the case of *Lamond v. Deville*, in the Q. B. (9 Q. B. 1030; 16 L. J., N. S., 136, Q. B.), in which a count for goods bargained and sold was held not to be maintainable where the delivery of the goods became out of the plt.'s power by reason of a subsequent sale of them. But be this third point of what value it may, upon the first and second grounds it appears to me that the defts. are entitled to our judgment.

CHANNELL, B.—I have entertained some doubt in the course of the discussion, and my mind is not now altogether free from doubt as to the particular issues; but on a careful consideration of the argument, I have come to the conclusion that the defts. are entitled to our judgment. I entertain some doubt upon the question raised by the first plea. I quite agree that where parties sign or otherwise adopt a written instrument which they mean and understand to be the terms of the agreement between them, they cannot by parol evidence alter the terms of that instrument. I should be sorry to say one word intimating any doubt in my mind upon such a subject. But where the parties have signed an instrument which they mean to be the written instrument between them, parol evidence is admissible for the purpose of invalidating the agreement altogether on the ground of fraud. The case, as stated by the arbitrator, appears to me to warrant the view that, although the bought and sold notes were respectively signed by the parties, yet both parties understood that they were never meant to be the contract at all. I entirely agree with the observations of my brother Bramwell, that we should be very slow in adopting such a conclusion, and that judges should be very careful to put a jury on their guard before they induce them, by their verdict, to come to such a conclusion. But I see no reason why

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the jury here might not find that there was no contract, and I consider that there is in the case a finding of facts, which authorised me to come to the conclusion that there was no agreement between the plt. and defts. such as the plt. has declared on in the first count. My brother Bramwell has put the case upon another ground; he has proceeded to see how far the plt. would be entitled to recover on the ground that the parties may either have meant this to be an agreement, or that they are estopped from setting up that they understood it was to be no agreement. Now, the agreement declared on is the agreement disclosed by the bought and sold notes; these notes are set out in the case, and the terms upon which the parties had previously agreed, and on which the defts. were induced to sign their part of the contract, are fully stated in the case; but it appears to me clearly that if the contract was a contract that was meant to bind the parties, it cannot be answered in the way in which it is proposed to answer it. Then, was there such a fraudulent representation in the bought and sold notes as would prevent the defts. being liable and entitle them to treat the contract as they seek to do? I think that there was such a fraudulent representation as would entitle defts. to relief. In this point of view the matter is not disputed, so far as regards the general principle. But the answer which my brother Pigott has given is this, that, although there might have been fraud such as would have entitled the defts., if they had done nothing, if they had remained quiescent, to treat the contract as null and void, yet they have, to a certain extent, acted upon it, and by so acting have estopped themselves from setting up the invalidity of the contract on the ground of fraud. I confess I do not see, on full consideration, that this is an argument which ought to prevail. As I have stated, the contract declared upon is that which is to be gathered from the bought and sold notes, and the invoice as delivered on the 21st July. It does not appear to me that the invoice gives, in terms, any different notice or intimation to the defts. from that which is given by the bought and sold notes, with the exception that the bought and sold notes speak of an indefinite quantity, and the invoice when delivered assumes to estimate the quantity, for the purpose, as I consider, of determining what was the amount of deposit to be paid. It is true, that the invoice debits the defts. as the buyers, and debits them as buyers of Rogers the plt.; but the heading of the invoice does not carry the case further than the bought and sold notes did. I do not think, therefore, that any information of any new fact is given by the invoice, except what I have stated, viz., that this was an assumed estimate of the quantity, for the purpose of ascertaining the amount of the deposit. Upon the whole, upon the best consideration I can give to the subject, there is no notice that we can or ought to rely upon before the 3rd Aug. On the 3rd Aug. one of the defts. makes a statement to Sir James Campbell, which shows that on that day he had notice from the plt. that he the plt. then assumed to be treated as the principal, and then the deft. discloses to Sir James Campbell what the real transaction was. Of course, what he disclosed to Sir James Campbell would not be evidence against the plt., but it is evidence that at that time the deft. had that knowledge, without which he could not have made this communication to Sir James Campbell. If that be so, it seems to me to refute any argument that seeks an adoption of the contract by the payment of the deposit. There is another fact, not immaterial with regard to the payment of the deposit, that, although the deposit was paid on the 25th, in pursuance of the letter of the 24th, it was nothing more than the carrying out of what was the original arrangement between the parties, because on the very day on which the verbal agreement was

come to, on the faith of which the parties entered into the written contract, the plt. requested the defts. to pay the deposit into the bank to the credit of Sir James Campbell. At the earliest period of the transaction, it was so arranged, and it was so paid in, no doubt, under the letter, in which the plt. says he is about to go to Denmark, but again requests the defts., following up the original request, to pay into the bank to the account of Sir James Campbell, carrying out the original suggestion made at the original interview. Leaving the deposit then out of the case, as not amounting to an adoption of the written contract, what other facts remain to be considered? These, that the defts. have had the bark and paid for it to Sir James Campbell. It appears to me (independently of the point my brother Bramwell suggested) that the plt. has not delivered the bark himself, and that the defts. have not obtained it as from the plt., but have obtained it as from Sir James Campbell, whom they were entitled to regard as the rightful seller of it. Taking those circumstances into consideration, there has been, neither by the receipt of the bark, nor the payment of the money to Sir James Campbell, any adoption of the particular contract which the plt. has declared on. There remains one other matter for consideration—the right of the plt. to recover the 23*l.* 12*s.* 7*d.* for expenses. It seems to me that the plt. is not entitled to recover that amount upon the special count. It is put, however, that he is entitled to recover it on the count for goods bargained and sold. I dissent from that view. It appears to me that, taking the written contract, it amounts to this: a contract to pay a certain price per ton, *plus* certain expenses. Now, the amount of the expenses would, I apprehend, be part of the price, provided those expenses had been rightfully and properly ascertained and an account of them sent by Sir James Campbell to the defts. That was never done before action brought, and I think, on the day on which this writ issued, the amount of those expenses did not constitute a debt; in other words, they were not ascertained as a part of the price, for which the plt. could sue in debt as for goods bargained and sold. Without being free from all doubt as to the particular issues on which I should prefer to enter the verdict for the defts., I am of opinion that the defts. are entitled to our judgment.

WILDE, B.—I am of the same opinion. The case has been very ably argued on both sides. After some doubt, I have arrived at a conclusion satisfactory to my own mind upon two very short points. The plt. declares upon a contract, and he must prove that such a contract was made. He lays before the court two documents, the bought and sold notes signed by the parties. No doubt, *prima facie*, without explanation, any one would conclude that there had been a contract which was contained in those notes. A document headed "bought and sold notes," and signed by the parties, is not, however, necessarily a contract at all. It is always competent to the parties to show on what occasion it was made, or, when it was written. It is necessary for any person seeking to establish a written contract, to prove not merely that a certain paper has the deft.'s signature, but that he made that as a contract. The case which my brother Bramwell has cited of *Pym v. Campbell*, in the Q. B., goes to the full length of that proposition. Then what is the evidence as to whether the defts. made the contract which the plt. charges them with having made? The statement in the case is, that the plt. proposed to sell to the defts. certain bark at a price to be calculated by the last year's prices, adding to that certain expenses, and that the defts. thereupon, and on the faith of that representation, and in pursuance of that request, agreed to buy the bark on those terms. That is the form in which the arbitrator has stated the con-

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tract that was made between the parties. No doubt that is not the contract that the plt. is suing on. What does the arbitrator say as to the signing this paper? He says that the plt. requested them to sign a bought note, stating the nominal price at 6l. a ton, and stated to the defts. that they should not be called upon to pay more than the actual amount of the last year's prices and the expenses. That is the statement of fact from which the court are to conclude whether or not the note so signed was intended by the parties to constitute a memorandum of the contract which they made. It seems to me that, so far from proving that, it negatives it; it states the contract to be different from what is found in the note. The note was not signed as a memorandum of the contract, but it was to contain a price which was nominal, which was not to be paid. It seems to me that the plt. fails upon the issue of *non assumpsit*, and that is quite sufficient to decide this case. It seems to me also, that the defts. are entitled to the judgment of the court upon the second issue. If the plt. ever had a contract, it is contained in the bought and sold notes, and that contract has been avoided by the fraudulent representation by which it was accompanied. The plt. does not deny that that would be the case, but he says the defts. adopted the contract after they were aware of the fraud. Fraud does not vitiate the contract necessarily—it vitiates it or not according to the election of the defts. That is a proposition of law. The plt. says the defts. have elected to stand by the fraudulent contract. It is said that, after the defts. had notice that plt. claimed to treat this not as a nominal, but as the real price, the defts. adopted that view and acted upon it. But here is the evidence of what took place at the meeting of the 3rd Aug. between one of the defts. and Sir James Campbell. The deft. stated that the sale was made by the plt. as agent of the Crown, and that the price inserted in the bought and sold notes was the nominal price only, and by that arrangement the defts. were only to pay the last year's prices and the expenses of carting and rickling. So that it appears that upon the 3rd Aug. all that the defts. did was to insist that the contract was not that which is set out in the written documents, but that which the plt. represented it should be. How that can be said to be an election and adoption of the written contract I am at a loss to conceive. It seems to me there was no election to do otherwise than stand by the original contract; there was no election to take the bought note as the contract, notwithstanding the fraudulent representation. So far as the defts. could do it, there was every manifestation made by them to stand by the original contract. Thereupon they pay their money and get the bark. There is nothing to prevent them from setting up fraud, which they do successfully. With regard to the claim for expenses, it is not necessary to express any opinion. I, for one, if there were any doubt about it, would give leave to the defts. to add a plea in order that they might not lose their costs as to them, the plt. having sworn that he was not going for expenses. It seems to me, upon the whole, that the defts. are entitled to our judgment. *Judgment for defts.*

Plt.'s attorneys, *Jones & Starling*, 11, Gray's-inn-sq.
Defts.' attorneys, *Risley & Stoker*, 14, Gray's-inn-sq.

May 6 and July 6.

DUCKWORTH v. EWART.

Covenant to execute a deed—Damages arising from breach of—Action for—Principle on which damages to be assessed.

A. was the owner of building land with unfinished buildings upon it, subject to a first mortgage for 4300l. to B., and a second mortgage for 350l. to deft. By a deed of 23rd June 1860, to which A. and B.,

and the deft. and certain other creditors of A.'s and plt. were parties, the property was conveyed to plt. in fee discharged of the equity of redemption, but subject to B.'s mortgage, upon trust, at plt.'s discretion, to sell the property, or to mortgage it in not exceeding 5000l., and out of the proceeds to pay, first, the mortgage to B.; secondly, plt.'s own advances; thirdly, deft.'s mortgage; fourthly, the other creditors; and lastly, the surplus (if any) to A.; and deft. thereby covenanted to execute any deed necessary to effect any disposition of the property thereby authorised. Plt. had expended about 400l. on the property, and B., the first mortgagee, having agreed to take 4100l. in full for his mortgage claim, plt. negotiated a loan for 5000l. on the security of the property, with persons who required deft. to join in executing the mortgage-deed, the draft of which had been approved by deft.'s solicitor on his behalf. At the last moment, when all parties were assembled to complete the business, deft. refused to execute unless plt. paid him his mortgage claim of 350l., which plt. refused to do, and thereupon the intended mortgagees declined to advance the 5000l. Shortly afterwards, B., the first mortgagee, sold the property, under his power, at a forced sale, for a sum insufficient to cover his mortgage-debt and the expenses. In an action to recover damages from deft. by reason of his breach of covenant, it was

Held, per Pollock, C. B. and Bramwell, B., that the plt. was entitled to recover only the costs of the abortive mortgage, and the expenses which were rendered fruitless by the deft.'s breach of his covenant to execute the proposed deed. The deft. may have been the causa sine qua non, but he was not the causa causans of the alleged loss.
Contra (per Martin, B.), that the plt. was entitled to recover substantial damages. In addition to the costs of the abortive mortgage, he was entitled to recover the difference between 5000l. and the value of the land as building land, such as it was contemplated to be by the indenture of 23rd June 1860. It was the direct and immediate consequence of deft.'s breach of covenant that plt. was deprived of the land, and as against the deft. it must be taken to be of that value. At all events, plt. is entitled to 900l., the overplus of the 5000l., after paying 4100l. to B., the first mortgagee.

To ascertain what are the damages payable on a breach of contract, it is to be ascertained what is the object of the contract contemplated by the parties.

The action was brought to recover damages for a loss alleged to have been suffered by plt. by reason of the deft.'s breach of covenant to execute a certain deed. The facts were shortly as follows:—

E. and H. Routledge, builders, had bought a piece of land in Cheshire, near Liverpool, for building purposes, but not having sufficient capital to complete the buildings, they borrowed money from various parties to enable them to proceed. Amongst others, they borrowed 350l. from deft., having previously mortgaged the premises to the Borough Permanent Building Society, by mortgage dated 14th Dec. 1859, to secure 4300l. and interest. Deft. took a second mortgage of the property dated 15th Dec. 1859, to secure his advance of 350l., and eventually the other parties made advances to E. and H. Routledge, which were also secured by further subsequent mortgages. The Routledges being, after all, unable to complete the buildings, an arrangement was come to between the parties, and a deed dated 23rd June 1860 was made, the substance of which is sufficiently stated in the judgment, and for breach of which this action was brought.

After the execution of the indenture of 23rd June 1860, set forth in the declaration, by which deft. covenanted with plt. to execute any assurance which

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he might be reasonably required by plt. to execute in order to carry out the object of the said indenture, plt. proceeded to carry the trusts of the deed into execution, and expended upon the land, or made himself liable to the amount of, 1100*l*. He also arranged with the building society, who agreed to accept 4100*l*. in satisfaction of their mortgage-debt of 4300*l*., and for that purpose he contracted with certain persons for a loan of 5000*l*. upon mortgage of the land. A draft of the mortgage was prepared and approved by the deft.'s solicitor on behalf of deft. and all other parties. The draft was engrossed, and a meeting appointed to complete. All parties interested attended. The proposed new mortgagees attended with the money; the persons who acted on behalf of the building society attended to receive their debt; the deft. also came accompanied by his solicitor, but at the last moment he refused to execute the mortgage unless he were first paid his 350*l*. and interest, which plt. refused to do, and the transaction went off. The result was, that the building society acted upon a power of sale contained in their mortgage, and sold the property at a forced sale for 4510*l*., which was exhausted in paying their debt and other expenses. At the trial before Martin, B., at the last Liverpool spring assizes, there was evidence on behalf of the plt. that the property for building purposes was worth 7530*l*., and on the other hand there was evidence on behalf of the deft. that it was only worth 4375*l*. It was admitted that the plt. was entitled to the verdict, which was thereupon entered for plt., leave being reserved to deft. to move the court if there were no evidence to go to the jury; and if the court should think deft. liable, they were to state the principle upon which the damages ought to be assessed by an arbitrator, who was to have power to call for evidence beyond that upon the judge's notes if he should think fit.

A rule was accordingly obtained, calling on plt. to show cause why the damages should not be reduced to 1*l*., and why an arbitrator should not assess the damages accordingly on the ground that plt. was not entitled to more than nominal damages, against which rule

Brett, Q. C. (with *Milward*), for plt., showed cause, and cited

Hadley v. Bazendale, 9 Ex. 341; 23 L. J. 179, Ex.; *Maine on Damages*, 14.

T. Jones, for deft., in support of the rule, cited

Hanslip v. Padwick, 5 Ex. 615; 19 L. J., N. S., 372, Ex.;

Gee v. Lancashire, &c. Railway Company, 3 L. T. Rep. N. S. 328; 30 L. J., N. S., 11, Ex.; 6 H. & N. 211;

Fletcher v. Tayleur, 17 C. B. 21; 25 L. J., 65 C. P.;

Wilson v. Lancashire and Yorkshire Railway Company, 3 L. T. Rep. N. S. 859; 30 L. J. 232, C. P.

July 6.—*MARTIN, B.*—This is a very important case. It was arranged at Nisi Prius that a direction should be given to an arbitrator on what principle the damages were to be assessed, and the real question is, whether or not the plt. is entitled to a very considerable sum of damages consequent upon the breach of a covenant, which it was alleged the deft. had broken, and I am of opinion that he is so entitled. The facts of the case are as follows [his Lordship here recapitulated the facts of case as they appear in the above statement, and then proceeded as follows]:—First, I think the plt. entitled to the costs of the proposed mortgage, which was rendered abortive by the breach of covenant of the deft.: secondly, I think the deft. liable for the difference between 5000*l*. and the value of the land as building land, such as it was contemplated to be by the indenture of the 23rd June 1860. To ascertain what are the damages

payable on a breach of contract, it is to be ascertained what is the object of the contract contemplated by the parties. The object in the present case was, that the land should be dealt with as building land by the plt. He was to finish and complete the buildings, and as a means to enable him to do so, he was to borrow 5000*l*. on mortgage, and the deft. covenanted in substance to execute the mortgage-deed. He refused to do so when the money was ready to be advanced. The consequence was, that the building society acted upon the power of sale, of which I think the deft. not only must be taken to have, but of which he had, actual knowledge; and the land was taken out of the hands of the plt., who was thereby utterly incapacitated from dealing with it in the manner intended by the indenture. It was therefore the direct and immediate consequence of the deft.'s breach of covenant that the plt. was deprived of the land, and, as against the deft., I think it must be taken to be of the value which the indenture contemplated it would have been if the 5000*l*. had been obtained; but it would have been burdened with a mortgage of 5000*l*., and it therefore seems to me that the direct and immediate damage to the plt. is the difference between that sum and the value of the land as contemplated by the indenture if the 5000*l*. had been obtained. It was said that the plt. might have procured the 5000*l*. from some other party, but of this there is no evidence. He had arranged to obtain it upon condition of the deft. being a party to the mortgage-deed, in accordance with the covenant; but the latter, in breach of it, refused to be such party, and there is no evidence, nor indeed any ground for supposing, that after what occurred at the meeting to complete, the plt. could have procured the 5000*l*. from any other quarter, unless, at all events, the deft. had been party to the mortgage, which he had already refused to be. This, I think, the direct and immediate damage to the plt. consequent upon the deft.'s breach of covenant. But damages may be estimated in various ways, and I think there is another view of this case which clearly entitles the plt. to 900*l*. The plt., in execution of the trusts of the deed, had expended and rendered himself liable to the amount of 1100*l*. If the deft. had performed his covenant, the plt. would have been in possession of 5000*l*. Therewith he would have been obliged to pay the building society 4100*l*.; but the residue, 900*l*., would have been by the terms of the indenture applicable to reimburse himself against the 1100*l*. He was deprived of this by the deft.'s breach of covenant, and I own it seems to me clear that 900*l*. is a damage directly and immediately consequent by reason of it; but in addition to this, I think that, if the arbitrator be of opinion that the land, if in the state contemplated by the indenture, would have been of a value exceeding 5000*l*., sufficient to enable the plt. to be paid the 1100*l*. expended by him, and the costs of the mortgage, he is entitled to them. I should add, that the Lord Chief Baron differs from the judgment which I have delivered, and agrees with my brother Bramwell in thinking that all that the plt. is entitled to by way of damages is the costs of the abortive mortgage, and the expenses which were rendered fruitless by deft.'s conduct.

BRAMWELL, B.—In this case it is desirable to state the facts to show the view of them on which our opinion is founded. [His Lordship here stated the facts of the case, and then proceeded as follows:] The deft. covenanted to execute any deed necessary to carry into effect any disposition of the property authorised by this deed. The plt. arranged with the first mortgagees that they should accept 4100*l*. in full satisfaction of the debt; he also procured persons to lend 5000*l*. on mortgage of the premises in question. These persons required the defendant to execute the

Ex.] Re — (an Attorney)—DICKINSON v. NORTH-EASTERN RAILWAY COMPANY.

[Ex.]

deed of mortgage which he was bound to execute, and which was approved by his solicitor. This, however, he refused to do, at the last moment, unless paid his debt by the plt.; the plt. refused to do so, and the intended mortgagees thereupon refused to advance the money. Afterwards the first mortgagees, in exercise of a power of sale, sold the property for a sum insufficient to cover them. There was evidence that the property was worth much more than 5000*l.*, and the sale a bad one, and there was evidence that it was worth considerably less. Whether the plt. sought for another mortgagee, whether he offered a higher rate of interest, or whether he sought and offered in vain, having found the only persons who could be tempted by any rate of interest to lend anything on the property, did not appear; nor did it appear why he did not pay off the first mortgagees, and so prevent the disastrous sale, nor why he did not buy the estate, nor whether the bad sale was owing to the state of the money-market, or to any absence of purchasers owing to a wet day, or a neighbouring race, or other objects of attraction. But it was said that the deft. by his breach of contract had caused a loss to the plt. of the difference between 4100*l.* and the real value of the estate. The action is brought for the deft.'s breach of covenant in not executing the intended mortgage, and we have decided that the deft. is liable to some damages; the question is, what? I am of opinion only to the expense of the abortive mortgage. The deft. may be the *causa sine qua non*, but he was not the *causa causans* of the alleged loss. If the intended mortgagees had not insisted on the deft.'s execution, if they had not had a power of sale, if they had not exercised it, if another mortgagee had been procured, if the plt. had purchased, if the sale had been favourable, the loss would not have happened. Nay, if the plt. had paid the deft. his claim of 350*l.*, it would not have happened. The deft. is not the cause of all these things happening and not happening. If the deft. is liable to these damages, so would the intended mortgagees have been if the mortgage had gone off by their default; so would every intended lender of money be, at all events, if he knew the purpose for which it was borrowed. It is said that, at all events, he is liable in 900*l.*, the difference between the 4100*l.* and the 5000*l.*, which the plt. could have certainly had, and as certainly lost; but the former reason applies to this; each claim is based on the same fallacy. What was the loss at the moment of the breach of contract? Let us see what difference it at once caused in the plt.'s position. Had the contract been fulfilled, he would have had an estate subject to a mortgage of 5000*l.*, and in debt to him 300*l.*, in all 5200*l.*, with other liabilities. By the breach of contract he had an estate subject to a mortgage of 4100*l.*, and in debt to him 1100*l.*, in all 5200*l.*, and subject to the same further liabilities. His position, therefore, was the same, less the expenses of the abortive mortgage. He became worse off by subsequent events, which might or might not have happened. The case has been put of a horse to be delivered and paid for at a future day, and the property not to pass meanwhile, which sickens with a mortal disorder before the time for delivery and dies, after the buyer's refusing to take it. I think the buyer would be liable for the whole price because there is a market price for such things, and the market price of the animal would have fallen. But that is not the case with land, nor indeed is that the claim made here. It is not said the land fell in price, and so the deft. ought to pay the difference. It is said the land remained the same in value, but by the acts of others was sold at a loss. The case is more as though the rejected horse, being ridden home, ran away or was run against, and got hurt. The present case seems to me as though I were to say to a man, "I will always give you 2*0s.* for a sovereign,"

and the promisee sends me one by a child; I break my promise, the child returns with the sovereign, shows it to other children, and it is stolen, or lost; should I be liable? Certainly not. *Logan v. Hall*, 4 C. B. 598; 16 L. J., N. S., 252, C. P., seems very much in point; see also *Sedgwick on Damages*, c. 3; *Maine on Damages*, 14; and the cases of *Archer v. Williams*, 2 C. & R. 26; and *Tyrer v. King*, cited by him; see also *Laird v. Pim*, 7 M. & W. 474; 10 L. J., N. S., 259, Ex. I think, therefore, the damages are the expenses of the abortive mortgage. If the premises were worth less than 5000*l.*, and there was no covenant in the mortgage to pay the money, then the difference between their value and 5000*l.* might be recovered. Anyhow the direction to the arbitrator cannot be to ascertain the loss as proposed by the plt., without taking into account whether or not the plt. could have prevented that loss by finding another mortgagee or otherwise.

Rule absolute to reduce the damages to the amount of the costs of the abortive mortgage; such amount to be assessed by an arbitrator. (a)

Plt.'s attorneys, *Gregory and Rowcliffes*.

Deft.'s attorney, *T. Price*, 24, Abchurch-lane, agent for *Husband*, Liverpool.

Tuesday, Nov. 3.

Re — (an Attorney).

Where serious charges of misconduct against an attorney are brought before the court of which he is a member, the court will not permit any private arrangement of it to be made between the parties, but will require that such misconduct be fully explained to the satisfaction of the court.

This was a case which stood in the peremptory paper, and when called on in its order no one appeared on either side.

POLLOCK, C.B. then said:—This is an application against an attorney, an officer of this court. The application was grounded upon alleged misconduct disclosed in certain affidavits filed, and which have been very carefully perused by one of my learned brothers. Grave charges are made against the attorney, which must be answered by him, and if not answered he ought to be punished. If the charges are not properly and fully explained, the attorney is a fit subject for a prosecution in some way. The court will therefore not discharge the rule which has been obtained, neither will it be struck out. If those whose duty it is to be here and proceed with the matter forget their duty, the court will not forget its duty, but take care that such steps are taken as will prevent a private settlement of the proceedings by smothering it and so getting rid of the matter. A rule with such charges as the present shall not be disposed of at the will of the parties themselves, and we hope these observations will be conveyed to the parties concerned in the rule.

Friday, Nov. 6.

DICKINSON (Administratrix, &c.) v. NORTH-EASTERN RAILWAY COMPANY.

Lord Campbell's Act, 9 & 10 Vict. c. 93—Meaning of term "child" in 2nd section—*Illegitimate child*.

The word "child" in sect. 2 of the 9 & 10 Vict. c. 93 (Lord Campbell's Act), means a "legitimate" child; and an action cannot be maintained on behalf of a bastard child against a railway company for damages by reason of the death of the mother through an accident to the train in which she was travelling.

This was an action brought by plt., as adminis-

(a) It is understood that this case will be carried to the Ex. Ch.

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MORTON v. THORPE AND OTHERS.

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tratrix of her daughter Hannah Dickinson the younger, deceased, against the defts., on behalf, as well of herself, the mother of the said deceased, as of William Dickinson, the child of the said Hannah Dickinson the younger, to recover damages, under 9 & 10 Vict. c. 93 (Lord Campbell's Act) for the loss sustained by them respectively through the death of the said Hannah Dickinson the younger, who was killed by an accident arising from the collision of trains on defts. line of railway, on which deceased was travelling as a passenger. The particulars delivered by plt. in compliance with the said Act, stated that plt., aged seventy-three, and the said child, an infant aged seven years, were each of them entirely maintained, supported, and provided with a home, by and through the industry of deceased, and each claimed damages for the loss of such maintenance, &c. in consequence of her death.

Defts. pleaded that plt. was not the mother, and the said William Dickinson was not the child, of the said Hannah Dickinson deceased, as alleged, on which issue was joined.

On the cause coming on to be tried before Mellor, J. and a special jury, at the last Durham assizes, upon its being intimated to his Lordship that the child William was illegitimate, his Lordship ruled that no action could be maintained on his behalf, and told the jury that the child being illegitimate, was not to be considered as having sustained any damage, and thereupon the jury found for the plt. alone, as the mother of the deceased, with 150*l.* damages.

Price, Q.C. now moved, on behalf of the plt., for a rule to show cause why a new trial should not be had on the ground of misdirection, or why damages should not be assessed on behalf of the infant illegitimate child of the deceased, and contended that, being the child of the mother, he was not expressly excluded by the words of the statute. The 2nd section uses the words, "wife, husband, parent and child," and it was clear from the interpretation clause (sect. 5) that the Act was not confined strictly to the blood relationship of a child, for it was there said, that "child" included both a "grandchild" and a "step-child." The Act therefore gave a more extended meaning to the word "child" than the Statute of Distributions. [POLLOCK, C.B.—Because the interpretation clause extends the term "child" to grandchild and step-child, you ask us to extend it to a bastard.] The word "child" does not necessarily exclude an illegitimate child. [POLLOCK, C.B.—In a statute it does, though in some cases of devises under a will it may be otherwise.] The mere legal right to support cannot alone give a right of action; the moral obligation, as here, was sufficient to give it. Under the poor-law a grandfather and grandchild were each liable to contribute to the support of the other, if destitute, and that though the father were alive. The obligation on the mother to provide for her illegitimate offspring is recognised in the judgment of the Ex., delivered by Channell, B., in

Dickenson v. Wright, 2 L. T. Rep. N. S. 155; 29 L. J. 150, Ex.; affirmed in error, 4 L. T. Rep. N. S. 21 (*vide* judgment of Cockburn, C.J.)

Marriage prohibitions are held to apply to bastards as well as to others, on the ground that the tie of natural consanguinity was an equal bar with that of legitimate relationship:

Haines v. Jessel, 1 Lord Raym. 60; s. c. *nom. Haines v. Jeffreys*, Comyn, 2;

Folliot v. Koetsoo, 2 L. T. Rep. N. S. 178; 29 L. J. 128, M. C.;

Reg. v. Brighton, 5 L. T. Rep. N. S. 56; 30 L. J. 197, M. C.

[PIGOTT, B.—I think this case was decided in principle in the Q. B. two or three days ago,

in the case of an action against the administratrix of the mother of a bastard. (a) CHANNELL, B.—The 2nd section enacts, &c. (reads it). Now, had the mother brought the action for the death of the child, how could she have brought herself within the Act? BRAMWELL, B.—Suppose the son to have had a child, do you contend it would have come in under the interpretation clause as a grandchild? Illegitimate children have taken under a devise to "children." See the cases collected, 2 Jarm. Wills; and *Gill v. Shelley*, 2 Russ. & Myl. 336, there cited by Mr. Jarman. [BRAMWELL, B.—There the devise was to "the children" of the deceased Mary Gladman, who at the time of the making of the will had one legitimate and one illegitimate child only. POLLOCK, C.B.—The rule is that a gift to children means legitimate children, unless circumstances or the context show that illegitimate children must have been intended. It cannot be stated too broadly. See Hawkins on the Construction of Wills, p. 80. PIGOTT, B. referred to 2 Wms. Executors, 883, 2nd edit.] The case is within the spirit of the Act, for beyond question the child was dependent solely on its mother, and is now thrown on the grandmother, and the Act must mean any child who was deriving pecuniary advantage, and is deprived thereof by the death.

POLLOCK, C.B.—We are all agreed that the application for this rule must be refused. We have no doubt that in this Act of Parliament, as in all others, the word "child" means "legitimate" child only; and I should be very sorry to throw the least doubt upon the point by granting the present rule. No authority has been shown to us for the contrary construction for which Mr. Price has contended, and therefore the rule must be refused.

BRAMWELL, CHANNELL and PIGOTT, BB. concurred. *Rule refused.*

Plt.'s attorneys, *Gregory and Rowcliffe*, 1 Bedford-row, agents for *Robinson*, Richmond, Yorkshire.

COURT OF PROBATE.

Reported by DR. SWABNEY, of Doctors'-common.

July 16 and 30.

(Before Sir CRESSWELL CRESSWELL.)

MORTON v. THORPE AND OTHERS.

In the Goods of ASHTON MORTON, deceased.

Will—Administration—Parties interested under will cited and not appearing—Practice.

Where parties interested under a testamentary paper have been cited to appear and propounded it, and have not appeared and propounded it, the court will grant administration as to an intestate, or probate of an earlier will, as the case may be, in common form:

Quære, ought not the will in respect of which the parties are cited to be filed in the registry, if in the possession or power of the party applying?

In this case the deceased, Ashton Morton, died on the 31st Jan. 1863, a bachelor without a parent, and leaving John Morton and Martha Richardson, widow, his natural and lawful brother and sister, and his only next of kin and the only persons entitled in distribution in case he died intestate. After his death a will bearing date 22nd Nov. 1862 was produced, wherein the said John Morton and John Thorpe were appointed executors; and various persons of the names of Brown, Thorpe and Richardson, including the said Martha Richardson, were legatees.

The will had been filed in the registry, and a cita-

(a) The case referred to is *Rutlinger v. Temple* (Administratrix), reported ante, p. 256, where it was held that there was no legal obligation on the personal representative of the mother of a bastard under sixteen to pay out of the assets towards its support since the mother's death.

tion founded on the affidavit of John Morton had been served on the other executor and the legatees, calling upon them to cause an appearance to be entered for them in the court, and to propound the said will in solemn form of law, or to show cause why the said will should not be declared null and invalid, and why letters of administration should not be granted to John Morton, as the brother and next of kin of the deceased, with intimation that in case of the parties cited not appearing and propounding the will, the court or its registrars would proceed in the premises, their absence notwithstanding.

Pritchard moved the court accordingly.

Sir C. CRESSWELL.—Did not Sir Herbert Jenner, in the *Goods of Watts*, deceased, 1 Curt. 594, refuse to set aside a will on the consent of parties interested, observing that no person's consent can make a will no will? You had better consider this point.

Pritchard renewed the motion in the case referred to.—It does not appear that the parties interested under the will had been cited to propound it. In a later case, where that was done, Sir Herbert Jenner approved the course adopted, and granted probate of a will of earlier date, passing over one of later date.

Palmer and Brown v. Dent and others, 2 Bob. 284;

Counsel also referred to certain unreported cases:

Boddicoate v. Gossip and others, 15th Dec. 1849;
Hawker v. Hawks and others, 19th March, 1850;
Westcott v. Langworthy, 13th Nov. 1852, in support of the practice.

There was also an affidavit of one of the attesting witnesses to the effect that he placed his signature to the will on the 1st Feb. 1863, after the deceased was in fact dead.

Sir C. CRESSWELL.—If you intend to rely on this affidavit I should certainly require further information.

Pritchard.—I rely on the cases cited, and submit that where the parties interested have been cited the court need not have any information as to the validity or invalidity of the paper. *Cur. adv. vult.*

June 30.—Sir C. CRESSWELL.—I have considered this matter, and think that there is a substantial distinction between citing parties interested to appear and propound a will, and merely bringing in their consents to the will being passed over. As the parties cited in this case have not appeared, I think administration may go to the brother as prayed.

Solicitor, *H. D. Pritchard*.

COURT OF BANKRUPTCY.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Tuesday, Oct. 13.

(Before Mr. Commissioner GOULBURN.)

Re STOWELL.

Creditors placing claims upon the proceedings—
Opposition by.

Where a claim is upon the proceedings only, the claimant is not precluded from opposing a bankrupt's order of discharge.

This bankrupt, a schoolmistress, came up for her order of discharge.

Robertson Griffiths appeared to oppose for a creditor who had only placed a claim upon the proceedings.

Mr. Commissioner GOULBURN inquired whether there was any precedent for allowing an opposition by a creditor who had not proved, but had only claimed to prove for a debt?

R. Griffiths submitted that it would be a great *prima facie* case of hardship to prevent a creditor opposing under such circumstances.

Mr. Commissioner GOULBURN wished to know

whether there was any precedent before his brother Holroyd?

Griffiths could not cite a case, but thought he had known such an opposition permitted.

Mr. Commissioner GOULBURN doubted whether an opposition could proceed until the claim had been ripened into a proof, but the way to do it was by adjournment, to allow time for the claim to be turned into a proof; but there was hardship in that course upon the bankrupt. But the debt might be also taken *pro concessus*. What was the object of the creditor?

R. Griffiths.—A cash and deficiency account.

Godday, solicitor for the official assignee, thought such an account would be utterly useless.

Mr. Commissioner GOULBURN thought the creditors entitled to a reasonable account, and ordered an adjournment for that purpose.

Adjourned accordingly.

[*Note*.—An undertaking by a creditor to prove, as a condition for him to be allowed to oppose the bankrupt, upon his coming to pass his last examination, amounts to an election within this section, and consequently avoids an execution by the creditor under which he detains the bankrupt in custody: See *Re Johns*, 32 L. T. Rep. 41; and *Dor. & Mac. Bank. Prac.* 861.]

DIGEST OF MARITIME LAW CASES (EXCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from p. 238.)

[*N.B.*—The LAW TIMES REPORTS, N.S., will give all the Maritime Law Cases decided from Michaelmas Term 1858. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1858. A Digest of the Salvage Cases during the same period is appearing in the LAW TIMES.]

SHIPOWNER (continued).

2139. Question as to shipowner's liability for loss caused by a mistake of the master. Opinion of Campbell, C. J.: (*The Perseverance*; *Usborne v. Matlocks*, Q. B., July 1, 1856, *Shipping Gazette*.)

2140. Claim at the instance of a merchant against a shipowner for damage to cargo of potatoes from being left unprotected, except with canvas, for several days during severe frost at Constantinople: (*The African*, s. *Sichell v. Dixon*, &c., Q.B., Nov. 29, 1856, *Shipping Gazette*.)

2141. Shipowner held liable to shippers for value of goods delivered to holders of fraudulent assignment of bill of lading, the master having signed bills of lading without seeing the mate's receipt for goods: (*Schuster and Co. v. McKellar*, Q.B., Feb. 11, 1857; rule for new trial granted, Q.B., April 17, 1857, *Harrison's Digest*, 198; 3 *Jar. N.S.* 1320; 36 *L. J.* 281, Q. B.; *Maclean* on the Law of Merchant Shipping, 344.)

SHIP'S PAPERS.

(See "Simulated Papers," Spoilation.")

2142. Practice of the court where simulated or contradictory papers are produced in a claim for restitution of captured property. Colourable bill of lading. Burden of proof: (*The Ida*, A. C., June 29, 1854; 1 *E. & A. R.* 336.)

2143. Effect given to the fact of the regularity of ship's papers in questions relating to the ownership or national character of a captured ship: (*The Baltica*, A. C., Feb. 9, 1855; *Spink's Prize Cases*.)

2144. Case relative to papers to be carried by a neutral ship. Duty of captors in regard to ship's papers, &c., under the Act 17 *Vict. c. 18*: (*The Ossee*, J. C. P. C., Feb. 23, 1855, *Spink's Prize Cases*.)

SHIPPER.

(See "Dangerous Goods," "Freight," 1218.)

INDEX TO CONTENTS.

Delivery of Cargo, 2146.

Freight, 2147, 2148 to 2150.

Hypothecating Cargo, 2145.

Spontaneous Combustion of Cargo, 2149.

2145. Held, that a shipper of goods at Newcastle, who had transmitted the bills of lading to the consignees in New York, could not interfere to prevent the master pledging the cargo at an intermediate port for the repairs of the ship, unless he could show that the property of the goods still remained with him; ship bound from Newcastle to New York, put into Cowes for repairs: (*Rayne v. Benedict*, Ch. C., April 10, 1841, affirming Judgment of Vice-Chancellor. But see *Benecke's Principles of Indemnity*, 253, as to master not being entitled to hypothecate cargo if he cannot thereby.

save part of the cargo.) Cases relative to giving notice to shippers regarding bottomry, &c., Noa. 244, 259.

2146. Question as to claim of the shipper of a cargo purchased by him on account and risk of a correspondent to withhold delivery of the cargo: (*Green v. Maitland*, Rolls Court, Feb. 10, 1842, *Shipping Gazette*).

2147. Question as to liability of shipper of goods for freight where the "stop" on the goods for freight was taken off, and the consignees became bankrupt: (*Green v. Dirom*, &c., E.C. July 11, 1848, *Shipping Gazette*.)

2148. The owners of a ship may proceed either against shipper or consignee for freight, and may say to the consignee, "We take your security to enable the stop on the cargo for freight to be removed, but if you do not satisfy the freight we hold the shippers liable." Observations on *Saunders v. Vanzeller*, the Lord Chief Baron, in *Green v. Dirom*, &c., C. E., July 11, 1848, *Shipping Gazette*. See No. 2150.

2149. Verdict of a majority of a jury taken of consent, finding that a cargo of copper ore had not been in a fit condition for shipment when put on board and spontaneous combustion arose from the sulphuretted hydrogen emitted by the ore, and other goods had to be taken at an intermediate port in lieu of it at a less freight; shipper held liable, under the direction of the Lord Chief Baron, to make up the deficiency of freight to the shipowner: (*The Thomas Bell; Richardson v. Sadler*, C. E., Dec. 21, 1852.)

2150. Liability of shipper in London for freight refused to be paid by the consignee for carriage of a mare landed at St. Vincent: (*The Bolivar; Greathead v. Lidiard*, C. S. C., March 30, 1854, *Shipping Gazette*. See No. 2148.)

2151. Shipper of goods held liable in payment of freight in the first instance for bricks which had been reduced to dust owing to machinery having been stowed above them, but were virtually received in their decomposed state and used as ballast by the shipper's agent at the port of destination. A claim for damage to the goods should be the subject of a separate action: (*The Matilda Wallenbach; Garrett v. Melhuish*, V. Ch. C., *Shipping Gazette*, April 29, 1858; 33 L. T. Rep. 25; W. Rep. 491; 4 Jur. N.S. 943.)

SHIPPING AND MERCANTILE GAZETTE.

2151 a. Verbatim report in the above Journal of Judge's summing up at the trial of a cause at Guildhall, referred to by the court in *The Harbinger; Lindsay v. Leathly*, Q. B., Mitchell's Maritime Register, April 18, 1863.

[Note by the Compiler.—The reports of the judgments in Admiralty cases given in the *Shipping Gazette* are peculiarly valuable, and have been not only filed by proctors for convenient reference, but on various occasions cited in the Admiralty Court, and made available by Dr. Swaby in his series of Admiralty Reports. This Digest and the Digest of Salvage Awards is an index to reports in that shipping journal since its commencement; in other words, a digested index to Dr. Lushington's decisions down to the year 1860, and including many leading cases since that date.]

SHIPPING MASTER.

2152. Non-interference of shipping master in cases of wages where proceedings are pending before a decree has been made by a court of law: (*The Countess of Casador*, Thames Police Court, Aug. 25 and 27, 1855, *Shipping Gazette*.)

2153. Another case on the same subject. Construction of 13 & 14 Vict. c. 97, sects. 96 and 98: (*The Araminta*, A. C., Feb. 29, 1866; W. Rep. 396.)

SHIP'S STORES.

2154. Shipowners held liable for stores supplied to the order of the ship's agent in London by directions of the managing owner: (*Hall v. Howard*, C. S. C., *Shipping Gazette*, Dec. 16, 1843.)

2155. Shipowner held liable for necessary stores supplied at Bristol by order of the master to a ship belonging to Sunderland: (*Moore v. Cooper*, Bristol C. C., Dec. 8, 1854, *Shipping Gazette*.)

2156. Spare spars, canvas, boats, and surplus stores for ship's use, held to be included in the words "ship's tackle, apparel, and furniture," and therefore within the seamen's lien for wages. Stores for three years had been put on board. The crew proceeded for their wages, and the ship and stores were sold by order of the Vice-Admiralty Court. Authorities cited in argument:—Pritchard's Admiralty Digest as to mariners' lien for wages; *Gale v. Laurie*, 5 Barnewell & Cresswell. Construction of 53 Geo. 3. c. 189. No order made as to costs, it being the first time the question had been raised: (*The Prince Regent*, Vice-A.C., Adelaide, *Shipping Gazette*, Aug. 10, 1857.)

[Note.—In the report of this case it is mentioned that one of the counsel said, "He believed there were no Admiralty Reports in the colony, and he could therefore rely only on the text-books and colonial practice."]

SHIPWRIGHT.

(See "Repairs.")

2157. A shipwright having contracted to repair a ship so as to render her fit to be put on the red star class in Lloyd's register, held liable for loss caused by the negligence of his workmen in omitting to make good certain defective places in the ship: (*The Enterprise; Strong v. Taylor*, C. P., July 2 1863, *Shipping Gazette*.)

2158. Verdict of jury against shipwright for cost of renewing insufficient repairs, and for half the consequential damage by having to put into a port. Question as to general or limited contract: (*The Tamerlane; Elmist v. Picher*, Western Circuit, Winchester, March 4, *Shipping Gazette*, March 9, 1857.)

SIGNAL OF DISTRESS.

2159. What is a signal of distress? Fishing vessels leaving their occupation to answer such a signal, and therefore in the expectation of having to perform a salvage service, are entitled to indemnity. Mere ignorance of locality does not seem a sufficient ground for charging salvage instead of pilotage: (*The Pepita*, A. C., March 15, 1853, *Shipping Gazette*.)

2160. In salvage questions, any signal hoisted by a vessel which is in a damaged state is held to be a signal of distress, and not merely a signal for a pilot: (*The Felix*, A. C., April 4, 1853; *The Hedwig*, A. C., April 29, 1853; *The Nimrod v. The John*, A. C., Feb. 28, 1854, *Shipping Gazette*.)

SILK.

2161. Underwriters held not liable for a total loss on silk damaged by salt water and sold at an intermediate port, although part of it might, at a reasonable expense, have been put into proper condition to be forwarded to its destination; the silk being insured free from particular average. Case of *Rouse v. Salvador* distinguished from this case. Principles applicable to constructive total loss of goods: (*Navone v. Haddon*, &c., C. P., Jan. 23, 1880; Harrison's Digest, 2016; C. B. 80; 19 L. J. 161, C. P.; Arnold, 1128.)

SIMULATED PAPERS.

2162. In disposing of a claim of a neutral merchant for restitution of cargo, Dr. Lushington said that further proof could not be allowed, "where there was any attempt to deceive the court by the manufacture of papers not of a true and genuine character": (*The Ida*, A. C., June 25, 1854; 1 E. & A. R. 336.)

(To be continued.)

Equity Courts.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Thursday, Nov. 5.

MARTER V. MARTER.

Practice—Motion for decree—Non-appearance of plt.—Affidavit—Costs.

Where the plt. has given notice to the deft. in a suit, that it is to come on to be heard upon a motion for a decree, and then does not himself appear at the hearing, the deft. who does appear is entitled to his costs without producing an affidavit of service of the notice of motion.

This cause came on to be heard upon a motion for a decree. The plt. had served the deft. with a notice of the motion; but nevertheless did not himself appear upon it.

Hobhouse, Q. C., for the deft., asked for his costs. There was no affidavit of the service of the notice of motion upon him, and the only question was, whether it was necessary to produce such an affidavit to the court in order to entitle him to the costs of his appearance on the motion?

The MASTER of the ROLLS.—This being a motion for a decree, I think that no affidavit is required.

Hobhouse, Q. C., at a later period of the day, again mentioned the case, and said that, if the non-appearance of the plt. should be found to have arisen from any informality in the proceedings taken in the offices of the court (where some uncertainty appeared to exist as to the correct practice), his client would not avail himself of that circumstance.

July 9, 14, 15 and 31.

BROUN V. KENNEDY.

Barrister and client—Deed of gift by the latter to the former—Undue influence—Deed set aside.

Where one person possesses undoubted influence over another, he must not, even if the influence springs from ties of the most sacred and legitimate character—as, for instance, that of a father over his own daughter—exert his influence for his own advantage.

[ROLLS.]

BROUN v. KENNEDY.

[ROLLS.]

*K., a barrister, acted as the professional adviser of P. S., and being counsel for her, succeeded, after much litigation, in establishing her title to some valuable estates. K. possessed great influence over P. S., and she, in return for his services, executed a deed conveying to him the reversion in fee, expectant upon her decease, in the recovered estates. K. and P. S. afterwards became at enmity with each other. K. brought an action against her, upon an alleged contract to pay him 20,000*l.* for his services. The Court of C. P. held that, even if such a contract were proved to exist, no action would lie upon it. P. S. afterwards filed a bill in this court to set aside the deed of conveyance, on the ground of undue influence exercised over her by K. :*

Held, that the deed must be set aside; the reversion in the estates reconveyed by K. to P. S., and the cost of the suit paid by the former.

The *plts.* in this suit were Charles Wilson Broun and his wife Patience, by Richard Lawrence her next friend. The *defts.* were Mr. Charles Rann Kennedy, barrister-at-law, and a Mr. Reid.

The object of the suit was to set aside a deed, dated the 10th May 1859, by which the *plt.* Mrs. Broun had conveyed to the *def.* Mr. Kennedy the reversion in fee, expectant on her decease, in certain real property called the Swinfen-hall estates, in the county of Stafford.

The deed in question was as follows:—"This indenture, made the 10th May 1859, between Patience Swinfen, of Swinfen-hall, in the county of Stafford, widow, of the one part, and Charles Rann Kennedy, of the Inner-temple, London, barrister, of the other part: Whereas the said Patience Swinfen has for a long time past been engaged in legal proceedings in and about the defending and establishing her title to the estate hereinafter mentioned, and the said legal proceedings have been brought to a final conclusion, and her title to the said estate is now fully established: And whereas the said Chas. Rann Kennedy has been engaged as her counsel in the said legal proceedings, and she the said Patience Swinfen desires to recompense him for his services as such counsel, and to convey to him the reversion of the said estate subject to her own life-interest therein, and chargeable as hereinafter appears: Now this indenture witnesseth that, in consideration of the services rendered to her as aforesaid by the said Charles Rann Kennedy, and also in consideration of her esteem and friendship for the said Charles Rann Kennedy, she, the said Patience Swinfen, doth hereby, of her own free will, give, grant and convey unto the said Charles Rann Kennedy, and his heirs, all that her estate at Swinfen, near Lichfield, in the said county of Stafford, comprising a mansion-house and grounds and several farms near or adjoining thereto, all which said estate was devised to her, the said Patience Swinfen, by Samuel Swinfen, of Swinfen-hall aforesaid, and all the lands, hereditaments, rights, liberties, easements, privileges, rents and profits whatsoever to the said estate belonging or in anywise appertaining, or with the same now or at any time heretofore demised, held, occupied, or enjoyed, or reputed, deemed, taken, or known as part or parcel thereof, with their appurtenances, and all the estate, right, title, interest, property, claim and demand, both at law and in equity, of her the said Patience Swinfen, in, to, or upon the said premises, and every part thereof, to have and to hold the said estate, mansion-house, grounds, farms, land, hereditaments, and all and singular other the premises hereby given, granted and conveyed, or expressed and intended so to be, unto the said Charles Rann Kennedy, and his heirs, to the use of the said Patience Swinfen, for the term of her natural life, and from and after the decease of the said Patience Swinfen to the use of the said Charles Rann Kennedy, his heirs

and assigns, subject to and chargeable with all such debts as shall be due and owing from the said Patience Swinfen at the time of her decease, not exceeding in the whole the sum of 10,000*l.*, and also subject to be chargeable with the payment of such sum or sums of money not exceeding in the whole the sum of 10,000*l.*, to such person or persons respectively as the said Patience Swinfen shall by her last will direct and appoint. In witness whereof the said parties hereunto have set their hands and seals, the day and year first above written.

"PATIENCE SWINFEN (L. S.)

"CHARLES RANN KENNEDY (L. S.)

"Signed, sealed and delivered by the above-named Patience Swinfen and Charles Rann Kennedy, in the presence of Edw. H. Collis, attorney, Birmingham; James Ure, attorney, Birmingham."

In the month of Dec. 1861 the *plt.* Patience Swinfen married Mr. Charles Wilson Broun, when a marriage-settlement was executed, of which the *def.* Mr. Reid was the trustee.

The further facts of the case, so far as they are material to this report, will sufficiently appear from the judgment of the *M. R.*, *infra*.

Cole, Q.C. and *E. Kay* appeared for the *plts.*, and contended that, as Mr. Kennedy was a barrister-at-law, the consideration expressed in the deed vitiated it; and that, moreover, it was executed by Mrs. Broun under the pressure of a most extraordinary and improper influence, which Mr. Kennedy had obtained over her. They cited

Hoghton v. Hoghton, 15 Beav. 278;

Huguenin v. Bazeley, 14 Ves. 273;

Cooke v. Lamotte, 15 Beav. 234;

Anderson v. Elsworth, 3 Giff. 154.

Kennedy appeared personally on his own behalf, and at great length and in a most able and learned argument contended that, his position of counsel and adviser to Mrs. Broun did not prevent him from accepting such a gift as that comprised in the deed of 1859, and he insisted that no undue influence had been exerted by him to bring about the execution of the deed by Mrs. Broun in his favour. He cited

Kennedy v. Broun, 32 L. J., N. S., 137, Q. B.;

Gibson v. Jeyes, 6 Ves. 266;

Holman v. Loynes, 4 De G. M. & G. 270;

Hobday v. Peters, 29 L. J., N. S., 780, Ch.;

Morgan v. Higgins, 1 Giff. 270;

O'Brien v. Lewis, 7 L. T. Rep. N. S. 734; *s.c.*

on appeal, 8 L. T. Rep. N. S. 179, 380, 683;

Cooke v. Setree, 1 Ves. & B. 126;

Billage v. Southee, 9 Hare, 534;

Re Whitcombe, 8 Beav. 140;

Stedman v. Collett, 17 Beav. 608;

Blagrove v. Routh, 2 K. & J. 509;

Waters v. Taylor, 2 Myl. & Cr. 527;

Wells v. Middleton, 1 Cox, 112;

Griffiths v. Robins, 3 Mad. 191;

Nottidge v. Prince, 2 L. T. Rep. N. S. 720;

Woodwards v. Humpage, 3 Giff. 337;

Archer v. Hudson, 7 Beav. 551;

Baker v. Bradley, 7 De G. M. & G. 597;

Walker v. Smith, 29 Beav. 394;

Hindson v. Wetherall, 1 Sm. & G. 604; *s.c.*

on appeal, 23 L. J., N. S., 120, Ch.;

Pridenax v. Lonsdale, 8 L. T. Rep. N. S. 109, 554;

Pratt v. Barker, 1 Sim. 1;

Forshaw v. Wilsby, 30 Beav. 243;

Toker v. Toker, 8 L. T. Rep. N. S. 525, 797.

Cole, Q.C., was not called upon for a reply.

July 31.—THE MASTER OF THE ROLLS.—This suit was instituted to set aside a deed by which the *plt.*, Mrs. Broun, granted to the *def.*, Mr. Kennedy, the absolute interest in the reversion of an estate at Swinfen, subject to her life-interest in that estate. Mr.

Kennedy contested the right of the plt. to the relief for which she asked; first, on the ground that the deed was the voluntary gift of the plt., uninfluenced by him, that it was well understood by her, and that it proceeded from her gratitude to him for his services on her behalf, and he urged that a subsequent alteration of her intention could not enable her to revoke a gift deliberately made. Secondly, the deft. contended that the deed was good, because either it was founded on a contract, or it was nothing more than a due and just return or remuneration for the services which he had rendered her, and the sacrifices which he had made on her behalf. The facts are very simple, and the main and important facts are not in dispute. In June 1854 Mr. Swinfen, jun., the first husband of Mrs. Broun, died. On the 7th July following his father made a will in favour of his daughter-in-law, and died on the 26th day of the same month. The will was contested, and a suit was instituted in this court by the heir-at-law for an issue to try the validity of it. In July 1855 a decree was made by me directing an issue *deviseavit vel non*, to try the validity of the will. The issue was tried in March 1856, and resulted in a compromise. A juror was withdrawn and the terms of the compromise were embodied in an order of the court. Mrs. Swinfen objected to the compromise; contested her being bound by it, and refused to obey that order. Up to that time the deft. had not acted for Mrs. Swinfen as her counsel, nor, indeed, was he in any respect acquainted except from some civilities of hers towards his daughter. It appears from his own answer in this suit, that their acquaintance first took place in April 1856. She consulted him respecting her lawsuit. At her request he saw her solicitor, and in that month he wrote an opinion on her case. From that time forwards, according to the statements made in Mr. Kennedy's answer, he acted as her confidential adviser, and from Aug. 1856 he seems to have acted as her counsel on every occasion on which she required such assistance. In June 1856 a rule nisi for an attachment against Mrs. Swinfen, which had been previously granted, was discharged, on the ground that there was not sufficient evidence of her refusal to obey the order; but, in doing so, the judges expressed their opinion that Mrs. Swinfen was bound by the compromise entered into on her behalf by her counsel, and that she would be compelled to abide by it. Application was thereupon again made for an attachment in Michaelmas Term, on complete evidence of the refusal of Mrs. Swinfen, to obey the order of the court; but in Jan. 1857 that rule was discharged, in consequence of Crowder, J. expressing his opinion that the mere relation of counsel and client did not confer on the counsel, without the consent of his client, a general power to bind her by an agreement for a compromise. Thereupon, in Feb. 1857, a suit was instituted in this court by the heir-at-law for the specific performance of the agreement for a compromise. That bill was dismissed by me in Nov. 1857. My judgment was affirmed by the Lords Justices in April 1858. The issue was then tried a second time, on the 12th Aug. 1858, and a verdict was given for the plt. Mrs. Swinfen. In Nov. 1858 a motion was made for a new trial before me, on which I gave judgment in Jan. 1859, refusing to grant a new trial. On the 5th March following the bill of the heir-at-law was dismissed as to the real estate, and a decree was made by this court, establishing the will, by which the long and various litigation connected with this remarkable case terminated; and the title of the plt. to the Swinfen estate, an estate of great value, and said to be worth 60,000*l.*, was finally and conclusively established. In all those proceedings, from Aug. 1856, Mr. Kennedy had acted both as the counsel and also as the confidential adviser of the plt. The deed which is now sought to be set aside was executed on

the 10th May 1859, two months after the final establishment of the plt.'s title. It is the common case of both the plt. and the deft. that the plt. felt the warmest gratitude to the deft. for his services and exertions in her favour, and that she attributed her success to those exertions. She speaks repeatedly in her letters in those and similar terms: for example, in one of them she says, "The cause he had so nobly won for her." It is also certain, and is not contested by the plt., that the deft. devoted himself to the winning of her cause; and that he took upon himself for her sake and for that purpose labour of no common order, and certainly not of a description usually falling within the province of a counsel; such as writing and publishing a pamphlet narrating the case, and containing an argument in her favour, which, as he believed, had a material influence in producing her ultimate success. His position as counsel and adviser was anomalous in another respect; he had, as he states, refused to take any pecuniary remuneration from her; and he waited until the litigation should be successfully concluded before he made, or intended to make, any claim upon her justice or her gratitude. It appears, however, that he did receive considerable sums of money for fees, out of the moneys paid by the opposing party, who was condemned in costs amounting, as I was informed by the counsel for the plt. in the argument, to 700*l.*, but which I have not found established in the evidence; and as he admits to upwards of 150*l.*, that fact is not, in my opinion, very material. It is certain that he never received any remuneration directly proceeding from her. It is also his case that he always expected that he was to be amply remunerated when the litigation was successfully concluded; and, as he states, she repeatedly promised that his expectations should be realised. That part of the case I shall, however, have more minutely to consider when I come to deal with the latter branch of Mr. Kennedy's argument. The first thing the court has to consider is the position of this gentleman and lady towards each other in April and May 1859. I cannot doubt (nay, I should, as I believe, be shutting my eyes to the clearest evidence of the most ordinary motives and feelings of human nature daily displayed, if I were to doubt that at that time the deft. possessed great influence over the plt. Undoubtedly she owed much to him, and she believed that she owed everything to him, both her estate and her position in society, so far as it was dependent on her fortune. Indeed, the deft. intimated that the warmth of the gratitude felt by the plt. towards him extended far beyond ordinary and becoming limits, and that those feelings were reciprocated by him. I cannot, in any of the cases with which I have met, or which are to be found in the books, discover, nor indeed can I conceive, a case, in which, if all the deft. states be correct, the influence and control of a man over a woman would be more complete or absolute, unless it were that of a father over a daughter, or that of a husband over his wife. The rule enforced by the Court of Ch. is, that where a man possesses such influence over another, however such influence was acquired, even if it sprang from ties of the most sacred and legitimate character, as, for instance, that of a father over his own daughter, he must not exert that influence for his own advantage. Having made those observations, I shall now proceed to examine the evidence as to the transaction itself. Respecting that there is no conflict in the evidence. It proceeds from the deft. himself. His case as he relates it is this: that towards the end of March 1859 he heard that the plt. was going to marry a second husband; he asked her about it, she denied it and ridiculed the idea; he doubted her; he perceived, to use his own words in his argument before me, that there was an element of treachery in her, he therefore determined to ask her for some security. He states that he considered it to be a duty that he owed

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BROUN v. KENNEDY.

[ROLLS.]

to himself to do so, and that in consequence he wrote a letter of the 19th or 20th April for that purpose. What subsequently occurred is stated in the 55th, 56th and 57th paragraphs of his answer. Those paragraphs are as follow:—"This being the period of the general election, I was advised by some persons to endeavour to get into Parliament, and in the first or second week of April I requested the pl^t. Patience Broun to raise, if possible, 4000*l*. or 5000*l*. by mortgage, to enable me to become a candidate with advantage. I asked her in particular to make inquiries if I had any chance at Lichfield, and I believe that she made such inquiry, as appears by her letter to me of the 10th April 1859, to which I crave leave to refer. This project, however, was soon afterwards given up by me, though I did not immediately inform her of my having relinquished the same. About the 19th or 20th April I wrote and sent a letter to her, reverting to my previous request to make a provision for me. In a letter to me dated Thursday (being the 21st April), she promised to comply with my request if in her power. This letter I have lost or destroyed. I had not received it when I wrote to her again on the same subject, and received from her, in reply, a letter dated 'Saturday' (being 23rd April), partly as follows: 'I have not much to say in this, only I do not like to leave your letter, received yesterday, unanswered. You will only this morning get my letter of Thursday, in which I have promised to comply with your request if in my power. I am now waiting to know what it is. I see the action will not come on until after Trinity Term; that is a long way off.' On the same Saturday I wrote and sent a letter to her pressing her to come up to London to make some arrangements with me. She replied to me by a letter, dated 'Sunday' (being 24th April), containing passages as follows: 'I again say we will stand or fall together, and I faithfully promise you that all and everything I can do for you, I will do it; you may rely upon my co-operating with you in all that is for your advantage present and future. If I live I will be in town on Wednesday or Thursday next. I cannot be before; and then I must be back in three or four days. In the meantime you may make all preparations for standing for any place you may think proper, and may God prosper you. The last-mentioned letter also contained a passage leading me to infer that she had made a will, disposing of the bulk of the property in my favour. This passage, however, was contained in a portion of the said letter which is torn. A fragment remains, and I am unable to supply the last portion from memory. The said Patience accordingly came to London on the 28th April, and I met her by her request at the railway station, and accompanied her to her lodgings; no conversation on matters of business took place that evening, but it was arranged that we should go the next day to the Zoological-gardens in the Regent's-park. On the following day I called at her lodgings and had an interview with her, when, after referring to my position, I said to her that we ought to come to an understanding; and I asked her if she considered herself indebted to me in the 20,000*l*. which she had so often referred to, to which she replied, 'Certainly; but you know you will have to wait for it some time.' I replied that was true, but that I ought to have some security; she said she was willing to give it; but asked me what I wanted? I mentioned a mortgage. She said she did not like mortgages, and after a while she said, 'I have sketched out a will as I have told you, and I have given you as good as 20,000*l*.' This she explained by saying that she had left me the whole estate charged with 10,000*l*. to her relations. I replied, 'You know a will is no security at all.' The conversation was soon after interrupted by her going up stairs to prepare for going to the Zoological-

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gardens. We then went to the Zoological-gardens and after some time we sat down on a bench, and I renewed the conversation, and asked her if she would convey to me by deed what she meant by will, and she said 'Yes, cheerfully.' There was a discussion whether it should be made an absolute conveyance or by way of mortgage, and I explained the difference, which indeed she well understood. She said she should like it to be a deed of gift, and added, 'I wish to give it to you. I always meant it for you and for your family if you won.' Presently she said, 'In case I should wish to sell the estate hereafter and give you the money, you of course will not stand in the way.' I said, 'Certainly not, I should prefer the money.' She then repeated what she frequently said to me before, that she might like to sell the estate in order to give something to her brothers and sisters in her lifetime, which would do them more good than legacies after her death. The next day I drew a draft of the proposed deed in accordance with our arrangement, and gave it to her to read, and she read it, and I left it with her. A day or two after she said to me that, as she was considerably in debt, she would like to have a clause charging her debts upon the estate, and I asked her to name what sum she thought would be sufficient. 10,000*l*. was thereupon fixed on as an outside sum, and I inserted such clause as she required. She said she would make up the difference to me by making me an allowance at some future time if I wanted it. The draft remained in her possession till May 6th, and she fully understood and approved of it. I then asked her what solicitor she would like to attest it, saying, that it ought to be attested by her own solicitor, and proposing Mr. Simpson, but she said she would not like the matter to be known in Lichfield at present. I remonstrated with her on that point, saying there was no occasion for secrecy. However, she said she had a feeling about it, and I gave way. I never had any wish to conceal this matter from Mr. Simpson, whom I considered friendly to me. The said Patience then named and chose Messrs. Collis and Ure. She was then on visiting terms with Mr. Collis, and had known him for about three years; and Messrs. Collis and Ure were at that very time acting as her attorneys in the action against Lord Chelmsford. Mr. Ure was at that time wholly unknown to me, except by sight. I believe I wrote to Mr. Collis at her request to explain what was required to be done. She left London on the 6th May, having appointed to meet me at Birmingham on the 10th May; I went to Birmingham on the 8th or 9th May." That is all that is contained in those three paragraphs of Mr. Kennedy's answer; and I regret to say that the account there given only confirms the view I have previously stated, of the power which at that time the deft. had over the pl^t. It seems to me to point how difficult, if not impossible, it would have been for her, even had she been so inclined, to have extricated herself from his influence. His case is, that he required this deed as a remuneration for his services; that he first asked for it, that she consented to his request; that he prepared the draft; that he gave the draft of it to her to read and consider; that she did so and returned it after several days, approving of the draft; that he appointed to meet her at Birmingham on the 10th May, at the office of Mr. Collis, to execute the deed itself. I shall presently have to consider the second contention of Mr. Kennedy, viz., whether the deed can be supported on the ground of consideration. But in the view I am now taking of it, viz., as of a mere voluntary gift, it is impossible not to see that in the position in which they then stood to each other, it was not morally in the power of the pl^t. to resist the deft.'s request for this deed. Every letter she writes, every statement he makes, show to my

mind more and more distinctly how completely, at that time, his influence was riveted upon her. Accordingly on the 10th May she was faithful to her appointment; she went to Mr. Collis's office, where she found the deed ready engrossed under the instructions of Mr. Kennedy, previously given to him; she remained a long time with Mr. Collis alone, and when Mr. Kennedy returned he found the deed duly executed. Thereupon the plt. and deft. went away together to her house at Swinfen. I do not think it necessary to go through the evidence, in detail, of Mr. Collis and Mr. Ure. It is plainly shown by that evidence that the deed was read over and explained to her by Mr. Collis, and subject to an observation I shall presently have to make on the effect of the deed, not apparent on the face of it, it is clearly proved that she understood it. Indeed, I understand that that is not disputed on the part of the plt.; but that is not sufficient to support the transaction. A father may obtain from his own child the grant of his whole estate; the child may imperfectly understand what he is about, but that will not enable the father to hold the property and turn his son or daughter penniless on the world. The influence so possessed, and however acquired, I repeat, must not be exercised for the benefit of the person possessing it. That principle is established in the case of *Huguenin v. Buzzeley*, and in many of the other numerous cases on the subject cited and commented upon before me. Here the influence over the plt. was acquired by the deft. in the manner I have stated. The extent of it appears from his assertions and suggestions. He possessed it at the time, and it was exerted by him—in that instance at least—exclusively for his own advantage. But that is not all. It is certain that, in one very material respect, the plt. did not understand the effect of the deed, and that it was not explained to her; and indeed this effect of the deed does not appear to have been understood, or at least it was not present to the mind of either Mr. Kennedy or Mr. Collis. It certainly was not present to the mind of Mrs. Swinfen; and yet the effect is a very material one. When she executed the deed, she thought—and not only she thought, but Mr. Kennedy and Mr. Collis thought—that during her life she was to enjoy the estate as she had hitherto done; that she might grant leases, cut trees, open mines and quarries, pull down cottages and the like; but the deed incidentally takes away from her all that power. The consequence is this, that if I were to uphold the deed, the deft. would come for an injunction to restrain the plt. from performing any one of those acts, on the first intimation of her intention to do so; and, with the present feelings between the parties, but a very short time would possibly elapse before such an application would be made. The deft. admits that this circumstance was not explained to the plt., and simply because, as he states, no one thought of it. He suggests that the deed might be reformed for the purpose; but, in the case of a voluntary deed, that is impossible. If the deed do not express the intention of the grantor, the grantor may make a fresh deed, and, with the assent of the grantee, cancel the old one. This court cannot compel a grantor to alter the grant; and if the grantor contests it, the deed must stand or fall in its actual condition, without alteration. I find it difficult to explain the transaction which immediately followed; when Mr. Kennedy, at Mrs. Swinfen's request, prepared a will for her exactly as if no such deed had ever been executed. I am confident that she understood the deed to the extent, and in the qualified way, in which it was explained to her; and therefore she must have understood that the deed, if acted upon, would have made any such will inoperative. Why she executed it, and why Mr. Kennedy at her request prepared it, I cannot discover. It is possible that she may have supposed that the deft. would not enforce the

deed; but that he would still leave her the power over the estate, as if the deed had not been executed. But whether those or other feelings were present to her mind at the time I am unable to ascertain; still, this is clear, that at the time she thought, and the deft. allowed her to think, that she could dispose of the estate by will. The possible explanation of this part of the transaction, which I have suggested, may perhaps derive strength from the fact that Mr. Kennedy, since the execution of the deed, has, as he states, thrice offered to return it; and that she has thrice refused to accept it. Mr. Kennedy, in argument, laid great stress on that circumstance, and said that that the gift had been made to him three times over; but in my opinion that circumstance will not assist his case. It is clear that his influence over the plt.'s mind continued after the execution of the instrument. The letters and all the evidence show it; in fact, it continued until she determined to marry her present husband, and intimated that intention to the deft. The same motives and influence, which induced her to execute the deed, would naturally lead her not to take it back. If the offer to return the deed had been made after, or shortly before, the filing of the bill in this suit, it is obvious that the offer would not have been refused; and little stress can be properly laid on the fact of an offer being made which it is reasonably certain will not be accepted. Mr. Kennedy argued strenuously that the relation of advocate and client did not exist at the moment of time when this deed was executed; for that the plt. was not then engaged in litigation. But this court does not proceed on the mere technicality of the existence of such a relation at that moment (if the fact were so), but upon the proof that the degree of influence existing at the time, which in the present case is established conclusively, arose from the relation of confidential adviser and counsel previously existing and subsequently continued; and which enabled the deft. to exert over the mind of the grantor a power sufficient to obtain the deed. Treating it then simply as a mere voluntary instrument, I am of opinion that the transaction cannot be maintained, and that the deed cannot stand. I come now to the second part of Mr. Kennedy's argument, and have to consider whether the deed can be supported on any other ground than as a mere voluntary gift of the donor. The way in which Mr. Kennedy put that part of his argument was twofold. First, he said he had a contract for the deed, or its equivalent, which must be supported in equity; or if not, then, secondly, he said that there existed a moral obligation sufficient to support the deed, which was given fairly and equitably in the performance of that obligation. With respect to the first of those grounds, it is in substance disposed of by the decision between the parties in the Court of C. P. Mr. Kennedy in his affidavit states, that the plt. repeatedly promised to give him 20,000*l.* for his services; and he refers to various occasions when she uttered those or similar expressions, viz., "Your 20,000*l.* is safe." No contract, in the proper sense of that word, is even alleged by the deft.; but it was in respect of that species of promise that he brought his action and obtained a verdict, at Warwick, for 20,000*l.* against the plt. The Court of C. P. has held that such promises, if established, constituted no sort of obligation on which an action could be maintained. I therefore abstain from going more at large into that part of the subject. Even if I dissented from it, I should be bound by that decision; but, in truth, in every word of the able judgment delivered on that occasion I concur. It is strictly applicable to the case before me, so far as it depends on contract or promise; the only difference being, in that case a promise to pay 20,000*l.*; and in this a deed in performance of such a promise, conveying a reversion worth 20,000*l.* As a contract,

it cannot be supported; and if the deed of May 1859 be but substituted for the words "verdict for 20,000*l.*," in a passage from the judgment of the Lord Chief Justice, which I am about to read, the observation of the learned judge will apply accurately to the present case. The Lord Chief Justice points out strongly the injurious consequences which would follow from such a contract, could it be maintained. "The facts of the present case," observes his Lordship, "forcibly show some of the evils which would attend both on the advocate and on the client if the hiring of counsel were made binding. In this case the advocate, by disclosing words of intimate confidence which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount, and of that we hope we may say that there is no one in the profession of the *plt.* who would be willing to accept from him this verdict of 20,000*l.* as a gift." I say I hope and believe there is no one in the profession who would be willing to accept from him the reversion of the Swinfen estate as a gift. The transaction then cannot be supported on the ground of contract. If the transaction cannot be supported on that ground, how can it be supported on that of a moral obligation, the fair and equitable performance of which required this deed to be given? The facts supposed to raise that moral obligation are the following:—A gentleman of knowledge and ability in his profession becomes acquainted with a lady involved in a very peculiar and intricate mass of litigation, engrossing a large amount of public interest. She consults him on the subject; he gives her advice. She is struck with his views, and requests him to see her solicitor and to act as her counsel. He consents. He refuses to take any fees from her, and he ably conducts the litigation to a successful result. What moral claim do those facts give him upon her? I am unable to see any. If he pleased, he might have required to be paid as other advocates are paid. He preferred to act gratuitously. What was his motive in so doing? Did he do so from motives of friendship? or, because he thought that, by so doing, he should ultimately obtain a larger remuneration than if he had consented to take fees in the ordinary manner? If he acted purely from motives of friendship, then his services and sacrifices are repaid by friendship; and it is a violation of friendship to make it the cover to a larger reward than he would have obtained if he had been paid in the ordinary mode of remunerating counsel. But in neither case does any moral obligation rest with the client to remunerate the advocate in any other than the ordinary way. If he acted from motives of friendship, he is repaid by the regard and friendship of his client. If he acted from the desire for money, then he is entitled to be paid as other advocates are paid. But he cannot in a court of equity make that friendship the means of obtaining from his client lucrative advantages far exceeding those to which any man in the character of counsel could be entitled, whatever might have been his services or his sacrifices. But another view of this part of his case is wholly passed over by Mr. Kennedy. In no case, not even where the counsel acts gratuitously for his client as a friend, can the obligation be considered as resting all on one side. It is no slight advantage to a gentleman toiling up the arduous path of the profession of the law, to obtain the distinction of conducting to a successful termination a long and intricate litigation of great public interest, which attracts the attention of the public and turns upon him the eyes of the profession. That distinction Mr. Kennedy obtained, and he did so by means of the *plt.*, and it requires no great amount of foresight to predict that this distinction would have rapidly raised him to the eminence in the profession which his knowledge and abilities entitled him to fill, had it not

been for the unfortunate and ill-advised course which he has latterly thought fit to pursue. Mr. Kennedy began his long and elaborate address to me with the expression of satisfaction that he should now have what he had never had before, an opportunity of fully stating and explaining his whole case from the beginning to the end. To that I have listened attentively. But I have been both surprised and grieved at the mode in which he has done so, and at the tone with which he has thought himself justified in treating his opponent in this case. He has compelled me to advert to a circumstance in his defence, which I do with pain and reluctance. He has more than once intimated that the friendship between the *plt.* and himself assumed a warmer aspect than that of mere gratitude. He has dwelt elaborately on such passages in the *plt.*'s letters as seemed to him to assist his argument to me in that respect; and in his address to me he boasted that by reason of the intimate knowledge which he acquired of the lady in his private relations with her, he was able to do what the Lord Chief Justice of England when at the bar had failed to do, and, to use his own expression, "he was able to make her stand at Warwick a spectacle of scorn and derision to the whole court." Whether such insinuations are or are not founded on fact it is not my province to inquire. If they are true I should have supposed that a sense of honour and consideration for any lady so circumstanced would have induced him to abstain from any such allusions; the more so as they can only be prejudicial to his case, which rests on the absence of his possessing any undue influence over her. If the imputation be true, it proves how completely she was in his power; if it be untrue, I cannot venture to permit myself to express my opinion respecting such insinuations! This, however, is certain, that from the moment she informed him of her intention to marry a second husband, his conduct towards her has been marked with the most vehement animosity; and he now seems surprised, and in his address before me complains, that that has been met with a similar return of corresponding animosity on her part. He complains that, instantly on the decision in her favor by the Court of C. P., she exacted the payment of the costs of the action within four days, by the exercise or by the threat of every form of execution which the law allows; and he then asks whether it is likely that he should have possessed any influence over a person actuated by such motives and imbued with such feelings towards him? But Mr. Kennedy should remember, that when former friends become enemies, the extent of their mutual hostility is usually proportioned to, and measured by, the depth of their former friendship. The question before me is not what are the feelings of the *plt.* now, or what they were towards him after the trial at Warwick? but what they were in April and May 1859, when he obtained from her the execution of this deed? After listening attentively to Mr. Kennedy's long and elaborate speech, and after reading and considering the evidence, I have arrived at the conclusion that the *deft.* possessed a great and overpowering influence over the mind of the *plt.* at that time; and that he exerted that influence to obtain from her this deed. I am also of opinion that the deed cannot be supported on any ground of contract or of promise; and that it cannot be supported on any ground to the effect that it was made in the due performance of any moral obligation. My decree, therefore, is that the deed must be delivered up to be cancelled. Mr. Kennedy must reconvey the reversion, and he must pay the costs of this suit.

Solicitors for the *plts.*, John and Charles Cole, agents for Charles Simpson.

Solicitor for the *defts.*, C. H. Esdaile.

Tuesday, Nov. 10.

JENNINGS v. RIGBY.

Administration—Unregistered judgment-creditor—Priority—23 & 24 Vict. c. 38, s. 3.

A. died intestate in Sept. 1862 and letters of administration to his estate and effects were granted to his widow. Two creditors of the intestate then obtained judgment against the administratrix. In Dec. 1862, the usual administration decree was made in this suit. At that time the judgments were not registered. In the administration of the assets, the simple contract creditors of the intestate insisted that the unregistered judgment-creditors had no priority over them. It was, however,

held, that the unregistered judgment-creditors were entitled to be paid before the simple contract creditors.

The 23 & 24 Vict. c. 35, s. 3, observed upon; and Gaunt v. Taylor, 3 M. & G. 886, 11 L. J. 68, C. P., followed.

This suit was instituted for the administration of the estate of an intestate, who died in Sept. 1862. Letters of administration to his effects were granted to his widow. Two creditors of the intestate afterwards obtained judgments against the administratrix. The usual administration decree was made in the suit in Dec. 1862. The two judgments were not registered till after the decree was pronounced. The chief clerk, by his certificate, found that the judgment-creditors of the intestate, who had so obtained their judgments against his administratrix, were, notwithstanding that those judgments were unregistered when the decree was pronounced, entitled to be paid in priority to the simple contract creditors of the intestate; but, as between themselves, according to the dates of their respective judgments. The question was, whether the chief clerk's certificate was correct?

Selwyn, Q.C. and De Gez appeared for the simple contract creditors, and contended that the 23 & 24 Vict. c. 38, s. 3, deprived all unregistered judgment-creditors of "any preference against heirs, executors, or administrators in the course of their administration of their ancestor's, testator's, or intestate's effects."

They cited

2 & 3 Vict. c. 11, ss. 1, 2 and 5;

Fuller v. Redman, 26 Beav. 601; s. c. 33 L. T. Rep. 313;

Bird appeared for one of the unregistered judgment-creditors, and contended that the 23 & 24 Vict. c. 38, s. 3, applied only to judgments obtained against the testator or intestate in his lifetime, and not to those obtained against the administratrix. He cited

4 & 5 Will. & M. c. 20, s. 11;

Gaunt v. Taylor, 3 M. & G. 886; 11 L. J. 68, C. P.

as to undocketed judgments, under the old law.

W. Pearson appeared for the other unregistered judgment-creditor, and cited the

23 & 24 Vict. c. 38, s. 4.

H. Humphreys appeared for the administratrix.

Selwyn, Q.C. in reply.

The MASTER of the ROLLS.—I am of opinion that the case of *Gaunt v. Taylor* is too strong to be disregarded in the present one. The 2 & 3 Vict. c. 11, put an end to the docketing of judgments, which was required by the 4 & 5 Will. & M. c. 20. The result of that change in the law was this: a judgment might have been recovered against a testator or intestate in his lifetime, of which judgment his personal representative might have no notice; and then, if the representative paid the simple contract creditors before such judgment-creditor, he was guilty of a *devastavit*. That was felt to be a great hardship. Then came my decision in *Fuller v. Redman*, in which I held that

dockets being put an end to by the 2 & 3 Vict. c. 11, the old law was restored; that that being so, I had no option in the matter, but was compelled to disallow to the administrator, in that case, moneys which he had *bond fide* applied in the payment of debts as against a debt due on record, of which he really had no notice. After that case was decided by me, Lord St. Leonards procured the 23 & 24 Vict. c. 38, to be passed, in order to get rid of the very difficulty which arose in *Fuller v. Redman*. He did succeed in remedying the evil he sought to reach; but at the same time he did not think it necessary to make any declaration or enactment as to judgments entered up against a representative of a testator or intestate. *Gaunt v. Taylor* had decided that the provisions of the previous Act of Parliament, the 4 & 5 Will. & M. c. 20, did not apply to the case of undocketed judgments recovered against a personal representative. The learned judges did not give their reasons for the decision in that case; but a personal representative must have notice of any judgment entered up against himself. He must know of it; and it may well therefore be that Lord St. Leonards thought it unnecessary to provide specially against any liability on the part of a personal representative to a *devastavit* for preferring simple contract to judgment creditors. In truth, I am of opinion that the present case is governed by that of *Gaunt v. Taylor*. The course to be pursued, therefore, in the administration of the assets in this case will be, first, to pay the costs of all parties to the suit as between solicitor and client; then the specialty debts of the intestate; then the judgment-debts recovered against his administratrix; and then to apply the rest of the estate in satisfaction of the simple contract creditors. The judgments obtained against the administratrix must take priority, *inter se*, according to their respective dates.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSHANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Wednesday, Nov. 4.

(Before the LORD CHANCELLOR (Westbury).

Ex parte GILL, *re* ALLEN.

Bankruptcy—Separate and late partnership creditor.

Where a firm has dissolved partnership, and one of the late partners becomes bankrupt, there is no foundation for the doctrine that the separate creditors of the bankrupt must be paid off before the partnership can be admitted as a creditor.

This was an appeal from an order of Mr. Commissioner West, whereby he rejected a proof for a sum of 717l. 14s. 3d. tendered on behalf of Messrs. Gill, Bishop and Hewitt against the estate of Frederick Allen, a bankrupt.

Allen was in partnership with Gill, Bishop and Hewitt, as cloth merchants, at Leeds, under the style of "John Purchon and Co.," for a term of five years, from the 1st July 1855. This partnership expired by effluxion of time on 30th June 1860.

Allen was adjudicated a bankrupt on a petition dated the 1st Aug. 1862, and on the 6th Dec. separate notices of claim for a sum of 650l., and of a motion to reserve dividends on that amount, were served and filed on behalf of Gill, Bishop and Hewitt.

On the 19th the motions came on to be heard before the commissioner, and it was then by consent referred to Mr. George Young, the official assignee, to find what was due between the parties. The official assignee made his report on the 21st May last, whereby he found that at the date of the petition there was a balance due from Allen to Messrs. Gill, Bishop and Hewitt, including interest, of 717l. 14s. 3d. He

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also found there was not anything due from Allen to either of the three partners severally. Also that Allen claimed to set against the above balance a sum of 794*l.* 19*s.* for cash paid by him, as he alleged, for goods on account of the late partnership firm, for which Allen had produced receipts, but of which goods no trace could be found in the books of the late partnership firm, nor was the payment for the same entered in such books.

Upon the partners applying to prove against the estate of Allen for the 717*l.* 14*s.* 3*d.*, the learned commissioner on the 17th July last, rejected the proof on the ground that it could not be admitted against Allen's estate before the separate creditors of Allen had been paid in full. He considered himself bound by the remarks of Lord Eldon in *Ex parte Reese*, 9 Ves. 590; and by the decisions in *Ex parte Nolley*, 1 M. & A. 47, and *Ex parte Harris*, 1 Rose, 437.

Against this order Messrs. Gill, Bishop and Hewitt appealed.

Daniel, Q.C. and *De Gez* supported the appeal. They were stopped by the Court.

Bacon, Q.C. and *Rozburgh* supported the commissioner's order.

The LORD CHANCELLOR (without hearing the reply).—After an examination of the partnership accounts has been made, the creditors who appear as claimants on the present occasion make a demand against the bankrupt, as the result of taking this account for the sum of 717*l.* The commissioner has rejected that claim, on the ground that the separate creditors of the bankrupt must be paid off before the partnership can be admitted as a creditor. I need not say that that ground of decision is wholly untenable, and the cases which are referred to have no reference whatever to the present. That ground of decision must therefore be entirely overruled. Then it has been said on the part of the bankrupt, that the report of the official assignee to whom, after the bankruptcy, the assignee and the partners referred the question of liabilities and debts, after finding that the sum of 717*l.* was due to these partners at the date of the bankruptcy, states that the bankrupt claimed and alleged that a larger sum was due to him in respect of goods which he had bought and paid for, but with regard to which no trace was to be found in the partnership books, either of the goods themselves, or of the payments. I must take that merely as a special circumstance stated by the official assignee, who is much more bound by the facts appearing on the case than by a mere statement or allegation of the bankrupt. Therefore, if it were my duty to proceed further, and to adjudicate upon this case, I should be compelled to look upon this statement as a mere voice by the bankrupt, a mere assertion by the bankrupt, of which he has adduced no proof whatever. I cannot therefore permit such a statement to prevail. Let the proof be admitted; the apps. to take back their deposit. I cannot listen to the suggestion that there may or may not be separate debts due from Allen's estate.

Solicitors: for the apps., *Singleton and Pitman*, agents for *Barret*, Leeds; for the resp., *Williams, Hill and Co.*, agents for *Burd and Barwick*, Leeds.

Ex parte COLLINGE, re HOLDSWORTH.

Bankruptcy—Proof by partner.

Where two partners A. and B. had dissolved partnership, on the terms of B. handing over to A. his share of the joint assets, and A. entering into a bond to pay B. 10,000*l.*; and afterwards A. became bankrupt; proof against A.'s estate for the debt was not permitted, although B. had, since A.'s bankruptcy, handed over all his estate to trustees for the benefit

of his creditors, and his separate creditors (or all except one) having renounced their claims, it appeared that the proof would virtually enure to the benefit of the joint creditors of the late firm:

The rule that a partner is not to be permitted to prove against the separate estate of his copartner until the joint debts are paid, is not framed for the benefit of the joint creditors solely; the ground of it being, that a man is not to be allowed to do that whereby he may possibly come into competition with his own joint creditors.

This was a special case on behalf of John Collinge, Samuel Fox, Henry Bagshawe, Matthew Henry Habershon and David Davy; the trustees of an assignment dated the 14th Nov., and executed by Major George Elliot Ashburner.

In Sept. 1861 Harry Holdsworth, since bankrupt, and then carrying on the business of a hardware manufacturer at Sheffield, took Major Ashburner into partnership, and articles of partnership dated the 2nd of that month were executed between them. The terms were, that the partnership should continue for seven years from the date; that the Major should bring in 8000*l.*; and that the capital of Holdsworth should be the net value of the buildings, plant, machinery, stock-in-trade, book-debts and effects in the business then carried on, which had been computed to amount to a like sum; Holdsworth guaranteeing that the debts to be paid out of the assets did not exceed 9300*l.*, consisting of the following items—bank and mortgage, 2000*l.*; acceptances, 4000*l.*; accounts owing, 3300*l.*; and also that the ledger accounts then owing were not less than 4500*l.* If the profits amounted to 2500*l.* a year and upwards, they were to be divided; if not, the Major was to receive 1200*l.* a-year out of the profits. If the profits did not amount to 1200*l.* in any year, the deficiency was to be a first charge on the profits of the next year in favour of Major Ashburner. All losses were to be divided equally. Further advances on the part of either partner by way of increased capital were to bear 5 per cent. interest.

By a bond of even date, Harry Holdsworth, as principal, and William Holdsworth, as surety, became jointly and severally bound in the sum of 2000*l.* to secure the capital against debts over and above the sum of 9300*l.*, and against a deficiency in the ledger credits below 4500*l.*

The business was carried on under the style of Harry Holdsworth and Co., and Wright, Holdsworth and Co., until the dissolution of the partnership on the 2nd Sept. 1862, under the management of H. Holdsworth alone. During this period Major Ashburner paid in sums, as capital, amounting together to 9956*l.*

The deed of dissolution of the above date recited that Major Ashburner was about to proceed to India, and that the partners had agreed to dissolve; and it was thereby agreed that H. Holdsworth should remain in possession of the stock-in-trade and assets, taking upon himself the debts and obligations, and undertaking to pay to Major Ashburner 10,000*l.* In pursuance of this agreement, by a bond of even date, H. Holdsworth, as principal, and William Holdsworth, as surety, became bound in a sum of 20,000*l.*, to secure payment of the above sum and interest at 15 per cent. The deed contained a covenant that the Holdsworths would within nine months pay and discharge all the debts and liabilities of the late partnership, and indemnify Major Ashburner.

On the 25th Sept. 1862 H. Holdsworth sent Major Ashburner cheques and promissory notes to the value of 1275*l.*, the cheques being drawn by H. Holdsworth on his bankers in the name of Wright, Holdsworth and Co., and made payable to the bearer, and the notes drawn by H. Holdsworth in the name of H. Holdsworth and Co., and made payable to the order of Major Ashburner. One

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of the cheques for 200*l.* was paid, the other cheques and notes were delivered over to the assignees of the bankrupt before the 14th Nov. 1862.

Major Ashburner alleged that the cheques and notes were so drawn in pursuance of a verbal agreement between him and his partner, when the dissolution was being arranged, that this sum should be paid for interest and share of profits due to him.

Notice of dissolution appeared in the *Gazette* on the 5th Sept. 1862.

The bankruptcy took place on the 14th Oct. 1862. On the 3rd Nov. following a private meeting of the creditors was held, at which a resolution was passed that the bankruptcy should be proceeded with, upon the net estates being handed over to the trustees; that the meeting was anxious to save Major Ashburner from bankruptcy; and that upon certain private creditors of his to the amount of 5545*l.* releasing all claims against the joint and several estates, an assignment should be taken from Major Ashburner. It was also resolved that the estate so released should be distributed precisely as if both parties had been bankrupt under a joint petition, "to the intent that the respective rights of all the creditors be preserved."

By the deed above mentioned, dated the 14th Nov. 1862, and made between H. Holdsworth of the first part, Major A. of the second part, the above-named trustees of the third part, and the several other persons being creditors in their own right, or in co-partnership of Holdsworth and Ashburner, or of one of them, whose names were thereto affixed or set, and all other the creditors of Holdsworth and Ashburner, or either of them, of the fourth part (but which deed had as yet been executed by Major A. alone), after reciting the above resolutions, it was witnessed that Major A. assigned to the trustees all his real and personal estate upon the trusts thereafter declared, and it was agreed and declared that the trustees should stand possessed of the effects of H. Holdsworth and of the property thereby assigned by Major A. for the benefit of the creditors of Holdsworth and Ashburner in a like course of administration as if the bankruptcy had been annulled by a joint adjudication against the two, and as if the estate so assigned had been vested in the trustees as the assignees under such joint adjudication. It was also declared that there should be reserved to the parties of the third and fourth parts all such rights and privileges as they were respectively entitled to by virtue of the law and practice in bankruptcy. There was also an indemnity and release of Major A. personally by the several parties of the third and fourth parts in respect of their respective debts.

It was also declared that, in case a petition for adjudication should be presented against Major A., or in case any of the said private creditors should, in any way, seek to participate in the benefit of the present indenture, or in case they, or any of them, should not, within six months, by deed release all claims against the joint and several estates of Holdsworth and Ashburner, and each of them, then the release therein-before completed should cease and be void.

This deed was duly registered under the 194th section. The separate creditors named in the deed had released their debts, and the only remaining separate creditor of which the parties had notice was the Sheffield and Rotherham Banking Company, who claimed to prove for 1000*l.* on the joint and several promissory note of Major A., H. and W. Holdsworth. This sum was part of a joint debt of 5374*l.* 4*s.* 6*d.* claimed by the banking company, and for which they held title-deeds on deposit as securities, but not of admitted sufficient value to cover the claim. The bank had claimed to prove the 1000*l.* against the separate estate, but the proof had been rejected on the ground that the securities had not been realised.

At a meeting of the bankrupt's creditors held on

the 17th Nov. 1862, when the above-named trustees were appointed creditors' assignees, a resolution was passed whereby, after reciting the above deed, it was resolved that there should be reserved to the creditors of Holdsworth and Ashburner, and each of them respectively, all such rights and privileges as they respectively were now entitled to, under or by virtue of the law or practice in bankruptcy. These resolutions were confirmed by the court.

The trustees submitted that the bond of the 2nd Sept. was a valid and subsisting bond, and that the moneys due thereon passed by the assignment of the 14th Nov. 1862 upon the trusts thereof, and that the trustees were entitled to prove against the bankrupt's estate for the amount secured by the bond, and also for the sum of 1075*l.*

On behalf of the bankrupt's estate, it was contended that there could be no such proof.

The question submitted to the court was, whether the trustees were entitled to prove for the above two sums.

On the 1st. Aug. last Mr. Commissioner West held that the trustees were not so entitled, on the ground of the established rule that a partner cannot prove for a debt against the estate of his copartner so long as there are other creditors remaining unpaid.

The balance-sheet on the file showed the following figures:—Separate estate, liabilities, 23,067*l.* 8*s.* 8*d.*; assets (including property given up to assignees), 29,005*l.* 3*s.* 6*d.*; surplus, 5937*l.* 14*s.* 10*d.* Joint estate, liabilities, 21,899*l.* 5*s.* 3*d.*; assets, 3373*l.* 17*s.* 6*d.*; deficiency, 18,525*l.* 7*s.* 9*d.* It was stated that the separate creditors had already received 6*s.* in the pound, and might, perhaps, expect 3*s.* or 4*s.* more; whereas, the joint creditors probably would get no more than 1*s.*

Bacon, Q.C. and Swanston now appeared in support of an appeal against the above decision.—They did not deny the existence of the rule, but argued that under the peculiar circumstances of this case it was not admissible. The rule was established for the benefit of joint creditors, but in this case it worked precisely the reverse, because, if acted upon, it would keep from the joint creditors of Holdsworth and Ashburner the value of the proof for 11,075*l.* The rule was not to be extended to the positive damage of joint creditors. In this case it was manifestly unjust that the separate creditors should receive dividends on their claims, and that Major Ashburner, whose claim was equally valid, should receive none. The 1075*l.* was paid in respect of profits; and the 10,000*l.* security was given in return for the major's advances. If the proof were admitted, whatever it realised would become the separate estate of Major Ashburner; his separate creditors were removed by the deed, there were no private debts, and the only separate debt was the claim of the bank, which was moreover a partnership debt. All the balance therefore would go to the joint estate, and be for the benefit of the joint creditors. The rule only applied where the partner's proof was in competition with his own creditors, which was not the case here.

Ex parte Lillioe, 1 Gl. & J. 382.

Giffard, Q.C. and H. Humphreys, contra, were not called upon.

The LORD CHANCELLOR.—I am very sorry for the circumstances of this case, and for the loss and suffering which has been incurred by Major Ashburner. But I am not at liberty to allow this proof to be entered. The facts of the case are beyond the possibility of doubt; the law has been established time out of mind. Major Ashburner became a partner with Holdsworth in 1861. The partnership was dissolved in Sept. 1862. Holdsworth and his brother gave a bond for 10,000*l.*, and Major Ashburner in return transferred and released to Holdsworth all his estate and interest in the partnership, so that all the joint estate became con-

verted into the separate estate of Holdsworth. An application is now made to prove for that debt against the separate estate. Unfortunately there are large creditors of the firm of Holdsworth and Ashburner. The rule is that a partner cannot prove for a debt so as to compete with the joint creditors. A joint creditor cannot make a claim against the separate estate; a joint creditor cannot be paid out of the separate estate until the whole of the separate creditors have been paid. But it is quite a mistake to suppose, as it has been argued, that the objection to a proof against the separate estate of a partner is made by joint creditors, or for the benefit of joint creditors. The rule enures just as much for the benefit of separate creditors. "You must first of all release the separate estate from all possible liability to joint debts." That lies in the mouth of the separate creditors to say. It has been erroneously supposed to lie in the mouth of the joint creditors only. It has been ingeniously argued that under the peculiar circumstances of this debt, substantially the ground of the objection to the proof against the separate estate has been got rid of. I do not think, however, that the circumstances touch the objection in the smallest degree. The rule remains, that, so long as there are joint debts, and there is the possibility of those joint debts being brought upon the separate estate, a partner who is liable for these joint debts shall not make any claim against the separate estate, because by possibility he may come into competition with his own joint creditors. That principle is the foundation of the rule, and this ingenious argument does not touch upon its grounds in the slightest. It appears that, after the bankruptcy, an assignment was made of the separate estate of Major Ashburner, including this debt of Holdsworth for the benefit of the joint creditors, probably so far converting his separate assets into joint assets. But that circumstance is of no avail whatever, unless the joint creditors are willing to accept that assignment as payment in full, and to release the joint liability. If that were done, and there were no longer any joint liability to which Major Ashburner was exposed as partner, there would remain no objection to his proof against the separate estate. But this debt must be brought forward as a bond-debt due to Major Ashburner, not to the joint estate, and the objection still remains, that a partner is not to be permitted to prove whilst there is any portion of the joint liability remaining. The resolutions of the creditors on the subject are out of the question, unless the meeting was held under some parliamentary powers; but nothing of the kind is pretended. Whilst the possibility remains of a partnership debt being claimed, no separate debt can be proved. I think that the learned commissioner came to a right conclusion. The appeal must be dismissed, but without costs; the deposit to be returned.

Solicitors: for the apps., *Dobinson and Gears*, agents for *W. and B. Wake*, Sheffield; for the resps., *Johnson and Weatheralls*, agents for *Smith and Burdakin*, Sheffield.

Thursday, Nov. 5.

(Before the LORD CHANCELLOR (Westbury.)

REEVE v. WHITMORE.

MARTIN v. WHITMORE.

Deed—Construction—Assignment of existing chattels with licence to enter and seize future property.

By deed, in 1858, S., a brickmaker, assigned to H. by way of mortgage "all and singular the stock of bricks then being, or at any time thereafter to be," in and upon the brickfield which was in his possession. By another deed, in 1859, to which H. was party, and which recited the deed of 1858, in consideration of an advance by G., S. assigned to G. all and sin-

gular the prepared clay, &c., and stock of bricks "in and upon" the said brickfield. The deed contained an agreement that G. might, when he pleased, put a manager into possession of the property, and further witnessed that S. granted to G. full licence, power and authority, during the continuance of the security, to enter upon the said brickfield and to seize, hold possession of and sell, the clay, bricks, machinery, plant, &c., "which might be in and upon the said premises, in like manner as if the same formed part of the chattels and effects thereby assigned or intended so to be."

Held, upon the construction of the latter deed, that it operated as an assignment of those chattels only which were on the premises at the date of the security, with a power to the mortgagee at any future time during the continuance of the security to enter and seize the property which he might then find there.

This was an appeal on behalf of Messrs. Martin, defts. (by amendment) in the first suit, and plts. in the second suit, against a decree of Kindersley, V. C.

The facts will be found fully stated in the report of the case in the court below: (7 L. T. Rep. N. S. 839.)

J. H. Palmer, Q.C. and *T. Stevens* supported the appeal.—They contended that the intention of the parties to the deed of May 1859 manifestly must have been to have assigned not only the bricks, &c. then on the premises, but all future property. It would be absurd to suppose that the mortgagee would have advanced his money on any less security. This being so, the frame of the deed arose from a desire to pass not only the equitable but the legal title. This then was not a mere licence, it was a licence accompanied with and auxiliary to a grant. In *Holroyd v. Marshall*, 7 L. T. Rep. N. S. 172, the contract was held to extend to after-acquired property. A power of attorney when given for valuable consideration is not revocable: (*Bromley v. Holland*, 7 Ves. 28.) Reference was also made to the remarks of Vaughan, C. J., referred to in *Wood v. Leadbitter*, 13 M. & W. 844. On the second point they contended that Simpson must be held to have had constructive notice of the deposit by Green with them, owing to the business relations subsisting between the two.

Glasse, Q.C. and *Wm. Pearson*, for the plt. *Reeve*, and

Baily, Q.C. and *Fry*, for the deft. *Hendrick*, were not called upon.

THE LORD CHANCELLOR.—This case has been very well argued, but having regard to the limited extent of the declarations given in the decree with which I have to deal, I do not think it right to interfere with that decree. The principal question, which is concluded by the first declaration in the decree, is, whether the assignment by way of mortgage from Simpson to Green operates as a present contract with respect to the bricks and the clay and the materials that might thereafter be brought upon the premises by Simpson. If there were upon the face of the decree either expressly, or if there could be collected from the provisions of the deed by necessary implication, a contract or agreement between the parties that the mortgagee should have a security attaching immediately upon future chattels to be brought on the premises, then undoubtedly the case would have given to the mortgagee, Green, a present interest in all those materials, whether manufactured or raw, which might be brought on the brickfield after the date of the security. But it is quite clear that, so far as express words are concerned, there is nothing of the kind to be found. It is quite clear that the language of the instrument is confined to its being a contract, and a transfer touching only the chattels and effects which at the time were on the brickfield; and nothing can illustrate that more forcibly than the circumstance that

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the nature and terms of the present security to Green are brought by the recitals on the face of the instrument in direct contrast with the terms of the antecedent transfer to Hendrick. There is a recital distinctly stating that the contract with Hendrick was not limited to the then existing materials and manufactured articles, but extended also to those that might, during the security, be brought on the premises. But, for some reason or other, the grantor of the deed declined to follow the example of that security, and limits the operation of the transfer to Green, so far as the transfer is concerned, to the property then upon the premises, and the transfer follows the recitals of the deed; and therefore the contract and the transfer are perfectly harmonious and co-extensive. But then there are found in the deed two things which exclude the notion of there being at that time any contract with regard to a present interest in the property to be afterwards acquired; and those two provisions are, first of all, the stipulation that it should be competent to Green, if he pleased, to put a manager in possession of the brickfield; and, secondly, and most materially, that distinct power which is given to Green in the final clause of the deed to enter upon the premises and seize and dispose of the property in the shape of bricks, manufactured and unmanufactured articles, which he might find there at any time. Now, if these provisions prevent my arriving at the conclusion that I can imply a contract which would be in point of fact to extend the operation of the deed beyond the distinct words in the operative part and beyond the recitals, and to make the deed have an effect which to a great extent would supersede and render unnecessary the provisions that I have referred to—if that be so, the inquiry is simply this, whether the deed may not be accurately represented as being a contract, and a security to the extent of all the manufactured articles and raw materials and machinery then upon the premises, and a contract that the mortgagee should have a power at any time he pleased of entering upon the premises and seizing the manufactured and raw material that he might find there, even although those things so seized were not upon the premises at the date of the security. The difference, therefore, is very clear and distinct with regard to the operation of the deed. It is the difference between a present contract that the mortgagee should have a right and an interest attaching immediately by force of the contract upon all that property which in future might be brought on the premises, and a contract that the mortgagee should have a power of entering upon the premises for the purpose of seizing and taking possession of that future property. The contract that he should have a power to seize appears to me to be perfectly distinct from a contract that he should have a present and immediate right which would attach *instantly* upon the property brought upon the premises without the act of seizure. I think he has no such thing. I think the true extent and operation of the deed was merely this, that he has passing to him, by virtue of the contract, a right and a security on, and an interest in, all the then existing property, and the security is accompanied by a power enabling him at any time to enter upon the premises and take the future property that might be found there. But a power is a very different thing from an interest, and if the extent and limit of the contract be merely that he should have such a power, then an interest would not arise under the power till the power was exercised, subject, however, to the observations that I shall hereafter make with reference to the exercise of that right. I think this case has been rightly decided by the V. C., when he declared that the instrument of May 1859 did not operate or take effect as an equitable assignment of any clay, bricks, and so forth, which were not then on the brickfield. I

think it did not, because I think there was no present existing contract that, immediately on the execution of the security, the mortgagee should have such right, title and interest with respect to such future property. If there had been such a contract, it would have been an assignment, and would have fallen within the principles explained by the H. of L. in the case of *Holroyd v. Marshall*. Now the second point to which the decree refers, and which it concludes by declaring, is merely this, that the depositaries, namely, the Messrs. Martin, the bankers, who took an equitable mortgage by way of deposit of this mortgage to Green, not having given notice, the mortgagors are bound by the subsequent transactions between the mortgagor and the original mortgagee in relation to that mortgage. It has been urged before me that the *evidentia rei* arising from the circumstances proves that the mortgagor, Simpson, must have had notice of the banker's interest. If it be granted that the evidence extends thus far, that Simpson either knew or had reason to believe, that the money he received from Green was obtained from the bankers, it would stop very far short of giving to Simpson any ground for inference or knowledge that the bankers had become the depositaries of this security. I cannot—because it is probable that Simpson knew that Green was indebted to his bankers for assistance—infer that Simpson ought to have known that this particular mortgage had been deposited with those bankers. I think those two declarations are perfectly correct. I think, having regard to the inquiries directed, and which I see no reason to disturb, that the V.C. was quite right in not going further to conclude the remaining point, which must be considered as remaining open and unaffected by this decree. That point is this: It appears that Reeve, the subsequent mortgagee—that is, the mortgagee of the equity of redemption to Simpson—entered, by virtue of his mortgage, into possession of the property then being on the brickfield, and it appears that Reeve had express notice of the security to Green. He had express notice, therefore, of the power given to Green, and I think it clear that, whilst Reeve continued in that position, the property not being converted into money, it would have been quite competent to Green, and the assignees of Green, either the bankers or his assignees, to have entered upon Reeve being so in possession. *De facto* it appears that the assignees of Green did enter, but then their entry would not avail for the benefit of the bankers, save so far as there was any money due to Green, at the time of his bankruptcy, upon the security deposited with the bankers. But inasmuch as the court intervened in that state of things before the property was realised, and whilst Reeve remained in possession, I think the equities of the parties ought to be determined by a reference to what might have been done by any one of the parties under the powers given by their security, and that therefore their priorities will be regulated by a reference to those powers. I do not find any necessity for infusing any words into the decree to keep that matter open, because it is not concluded by any declaration. It will arise more conveniently and certainly after the answers have been given to the inquiries; but I advert to it only for the purpose of observing, that I do not consider that point to be at all prejudiced or involved by or in anything that the V.C. has done. I must affirm the decree so far as it is appealed from, and of necessity I must dismiss this petition of rehearing with costs.

Solicitors: for Reeve, *George Waller*; for Hendrick, *Thomas Davies*; for the Messrs. Martin, *Charles Stevens*.

Monday, Nov. 9.

(Before the LORDS JUSTICES.)

SMITH v. LEVEAUX.

Principal and agent—Accounts—Mutuality—Remedy at law.

The defts., a mercantile firm, employed the plt. as their traveller and agent, under an agreement that he should receive a commission of 7½ per cent., and an allowance of 3½ per cent. on all orders received from his friends first introduced by him. Disputes having arisen between the parties the plt. filed his bill, praying for an account of this commission and allowance, but the bill did not allege that there was any obligation on the part of the defts. to keep the accounts, or that there was any mutuality or complexity of accounts:

Held (reversing a decision of Wood, V.C.), that the plt.'s bill must be dismissed, and with costs, as the bill presented a case merely of contract on the part of the defts. to pay a certain commission, for which the proper remedy would be by an action at law.

This was an appeal by the defts., who carried on trade as wine merchants at Liverpool under the style or on behalf of the Hungarian Vineyard Company, against a decree of Wood, V.C., directing, amongst other things, an account of what was due to the plt. for commission on all orders for wines and brandies obtained by him or through his introduction. The circumstances were as follows:—

The plt. was a commercial traveller, and for some time previously to the year 1860 he had been employed by the defts. as their agent for a considerable district in England, upon certain terms, which were stated in the bill to have been, that the plt. should receive a commission of 7½ per cent. upon all orders obtained by him through his connections and friends, and executed by the defts., and although the evidence went to show that the original terms involved the payment of a higher rate of commission, it was clear that in Jan. 1860 the deft. Mr. Edward Leveaux, in a letter to the plt., informed him that his firm could not continue to pay so high a commission, and offered him the 7½ per cent. already mentioned. For the purposes of this report, however, this question of the rate of commission is not material, and it will be sufficient to state that on the 23rd July 1860 the deft. Edward Leveaux wrote a letter to the plt., which, after touching upon several matters of business, contained the following passage:—

“Now as regards the commission, I am most anxious that it should be as remunerative as possible with the successful working out of the business. To keep at our present prices for brandy, port, sherry, &c., I find it will not suit to allow a higher commission than the following, and particularly as I have had to give up a highly lucrative portion of our business so that I might have time to travel entirely in the Hungarian wine trade. On all business done by yourself, either in London or your district, 7½ per cent., where our full prices and shipping arrangements are adhered to, and of course only on good debts, and an allowance of 3½ per cent. on all orders received from your friends, first introduced by you, so long as you continue to exert yourself in the working out of the business, and are engaged in the selling of our Hungarian wines and spirits; but of course we could not bind ourselves in perpetuity to such an allowance, as you might cease to represent those interests, and then, of course, the allowance would cease at the same time. Such a contingency, I hope, however, is not likely to occur.”

These terms were accepted by the plt., in a letter written to the defts., dated the 1st Aug. 1860, but very soon afterwards the plt. became discontented with the extent of the district assigned to him, and required an extension of it; this was refused by the defts., and

thereupon the plt. wrote declining their agency from the day of his letter; upon this the plt. and the deft. Edward Leveaux met, and it was arranged that the plt. should continue his agency upon the former terms, but with this addition, that he should also receive 3½ per cent. commission upon orders to be obtained from such of his friends and connections as were not within the district assigned to him.

Subsequently disputes upon the accounts arose between the parties; the plt. ceased to act as agent for the defts. in Sept. 1861, and in the following year he filed this bill for an account of what was due to him, and for payment.

The foregoing statements were in substance admitted to be accurate, but the defts. did not demur to the bill, on the ground, as stated by their junior counsel during the argument of the appeal, that the bill and instructions were not laid before him within the time limited for demurring alone (namely, within twelve days after appearance), but the answer contained the following submission on their behalf: “We submit that this bill should not have been filed, and that the plt.’s remedy (if any) is by an action at law.”

Voluminous evidence was gone into in the suit, and defts. had filed a concise statement and interrogatories, upon which the plt. himself was examined, and the cause came on for hearing before Wood, V.C. early in June last, when his Honour, in pronouncing the decree already mentioned, thus expressed himself: “I am anxious to give my reasons for not acceding to Mr. Jessel’s view on the question of law. I should be most unwilling to do anything which would have the appearance or effect of throwing any doubt upon the decisions in *Dinwiddie v. Bailey*, 6 Ves. 136, and *Phillips v. Phillips*, 9 Hare, 471, that when the receipts and payments are wholly on one side this court will not take the account at the suit of an agent; that is to say, where it consists of receipts by A. on account of B., and payments made by A. on account of B. When the receipts and payments are wholly on one side, you cannot have an account; but where each side has been paying and receiving, having mutual confidence in each other, then the account arises. Mr. Jessel’s argument would have been perfectly right if it had been the case of a simple commercial traveller, if the defts. had not entered into a contract on their part, that for everything they sold upon the plt.’s introduction, and which of course he could know nothing of, they would pay him a commission of 3½ per cent.; therefore, the whole thing, as I apprehend, arises, and the defts. are brought here, and the account of that commission must be taken.”

The decree was therefore to the effect stated above, and the defts. appealed against the whole of it.

Willcock, Q.C. (with whom was *Rozburgh*) supported his Honour’s decision, contending that this was not a mere one-sided account, but one in which there was mutuality, and that the plt. himself possessed no means of knowing what orders were received from his own friends and connections, of which the defts. were bound to give him discovery. The plt. was not a mere agent or traveller for the defts.’ firm, but by the agreement he was entitled to participate in the profits, and the account which the bill sought could not have been obtained at law.

G. M. Giffard, Q.C. and *Jessel* supported the petition of appeal, and alleged that there was no equity disclosed upon the bill. There was neither mutuality nor complexity of accounts, nor was there any trust reposed in the defts. by the plt. The plt.’s only remedy was by an action at law, and he was mistaken in filing his bill, which ought to be dismissed. As to the discovery it was needless, for the plt. knew who the friends and connections introduced by himself to the defts. were, and might obtain all the information he required by an application to them.

The authorities referred to during the argument were

The North-Eastern Railway Company v. Martin, 2 Phil. 758;

Phillips v. Phillips, 9 Hare, 471;

Padwick v. Stanley, 1b. 627;

Foley v. Hill, 2 H. of L. Cas. 28;

Padwick v. Hunt, 18 Beav. 575;

Willcock, Q. C. having been heard in reply,

Lord Justice KNIGHT BRUCE said, that it appeared to him that the present bill stated a case for an action at law, but not such a case as would entitle the plt. to file a bill in equity. It did not fall within those principles as to account and agency upon which, when there was jurisdiction both in courts of law and of equity, that joint jurisdiction was based. He was unable, with great deference to the learned V. C., to come to the same conclusion as that at which his Honour had arrived, for it appeared to him to be solely a case of legal right, and, considering the established rules of this court, there was neither account nor agency within the meaning of those rules. The bill might have been demurred to, and it must be now dismissed.

Lord Justice TURNER said, that he should have hesitated to pronounce an opinion at variance with that of Wood, V.C., immediately and without further deliberation, if the subject had not been recently under his consideration; but as he had lately given full consideration to the subject, he thought that no benefit would arise from deferring his judgment in the present case. It had not been contended by the plt. that there would be any possible right in him to file a bill for an account, unless on the ground that it was the duty of the defts. to keep an account of their receipts, so far at least as concerned that portion of their business in respect of which the plt. was entitled to a commission, namely, on the orders received by the defts. from friends and connections of the plt. But, in the first place, the bill contained no allegation whatever that there was any contract by the defts., or that it was any part of their duty, to keep any such account; in the next place, it was not every contract which of necessity created such a trust as would justify this court in interfering; and in the third place, there appeared in this to be nothing more than a simple contract by the defts. to pay the plt. a commission upon the orders to be obtained from his friends and connections, and if the plt. could maintain a bill under such circumstances, it was impossible to say where the jurisdiction of this court in similar cases would cease. For instance, a banker not only received money paid in by his customers, but he also applied money which he received from other sources on their accounts; and upon the contention of the plt., if this bill were right, every customer of every banker might file a bill to have the accounts taken between himself and the banker. This was quite inconsistent with the principles laid down in the case referred to in the argument before the H. of L. (*Foley v. Hill*, *ubi supra*). It was clear that in the present case there were no mutual accounts between the parties, and although it would not be denied that complexity of accounts had in some cases been held to justify a suit in this court, there was no such allegation of complexity in the bill in this suit, nor was there any allegation that there were mutual accounts. With the greatest respect for his Honour, he was of opinion that the bill must be dismissed and with costs, but there would be no costs of the appeal.

Bill dismissed with costs, without prejudice to any action at law; no costs of the appeal, and the deposit to be returned to the defts.

Solicitor for the defts. appealing, *Michael*.

Solicitors for the plt., *Blake and Snow*.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs., Barristers-at-Law.

Thursday, July 16.

ATTORNEY-GENERAL v. ETHERIDGE.

Practice—Orders of the 6th March 1860—Costs—Charges for the printed answer.

In a bill of costs 2d. per folio was charged for revising the print of the answer of the deft. before filing. There was also, in addition to the printer's charges, a charge of 4d. per folio for the printed answer. The taxing master having disallowed these two items, a motion was made to vary his certificate:

The motion was dismissed with costs.

Where the printer's bill is paid as part of the costs of the plt., the deft. is not entitled, under the Orders of the 6th March 1860, to 4d. per folio in addition.

The bill in this case was dismissed with costs against the defts., and the case now came on upon motion to vary the taxing master's certificate, he having disallowed the two following items, namely:

"Revising print of the answer of the deft. Benjamin Copeland Etheridge, at 2d. per folio, before filing, 4l. 12s. 6d."

"Revising print of the answers of the other defts. now suing, at 2d. per folio before filing, 1l. 8s. 2d.; printer's charges for printing the answer of the deft. Benjamin Copeland Etheridge, 26l. 18s. 10d., of which 9l. 5s. was disallowed; printer's charges for printing the answer of the other defts., 11l. 1s.; disallowed, 2l. 16s. 4d."

The following document explains the nature of the suit:—

Hitherto a difference had existed in the taxing masters office, the majority of the taxing masters allowing the 2d. per folio for revising the print before swearing or filing, but this question having arisen they had met and all agreed that it should be disallowed. The whole scope of the orders was that it was optional either that it should be written or printed, and inasmuch as the solicitor, before he could certify to its correctness and leave it at the office, must go fully through it, he was entitled to the charge for revising it. The written answer was only temporary. The order intended that generally a written answer should be filed, but if the deft. thought fit he might file a printed one. The answer must be revised before filing. At the last moment the deft. might wish to make some alteration, and therefore a written answer was allowed to be filed first. The taxing masters had given their reasons, which were as follow:—"The taxing masters are of opinion that the true construction of the order of 6th March 1860 is that the fee of 2d. per folio to revise, in addition to 2d. per folio for examining and correcting the proof, applies to cases in which the print of the answer is sworn to and filed. The fee is given for revising the print before swearing or filing." Now, having reference to the direction of the 2nd and 3rd sections, it appears that the deft. is to swear to and file his written answer; after that he is to get it printed from a certified copy, and within four days thereof to leave a print with the clerk of the records. It is not possible then for him in such case to revise the print before swearing, and the print in such case is never filed; it is the written answer which is filed. But when the deft. swears to and files a printed answer, then this fee is given for the double revision of the print before the deft. is required to swear to it. The strict verbal construction of the order seems to render it impossible to say that the second revision is to apply to a case where a written answer is filed.

The 5th section says: "Notwithstanding the preceding orders, a deft. is to be at liberty to swear to and file a printed answer, and the fee given for revising the print before swearing or filing is considered to apply only to the cases in which a printed answer is sworn and filed or filed without oath or signature." In addition to the verbal construction of the above order, there seem to be some points for consideration. Where a written answer is filed and the print is to be made from a certified copy which cannot be altered, is more than 2d. per folio for examining and correcting the proof necessary? It being borne in mind that only 2d. per folio is allowed in the case of printed bills for correcting proofs and no fee for revising. If a printed answer be sworn and filed it must have been examined and corrected; but though quite correct as a print, the deft. before swearing it may wish an alteration made, and this renders a revise necessary. This requires a larger fee than when a written answer is filed; also if the schedule or fees to this order is of a compensatory character, it must be considered that in the case of a written answer being filed there is the profit on the written copy for filing, which does not take place when a printed answer is filed. On the question whether the money paid by the plts. for the certified copy of the answers at 4d. per folio, and also for the copies at ½d. a folio (for all are in the same position) should be retained by the defts.' solicitors for their own use, or be credited by them to their clients, the defts., in diminution of the expenses of printing the answer:

In the General Orders of the 6th March 1860 there is no intimation given that the deft.'s solicitor is to keep these moneys for his own use; on the contrary, the payments are to be made not to the deft.'s solicitor, but to the deft.: (see 7th section of the Orders.) And the 14th section of these orders refers to a schedule of fees to be taken by solicitors, but the payment for these copies is not in that schedule. In the case of printed bills, since their origin in 1852 to the present time, the plt.'s solicitor has invariably given credit for sums received from the defts. for printed copies of the bill (at a halfpenny per folio) to his client the plt. in case of the expense of printing the bill. In the Orders of the 7th Aug. 1852, as to printed bills, the schedule A contained this clause: "For printed bills (as paid) deducting any copies paid for by the deft." The solicitors' fees in this schedule A have been incorporated with other fees to solicitors in the Consolidated Orders which came into operation on the 14th Feb. 1860, but the said clause in schedule A not containing a fee to solicitors, has not found a place in the Consolidated Orders. In the case of printed answers under the orders of the 6th March 1860, the same practice has been carried out by the taxing masters to this time; that is to say, they have held that the money paid for copies of the answer (whether at 2d. per folio or a halfpenny per folio) belongs to the deft., and not to the deft.'s solicitor, and give credit for the same when received to his client, the deft., who pays for the printing, and should be entitled to the benefit of the sale of copies.

Marten appeared in support of the motion. He referred to

The Orders of the 6th March 1860;

Morgan's Chancery Orders, 3rd edit. 679, 682, rules 2, 3 and 5.

Hardy contra.

Marten in reply.

The VICE-CHANCELLOR said that, finding the taxing masters had arrived at a particular conclusion, he should hesitate very much in expressing a different opinion, more particularly as previously their opinions had not been uniform. It was, nevertheless, his duty to consider upon the orders whether that conclusion was the correct one; not whether it was reasonable that certain allowances should be made, but whether

under the orders a certain amount of a particular item should be charged, and beyond that he could not allow a farthing. It appeared to be optional with the deft. to swear to and file a written or printed answer, and if he swore to and filed a written answer, there must be left at the same time a fair written copy, and the clerk of records and writs must examine it with the printed one, and certify that it was correct, and from that, when certified, the deft. caused a print to be made; but as printers' mistakes must be guarded against, the table of fees included one for attendances with the written and printed copy and the certificates, in addition to examining and correcting the proof, 2d. per folio, and also another fee of 6s. 8d. to the solicitor for attending the printer. Then came the item in question, for revising the print before swearing or filing it, 2d. per folio. It was clear that a portion of this item, at least, "for revising print before swearing," referred to the swearing a printed, and not a written answer, there being no print in the case of filing a written answer until after it had been sworn and filed certificate made, &c. The words were not only "for revising the print before swearing," but before "filing." It was contended that the words referred to the case of a deft. who chose to swear to the print, and to file a written copy; but that was not the natural construction of the words. They referred to the case of a deft. filing the print which it was not required that he should swear to. There might be cases, no doubt, where the plt. dispensed with the oath and signature, but they must be peculiar and very rare. He agreed with the conclusion of the taxing masters. With respect to the second item, under the 9th rule, which the taxing master had disallowed, he had no doubt. When these orders were under consideration on the question of the propriety of printing answers, the idea was to compensate the deft. in the case where a very few copies were required, for it required a certain number to be taken to be remunerative. The plt. might require as of right ten copies, and as many more as he chose to pay for; and he must also pay for the stamp and 4d. per folio; but in that case the deft. was not to charge the printer's bill and retain the compensation. The motion, therefore, on both points must be refused with costs.

Solicitors: Pattison and Wigg, and Biggenden.

July 28 and 30.

PINCE V. BEATTIE.

Solicitor and client—Costs—Trustee—Improper investment.

Trustees being empowered under a settlement to invest trust-moneys upon mortgage of freehold, copyhold, or leasehold estate, invested upon mortgage of leaseholds, with only fourteen years to run, the Court directed the mortgage to be called in, without prejudicing any question as to the liability of the trustees in the event of a loss.

Where a client agrees with his solicitor to allow him, in addition to his proper legal charges, a commission or percentage upon the value of certain property, in the event of the solicitor recovering it for his client; and he afterwards admits his liability to the whole claim of the solicitor in a settled account between them, the court will nevertheless disallow the commission as being against the policy of the law.

Co-trustees, being made defts. in a suit, may sever in their defence, where relief is sought against the one in a matter with which the other has nothing to do.

A trustee who acts as solicitor for himself is entitled to his full costs against parties who unsuccessfully endeavour to set aside the trust-deed.

This was a bill filed against the trustees of a certain

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settlement, and against the wife and children of the plt., and it prayed that the settlement which had been made by the plt. in favour of his wife and children might be declared void, or might be rectified, or that the trusts thereof might be carried out under the direction of the court. Frederick Burton Pince, the plt., laid claim to an interest in certain property under the will of Margaret Blair Pince, and had retained the deft. James Beattie as his solicitor to prosecute his claim in respect thereof.

By an agreement in writing, dated the 14th Dec. 1853, made between the plt. of the one part, and Beattie of the other part, in consideration of Beattie's undertaking and agreeing to investigate the claim and establish, if possible, the rights of the plt. in the property to which he claimed to be entitled under the will or wills, estate or estates of certain members of his family, or by descent or otherwise, and in consideration of Beattie's making the necessary advances on account of the legal and other expenses incident thereto, as also towards the maintenance and support from time to time, of the plt., his wife and family, pending the said investigation and consequent proceedings, and the risk which Beattie would incur on account thereof, the plt., for himself, his heirs, executors and administrators, promised and agreed with Beattie, his executors, administrators and assigns, to pay him by way of bonus, in addition to his proper legal charges, a sum of money equivalent to 5 per cent. on the gross amount received by him, the plt., his heirs, executors, or administrators, through the intervention or by the professional exertions of Beattie in his behalf; and he thereby charged and made chargeable with the payment thereof, as also all other claims and charges of Beattie, his executors, administrators, or assigns, any estate or estates of whatsoever kind the same might be, and wheresoever situate, to which the plt. was entitled or might receive in the manner aforesaid, and the plt. was to do all acts necessary to ratify the agreement.

Mr. Beattie, in the following August, effected a compromise with the parties who had resisted the plt.'s claim, by which he received the sum of 1611*l.* 14*s.* on the plt.'s behalf; and on the 17th Aug. he paid the plt. 700*l.* On the following day the plt. executed a settlement, whereby a sum of 400*l.* became vested in Beattie and Thos. Wilkins, upon trust for the wife of the plt. during her life for her separate use, without power of anticipation, with remainder to the plt. during his life, with remainder to the children of the plt. as tenants in common, and there was a power to invest the trust-moneys on mortgages of freehold, copyhold, or leasehold hereditaments. The trustees advanced the sum of 50*l.* to the plt. on his promissory note, and invested 200*l.* on a mortgage of leaseholds having only fourteen years to run, and which produced a net rental of 70*l.* They also advanced 100*l.* upon another mortgage, and kept the remaining 50*l.* in hand. The deft. also paid to the plt.'s mother, Mrs. M'Mahon, the sum of 300*l.*, according to a previous agreement with the plt. Beattie then made out an account with the plt., in which he debited him with the sums paid, with his costs, and with a sum of 80*l.* 11*s.* 10*d.*, being 5 per cent. commission, according to the above agreement. The plt. signed this account, but afterwards became dissatisfied both with the settlement and the account; he then, through his solicitor, applied to Beattie for a fresh account; Beattie, however, answered by stating that the plt. had no reasonable ground to disturb the settlement or require any further account. The plt. then filed the bill praying as above. The deft. Thomas Wilkins appeared separately.

Glasge, Q.C. and W. H. Terrell, for the plt., abandoned that portion of the prayer of the bill which asked that the settlement might be set aside or

rectified, and they then proceeded to argue that the trustees had laid out the trust-moneys in improper investments; that the deft. Beattie having refused to account must pay the costs, and that he had no right to sever in his defence from Wilkins, his co-trustee; also that the commission of 5 per cent., which the deft. claimed, could not be allowed, as it was illegal. On this point they cited

Strange v. Brennan, 15 Sim. 346; 2 C.P. Coop. 1

Baily, Q.C. and Swinburne, for Beattie, contended that the charge for commission had been allowed by the plt. in the settled account between himself and the deft., and could not therefore now be disallowed.

Glasge, Q.C. in reply.

The following cases were also cited:—

Tolson v. Judge, 3 Drew. 306;

Nanney v. Williams, 22 Beav. 452;

Walker v. Smith, 29 Beav. 394;

O'Brien v. Lewis, 8 L. T. Rep. N. S. 179.

The VICE-CHANCELLOR said that the part of the bill which asked to set aside or rectify the settlement had been wisely abandoned. On such a form of bill as this Lord Langdale, M.R. had held that no relief could be given; but his decision had not been followed, the courts considering that the plt. was entitled to the remainder of the relief if a sufficient case was made out. So far, therefore, as the case was abandoned, the bill must be dismissed with costs. The first question was, whether the investment in leaseholds was a proper one. It appeared that these leaseholds, when the investment was made, had only fourteen years to run, and therefore, although, no doubt, the property being small, it was the object of all parties to make as good interest as possible, no loss must be incurred in so doing; consequently, this was not a good investment, and ought to be called in without prejudice to any question as to the liability of the trustees in the event of a loss. As to the 50*l.* lent on the promissory note, it was no security at all, and that sum must be brought into court in a reasonable time, and would stand to the general credit of the cause. As to the account against Mr. Beattie, it appeared there was a settled account in Jan. 1856, with the plt.'s receipt, which, subject to one item, concluded the transaction. This item was one of 80*l.* 11*s.* 10*d.* charged by Mr. Beattie for commission under the agreement of the 14th Dec. 1853, and the question was, whether the plt. had now a right to challenge it, notwithstanding it formed part of the settled account. It appeared from the case of *Strange v. Brennan*, and possibly other cases might be found on this point, that the V. C. of England and Lord Cottenham had decided that it was against the policy of the law, not only that a solicitor, while acting as such, should take a present gratuity from his client over and above the amount of his costs, but that he should enter into any stipulation to act as solicitor on the terms of getting a greater benefit than he would obtain by the costs which, according to the rules of law, he was entitled to charge. Therefore, that being established, it must be held that the contract between Pince and Beattie was illegal, and ought not to have been entered into. Although, therefore, that sum formed an item in a settled account, the plt. was entitled to recover it back. With regard to the severance of the trustees, it was clear that the plt. had occasioned it, for the bill sought relief against Beattie, and with this Wilkins had nothing to do; and therefore there must be two sets of costs in that respect. As to the costs up to the hearing, Mr. Beattie was not liable to them, for, being sought to be made personally responsible, there had been on his part no such pertinacious refusal to account as the M. R. thought made trustees liable to costs, where parties

were obliged to file a bill to obtain the information. This was not a bill for discovery, but to make Mr. Beattie liable for costs, and to set aside an instrument, and therefore it was not within the principle. With regard to the question whether the deft. Beattie should have his costs generally, or only those out of pocket, his Honour said he would look into the cases.

July 30.—The VICE-CHANCELLOR said, that having looked into the authorities, he was of opinion that where a suit was instituted to administer a trust, a trustee who acted as solicitor was allowed only his costs out of pocket, and in those cases where a trustee was allowed to employ a collector, but chose to collect himself, he could claim nothing for so doing. This practice was for the protection of the trust-estate. In the present case, however, it was not a question between trustees and *cestui que trust*, and his Honour was of opinion that Mr. Beattie was entitled to his full costs of so much of the bill as was dismissed with costs.

Solicitors: *J. J. Lea and J. Beattie.*

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Friday, Nov. 6.

SHUTTLEWORTH v. BRISTO.

Administration suit—Loss of testator's property—Willful default.

Certain shares, held by the testator as mortgagee, were proved to have been transferred after testator's death, but they were not accounted for by the executors, and it was certain that the surviving trustee had not received anything in respect of them.

The Court, in an administration suit, refused to make the shares an item in the account, as a charge of wilful default could not be introduced into it.

This was an adjourned summons.

A portion of the property of John Bond, deceased, to administer whose estate a suit had been instituted, consisted of some shares in the Ipswich Benefit Building Society, which shares he held as mortgagee, having advanced the sum of 814*l.* upon them to one Moses Samuel.

The deft. Bristo was the sole surviving executor of John Bond, and representative of his estate, and a decree had been made in the suit for common accounts.

Moses Samuel, the mortgagor of the shares, was also dead, as was his executor, Clarke; the Ipswich Benefit Building Society had also ceased to exist, and the shareholders had received back the money they had advanced on their shares. Those shares which had been mortgaged to Bond had, in some manner, been transferred to Clarke, the executor of the mortgagee. It was unknown by whom they had been so transferred, but it was certain that they had not been transferred by Bristo. Beyond this, the shares had been lost sight of. The legatees, and other parties interested in the property now claimed that Bristo, as representing the estate, should be made liable for their value.

Glassey, Q. C. and Martindale, for different persons interested in the estate, argued that this was a case of *devastavit* of the executors, and that the shares ought to be accounted for by them.

Baily, Q. C., Batten and Francis Webb, for Bristo and others, were not called upon.

The VICE-CHANCELLOR said that Bristo could be charged with nothing but what had come to his hands. If he had received these shares, he must be charged with them. The testator, John Bond, was possessed of them as mortgagee, and in Jan. 1846, which was after Bond's death, the shares were transferred, by whom did not appear, to a person named Clarke. It is clear that they were not transferred by Bristo; how then could he be charged with having received anything on account of them? The ground for the application

was, that they were part of the testator's property, and must be considered as coming to the hands of the executors, who were, therefore, liable in respect of them. If that were so, it would be entirely doing away with the distinction of an account of what each executor had actually received, and an account of what each executor might have received without wilful default. It was impossible to introduce a charge of that description into an account which had nothing to do with wilful default. What, however, was charged against them was, that they did not take care to realise and get possession of the money when the mortgage was redeemed; now, that was wilful default. No doubt it was a hard thing upon the parties that they had lost so much money, but why was a particular individual to be saddled with the loss, unless you could allow that he had actually received it? Bristo cannot be made chargeable with it.

Solicitors, *Wm. Smith, for Thorndike and Bird.*

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW,
Esqrs., of Lincoln's-Inn, Barristers-at-Law.

May 30 and June 1.

PELLEY v. BASCOMBE.

Statute of Limitations—Infancy and coverture—

Possession not adverse—Liability to account.

Upon the death of B. in 1833, leaving two infant co-heiresses, his brother, who was one of the executors of B.'s will, entered into possession of the property, received the rents and profits, kept down the interest on a mortgage, and made several permanent improvements. One of the co-heiresses died in 1834, and the other, who succeeded to her sister's share, being still an infant, married in 1843:

Held, that the brother must account, on the footing of guardian of the infants, for all the rents received by him during the infancy of the co-heiresses and the infancy and coverture of the survivor, but with an allowance for all permanent improvements made by him.

The facts in this case were as follows:—

John Scutt Bascombe, the father of the plt. Mrs. Harriett Pelley, being seized in fee of a messuage, lands and hereditaments in the parish of Affpuddle, Dorset, by an indenture dated the 27th Sept. 1817, demised the same by way of mortgage to Thomas Tapp, for a term of 1000 years, to secure 200*l.* and interest.

By his will, dated the 2nd Aug. 1833, John S. Bascombe gave and devised as follows:—"I leave to my beloved-wife Harriett Bascombe all and everything I may die possessed for her life, and at her death to be divided in equal portions between our two children Harriett and Susannah Marjory. I do appoint James Bascombe (my own brother) and John Langfield (my wife's own brother) as executors of my will and trustees for my wife and children." This will was attested by two witnesses only, and was invalid to pass real estate.

John S. Bascombe died on the 8th Aug. 1833, leaving his two daughters his co-heiresses at law.

Harriett Bascombe, the daughter (the present plt.), in the year 1843, being still an infant, married the plt. John Pelley.

Susannah M. Bascombe, the other daughter, died in 1834, leaving the plt. her only sister and heir.

On the death of John S. Bascombe, James Bascombe (his brother) entered into receipt of the rents and profits of the above property, and died in Feb. 1858, having spent 780*l.* in erecting a dwelling-house, five cottages, a malthouse, stable, barn, and other buildings thereon, and having kept down the interest on the mortgage.

He left a widow Mary, who became his administratrix, and Thomas Bascombe, an infant, his heir-at-law. Mary Bascombe paid off the mortgage-debt, and by an indenture dated the 17th Jan. 1860, the mortgage-debt and the term of 1000 years were assigned to her.

The bill was filed in April 1860, against Mary Bascombe and Thomas Bascombe, the infant, alleging that James Bascombe entered into possession on behalf of the plts., and praying for an account of the mortgage debt and interest, an account of the rents and profits of the mortgaged hereditaments received by James Bascombe and Mary Bascombe, &c., or which without their wilful default and neglect might have been so received; that on payment of what, if anything, should be found remaining due, Mary Bascombe might be directed to reconvey the said hereditaments to the plts., or as they should direct, &c.; and that in case it should be found that any balances were due from the estate of the said James Bascombe deceased, or the debt Mary Bascombe, the debt., might be ordered to pay such balances to the plts., or in case she should not admit assets, that the usual accounts might be taken, &c.

Mary Bascombe by her answer alleged that John S. Bascombe at the time of his death was, she believed, indebted to his brother James Bascombe in a considerable sum of money. She submitted to the court the plts.' right to redeem.

Thomas Bascombe, the infant, by his answer, submitted that the claim of the plts. was barred by the Statute of Limitations.

Malins, Q.C. and *Sandys* were for the plts.—They contended, first, that the Statute of Limitations did not apply, Mrs. Pelley having been under the disability of infancy and of coverture ever since her father's death. Secondly, that James Bascombe must be presumed to have entered into possession on behalf of the plts., and that his possession therefore had not been adverse to them: (*Thomas v. Thomas*, 2 K. & J. 79.) Thirdly, they said they did not desire to take the account against James Bascombe as mortgagee in possession, but only as a bailiff or agent.

Bacon, Q.C. and *Jolliffe*, for the defs., admitted the plt.'s right to the moiety which had descended to her from her father; but as to the other moiety, which had descended to her sister, they contended, first, that the plt.'s right was barred in 1853, twenty years from the father's death, the additional time allowed by sect. 16 of 3 & 4 Will. 4, c. 27, having expired ten years after the sister's death in 1834: (Sugd. V. & P. c. 12, s. 3, pl. 15, p. 400, 13th edit.) Secondly, that time began to run upon James Bascombe's entry. Since the 3 & 4 Will. 4, c. 27, possession need not be adverse in order to operate as a bar. The mere fact of possession was sufficient: (*Nepean v. Doe*, 2 M. & W. 894.) The evidence showed that James Bascombe entered for his own benefit. His paying the interest of the mortgage was not inconsistent with this: (Sugd. R. P. Stat. c. 1, s. 4, pl. 8, p. 78, 2nd edit.) James Bascombe, according to the plt.'s evidence, was only a constructive trustee, and consequently the 25th section of the 3 & 4 Will. 4, c. 27, did not deprive him of the benefit of the statute. Thirdly, as to the account, they cited

Pulleney v. Warren, 6 Ves. 72, 93.

Malins, Q.C. replied.

THE VICE-CHANCELLOR.—One effect of the statute 3 & 4 Will. 4, c. 27, is materially to alter the law as to what used to be called adverse possession. I conceive the present state of the law to be as follows: The fact of a person receiving the rents of a property raises a presumption that he receives them in the character of owner; but this presumption may be rebutted in many ways, e.g. by express evidence to the contrary; by evidence affecting the person who has entered into possession; or by evidence of the mode in which he

has dealt with the rents. In *Thomas v. Thomas*, Wood, V.C. had to consider the case of a father who had entered upon his infant son's lands, and he there expressed an opinion that an infant could not, in all cases, treat a stranger as a bailiff, for the purpose of escaping from the Statute of Limitations. But the present case, where the person who entered was the uncle, the nearest male relative of the infant and the executor named in her father's will, and where he employed the rents in keeping down the interest on the mortgage, can hardly be considered as a case of an entry by a stranger. Passages in Littleton, sect. 124, and in Lord Coke's Commentary thereon (Co. Litt. 90 a), are authorities to show, that an infant, even after attaining twenty-one, is entitled to make any stranger who has entered into possession account to him as a bailiff. The pleadings have removed any difficulty which I might otherwise have felt as to the case. According to my impression of the law on this subject, there ought to be nothing equivocal in a possession which is relied upon as a bar. Here it is alleged that James Bascombe entered into possession under an arrangement, an arrangement which neither John Scutt Bascombe's widow nor his children had any power to make. I am therefore of opinion that James Bascombe did not enter as a stranger, but in such a manner that he must be treated as being in possession in a fiduciary capacity. He did nothing during his life to alter the character of his possession, but his widow, Mary Bascombe, after his death, paid off and took a transfer of the mortgage, which I think a sufficient ground for making her account as a mortgagee in possession, and not like her husband, merely as a bailiff. The plt.'s right to redeem has been fully established as against Thomas Bascombe, the infant heir. I have had some doubts as to how far the accounts should go back, but I shall follow the decree in *Nemey v. Williams*, 22 Bear. 452, 469, and direct accounts from the death of Mrs. Pelley's father. But, as it appears that James Bascombe has laid out large sums in buildings and other improvements, I shall direct an inquiry as to what he expended in his lifetime in permanent improvements or otherwise for the benefit of the infant. I have taken the form of this inquiry from *Umbleby v. Kirk*, C. P. Coop., 1837-8, 254, where the expenditure was as unauthorised as here. I shall allow Mary Bascombe's costs to be added to the mortgage-debt, and not give any costs against Thomas Bascombe.

Solicitors for the plts., *Sandys* and *Knott*, agents for *King v. Johns*, Blandford; for the defs., *Rhodes, Sims* and *Duffell*, agents for *G. J. Andrews*, Dorchester.

Wednesday, Nov. 11.

BEADEL v. PITT.

Specific performance—What will constitute an agreement for a lease.

B. was tenant for fourteen years of two farms, the lease having being granted in 1839 by the deft.'s brother, who was entitled to three-fourths of the freehold, and the deft., who was entitled to the remainder. During the term B. died, and the plt. became entitled to the lease. The deft.'s brother died, and his widow (who was entitled to the three-fourths for her life), on the expiration of the term in 1853, agreed with the plt. that he should continue to hold on as tenant from year to year at the same rent. The deft. demanded an increased rent for his fourth, which the plt. agreed to give, and the deft. thereupon agreed (in writing of 17th March 1856) to grant a lease of such fourth for fourteen years from Michaelmas 1853 at the increased rent. On the death of the widow, in 1861, the deft.

became entitled to the entirety, and in March 1862 he wrote to the plt. to say he clearly had a right to hold the farms for the time specified, but he must of course pay the same rent for the other three-quarters. On the 25th March 1862 the plt. wrote to the deft., saying he quite agreed to pay the same rent for each quarter for the further three-quarters of the two farms from Michaelmas next, agreeably to the memorandum:

Held, that the plt. was entitled to specific performance of an agreement for a lease for fourteen years from Michaelmas 1853, with covenants similar to those contained in the original lease.

This was a motion for a decree.

By an indenture dated the 29th Sept. 1839, between Stephen Pitt, of Crickett Malharbie, Somerset, and deft. Samuel Pitt of the one part, and John Beadel of the other part, said S. Pitt being entitled to three-fourth parts, and said deft. to the remaining fourth part of the premises demised unto Beadel, his executors, &c., messuages and farms called "Howbridge-hall" and "Dengy," reserving the rent of 412l. 10s. to S. Pitt, and the rent of 137l. 10s. to the deft., their heirs and assigns, according to their respective shares in the said messuages and farms.

John Beadel personally occupied and farmed the premises until his death in Feb. 1847. By his will he bequeathed, from the Michaelmas-day next after his decease, his term and interest in Howbridge-hall and Dengy farms to the plt. Thomas Beadel.

On the Michaelmas-day after his death the plt. occupied the said premises. S. Pitt died in 1849, and on his death his widow, Elizabeth Pitt, became entitled to his three-fourths of the premises for her life. On the expiration of the term in 1853, Elizabeth Pitt agreed with the plt., so far as related to her life-interest in three-fourths, that he should continue to hold the same as tenant from year to year at the same rent as was reserved by the said indenture of lease, viz. 412l. 10s. per annum.

The deft., who, upon the death of the said Stephen Pitt, became entitled to the entirety of the premises for an estate in fee-simple, subject as to three-fourth parts thereof to the life-estate of Elizabeth Pitt, refused to grant the plt. a lease of the one-fourth of the premises to which he was entitled in possession, except on the terms of receiving an advanced rent, viz., the sum of 172l. 10s. per annum, and also a present payment of 100l. To these terms the plt. ultimately consented. The sum of 100l. was the deft.'s proportion of the expense of repairs on the expiration of the lease, which had been fixed by valuation.

The deft., on the 17th March 1856, signed the following memorandum, addressed to the plt.:

"Sir,—In consideration of your having agreed on your part to take a new lease of all my quarter share in Howbridge-hall and Dengy Farm now in your occupation under a lease which expired at Michaelmas 1853, such new lease to commence at Michaelmas 1853, and to be for the term of fourteen years, at the annual rent of 172l. 10s., and to contain covenants and provisions similar to those in the said expired lease, I hereby agree on my part to grant to you such lease, the same to be prepared and executed forthwith."

Elizabeth Pitt died in Nov. 1861, and the deft. thereupon became entitled to the entirety of the premises in possession, and the plt. and deft. thereupon entered into negotiations for a lease by the deft. to the plt. of the remaining three-fourths.

In a letter addressed to the plt. on the 17th March 1862 the deft. said: "From the memorandum you showed me, and which you thought of sufficient consequence to get stamped, you clearly have a right to hold Howbridge and Dengy for the time specified, but you must of course pay the same rent for the other three-quarters."

Shortly after the date of this letter the deft. served the plt. with notice to quit a certain farm called Small Lands-hall, which he had been occupying under a demise from the deft.

On the 25th March 1862 the plt. wrote to the deft. as follows:—"I have received your notice to quit Small Lands-hall, but I think from your expressions to me you do not wish me to leave it. I was taken by surprise when you visited me the other day, and it was weighty matter for me to consider so large an increase of rent, and required some time to think it over, but, if it is agreeable to you now, I will give you the rent you ask for the three farms for a lease for seven years, supposing you will give me fair farming covenants. P.S.—In the event of your not wishing me to have the three farms, I quite agree to pay the same rent for each quarter for the further three-quarters of Howbridge-hall and Dengy from Michaelmas next, agreeably to the memorandum" (meaning that of the 17th March 1856).

The deft. insisted on the notice to quit Small Lands-hall, and the plt. accordingly quitted the same in Sept. 1862.

Some disputes as to the shooting on the farms arose, and on the 11th Feb. 1863 the deft. wrote to the plt.'s solicitor demanding the rent for the entirety of the premises, and stating his intention of giving the plt. notice to quit on the Michaelmas following.

On the 13th Feb. the plt.'s solicitor wrote, threatening proceedings to enforce specific performance of the contract; but, on the 26th Feb., the deft. gave to the plt. notice to quit Howbridge-hall and Dengy on the Michaelmas following.

The plt. filed his bill on the 15th April, alleging that the agreement contained in the memorandum of March 1856 and the letters of the 17th and 25th March 1862, became complete, and that in the course of sundry conversations between the deft. and the plt. it was treated as binding on both sides; that the plt. had ever since, under and in part performance of it, continued in possession of Howbridge-hall and Dengy as to the entirety thereof, and that such possession had been with the sanction of the deft. until he gave the plt. notice to quit. The plt. had paid increased rent (on the footing of the said agreement) for the entirety of the premises up to the 25th March 1863.

The bill further alleged that, in confidence that a lease would be granted in accordance with the agreement of March 1856, he had, with the privity of the deft., laid out considerable sums of money in cultivating the farms, and praying that the said agreement might be specifically performed according to the terms of the agreement, and that the deft. might be decreed to execute a lease of the farms, or that damages might be awarded to him.

The deft., by his answer, insisted that no final agreement was ever entered into between himself and the plt., under which the deft. could have compelled the plt. to take a lease of the two farms, but that the plt. continued to occupy such farms as tenant only from year to year, determinable by either party on giving proper notice. He further denied that there was any agreement between himself and the plt. that the lease proposed to be granted by him to the plt. should correspond in particulars with those of the expired lease, except as to the amount of rent to be reserved, and the term to be created thereby, but that the covenants and other provisions were not, or had they ever been, arranged or agreed upon.

Greene, Q. C. and Culler, for the plt., contended that the plt. was entitled to a lease which should have imported into it the covenants contained in the demise of 1839, and consequently to a decree as prayed, with costs. They cited

Warner v. Willington, 3 Drew. 523.

V.C. S.] *Ex parte* RECTOR, &C. OF ST. JAMES, GARLICKHITHE, *re* W. HAYWARD, &C. [V.C. S.]

Malins, Q. C. and *Francis Walford*, for the deft., contended that there was nothing concluded between the parties. There was no agreement that could entitle either party to come to the court and ask for a decree for specific performance. There was no distinct offer contained in the negotiations for the lease between the plt. and deft., and the deft.'s notice to quit put an end to any pending agreement.

THE VICE-CHANCELLOR.—I think it is perfectly clear that the deft. is bound by the letter of March 1856. That letter relates to only one-fourth part of the premises; but as to that one-fourth there is, coupled with the agreement, the enjoyment of them under it, and it seems to me that the letter created a right on the part of the plt. to a lease of at least one-fourth of the premises on the terms mentioned in that letter. After the deft. became entitled to the other three-fourths, negotiations ensued as to them, and I think that the letter of the 17th March 1862 states the matter very clearly. In that the deft. says to the plt., "You have clearly a right to hold How-bridge-hall and Dengy for the time specified, but you must of course pay the same rent." The term and the rent are both here mentioned. But it is contended on the part of the deft. that the letters contained an offer only, which offer was never accepted. The plt. however, in his letter of the 25th March 1862, says: "I quite agree to pay the same rent for each quarter, for the further three-quarters, of How-bridge-hall and Dengy from Michaelmas next, agreeably to the memorandum." To my mind there is, coupled with the possession and enjoyment of these farms, that which binds the deft. and makes it impossible for him to contend with any degree of success that the plt. was holding these farms as a tenant from year to year; for that is the contention which in the face of these documents he has actually raised in his answer. These documents contradict that allegation entirely. The plt. has never held these farms as a tenant from year to year. It is very true that he held another farm upon a tenure of that kind; but there has been no agreement to hold these farms on those terms. The deft. never proposed that there should be a tenancy from year to year. The deft. plainly entertained a notion that he would like to exchange the covenants under which the farms in question were held, and to have covenants which related to other lands imported into the new lease; but that is a thing the court cannot allow, he having bound himself by the letter of March 1856. The plt. is entitled to a decree for the specific performance of the agreement for a lease of fourteen years, with covenants similar to the covenants in the deed of 1839, and the new lease must be settled at chambers if the parties differ. The deft. must pay all the costs of the suit.

Solicitors: for the plt., *Vallance and Vallance*, agents for *Blood and Douglas*, Witham; for the deft., *Young, Jones and Vallings*.

Friday, Nov. 13.

Ex parte THE RECTOR AND CHURCHWARDENS OF ST. JAMES, GARLICKHITHE, *re* THE ESTATE OF WILLIAM HAYWARD, deceased, and *re* THE 23 & 24 VICT. c. 193, THE LONDON CITY IMPROVEMENT ACT 1847, and THE LANDS CLAUSES CONSOLIDATION ACT 1845.

Taxation of costs—Lands Clauses Consolidation Act, sect. 80.

When lands were taken by a corporation under powers in a special Act, which embodied the Lands Clauses Act; upon a petition by the vendors for the investment of the purchase-money and payment of their taxed costs relating to the purchase and taking of the hereditaments:

The Court refused to make any other order as to costs than that they should be costs according to the Act.

This petition was presented by the Rev. Thomas Burnet, D.D., rector of the parish of St. James, Garlickhithe, in the city of London, and the churchwardens of the same parish, and it stated that by the 23 & 24 VICT. c. 193, entitled "An Act to establish at Smithfield, in the city of London, a Metropolitan Market for meat, poultry and other provisions, and for other purposes connected therewith;" it was, *inter alia*, enacted that all the powers, contained in the City of London Improvement Act 1847, and in the Lands Clauses Consolidation Act of 1845, incorporated therewith, should with reference to the taking of land and the erection of markets, &c., be extended to the 23 & 24 VICT. c. 193.

In Sept. 1862 the corporation of London gave notice to the rector and churchwardens of the above-named parish that, for the purposes of the first-mentioned Act, it was their intention to take certain messuages belonging to the parish. A correct valuation of the property having been made, the corporation paid into court the sum of 6022*l.* to the credit of the rector and churchwardens aforesaid, "The matter of the Metropolitan Act 1862," pursuant to the provision contained in that Act. It was stated in the petition that in the purchase or taking of the hereditaments and premises, and in consequence thereof, the petitioners had necessarily incurred certain costs other than the costs of the conveyance of the same and the costs of that petition, and they submitted that such costs ought to be borne and made good by the corporation, who had refused to pay the same.

The petitioners prayed that the sum of 6022*l.* might be invested in the purchase of Bank Three per Cent. Annuities and placed to the "account of the rector and churchwardens for the time being of the above-named parish," that the dividends might be paid to them, and "that it might be referred to the taxing master to tax and settle the petitioners' costs of the purchase and taking of the said hereditaments and premises, including therein all reasonable charges and expenses relating thereto, and also the costs of the conveyance of the same, with all usual charges and expenses relating thereto, and the costs of and relating to that application and consequent thereon, and that such costs when taxed might be paid by the corporation of the city of London to the petitioners."

The evidence showed that the costs, other than those of the conveyance and of the petition, and which amounted to about 20*l.*, had been necessarily incurred; that the late Mr. Bunning, the City architect, had in a letter written in reference to the matter stated that "the Act provides that the corporation shall pay all costs," but that the corporation had objected to pay the costs of the petitioners' solicitor in reference to the purchase and taking of the hereditaments and premises consequent thereon.

Bowring, for the petitioners, applied for an order in the terms set forth in

Seton on Decrees, 2nd edit. (1854) 662; and 3rd edit. (1862) vol. 2, p. 1072, sec. 19.

A. E. Miller, for the corporation, said he must oppose any other order than that costs be ordered "according to the Act."

THE VICE-CHANCELLOR.—I can only make an order in the common form, namely, "costs according to the Act." If there be any mistake on the part of the taxing master, then an application may be made to the court; but at present I can make no other order than that which was directed to be made by the Court of Appeal, in the case of *Re Cant's Estate*, 1 De G. F. & J. 153.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Tuesday, Nov. 3.

Re THE LONDON AND WESTMINSTER WINE
COMPANY (LIMITED).

Practice—Petition—General Order, 11th Nov. 1862,
rule 3.

The registered office of a company was found to be shut up and vacated. The Court directed that the copy of a petition to wind-up the affairs of the company might be put into the letter-box, and a copy served on one of the directors, and on the registered solicitor to the company.

A petition had been presented for the usual order for winding-up the affairs of the above company.

J. N. Higgins now applied to the court on affidavit to the effect that the deponent had taken the petition to be served at the registered office of the company, which, however, he found shut up, and no person there to take in messages or letters. It was also added that the deponent knew the residences of several of the directors of the company in London, and he believed that the solicitor to the company would know where the directors were to be found. He referred to

General Order 11th Nov. 1862, rule 3.

The VICE-CHANCELLOR said that a copy of the petition might be dropped into the letter-box at the office of the company, and another copy served on the solicitors, and also on one of the directors.

Order accordingly.

Solicitors: Harrison and Lewis.

Thursday, Nov. 5.

BETHELL v. CASSON.

Practice—Production of deeds and documents—Costs.

A deft. who has only a covenant from a third party to produce title-deeds for the manifestation of his own title, is not compellable to obtain the production of the deeds referred to by the covenant in order to establish a claim set up by a plt.

A plt. requiring production under such circumstances should offer to pay the costs of obtaining the production of such deeds by the party in whose possession they actually are.

This was a bill filed to restrain the defts. from working and getting slate upon lands which had been demised to them, and for a discovery.

The case made by the defts.' answer was, that the lands where the slate quarry was was part of a farm which had belonged to them and their predecessors from time immemorial, and they referred to deeds in their possession evidencing their title.

By the amended bill the plt. charged that, in certain other deeds of conveyance over which the defts. had power, there was a covenant for production of these deeds, and alleged that in such deeds the land in question was not included in the farm.

An interrogatory was exhibited in support of this charge and allegation.

By their answer to the amended bill, the defts. set out the covenant at length, but denied that they had ever seen or inspected the deeds therein referred to, and submitted that they were not, having regard to the frame of the covenant and the nature of the suit, entitled to require the production of the deeds by the covenantor, or bound to procure their production. They also stated that, to the best of their judgment and belief, the deeds did not contain anything to assist or support the plt.'s claim.

Exceptions were taken to this answer for insufficiency.

No tender or offer for the payment of the costs

which might attend the getting or production of the deeds from the third party in whose possession they were had been made by the plt. before suit.

W. M. James, Q. C. and Hanson, for the plt., contended that the deeds being in the power of the defts., they were bound to obtain the production of them.

Taylor v. Rundell, 2 Phill. 104.

Roll, Q.C. and O. Morgan, for defts., were not called upon.

The VICE-CHANCELLOR said this was a totally new application, and he was not disposed to make a precedent, no case similar to the present having been decided by the court. Upon the narrow ground that the plt., before applying to the defts. for information as to these deeds, ought to have tendered them the costs which they would necessarily incur in obtaining production of them, he should have been inclined to overrule the exceptions, for it was clear that a deft. was not bound to incur any expense in procuring for a plt. information which he did not himself possess. But he felt bound to decide the case upon a broader principle. A former vendor of the estate had entered into a covenant to produce these deeds for the purposes and at the instance of the purchaser. The plt.'s case was, that it would be found upon inspection that they did not include the property alleged to have been conveyed thereby; but no case had decided that, if any question whatsoever arose as to the property comprised in deeds the subject of such a covenant, the person entering into it was bound to produce them for the purposes of a stranger, even though, as might be the case here, such production might be attended with the greatest possible damage to himself. Indeed, if the defts. had obtained these deeds under the covenant, and had shown them to a third party, who had made use of such inspection to the covenantor's detriment, such an act would have amounted to a fraud on the covenant. This was in fact an indirect attempt to obtain information through parties to the suit to a person who was a stranger thereto, and between whom and the plt. there was no privity.

Exceptions overruled with costs.

Solicitors: Watson, and Bloxam and Ellison.

Thursday, Nov. 12.

FRY v. ERNEST.

Practice—15 & 16 Vict. c. 86, s. 19—Further time to answer—Costs of former suit—Deft. in default.

A deft. to an original bill, who has been ordered to pay the costs of a cross-bill filed by him and to which the demurrer of the original plt. was allowed, while in default of non-payment of these costs, filed a concise statement, with interrogatories, under the 15 & 16 Vict. c. 86, s. 19; the statement being substantially a repetition of his case on the cross-bill. The plt. having obtained an order on summons in chambers for a month's further time to answer from the day on which the deft. should have paid his costs: Held, that an order in this form must be discharged.

The former proceedings in this suit (reported 8 L. T. Rep. N. S. 762) may be recapitulated in a few words. The bill in Fry v. Ernest was filed for the purpose of realising by foreclosure certain mortgage securities; the deft. Ernest thereupon filed a cross-bill in Ernest v. Partridge, in which Fry was a deft., to have the securities set aside on the ground of fraud and conspiracy. Demurrers were put in to this bill on the part of the several defts., on the ground of multifariousness, and these demurrers were allowed with costs. Soon afterwards the deft. Ernest instituted separate suits against the several defts. to his cross-bill, not in terms referring

to it, but in fact splitting up his case on that bill into its separate parts as they differently affected the different defts. Certain proceedings had been taken by these persons to restrain the prosecution of these suits. In the case of Fry, the plt. in the original suit, and one of the defts. in the cross-suit, whose demurrer was allowed, and against whom a separate bill was afterwards filed, the deft., finding that he could not proceed by any suit, under the statute 15 & 16 Vict. c. 36, s. 19, filed a concise statement, with interrogatories founded upon it, which was in substance a recapitulation of his case in the suit. An order was made in chambers on the 9th June, on summons taken out by Fry, by which he was allowed a month's further time to answer the interrogatories from the day on which the deft. Ernest should pay him the costs of the demurrer in *Ernest v. Partridge*. Ernest now moved to discharge that order.

Rolt, Q.C. and Harding, in support of the motion, contended that though the court would not permit a party to be harassed by a second suit having the same object with one previously instituted, and for the costs of which the plt. was in default, yet the present mode of proceeding did not come within the same rule. This was a legitimate means of defence to the original suit against the deft., and the only mode he had of bringing forward his claims.

Gifford, Q.C. and Cracknall, in support of the order, urged that this was a mere abuse of the practice of the court. If the plt. was to be called on to answer these interrogatories, he might just as well have answered those in the cross-suit against him. The proceeding was, in fact, more vexatious than that of the suit, since the deft. could get no relief on his statement.

The VICE-CHANCELLOR said, that whatever might be the merits of the case, it was clear that the order could not stand in its present form. He looked upon this mode of proceeding on the part of a deft. as one of a nature purely defensive. Whether these interrogatories, in fact, went beyond the defence would be in the judgment of the court, looking to the materiality or relevancy of the plt.'s answer, or of any exception thereto: (s. 19.) The result would be, that the order made in chambers must be discharged with costs. Considering, however, that the deft. Ernest was in default for his former costs, these costs should not be paid to him till further order.

Solicitors: for plt., *Field, Roscoe and Co.*; for deft., *Kisch*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

Thursday, Nov. 5.

REG. V. STAPLETON.

o r-rate—Endowed school—School-house, &c., and master's residence—Rateability.

Premises were held in trust to permit the master, wardens, &c., of B. to hold and enjoy the house for a residence of 100 poor boys, a schoolmaster and necessary servants for a school. The boys were boarded, &c. and put out as apprentices. The establishment was purely an endowed one:

Held, that the schoolmaster was rateable for the house, &c. occupied by him, and the master, wardens, &c. for the portion appropriated for the boys, servants, school-house and playground.

Special case stated on appeals against a rate or assessment to the relief of the poor of the parish of Stapleton, Gloucestershire. The Quarter Sessions ordered the names of the apps. to be struck out of the rates.

By indentures of lease and release, dated respectively the 24th and 25th Nov. 1708, Edward Colston, of London, merchant, conveyed to certain persons (hereinafter designated the feoffees), and to their heirs and assigns for ever, certain manors, lands and hereditaments, therein particularly described, and also a capital messuage then since known as the Great House, in the parish of St. Augustine, in the city of Bristol, upon the trusts only and to the only intents and purposes following; that is to say, upon trust to permit the masters, wardens, assistants and commonalty of Merchants Adventurers within the said city of Bristol and their successors for ever (hereinafter designated the trustees), to hold and enjoy the said capital messuage, manors, lands and hereditaments upon the trusts, confidences, &c., for the only ends, intents and purposes following, that is to say, that the said Great House should for ever thereafter be used, enjoyed and employed for a house, habitation and abiding-place for fifty poor boys (by a subsequent endowment in the same deed increased to 100 poor boys), and one or more schoolmaster or masters, and for necessary servants to inhabit in and for a school to teach the said boys, and to find and provide for such boys meat, drink, washing and lodging, and clothing of all sorts of cloth, linen and woollen, and to place such boys apprentices from time to time when and as they should become capable, and to pay 10*l.* to a master with each boy, when he should be so placed apprentice, and a convenient allowance for such schoolmaster, at the discretion of the trustees, who might, from time to time, displace such schoolmaster and schoolmasters if they should think fit, and also from time to time to repair the said Great House, and to pay and discharge all the before-mentioned liabilities out of the rents, issues and profits of the said manors, lands and hereditaments thereby conveyed. By the said indenture it was provided that any vacancies amongst the boys should be filled up by the said E. Colston as their founder and visitor during his life, and that from and after a decease one-half of the said number of boys were to be chosen by the trustees and their successors from time to time, and the other half of the said number of boys, after the decease of the executors of the said E. Colston, by Francis Colston and eleven others therein named (and therein and hereinafter designated the nominees) and their successors from time to time. And the said indenture further provided that all the said boys should be ordered, governed, placed, and upon just cause displaced by the trustees, and that no poor boys should be thereafter elected or admitted in the said house but what were or should be the sons of freemen of the said city of Bristol, or born within the city, save twenty of the boys appointed by the nominees, which twenty boys might be of any other place, with a provision in favour of boys of kin to or of the name of the said E. Colston.

On the 1st Aug. 1842 the M. R., on an information filed by the Attorney-General, made a decree declaring that the lands, tenements, hereditaments and premises comprised in the indenture of settlement of 1708 are held on the charitable purposes therein expressed, and that the trustees are not entitled to appropriate the rents or profits thereof to their own use, and ordering a scheme for the management of the charity and the application of the rents and profits thereof.

On the 2nd May 1859 the M. R., on the application of the trustees, declared that it was fit and proper and for the benefit of the charity that it should be removed from the said Great House in St. Augustine's-back, in the city of Bristol, to the premises comprised in the assessment, and that the conditional contract for the purchase thereof entered into by the trustees should be completed and carried into effect, and it was ordered that the scheme hereafter mentioned should be the scheme for the future regulation of the charity, and

that the removal of the school should be completed and the necessary alterations in the premises effected by the trustees, with the sanction and direction of the court.

The scheme above referred to provided, *inter alia*—
1. That the charity and the lands and property thereof should continue under the management and control of the society of Merchant Venturers, herein designated the trustees.

2. That the trustees should, with the sanction and direction of the court, complete on behalf of the charity, the said purchase of the house and premises at Stapleton, and that the said message and premises should thenceforth, from the date of such completion, be called Colston's Hospital.

3. That the trustees might borrow money upon mortgage and sell the said Great House and premises.

5. That the trustees should, with the sanction of the Court of Ch., make such alterations in the said message and premises and land at Stapleton aforesaid as should be necessary for the adoption thereof to the purpose of the said hospital or free school.

11. That the proportion of eighty town and twenty country boys, as constituted by the said E. Colston, should not be interfered with, but that the existing limitation of eligibility by birth of town boys should be extended to the limits of the present borough.

12. That the surplus of the charity income which should remain undisposed of after making the payments and investments thereinbefore directed to be made should be applied in adding to the number of boys in the existing school such a number as the surplus income of the charity should from time to time be sufficient to support.

The said conditional contract for purchase was completed on the 14th July 1859, when the premises were conveyed to the present feoffees of the estates comprised in the settlement of 1708, upon the trusts thereof, and subject to the said order and scheme, the alterations and additions which have been made to the school premises received the sanction and approval of the Court of Ch.

The trustees and nominees hold monthly and other visitations of the school for the purposes thereof, but the trustees conduct all business in reference to the school and trust estates, which it is not requisite to conduct in the school premises, in their common hall in the city of Bristol.

Boys have been, and may continue to be, admitted to the hospital from the resp. parish.

The said message and premises and land are situate in the said parish of Stapleton, and up to the time of the removal of the said school to the said premises, were always rated for the support of the poor of the said parish, and in consequence of their value materially contributed to such support.

The rate is dated 24th Oct. 1861, and the assessment on Mr. Rowlatt comprises his apartments as well as the premises used for school purposes. Out of the 9 acres 22 perches which were purchased 2 acres 39 perches are let off to a tenant who is separately assessed.

The residue of the land, in respect of which the trustees were assessed, consists only of the house and offices, roads, playgrounds, shrubberies, a bathing place, about a quarter of an acre of pleasure ground, or garden, in front of the master's rooms, of which he has the exclusive enjoyment, the boys being sent out from it, and about a quarter of an acre of garden ground, cultivated by the boys themselves for their amusement. No profit is made by the sale of vegetables or fruit; but the whole produce of the garden, which is very trivial, is consumed by the boys themselves on the establishment.

The boys are ordinarily excluded from the ground in front of the master's rooms, to which he has a separate

entrance. The master's apartments consist of three sitting-rooms on the ground floor, with three bed-chambers above. The lower rooms open into a passage which communicates with the general dining-hall, and a passage on the upper floor communicates with the dormitories through doorways, which are closed or opened at the discretion of the head master. The trustees and nominees have access to all parts of the establishment, including the master's rooms.

The establishment consists of 120 boys, 5 under-masters and 7 servants. The head master is appointed during the pleasure of the trustees, and receives a salary of 200 guineas per annum, and has meals for himself and family from the school-house kitchen, beyond which any extras are provided by himself. He receives no perquisites from the pupils, nor any profit from the lands. Although the master's wife, who resides with him, holds no appointment in the employ of the trustees, she, in fact, discharges all those duties in the household which, if the master were not a married man, would devolve upon a matron to discharge.

Since the death of his two children, Mr. Rowlatt has had two nieces as frequent visitors residing with him in his apartments, and, on some occasions, his mother-in-law.

The parish officers of Stapleton rated Richard Rowlatt, the head master, as occupier of the said house, garden and premises used for the purposes of the said hospital or free school, and the trustees for so much of the said house and premises as is not appropriated to the use of the schoolmaster, against which rates appeal were entered.

Upon the hearing of the said appeals, the court, after hearing counsel on both sides, amended the rate by striking out the names of the said R. Rowlatt and the trustees on the ground of their having no beneficial interest in the premises, subject, however, to the opinion of the Court of Q.B. as to whether, on the foregoing statement of facts, the said R. Rowlatt and the trustees were liable to be so rated to the relief of the poor of the parish of Stapleton, or not.

June 26.—*W. H. Cooke* argued for the resps., and *Gray (Gilmore Evans with him)* for the apps.

Cur. adv. vult.

Nov. 6.—*BLACKBURN, J.*—The question in these cases is, whether the rate in respect of the house and premises occupied as Colston School is good? It appears, from the statement in the case, that the premises in question were, under the sanction of the Court of Ch. in 1859, conveyed to feoffees on trusts of a settlement made by Edward Colston, and subject to a scheme and order of the Court of Ch. for carrying out those trusts. The effect of the settlement and scheme is, that the feoffees hold the premises in trust to permit the master, wardens, assistants and commonalty of the Merchant Venturers of Bristol (called in the case the trustees) to hold and enjoy the house for a residence for 100 poor boys, a schoolmaster and necessary servants to inhabit in it for a school to teach boys. The trustees are to find and provide for them board and lodging there, and ultimately to put them out as apprentices. Of these boys eighty are to be sons of freemen of Bristol or born in the city, twenty may be born in any other place, but a preference is to be given to those who are of kin to the founder; all must be poor, and all of the Church of England. The premises are used for this purpose. The present schoolmaster, Mr. Rowlatt, has been rated to the relief of the poor of the parish as occupier of the portion of the premises used as his residence, and the trustees have been rated as occupiers of the portion appropriated for the boys, servants, school-house and playground. It does not appear on the case that the portion occupied by the schoolmaster is in excess of what would be reasonably appropriated to the accommodation of such a functionary. No ques-

tion is raised as to whether the nature of the school-master's enjoyment is sufficiently exclusive to make him the occupier, or whether it is merely an enjoyment as a lodger or inmate may be under the trustees. The present question raised is, whether the fact that the premises are held for the purposes of Colston school prevents the occupation from being beneficial so as to be rateable. We think the rates are good. It is now settled that where lands are occupied for public purposes, as for instance the court-houses, prisons and the like, so that (to adopt the language of the Court in *Reg. v. Wallingford Union*, 10 A. & E. 264) the public is the occupier, "whilst those who would otherwise have been the occupiers are in the situation of public servants, receivers and managers for the public benefit, without any interest of their own," there can be no rate imposed, for the rate must be on the occupier, and the occupier, in such cases the public, cannot be rated. But in the present case it cannot be said that the purpose for which these premises are occupied is public in any sense of the word; they are occupied for the purposes of a highly laudable charity, but of a strictly private nature. The recipients of the charity would themselves be rateable if they had an exclusive occupation. In *Reg. v. Cree*, 10 B. & C. 203, and in *Re v. St. Luke's Hospital*, 2 Bur. 1053, which were especially relied on, the decisions went on the ground that no person was shown to be occupier of the premises in question. In the present case there is no such difficulty, as by the express terms of the settlement, as well as from the nature of the thing, the trustees are to be in the occupation of the premises for the purposes of carrying out the charity. It is true that Lord Mansfield, in the case referred to, uses language which has been understood to lay down the proposition that where the occupiers of land are bound to apply it for the benefit of a charity they are not rateable. But this doctrine has not recently been adhered to. In the last case upon the subject, *Reg. v. Licensed Victuallers' Society*, 1 Bost & Smith, 71, Hill, J. says: 'I do not agree that there is no distinction between buildings used for charitable and buildings used for public purposes. In the former case there is an actual occupier, in the latter there is not.' Then my brother Crompton referred to several recent cases in which the distinction has been pointed out. The Court in that case acted upon the distinction, and we think we ought to follow the decision. The consequence is, in each case the order of sessions must be quashed and the name of the appellant restored. *Order of sessions quashed.*

Monday, Nov. 9.

ANONYMOUS.

Articled clerk—Service—Illness.

An articled clerk, whose service was interrupted by illness, and who was absent for a period of two years on account of his health, was nevertheless allowed to be considered as having sufficiently served under his articles.

Garth moved that partial service of an articled clerk during the five years should be deemed sufficient under these circumstances. The applicant was articled in Dec. 1857, and served three years and upwards, when he became so ill as to be obliged to discontinue for three or four months. He was then advised by eminent medical men to take a voyage to Australia for the benefit of his health, and consult a medical man on his arrival in that country. He did so, and was advised to remain in that country a short time. He returned to this country in June 1863, and has since followed up his service. During the voyage to Australia, he was engaged in his legal studies so far as his health would permit. The examiners had intimated

that they could not regard the service as sufficient without an order of the court. The cases of

Ex parte Hodge, 2 Jur. 989; and

Ex parte Matthews, 1 B. & Ad.,

show that where, as in this case, the service is interrupted by the act of God, the courts will allow the service to be deemed sufficient.

By the COURT.—Upon the authority of those cases we will allow the service here to be deemed sufficient.

Rule granted.

Tuesday, Nov. 10.

SIEBEL v. SPRINGFIELD AND OTHERS.

Factors—Lien—Sale—Appropriation of payments.

A factor in London purchased from time to time silk for R., and paid for the same. Remittances were made by R. generally, and not on account of any particular purchase. A general account current was kept by the defts., and then rendered to and checked by R., and the next account began with the balance of the preceding one. After the purchase of a certain lot of silk by the factor (which R. sold shortly afterwards to the plt.), two such accounts were delivered and balances struck in favour of R., showing that the factor had, subsequent to the purchase of this silk, received remittances from R. amply sufficient to cover both its price and also the preceding items of the account against him. Subsequently, the balance being much against R., the factor sold this lot of silk, among others, to recoup himself:

Held, that the accounts showed an election by the factor to appropriate the remittances about the time of the purchase of this lot of silk in payment of the advance on account thereof, and that they were therefore not entitled to sell it, as against the plt., to recoup themselves.

Special case for the opinion of this court.

Detinue for fifty-three bales of silk.

At the trial before Cockburn, C. J. a verdict was found for the plt. for the damages in the declaration, subject to a special case.

The defts., silk merchants and factors, carrying on business in London, acted for several years previous to the transactions in question in this cause for Rudolph Jung and Co., silk merchants at Paris. The course of business was—Rudolph Jung and Co., from time to time, gave orders to the defts. to buy silk for them, and also consigned silks to them for sale. The silks purchased by the defts. were paid for at three months prompt. The silk held by the defts. for Rudolph Jung and Co. was usually sold for that firm by the defts., and the proceeds placed to the general account between them, though on some occasions Rudolph Jung and Co. sold silk so held for them, which was delivered by the defts. Rudolph Jung and Co. were in the habit of remitting to defts. on the general account, and of drawing upon them on the same account. They never made remittances to meet any specific purchases. In the account current between Rudolph Jung and Co. and the defts. Rudolph Jung and Co. were debited with silks bought by the defts. for them, and with the drafts accepted by the defts. for their account when they arrived at maturity, and they were credited with the net proceeds of silks which had been bought by the defts. on account of Rudolph Jung and Co., and afterwards sold by the defts. for them, and also with their remittances. These accounts were made up half-yearly and sent to Rudolph Jung and Co. at Paris, and were then checked by them, and the next account was commenced with the balance of the previous one.

On the 27th Jan. 1857 the defts., by order of Rudolph Jung and Co., purchased fifty-six bales of silk (of which the fifty-three in question formed part), and advised Rudolph Jung and Co. of such purchase.

The defts. at the expiration of the prompt paid for this silk.

In Feb. 1857 the plt. bought of Rudolph Jung and Co. these bales, the price for which he shortly afterwards paid them; but although the defts. were informed of the fact of this sale, they were not aware until May 1858 that the plt. was the purchaser, and the goods still remained in their possession.

In Jan. 1858, Rudolph Jung and Co. being largely indebted to the defts. on the balance of accounts between them, the latter commenced selling the silks purchased by them for Rudolph Jung and Co., and in July 1858 sold the bales in question for 5307*l*.

By the custom of the silk trade in England, a factor has a general lien on all goods of his principal in his possession for the general balance of the accounts between them. He has also a right, when his principal is indebted to him on the general balance of the accounts between them, to sell any goods of his principal in his (the factor's) possession, for which he has paid the prompt, and for which he has not been repaid by his principal.

Upon the accounts between the deft. and Rudolph Jung and Co., the balance was in Feb. and June 1857 in favour of Rudolph Jung and Co., but from Dec. 1857 down to the bankruptcy of Rudolph Jung and Co. in Aug. 1858, it was in favour of the defts. to an amount largely exceeding the value of the silk in question.

The question for the opinion of the Court was, whether under the circumstances above stated the plt. was entitled to recover in this action against the deft.

Lush, Q. C. (*J. Brown* with him) for the plt.

Bovill, Q. C. (*Holland* with him) for the deft.

Cases cited:—

Bodenham v. Purchas, 2 B. & Ald. 39;

Clayton's case, 1 Mer. 608;

Rushforth v. Hadfield, 7 East, 224;

Hawes v. Watson, 2 B. & C. 540;

Smart v. Sanders, 8 C. B. 330;

Pease v. Hirst, 10 B. & C. 122;

Henniker v. Wigg, 4 Q. B. 792;

Simpson v. Ingham, 2 B. & C. 65.

COCKBURN, C. J.—I am of opinion that our judgment should be for the plt. There is no doubt that the goods in question were the property of Rudolph Jung and Co., for whom they were originally purchased by the defts., who paid the price of these goods on such purchase; and the defts., who have retained possession of them as against the plt., who purchased them from Rudolph Jung and Co., set up two grounds as entitling them to do so. The first was that defts., as factors for Rudolph Jung and Co., having a balance on their general account against them, were entitled to a lien on these goods for that general balance, and which would be so but for their having sold the goods. It is not disputed that where a factor, who has only a general lien, proceeds to sell the goods on which he has such lien, the lien is gone. It is therefore impossible that the defts. can have any benefit in this case from their general lien. The second ground taken was, that by the custom of trade set out in the case, a factor who makes an advance in respect of goods is entitled not only to a lien on those goods, but in the event of the general balance of account being in his favour, to sell such goods unless the advance has been repaid, and it was said that the onus therefore was upon the plt. to show that the advance in question had been repaid. This question depends on the state of the general accounts between the parties, and on the law in respect of such a state of accounts. The cases of *Bodenham v. Purchas* and *Ex parte Clayton* show that if there is a general account between parties and items on both sides, though it relate to different transactions, yet, if they are all blended, the appropriation of payments is, in the absence of anything to the contrary, to be made

according to the priority of the items. This is a sound and convenient rule, and there is nothing to take the present case out of it. Those cases govern the present one, and as the balance struck subsequent to these advances was in favour of Rudolph Jung and Co., I think the price of these goods had been repaid to the defts.; and the moment that is established the custom no longer applies, and there is nothing to prevent the plt. from recovering in the action.

BLACKBURN, J.—I am of the same opinion. Factors have a lien for their general balance on goods in their hands, but that is a lien without any right to sell, as was decided in *Smart v. Sanders*; and if a party who has this right tortiously sells, he is liable in trover, having thereby destroyed his lien. The lien, therefore, in this case was clearly destroyed by the sale, if it was tortious. Then the question is, whether the sale was tortious, and that depends upon the custom set out in the case. I am satisfied, upon the accounts, that the defts. had, in the present case, been repaid by their principal for these silks, and were therefore not entitled to sell. It appears that the parties kept accounts, in which they wrote down the sums on each side, in order of date, and rendered these accounts every half-year, with the balance struck; and twice since the advance upon this silk was put down, accounts have been rendered, and larger sums than those due at the time this advance was made have been paid off. The rule is correctly stated by Holroyd, J., in *Simpson v. Ingham*, 2 B. & C. 74, where he says that "the question is whether, from any entry in the books, there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been delivered;" and he adds, "those entries not having been communicated to the opposite party, it seems to me that the election was not complete." In this case the defts. put down the items in the account, and rendered it to the other side; and it seems to me that, when they had thus communicated this to the other side, they had made their election to apply the sums paid to the earlier items, and wipe them off so as to leave the balance only due. As soon as the accounts were rendered, this election was finally determined. That being so, the sale by the defts. was tortious, and the plt. is entitled to recover.

MELLOR, J. concurred. Judgment for the plt.

Wednesday, Nov. 11.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY (apps.) v. THE CHURCHWARDENS OF CANNOCK (resps.)

Poor-rate—Railway—Branch line—Profit derived by main line from traffic coming from the branch.

The rateable value of land in a parish may be increased by its producing a return to the occupiers out of the parish, as where a branch railway occupied by a company owning a main line into which it runs, produces a profit by virtue of the traffic which it causes over such main line.

The branch line of A. ran into the main line of B., and was leased to the latter at a fixed rent. The traffic on the branch yielded no profit whatever with reference to the branch itself, but such traffic passed over the main line, and contributed considerably to the traffic and profit of such main line:

Held, that B., as the occupiers of land in the parishes through which the branch line ran, were liable to be rated not merely with respect to the earnings of such branch lines in such parishes, but in respect of the value to them as bringing a profit to their main line.

This was a special case stated for the opinion of the court in pursuance of an order of Crompton, J., made

Q. B.] LONDON AND NORTH-WESTERN RAILWAY CO. v. CHURCHWARDENS OF CANNOCK. [Q. B.]

under the 12 & 13 Vict. c. 45, in an appeal by the London and North-Western Railway Company to the Quarter Sessions of Staffordshire against a rate for the relief of the poor of the parish of Cannock in the said county.

The case was as follows:—

The apps., the London and North-Western Railway Company, are an incorporated company acting under the provisions of an Act passed in the session of Parliament held in the 9th & 10th years of her present Majesty Queen Victoria, and intitled, "An Act to consolidate the London and Birmingham Grand Junction and Manchester and Birmingham Railway Company." The Cannock Mineral Railway Company were incorporated under that title, by the Cannock Mineral Railway Act 1845, and were thereby authorised to make a railway from Cannock Mill, in the resps.' parish, to the North Staffordshire Railway (Potteries line), forming a junction with the Trent Valley line of the apps.' railway at or near the Rugeley station of the said railway, in the county of Stafford. The same statute enacted, that it should be lawful for the Cannock Mineral Railway Company to demise or lease their undertaking for such consideration or annual rent, and upon such terms and considerations as they should think proper, to the London and North-Western Railway Company, for any term which had been or should have been agreed upon. In the exercise of this power, and before the completion of the line, a lease was agreed to be granted by the Cannock Mineral Railway Company to the apps., of their line and station, and of the goodwill of the trade of carriers thereon, at a yearly rental of 5500*l.* in perpetuity, and the apps. had entered into possession and enjoyment of the said premises and goodwill so agreed to be leased at the time of making the poor-rate hereinafter mentioned. For the purposes of this special case, it is said to be taken, that at the time of the making of the said rate, a lease had been granted in the terms of the said agreement. The apps. are bound by the agreement to keep the line in repair. Copies of the Acts of Parliament herein referred to accompany this case, and are to be deemed part thereof. The Cannock Mineral Railway was opened the 7th Nov. 1859, and is worked by the apps. They carry on exclusively upon it a business of carriers of passengers and goods. The length of the Cannock Mineral Railway is $7\frac{1}{2}$ miles, and it passes for a length of $2\frac{1}{2}$ miles through the resps.' parish. The actual number of acres of land occupied by the $2\frac{1}{2}$ miles of railway in the resps.' parish is 35 acres, and the rateable value of such land as arable or pasture land may be taken at 40*s.* per acre.

By a rate or assessment for the relief of the poor of Cannock and for other purposes chargeable thereon according to law, made on the 26th Nov. 1860, after the rate of 10*d.* in the pound, the London and North-Western Railway Company were assessed as occupiers of the said two miles and a half of the said Cannock Mineral Railway in the resps.' parish (and of the goodwill of the apps.' trade of carriers thereon) at a gross rental of 325*l.* 12*s.*, and a net rateable value of the same sum of 325*l.* 12*s.*, and the rate demanded of the London and North-Western Railway Company on that assessment amounts to 13*l.* 11*s.* 4*d.* The London and North-Western Railway Company duly appealed against the said rate, and gave due notice of such appeal, and such appeal was duly respited at the quarter sessions held in the first week next after the 28th June 1861, and again at the quarter sessions held in the first week next after the 11th Oct. 1861. The causes and grounds of such appeal, and the apps.' objections to the said rate, are to the effect that the apps. are in and by the said rate or assessment over-rated in respect of the yearly value of the rateable property occupied by them in the said parish, but it is

admitted that the apps. are to have the full benefit of such grounds should the effect of them be here insufficiently stated. The said order of Crompton, J. was made on the 11th May 1863, whereby it was amongst other things ordered that the parties should be at liberty to state the facts of the case in the form of a special case for the opinion of the Court of Q. B., they agreeing that a judgment in conformity with the decision of the said court, and for such costs as the court shall adjudge, may be entered on motion by either party at the court of sessions of the peace to be held in and for the county of Stafford next or next but one after the decision of the Court of Q. B. shall have been given. The gross receipts of the apps. in the year for which the rate was made amounted in the parish of Cannock to 143*l.* 6*s.* 9*d.* per mile, making 338*l.* 6*s.* 10*d.* for the two miles and a half of railway in the resps.' parish. The total expense of working the Cannock Mineral Railway in the resps.' parish in the year for which the rate was made, independently of the rent of stations, renewal of road, interest on tenants' capital and tenants' profits, amounted to the sum of 322*l.* 18*s.* 4*d.* per mile, making 807*l.* 5*s.* 10*d.* for the two miles and a half of railway in the resps.' parish. The expenses of working the railway in the resps.' parish therefore exceeded the gross receipts there, and so far as relates to the earnings or profits there, the apps. do not make any net earnings or profits in respect of the land occupied by them in the said parish. The Cannock Mineral Railway forms a link in the apps.' system of railways, and at the time when the said agreement for a lease was made, the apps. considered the possession of this railway desirable, both with a view to secure traffic for their main lines and to prevent other railway companies from gaining access to the district. These considerations induced the apps. to enter into the agreement for a lease of the Cannock Mineral Railway at the rent before mentioned; but so far as regards the exclusion of the said other companies from the district, such considerations, from a change of circumstances, did not exist at the time of the making of the rate in question. The Cannock Mineral Railway unites at one end, as before stated, with the Trent Valley Railway of the apps., and at the other forms a junction with the Cannock branch of the South Staffordshire Railway, of which last-mentioned railway and branch the apps. are also lessees. Passengers, minerals and goods are conveyed over the Cannock Mineral Railway and over the main and other lines belonging to or leased by the apps., at through rates and fares, and nearly the whole of the traffic on the Cannock Mineral Railway passes over some part of the apps.' other lines. By this means the Cannock Mineral Railway contributes considerable additional traffic to the main lines of the apps.' railways, but the apps. are rated in respect of such additional traffic, together with all other traffic passing along their lines in the different parishes where the profit upon it arises. In the above-mentioned statement of gross receipts the profits accruing to the apps. from the traffic so carried over their other lines from and to the Cannock Mineral Railway is not included. The traffic of the Cannock Mineral Railway is not yet fully developed; the line passes through a rich mineral district, and over land rapidly increasing in value. The apps. work the Cannock Mineral Railway in connection with and as part of their general system of lines, and in the manner which they considered most beneficial for such system, and not with any special reference to profits to be made upon the above railway alone, as distinct from the beneficial working of the whole system. It is admitted by the apps. for the purposes of this case that they are liable to be assessed at a net rateable value of 40*s.* per acre, being the value as arable or pasture land of the land occupied by them in

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the parish, making a sum of 70*l.* for the thirty-five acres of land, the total quantity of land the subject of this rate. The question for the opinion of the court is, upon what principle the apps. are liable to be rated for their occupation within the resps.' parish? If the court shall be of opinion that the apps. are not liable to be rated beyond the sum of 40*s.* per acre, then the rate is to be reduced accordingly to 70*l.*

If the court shall be of opinion that the apps. are liable to be rated beyond the said sum of 40*s.* per acre, then the rateable value upon the principle laid down by the court is to be ascertained by a reference and assessment to be made accordingly.

Mellish, Q. C. (*Davis* with him) appeared in support of the rate, and contended that although the railway might not yield any profit to the apps. in the parish itself, yet that, taken in connection with the main line, over which such traffic would pass, it would yield a profit, and so the line in such parish would be of enhanced value; independently of which such line would be of value to the company in connection with their general system, and as giving them a monopoly in the district. He referred to *Reg. v. South-Eastern Railway Company*, 3 El. & B. 481, as establishing this principle.

Borl, Q. C. (*Staveley Hill* with him), for the apps., contended that, inasmuch as the working of the line yields no profit, the apps. are only liable to be rated for their occupation at the value of arable or pasture land. [*COCKBURN*, C. J.—We must look to its value to a tenant, namely, what it would let for to a company so situated as this company.] Here is a lease in perpetuity, and therefore we must look at the case as though the branch line were an integral portion of the entire line, and then it should be assessed upon the parochial principle:

Reg. v. Fletton, 30 L. J. 89, M. C.

[*COCKBURN*, C. J.—Rent is *prima facie* evidence of value. Suppose at this moment there were no lease, and the apps. wanted to take it, what is the rent they would give? They would arrive at that by this process. What is the traffic on the branch, what are the expenses, what are the profits it would produce to the main line? with some other considerations. *BLACKBURN*, J.—What would be the elements of the rent? Why, amongst others, the capacity to add to the takings of the main line.] The true principle is stated by Lord Ellenborough in *Re v. Bedworth*, 8 East, 387, which is that the property can only be rated whilst it is productive. The rate must be made upon the parochial principle:

Reg. v. The Brighton Railway Company, 15 Q. B. 213;

Reg. v. The Great Western Railway Company, 15 Q. B. 1085;

The Newmarket Railway Company v. St. Andrew-the-Less, 3 El. & B. 94.

[*WIGHTMAN*, J.—Is it found in the case that the London and North-Western Railway Company, if released from the lease, would give nothing as a rent for the line?] It is not so found. [*BLACKBURN*, J.—Why, if there are no profits, do they keep the line open?]

By the COURT.—The case must go back as provided for, to have it ascertained what, taking all its advantages into consideration, is the rateable value of the branch line in the resp.'s parish to the apps.

Judgment accordingly.

Attorney for the resps., *John Collis*, Penkridge.

Attorney for apps., *James Blenkinsop*, Euston Station.

PAPPIN (app.) v. MAYNARD (resp.)

Highway—A game upon—5 & 6 Will. 4, c. 50, s. 72—Conviction.

Where a number of persons assembled together in a public highway to enjoy a diversion called "a stag hunt," which consisted in one of the number representing a stag, and the others chasing him, whereby an obstruction was caused:

Held, that this was "a game" within the meaning of sect. 72 of the 5 & 6 Will. 4, c. 50.

This was a case stated under the 20 & 21 Vict. c. 43, upon a refusal of justices to convict of an offence under sect. 72 of the 5 & 6 Will. 4, c. 50 (the Highway Act), which imposes a penalty upon any person who "shall play at football, or any other game, on any part of the said highway, to the annoyance of any passenger or passengers."

It appeared that many of the inhabitants of Stratton, Cornwall, were in the habit of amusing themselves, on certain evenings, by a representation of a stag-hunt in the public streets, which consisted in one of their number being dressed so as to represent a stag, and many others following him, as in the chase. On the 1st May last such a game was indulged in, and caused an obstruction, and upon an information laid under the foregoing section, the justices dismissed it, holding that this was not a game within the meaning of the Act.

Welsby now appeared in support of the information. [*COCKBURN*, C. J.—What do you say to Guy Faux, or to sweeps upon a May-day?] Those would be games within the Act if they were an obstruction. These facts show that the parties were engaged in a game, and they obstructed the highway. [*COCKBURN*, C. J.—It might be said to be analogous to the game played by schoolboys of "hare and hounds." Just so; and as it was an obstruction, it is clearly a game within the meaning of the section.

No one appeared on the other side.

COCKBURN, C. J.—Assuming that they were pretending to hunt the stag, it certainly appears to be a game such as might be the subject of a conviction under the statute. The case, therefore, must go down again to the justices, with our opinion upon it.

Case remitted to the sessions, with the opinion of the court.

HOPTON (app.) v. THIRWALL (resp.)

The Salmon Fishery Act—Having in possession the young of salmon—Ignorance of fish being the young of salmon.

Under the Salmon Fishery Act 1861, sect. 15, a penalty is imposed upon any person who shall "have in his possession the young of salmon." A., with a rod and line, caught a number of samlets (the young of salmon) whilst he was fishing for trout, not knowing the difference, and having no intention of taking or having in his possession samlets or the young of salmon, or the young of the salmon species:

Held, that he had committed no offence under the statute.

This was a case stated under the 20 & 21 Vict. c. 43, upon a refusal of justices to convict upon an information under the 24 & 25 Vict. c. 109, s. 15 ("An Act to amend the laws relating to fisheries of salmon in England.")

By the above section it is enacted (*inter alia*) that no person shall do the following things or any of them: "wilfully take or destroy the young of salmon, or have in his possession the young of salmon;" and by sect. 4 it is enacted (*inter alia*) that "young salmon shall include all young of the salmon species, whether known by the names of fry, samlet," &c.

It appeared that the deft. was found fishing in the

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river Ithon, Radnorshire, with a rod and line; that he had trout and samlet in his basket, eight or ten samlets being recently killed; that the deft. admitted taking them, but stated that he had taken them while fishing for trout, not knowing at that time the difference between trout and samlet, and having no intention of taking or having in his possession samlets or the young of salmon, or the young of the salmon species. The justices, upon the hearing, found that the deft. had taken and had in his possession certain fishes found in the river Ithon called samlets, but that he had not done so wilfully, and that he was at the time ignorant of the fact of the said fishes being samlets, or the young of salmon, or young of the salmon species, and they were of opinion that they ought not to convict the deft. of the offence, and they therefore dismissed the information.

Davis now appeared for the app., and contended that the justices were wrong, for that as in fact the samlets were in his possession, it was immaterial whether or not he knew they were samlets. [COCKBURN, C.J.—Ignorance of the law is no excuse, but it is otherwise with ignorance of the fact. Suppose he had thought they were trout. He must intend to act unlawfully.] The Legislature has made it an offence "to have samlets in his possession." [COCKBURN, C.J.—*Prima facie* he must be taken to know what it is he has in his possession; but here the justices have specifically found the other way.] That might be a ground for mitigating the penalty, but the Legislature has made it an offence merely to have them in possession.

By the COURT.—For the reasons which the justices have given they came to a right decision.

Judgment for the resp.

Thursday, Nov. 12.

WILLIAMS v. GIBBONS.

Absconding Debtors Act—14 & 15 Vict. c. 52—
Arrest of deft.

Under the 14 & 15 Vict. c. 52 (the Absconding Debtors Act), a County Court judge may issue a warrant for the arrest of a debtor, but such arrest can endure for only seven days, within which time the creditor is required (to make such arrest justifiable) to issue and serve a capias issued by an order of a judge out of one of the Superior Courts. Where, however, a party has been so arrested under a warrant, and at the expiration of the seven days has been discharged out of custody for want of a capias, the plt. is not thereby precluded from afterwards obtaining upon proper materials a capias whereon to arrest such deft. Masters v. Johnson, 8 Ex. 63, overruled.

McIntyre moved for a rule to discharge the deft. out of custody, he having been arrested upon a capias issued under the 14 & 15 Vict. c. 52 (the Absconding Debtors Act), under the following circumstances:—A plaint against the deft. and another for the recovery of a sum of money came on for hearing in a County Court upon the 24th Sept. last, when the judge gave judgment against the other deft., but adjourned his judgment with reference to the present deft. for a month, stating that he had great doubts as to his liability. On the 6th Oct. the plt. issued a writ of summons out of this court against the deft. for the same cause of action. On the 12th he applied to the County Court judge for a warrant under sect. 2 of the above-mentioned Act to arrest the deft. This application was refused on the ground of the pendency of the plaint, whereupon the plt. withdrew the plaint, and thereupon the County Court judge granted the warrant. On the 14th the deft. was arrested upon it by the sheriff of Lancashire at Liverpool, and on the 16th the plt. made the

requisite affidavit, whereupon a capias issued out of this court against the deft. on the following 20th. This writ not having been served, the deft. on the 22nd was discharged by the sheriff out of his custody. On the 24th a fresh capias issued out of this court into Glamorganshire, where the deft. was arrested on the 26th of the same month. A summons had been taken out before a judge at chambers for his discharge out of custody, which was adjourned to the court.

By sect 2 of the 14 & 15 Vict. c. 52, it is enacted that it shall be lawful for the judge of any district County Court, on application by or on behalf of any creditor, upon due proof by affidavit to the satisfaction of such judge that a debt of 20l. or upwards is owing to such creditor and is then payable, and that there is probable cause for believing that such debtor, unless he be forthwith apprehended, is about to quit England with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the courts of law in England so long that thereby the said creditor will or thereby may be delayed in the recovery of the said debt, to grant a warrant to the high bailiff of the said County Court whereby he shall have authority at any time within seven days after the date of the said warrant to arrest the person named in such warrant, and such warrant may be executed in any part of England: "provided always that every creditor who shall cause such warrant to issue shall forthwith cause to be issued a writ of capias . . . and such debtor or debtors shall, if in custody, be served with such writ of capias within seven days from the date of such warrant, including the day of such date." And,

By sect. 3, it is enacted, that "the warrant or warrants which shall be issued by virtue of this Act shall be auxiliary only to the processes now in use, and shall be wholly void and of none effect whatever as a protection to the person on whose behalf such warrant shall have issued, unless such writ of capias shall be issued and served in manner aforesaid;" and by the provision in sect. 6 it is provided "that if no writ of capias be issued and served within seven days from the date of the said warrant, including the day of such date, the person arrested under such warrant shall be entitled to be discharged from custody," &c.

McIntyre now contended that, as nothing was done upon the first writ of capias, which was issued on the 20th Oct., and the deft. was discharged at the expiration of the seven days from his arrest upon the warrant, the plt. was not entitled to issue a second capias, and so arrest him a second time. *Masters v. Johnson*, 8 Ex. 63, is conclusive. *Hughes v. Griffiths*, 32 L. J. 47, C. P., which will be cited on the other side, does not turn upon the same point. [BLACKBURN, J.—The case of *Masters v. Johnson* is certainly in your favour, for it seems to decide that, when the warrant is spent, the capias is spent also.] The plt. must take his proceedings with all their incidents, and must sue out his capias within the seven days if he means to arrest. If the deft. is in custody, then the capias must issue and be served within seven days.

Gray, Q.C. showed cause in the first instance, and contended that, although, if no capias issued and was served within the seven days after the arrest upon the warrant, such arrest could not be longer prolonged, and the plt. would lose his protection, yet there is nothing which takes away the power of the court, upon proper materials, to order the arrest under the Act at any time of a party about to abscond; that arrest under the warrant is not a step in the cause. [BLACKBURN, J.—It seems to me to mean that the deft. shall not be kept in arrest under the warrant more than seven days, and that if the capias is not procured within that time the deft. shall be discharged. WIGHTMAN, J.—The 6th section seems to

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support your view.] The warrant was only intended to hold the deft. until you get the capias.

McIntyre was heard in reply.

WIGHTMAN, J.—I am of opinion that this rule should be discharged. The proceedings were taken under the Absconding Debtors Act, 14 & 15 Vict. c. 52, upon a warrant granted by a County Court judge, upon which warrant the deft. was arrested on the 14th Oct., but no capias issued within the seven days to support such warrant, and the consequence was that the deft. was discharged. He was, however, afterwards arrested on a capias as an independent proceeding, and the question is, whether this was regular or not? He was arrested at first by virtue of a warrant issued by a County Court judge, under the provisions of the 1st section of the 14 & 15 Vict. c. 52 [his Lordship read the section]. But to make the arrest lawful, it was necessary that a capias should issue, and be served within seven days. This was not done, and he was accordingly discharged from his arrest under the warrant. He was afterwards arrested upon a capias issued upon similar materials to those which were before the County Court judge; in fact, upon materials which satisfied the learned judge who granted the capias. The contention is that he could not be arrested under this capias, as the first arrest was a part of the proceedings, and that having failed, the subsequent arrest fails also. But the warrant is only auxiliary to the regular process. I confess I see no reason for holding that the capias was unlawful by reason of what had taken place; as he was still in England, and in the opinion of the learned judge about to go abroad, he was subject to be arrested. The case of *Masters v. Johnson* was relied upon for the applicant, and in that case it was certainly held that the second arrest was unlawful. [His Lordship here referred to the case.] This case proceeds upon the principle of *nemo debet bis vexari pro eadem causa*. But he is not in fact twice vexed for the same cause; he is about to go abroad, and for that he is arrested; that is not the cause of action. This is not a second arrest for the same cause of action, but an arrest because he is attempting to leave the country. But there is a subsequent case of *Hughes v. Griffiths* in the C. P., which, although not expressly upon the point, seems to throw a doubt upon the soundness of the decision in *Masters v. Johnson*. It was not necessary in that case to decide the point, but one of the objections was the same. I certainly differ from the judgment of the Court of Ex. in *Masters v. Johnson*, and I think the rule in this case should be discharged.

BLACKBURN, J.—I certainly admit that the case of *Masters v. Johnson* is quite in point, and that we cannot discharge this rule without saying that we differ from the Court of Ex. If this were a question which might go into a court of error, we should not overrule the decision of a court of co-ordinate jurisdiction if that decision had not been overruled in error; but where there is no writ of error, although we look at the judgment of such a court with the greatest respect and deference, we must act upon our own views. Mr. Gray's reference to the former practice before arrest upon *meane* process was abolished has great weight, and the question is, does the neglect to arrest on the capias which issues upon the warrant render the proceedings void, or merely render the detention under the warrant of no effect, and leave the parties responsible for such arrest? I am not aware that the existence of a warrant granted by a County Court judge can restrict the power of the Superior Courts to issue a capias. In the case of *Masters v. Johnson* the Court of Ex. came to the conclusion that the arrest under the warrant was a stage in the proceedings. [His Lordship read a part of the case.] I must say that I am of opinion that the judgment of the Court of Ex. is wrong, and that this rule should be discharged.

MELLOR, J.—I am satisfied that the judgment of the Court of Ex. in *Masters v. Johnson* cannot be supported, and that the proceedings under the Absconding Debtors Act are merely auxiliary to the old process. The object of the warrant was to avoid the delay of obtaining a capias, and therefore is only to have effect during seven days. But this does not affect the general powers of the Superior Courts to order an arrest upon proper materials. (a)

Rule discharged.

Friday, Nov. 13.

COX v. COOPER.

Pleading—*Libel—Innuendo*—C. L. P. A. 1852—s. 61.

This report appeared in a newspaper:—"C. v. G. When this case was called on, the plt. was not in court, on which A., who appeared for deft. (the plt.'s mother-in-law), applied for costs, which were allowed and the case struck out." An action of libel was brought for it, and the declaration alleged by averments that it did not appear in the County Court that the deft. was the plt.'s mother-in-law, but the fact was maliciously introduced into the report for the purpose of creating an unfavourable impression against the plt., and a suspicion of him, and that he ought to be regarded with suspicion of being guilty of something wrong and blameable in suing his mother-in-law:

Held, that the declaration did not disclose any cause of action:

Sect. 61 of C. L. P. A. 1852 commented on.

Demurrer to the declaration.

Declaration.—For that the deft. falsely and maliciously wrote and published of the plt. in a certain newspaper the words following:—"Huntingdon County Court, Thursday—Cox v. Gowler."—When this case was called on the plt. D. S. Cox (meaning the now plt.) was not in court, on which Mr. Ginn, who appeared for the deft., the plt.'s mother-in-law, applied for costs, which were allowed, and the case struck out" (meaning that the now plt. was the plt. in an action in the Huntingdonshire County Court, when in fact he was not the plt., and one J. Cox was the plt. therein, and meaning that in that action the plt. was suing his mother-in-law, and meaning that the said action was struck out, and that the County Court ordered the now plt. to pay costs on account of the said action being so struck out, when in truth the said action was not struck out, but the trial thereof was only adjourned with costs to be paid by the plt. therein, and was so adjourned on the application of the plt. therein, and meaning that the relationship of son-in-law and mother-in-law, which in fact existed between the now plt. and the deft. in the said action, was mentioned in the said County Court in the course of the proceedings therein, or otherwise appeared from these proceedings, when in truth it was not so mentioned and did not so appear, but being otherwise known to the now plt. was by him maliciously introduced into the said libel for the purpose of creating in the minds of those who should read the said libel an impression unfavourable to the now plt. and a suspicion against the now plt., and meaning that the now plt. ought to be regarded with suspicion of being guilty of something wrong and blameable in so suing his said mother-in-law in the said action.)

Demurrer and joinder.

D. D. Keane, in support of the demurrer, was stopped by the Court.

Archibald in support of the declaration.—Since the C. L. P. A. 1862, s. 61, it is only necessary to aver that the words were used in a defamatory sense, and

Cockburn, C. J. was absent.

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MONTEFIORE v. LLOYD.

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then it is a question for the jury to say whether they are libellous. [BLACKBURN, J.—The declaration does not say that the words were used in a defamatory sense.] The last averment is that the libel meant that the plt. ought to be regarded with suspicion of being guilty of something wrong and blameable in suing his mother-in-law. [WIGHTMAN, J.—“Of being guilty of something blameable.” What is that?] It may be that the plt. sued his mother-in-law out of a litigious spirit. The pleader may now in the declaration put any construction he pleases on the words, and it is a question for the jury whether there is any libel. The innuendo in the declaration shows sufficiently that the report was published in a defamatory way.

Hemmings v. Gasson, 1 E. B. & E. 346.

WIGHTMAN, J.—I am clearly of opinion that the declaration cannot be supported. Sect. 61 of the C. L. P. A. 1852 does not make that actionable which was not so before. The only object of it was to dispense with the prefatory averments then in use for the purpose of showing that the words spoken were used in a defamatory way. But taking all that appears on this declaration, as well as the innuendo that the deft. meant that the plt. was a person who ought to be regarded with suspicion of being guilty of something wrong and blameable in so suing his mother-in-law, there is no ground of action, unless it be actionable to say that you sued your mother-in-law. The latter part of sect. 61, “and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient,” show that a cause of action must appear on the face of the declaration. Now here, with the alleged meaning set out, I am of opinion that the declaration does not show a cause of action.

BLACKBURN, J.—Sect. 61 was only meant to alter the form of pleading in declarations for libel or slander, and not the law. The words must still bear, or be alleged in the declaration to bear, such a meaning as will show a cause of action. Formerly, where words, when taken in their ordinary sense, did not bear a defamatory construction, it was necessary by prefatory averments to show that they were used in that sense. The section dispenses with those averments, but there must now be a distinct averment that such words bear a meaning which is actionable. All that is set out in this declaration is, that the reporter published in a newspaper that the plt. had been suing his mother-in-law in the County Court.

MELLOR, J.—It appears to me that the innuendo limits the meaning of the report to this, that the plt. sued his mother-in-law in the County Court, and unless that is an actionable statement there is no cause of action here. *Judgment for the deft.*

COURT OF COMMON BENCH.

Reported by W. MAYN and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Tuesday, Nov. 10.

MONTEFIORE v. LLOYD.

Bond—Principal and surety—Contemplated partnership of principal debtor.

Where the deft. gave a bond to the plts., an insurance company, whereby he became surety for his son on his appointment as their agent, knowing at the time that his son was about to enter into partnership with a third person; and the son, after the execution of the bond, did accordingly enter into partnership with that person, and the partnership firm so formed was constituted their agents by the company, and acted as such till they failed, which they did indebted to the company:

Held, in an action on the bond, that the deft. was not

liable for moneys received by the partnership firm as agents for the company.

Special case stated by consent of the parties and by order of Willes, J. The action was on a bond brought by the plt., as chairman and on behalf of the Alliance British and Foreign Life and Fire Assurance Company, in pursuance of an Act of 5 Geo. 4, enabling the company to sue and be sued in the name of any member of the company. The circumstances of the case were as follows:—

In the year 1854 Mr. G. H. Fox, who resided and carried on business in Adelaide, in Australia, was the agent of the said company at Adelaide, and by a letter dated from Adelaide the 27th Nov. 1854, the directors of the company were informed of his desire that Mr. John Sanderson Lloyd should be associated with him in the agency of the company at Adelaide. The following is a copy of that part of the letter addressed to the secretary of the company in which such desire was expressed:—“I have now to request that you will be good enough to intimate to the directors my desire that the name of Mr. John Sanderson Lloyd should be associated with mine in the power of attorney for the conduct of this agency, as I am about taking that gentleman into partnership. I may observe that Mr. Lloyd has been in my counting-house for some time, and is nephew to Mr. J. S., one of the partners in the firm of S. and Co., and you could apply to that gentleman as a referee in case of need. My more particular object in wishing this is, that I contemplate visiting England next year, and it is important that the interests of the company should not suffer during my absence. You will be furnished with the necessary security for Mr. Lloyd. I should also further mention that Mr. Lloyd has had for some time the management of this branch of business in our counting-house, and I consider him in every way fully qualified to manage efficiently the agency of the company.”

On the 14th Feb. 1855 a resolution was passed at a meeting of the board of directors, “that Mr. J. S. Lloyd, of Adelaide, be associated with Mr. G. H. Fox in the management of the agency there, as suggested in a communication from the latter gentleman, dated 27th Nov. last, and that he be required to furnish security to the extent of 500l.”

On the 1st March 1855 F. A. Englebach, on behalf of the company, wrote to Mr. Fox a letter, of which the material portion was as follows: “I am happy to inform you that, in accordance with your request, the directors have associated Mr. J. S. Lloyd with you in the control of the Adelaide agency, and a new power of attorney will consequently be prepared and forwarded by the next mail. It will be necessary that Mr. Lloyd execute a bond for 500l., to which Mr. Theodore Lloyd, of the Stock Exchange, and Mr. Isaac Lloyd, of Bristol, have undertaken to become sureties.”

The said J. S., mentioned in the extract of the letter of the 27th Nov. 1854, declined to become one of the sureties, but wrote on the 7th Feb. 1855 a letter to the deft., who was the father of J. S. Lloyd, as follows:—

“I send you on the other side an extract of a letter from G. H. Fox to the Alliance Company, whose agency we were the means of obtaining for him. It will be necessary, if J. S. Lloyd be associated with him in the agency, that a bond signed by two parties for 500l. be entered into. As it is only insuring his integrity, it is a nominal thing, but I cannot be one on account of my articles of partnership, which expressly prohibit any one of the partners becoming surety. I should think J. S. Thomas might not have the same objection, and your own name would do for one. I enclose a form.”

The extract alluded to in this letter was a copy of the extract set out above. The letter with the extract

on the other side of it was received by the deft. shortly after the date thereof, and he, as well as one Theodore Lloyd, consented to be sureties for J. S. Lloyd.

On the 14th March 1855 the defts. duly executed and delivered to the company the bond on which the action was brought, being a joint and several bond in the ordinary form, of John Sanderson Lloyd, Theodore Lloyd and Isaac Lloyd, to the deft. for 500*l.*, given to the Alliance British and Foreign Life and Fire Assurance Company, and dated March 14, 1855. The condition of the bond was as follows:—

"Whereas the above bounden J. S. Lloyd hath been nominated and appointed by the board of directors of the Alliance British and Foreign Life and Fire Assurance Company to be an agent of the said company at Adelaide, and on such his nomination it was stipulated by or on behalf of the said company, and agreed to by the said J. S. Lloyd, that he together with the above bounden Theodore Lloyd and Isaac Lloyd should enter into the above written bond or obligation for securing the fidelity of the said John Sanderson Lloyd. Now the condition of the above-written bond or obligation is such that if the said J. S. Lloyd, his heirs, executors, or administrators, or some or one of them, shall and do from time to time and at all times hereafter, when and so often as he or they shall be thereunto required by the actuary, secretary, or other officer of the said company, well and truly pay or cause to be paid unto the directors of the said company, some or one of them, or to such person or persons as they or he shall order, direct, or appoint, all such sum and sums of money as shall be by the said J. S. Lloyd had and received as or by way of premiums for assurances effected with the said company or otherwise howsoever on account and for the use and benefit of the said company, or with which he shall be entrusted by or on account of the said company; and also shall and do from time to time, and at all times hereafter when and so often as he or they shall be thereunto required by the said actuary, secretary, or other officer, render to the said directors, some or one of them, a true, just and perfect account of all and every sum and sums of money that shall be by him had and received or paid, laid out and expended for or on account of the said company; and also shall and do well, truly, justly and honestly in every respect behave and conduct himself in his said office or employment of agent to the said company; then the above-written bond or obligation is to be void, otherwise to be and remain in full force and virtue."

The word "an" mentioned in the above passage, that is to say, "to be an agent of the said company" was before the execution of the bond written over the word "the," which last-mentioned word was part of a printed form, and had been previously struck out. The bond was also duly executed by J. S. Lloyd and Theodore Lloyd.

On the 3rd April 1855 J. W. Collins, on behalf of the company, wrote to Fox a letter, of which the material portion was as follows:—"I now beg to forward a power of attorney, constituting J. S. Lloyd, Esq., an agent of the company. I also enclose a bond for his signature which, as he will perceive, has already been executed by the sureties to whom I referred in my last." The power of attorney referred to in this letter was duly executed on the 28th March 1855 by the president and directors of the company, who thereby ordained, nominated, constituted, authorised, empowered and appointed J. B. Were, G. H. Fox, and J. S. Lloyd, all of Adelaide, in the colony of South Australia, merchants, jointly, and each or either of them separately, the true and lawful attorney and attorneys of the said company, to assure buildings, goods, and other property, in Adelaide and elsewhere, against loss or damage by fire, subject to certain conditions not material to the case.

The J. B. Were mentioned in this power of attorney had been, since 1851, appointed by the president and directors of the company an agent of the company, and had been authorised and empowered by them, by power of attorney, either jointly with G. H. Fox, or separately, to insure goods, buildings and other property, in Adelaide and elsewhere, against loss or damage by fire, subject to the same conditions as those mentioned in the power of attorney of the 28th March 1855; but since Feb. 1852 he had resided at Melbourne, and entirely ceased to act as agent for the company, though the power of attorney had not actually been taken away from him.

In June 1855 J. S. Lloyd entered into partnership with G. H. Fox at Adelaide. They there carried on business under the name, style and firm of George Henry Fox and Co., until the firm failed as herein-after mentioned.

On the 19th Dec. 1855 the president and directors of the company duly executed a power of attorney, by which they nominated, appointed and authorised G. H. Fox and J. S. Lloyd, both of Adelaide, in the colony of South Australia, merchants, trading under the firm of George Henry Fox and Co. jointly, and each and either of them separately, to be the agents of the company to assure buildings, goods and other property, in Adelaide and elsewhere, against loss or damage by fire, subject to certain conditions which were not material to the present case.

In Feb. 1859 the firm of George Henry Fox and Co., which consisted, as aforesaid, of the said G. H. Fox and the said J. S. Lloyd, failed, and was adjudicated insolvent in the Court of Insolvency in South Australia, and the estate of the firm was wound-up and administered in that court.

At the time of its failure the firm was indebted to the company in the sum of 450*l.* 11*s.* for premiums received by G. H. Fox and J. S. Lloyd, as agents for the company since the date of the bond. Of this sum, 338*l.* 18*s.* 2*d.* was due in respect of premiums received for fire insurances, and 111*l.* 12*s.* 10*d.* was due in respect of premiums received for life insurance. The company proved for the sum of 450*l.* 11*s.* on the joint estate of the firm in the said Court of Insolvency, and received thereon a dividend at the rate of 5*s.* 3*d.* in the pound, amounting to 118*l.* 5*s.* 5*d.*, and the company had not received any other sum of money in respect of the said sum of 450*l.* 11*s.*

The deft. objected to the admissibility in evidence of the documents and matters referred to, and stated above, bearing date previous to the execution of the bond.

The question for the opinion of the court was, whether the deft. was liable on the bond to the said company in respect to the unpaid portions of the said sums of 338*l.* 18*s.* 2*d.* and 111*l.* 12*s.* 10*d.*, or either of them, or any part thereof. The court to be at liberty to draw any inferences from such of the above facts as were admissible in evidence which a jury might have drawn.

Lush, Q. C. (Cohen with him) for the plts.—No act has been done by the company which was not contemplated by the surety when he entered into the bond, and he cannot say that his position has by any act of the company been altered to his prejudice. An agent may employ a clerk to act for him, without discharging his surety, and a partner would stand in the same position with respect to him as would a clerk. The cases of *Bellairs v. Ebsworth*, 3 Camp. 53, and *Mills v. The Alderney Union*, 3 Ex. 590, are distinguishable from the present by the fact, that the present deft., when he became surety, knew that the partnership was contemplated. The case of *The London Assurance Company v. Bold*, 6 Q. B. 514, which resembles the present, was decided upon the authority of *Bellairs v. Ebsworth*; but if it is examined it will be found to

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differ materially from that case. The money received by the deft. as agent for the company ought not to have been mixed up with the moneys of the firm, and his allowing this to be done with money received by himself or his partner was in itself a breach of the bond, which required that he should justly and honestly conduct himself in his office.

M. Smith, Q. C. (U. T. Cole with him) for the deft.—The extrinsic evidence of the letters cannot be admitted to control the bond, which must be construed by itself; but even if admissible, they do not affect its meaning. There is nothing to show that the deft. was to be liable for the integrity of Fox, of whom he knew nothing. If this had been intended, it might easily have been stated in the bond. The case is precisely similar to that of the *London Assurance Company v. Bold*, and the court must be asked by the plt. to overrule that case. [WILLIAMS, J.—It seemed to be taken for granted by the plt.'s counsel that the deft. in that case knew of the contemplated partnership; but upon reading the report of the facts of the case it does not appear to have been so.] It was certainly assumed by Lord Denman, C. J. and Wightman, J., in their judgments, that the deft. had such knowledge. It is consistent with the facts of the present case that it was intended that there should be a joint agency with a separate liability of Fox and Lloyd and their respective sureties. Under the first power of attorney, which was sent out to three persons, Lloyd might have received moneys for the company separately from the other two agents, and then the deft.'s liability under the bond would have attached. The partnership contemplated might have been a partnership as general merchants, but not as agents for the company. The plts. must contend that the deft. was liable for the integrity of the joint agency, and not for that of his son only.

Lush replied.—The security was not to be liable for Were, who never was in the contemplation of the parties a partner, nor for all defalcations of Fox; for example, not for moneys received by him and misapplied before they were delivered to the firm. The bond would have been inoperative if a liability for the joint agency had not been intended. As to the terms of the first power of attorney, the deft. did not know of it, and could not therefore have been influenced by it.

ERLE, C.J.—I am of opinion that our judgment ought to be for the deft. I am very much pressed by Mr. Lush's argument, and I think that if the surrounding circumstances showed that the bond could have no operation unless his construction were the right one, those circumstances should be taken into account and the bond construed with respect to them. But the words of the bond seem to be stronger according to the deft.'s construction than according to the plt.'s. They amount to this, that the deft. says: "I undertake to be answerable for John Sanderson Lloyd, and am willing to be answerable for any moneys which come into his hands;" that is to say, into his hands in the ordinary sense of the words. The plt.'s case is, that the deft. undertook to be answerable, not for Lloyd only, but for the firm of Fox and Lloyd. But the words of the bond are not so. Looking at the surrounding circumstances, at what took place at the time when the deft. entered into the bond with respect to the projected partnership, it does not appear that the partnership contemplated was a partnership for premiums only. Fox and Lloyd might have been general partners as merchants, and yet each might have been a separate agent for the company. If we look back to the first letter, we find that Fox wished to come to England and to have an agent appointed and associated with him that he might do so, and here he might have effected policies on his own account and sepa-

ately from the partnership firm. Then there is the letter of the 7th Feb. to the deft., saying, "the risk is only nominal, as you are only answerable for the integrity of your son." But, in the face of this, the plt.'s argument is, that the deft.'s responsibility was not to be for the integrity of his son only, but for the integrity of both Fox and Lloyd. The plt. argues that if Lloyd had been a separate agent of the company, and had chosen to employ a clerk or agent to receive moneys for him, his surety would have been liable for the misapplication of such moneys; but the authority of a partner is much greater than that of an agent. The powers of attorney are all joint and separate, and they are consistent with the fact of each party's acting for himself as a separate agent of the company.

WILLIAMS, J.—I am of the same opinion. At the same time I think it right to say that I do not think the authorities cited of *Bellairs v. Ebsworth* and *The London Assurance v. Bold* would constrain us from holding that the bond, as construed by the light of surrounding circumstances, extended to moneys received by the hands of the partnership firm. But the question is, are there such circumstances here as to lead to the conclusion that such was the intention of the parties? If there are such, then there is nothing in the language employed to prevent the court from giving effect to the intention. Although *prima facie* a receipt by A. means a receipt by A. alone, it may yet appear that a more extensive meaning was contemplated by the parties who used the words, and that the receipt was intended to be a receipt by A. in conjunction with some other party. Is there then sufficient evidence in the surrounding facts to show that such an extended meaning was contemplated here? At first I thought that there was, but I do not now think so. It is clear from the letter of the 7th Feb. that the deft. contemplated entering into the bond solely for the purpose of getting his son settled in the agency, and that letter points out that he will not be responsible if his son behaves with integrity. The mention of the proposed partnership leads to no other inference than that Fox and Lloyd were to be associated together in and share the company's agency, but not that the deft. was to be responsible for the acts of Fox as well as of Lloyd. I do not wish to express my opinion more strongly than is necessary for the decision of the case, but upon the facts as they have appeared I think our judgment must be for the deft.

BYLES, J.—I was at first impressed with the belief that the plt. would be entitled to our judgment; but in the course of the argument of the counsel for the deft. my opinion has been changed. My judgment rests chiefly on the language of the bond. It is true that a bond is not capable of being varied by any instrument not under seal; but still it is to be considered, what is the meaning of the bond as explained by the circumstances which existed before it was sealed? Surrounding circumstances mean co-existing circumstances. It must be remembered that at the time when the bond was sealed there was no partnership existing. What, then, are the words of the bond? "On such his nomination it was stipulated." This refers to some prior negotiation. Then come words which seem to me to be most important: "The said J. S. Lloyd, his heirs, executors, or administrators," shall pay such moneys as shall be "by the said J. S. Lloyd had and received," and render account of sums "by him had and received" in "his said office." Can we, looking at the co-existing facts, come to any other conclusion than that the deft. meant that the principal debtor should be liable for his own defaults only, and that the deft., as his surety, should have the security of his executors, whatever that might be? The consequence of joining other persons with the principal

debtor would be to deprive the defts., in case of the principal debtor's predeceasing those persons, of that security for which he had expressly stipulated. I take the law of partnership to be that, at least at law, if one of several co-contractors dies, his executors are entirely discharged from a performance of the contract. Although Fox and Lloyd were partners, the policies of attorney were separate, and the creditor might easily have said, "The accounts must be kept separate as between the creditors and the attorneys, although as between the attorneys themselves as partners they may be joined." I do not at all rely on the maxim that a surety is a favourite of the court, and I will merely add, with respect to the three cases which have been cited, that in the case which has been pressed upon us from the Q B., although there is nothing in the facts of the case as stated in the report to justify the statement that knowledge of the intended partnership was brought home to the defts., still there is no doubt that both Lord Denman, C. J. and Wightman, J., in their judgments, assumed that such was the case. On the grounds which I have mentioned, I think that judgment ought to be for the defts.

KEATING, J.—The words of the bond are clear enough. If then, on looking at the extrinsic evidence, it had been shown, as Mr. Lush in his able argument contended, and as I at one time thought, that the bond could have no operation at all except by the plt.'s construction being given to it, I should have hesitated to give it a construction which would have deprived it of all operation if any other had been possible. But it has been shown by Mr. Smith that the bond might have had an operation, and an important operation, though not going to the extent contended for by the plt. It is useless to repeat what has already been said. The impression produced upon my mind from the consideration of the extrinsic evidence is, that although the surety had knowledge which might, especially in the minds of lawyers, have led to the inference that he contemplated a responsibility for the coming partnership, yet that in reality he only contemplated a responsibility for his own son.

Judgment for the defts.

Wednesday, Nov. 11.

FELKIN (app.) v. BERRIDGE AND ANOTHER
(resps.)

Laying out of new street—Public Health Act 1848—Local Government Act 1858—Bye-law of local board of health.

The Public Health Act 1818 required certain notices to be given to the local board of health by persons laying out new streets in their district. The Local Government Act 1858 gave power to the local board to make bye-laws regulating amongst other things the laying out of new streets; but it contained a saving clause with respect to all "proceedings, matters, or things" begun under the previous Act. The defts. some time before the coming into operation of the Local Government Act, proposing to lay out a new street, gave the necessary notices required by the Public Health Act, to the local board, but did not proceed to lay the street out till the month of May 1862. In the meantime, in pursuance of the powers given by the Local Government Act, the local board had made a bye-law requiring notices to be given of a more detailed character than had been required by the Public Health Act, and they contended that the street had not been begun within the meaning of the Public Health Act, and that therefore the defts. ought to have given fresh notices so as to satisfy the new bye-law, and that they were liable to a penalty for proceeding to lay out the street without having done so. The local board thereupon

summoned the defts. before justices, who dismissed the complaint:

Held, on appeal, that the decision of the justices was not wrong.

Case stated for the opinion of the Court of C. P. under 20 & 21 Vict. c. 43, s. 2.

At a petty sessions held at Sittingbourne, on the 2nd June 1862, before justices of the peace for the district of Sheerness, in the county of Kent, the resps., Richard Berridge and Henry Bateman Jenkins, appeared to answer a complaint laid by app. Edward Felkin, the clerk to and on behalf of the Sheerness local board of health, that the resps., being the owners of certain land within that district, lying between Berridge-road or Green-street, Marina-town, and Marine-terrace, Ward's-town, near Sheerness, did, on the 12th March 1862, offend against a certain bye-law, No. 28, duly made in that behalf by the local board of health, pursuant to sect. 34 of the Local Government Act 1858, confirmed, printed, and hung up as required by that Act, and then and still in force (that is to say): For that the said resps. did lay out a new street within the said district, to wit, from and out of a certain road leading from Banks-town to Cheyney-rock to a certain chapel, of and belonging to a society called the Bible Christians Association, at Marina-town, in the said district, and did not, nor did either of them, give one month's notice to the local board of such intention by writing, delivered to the local surveyor, or left at his office as required by the said bye-law, in contravention thereof; and that the said resps. did not, nor did either of them, leave, or cause to be left at the office of the said surveyor a plan or section of such intended new street as required by the bye-law in contravention thereof.

By sect. 72 of 11 & 12 Vict. c. 63 (the Public Health Act 1848), it is enacted, "That one month at the least before any street, &c. is newly laid out as aforesaid, written notice shall be given to the local board of health, showing the intended level and width thereof, and the level and width of every such street shall be fixed by the said local board, and it shall not be lawful to lay out, make, or build upon any such street otherwise than in accordance with the level and width so fixed, unless, upon disapproval by the said local board of the level or width specified in such notice, the General Board of Health shall otherwise direct; and whosoever shall lay out, make, or build upon any such street otherwise than in accordance with the level and width fixed by the said local board, or approved by the said general board, shall be liable for every such offence to a penalty not exceeding 20*l.* for every day during which he shall permit or suffer such street to continue to be so improperly laid out, made, or built upon, and the said local board may, if they shall think fit, cause any such street laid out or made at a level or width otherwise than in accordance with the level and width so fixed or approved as aforesaid, or any building built in any such street otherwise than in accordance with such level and width, to be altered in such manner as the case may require, and the expenses incurred by them in so doing shall be repaid to them by the offender, and be recoverable from him in a summary manner: provided always, that if no such level or width be fixed, and no approval or disapproval of the level or width proposed be signified by the said local board within one month from the last-mentioned notice, the intended street may be laid out and made upon the level and of the width specified in such notice if the same be otherwise in accordance with the other provisions of this Act."

The Local Government Act 1858 (21 & 22 Vict. c. 98), took effect in the district of the Sheerness local board of health from the 1st Sept. 1858. By sect. 34 of that Act it is enacted, "That every local

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board may make bye-laws with respect to the following matters, that is to say :

"1. With respect to the level, width and construction of new streets, and the provisions for the sewerage thereof.

"2. With respect to the structure of walls of new buildings, for securing stability, and the prevention of fires.

"3. With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.

"4. With respect to the drainage of buildings, to water-closets, privies, ash-pits and cesspools in connection with buildings, and to the closing of buildings, or parts of buildings, unfit for human habitation, and to prohibition of their use for such habitation.

"And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws. Provided always, that no such bye-law shall affect any building erected before the date of the constitution of the district; but for the purposes of this Act, the re-erecting of any building pulled down to or below the ground-floor, or of any frame building, of which only the framework shall be left down to the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

Bye-laws were made by the Sheerness local board of health on the 25th day of Oct. 1860, in pursuance of this section:—

Bye-law No. 28 was as follows :

"Every person who shall intend to make or lay out any new street, whether the same shall be intended to be used as a public way or not, shall give one month's notice to the local board of such intention by writing, delivered to the local surveyor or left at his office, and shall, at the same time, leave, or cause to be left, at the said office, a plan and section of such intended new street, drawn to a scale of not less than 1 inch to every 44 feet, and every such plan shall show thereon the names of the owners of the land through or over which such street shall be intended to pass; the level, width, direction, the proposed mode of construction, the proposed name of such intended new street, and its position relatively to the street nearest thereto; the size and number of the intended building lots, and the proposed sites, height, class and nature of the buildings to be erected therein, and the proposed height of the division and fence walls thereon, and shall contain the name and address of the person intending to lay out such new street, and be signed by him or his duly authorised agent. Every such section shall show thereon the level of the present surface of the ground above some known fixed datum, the level and rate or rates of inclination of the streets with which it will be connected, and the level of the lowest floors of the intended new buildings."

Section 9 of the Local Government Act 1858 enacts that "all proceedings, contracts, matters and things respectively begun or made under any section of the Public Health Act 1848, repealed by this Act, may respectively be proceeded with and enforced, as if no such repeal had taken place, and all powers exercised or bye-laws made under any section, shall continue in force until the new powers and bye-laws authorised by this Act are brought into operation, and no such repeal shall affect any decree or order of the High

Court of Chancery, or of any other court of justice that has been obtained previously to the passing of this Act."

It was admitted by the app. that the resps. had given notices to the local board and had deposited plans of a new street intended to be laid out by them pursuant to sect. 72 of the Public Health Act 1848, some time before the Local Government Act 1858 came into operation.

The resps.' attorney objected that the complaint laid by the app. alleged no offence, inasmuch as the fact of notices and plans having been given, deposited and accepted in compliance with sect. 72 of the Public Health Act 1848, was not negatived. He contended that the notices given by the resps. to and accepted by the local board prior to the Local Government Act 1858 was "a proceeding, matter and thing begun or made," within the meaning of sect. 9 of the Local Government Act 1858, and might still be carried into execution.

The justices, considering that the admission by the app. that notices had been given and plans deposited and accepted by the local board previous to the operation of the Local Government Act 1858, was in fact an answer to the case, held the objection to be good, and dismissed the complaint.

The question for the opinion of the court was, whether the decision of the justices in dismissing the complaint on the ground aforesaid was or was not right in point of law.

It was said by the counsel for the app., but not stated in the case, that the notices had been given and plans deposited by the defts. as long as seven years ago, and that the street in question was one of a large number of streets projected by the defts., only a small portion of which had been subsequently laid out.

Archibald (Lush, Q. C. with him) for the app.—The facts are not satisfactorily stated in the case, for it is merely stated generally that the notices were given some time before the coming into operation of the Local Government Act. The words of the saving clause do not apply where a party has lain by for many years. There have been no "proceedings begun" within the meaning of the Act.

E. C. Willoughby for the resps.

ERLE, C. J.—In an appeal from the decision of magistrates, the apps. are bound to show that the decision of the magistrates is wrong. Upon the statement of the facts here it is not shown that the magistrates were wrong in their decision. I am anxious to limit our judgment by expressing it in this guarded way, so that in case the parties choose to raise the question again when subsequent dealings take place with the property, if they can change the facts at all, they may not be prevented from doing so.

WILLIAMS, BYLES and KEATING, JJ. concurred.

Judgment for the resps.

Nov. 11 and 12.

SAVAGE v. SAVAGE.

Markets—Local Board of Health—Penalty under bye laws.

By sect. 64 of 3 Geo. 4, c. xxv., it was enacted that no person should be subject to any penalty by virtue of this Act for placing or setting any stalls or standings, or exposing to sale any provisions, goods, wares, merchandise, or other articles or things whatsoever, in such parts of the several streets, lanes, passages, and public places within the town of Barnsley as should have been heretofore used for that purpose at the times of the usual fairs and markets within the said town, due care being taken to impede as little as possible the public passage along the same :

Held, that a Local Board of Health constituted since the passing of the above Act had power to direct by their bye-laws where certain goods should be exposed for sale in the town on a market day, and also to impose a penalty upon any person selling goods on ground not appropriated by the Board for that purpose; and that a person so violating their bye-law would not be exempted by the above statute from the penalty, notwithstanding he had exposed his goods for sale for many years on the same spot previously to the formation of the Board.

An information was laid before the justices sitting at petty sessions at Barnsley, by the app. (inspector of markets and fairs in the township of Barnsley) against the resp. (a butcher), for placing and exposing for sale some butcher's meat on May-day-green, in Barnsley, that not being the place appropriated for the sale of butcher's meat, contrary to the directions of the inspector of markets, and contrary to the statute and the bye-laws of the local board. The justices dismissed the information, and the app. being dissatisfied with their decision, the following case was stated for the opinion of this court:—

CASE.

A local Act, 3 Geo. 4, c. xxv., entitled, "An Act for lighting, paving, cleansing, watching and improving the town of Barnsley, in the West Riding of the county of York," was passed in 1822. By the 62nd section a variety of annoyances and nuisances in the streets, lanes, roads, highways, passages, or other public places in the said town, were prohibited. The same section provided that "if any person or persons shall in any of the present or future streets, lanes, roads, highways, passages, or other public places in the said town, expose for sale or sell any horse, ass, pig, sheep, bull, cow, or other beast or cattle (except in any public market or fair), or hang up, place, or expose to sale the carcass of any calf, sheep, swine, cattle, or beast, or any part or parts thereof, or any goods, wares, or merchandise whatsoever, or any fruit, vegetables, or garden stuff, or other matter or thing in or upon, or so as to project over or upon any footway or carriage way, or beyond the line of or on the outside of the window or windows of the house or shop at which the same shall be so hung up or placed or exposed to sale, or so as to obstruct or incommode the passage of any person or carriage;" any person so offending was rendered subject to a penalty of a sum not exceeding 5/.

Sect. 63 of the same Act, which is not repealed, is as follows:—"Provided always, and be it further enacted, that no person shall be subject to any penalty by virtue of this Act for placing or setting any stalls or standings, or any waggons, carts, or other carriages in which any provisions, goods, wares, merchandises, articles, or things shall have been brought and be offered for sale, or exposing to sale any such provisions, articles, or things, so as that such waggons, carts, or other carriages, stalls or standings, articles or things, be placed in such part of the said streets, lanes, roads, passages, or public places as shall be appointed for that purpose by the said commissioners, with the consent of the owner or owners of the fairs and markets held at, within, or for the said town of Barnsley for the time being, or his or their authorised agent, in writing, due care being taken in all the aforesaid cases to impede or obstruct as little as possible the public streets, lanes, roads, highways, passages and places within the said town."

And sect. 64, which is also unrepealed, is as follows:—"Provided also, and be it further enacted, that no person shall be subject to any penalty by virtue of this Act, for placing or setting any stalls or standings, or exposing to sale any provisions, goods, wares, merchandises, or other articles or things whatsoever, in such

parts of the several streets, lanes, passages, and public places within the said town as shall have been heretofore used for that purpose at the times of the usual fairs and markets within the said town, due care being taken to impede as little as possible the public passage along the same."

The Duke of Leeds was at the time of the passing of this Act the lord of the manor of Barnsley, and the owner of the markets and fairs in the town of Barnsley, which had been customarily held in parts within that town, with the pickages, stallages, market rents and tolls thereof, and of three pieces of land, one called the Church-field or Michaelmas Fair-field, in which the Barnsley October fair had usually been held, the Market-hill and the May-day-green, where fairs had always been held in February and May.

By an ancient charter, dated 1249, the right to hold a market in the town of Barnsley every week on Wednesday was granted to the priors and convent of Pontefract, and a market for the sale of butcher's meat and other marketable commodities has been always held on the Market-hill during the day time on Wednesday, and a like market was also holden there on Saturday evenings until the butchers commenced to sell their meat on Saturday upon the May-day-green. They so commenced more than thirty years before the commencement of these proceedings, and since then without interruption the sale of butchers' meat and several other marketable commodities upon stalls or standings has taken place on Saturdays upon the May-day-green; and on Wednesday also the market generally has been held, not only on the May-day-green but also on the Market-hill.

The butchers placed stalls on the May-day-green for the purposes aforesaid, and pipes were laid for supplying gas, and the same was supplied to and paid for by the stall owners.

Some of the butchers have paid during the past thirty years, although irregularly, to lessees and others, stallage rent for standing upon the May-day-green, but the right to collect this stallage has always been disputed.

The commissioners appointed under the said Act 3 Geo. 4, c. xxv., did not purchase the rights of the lord, but purchased the piece of land called the Market-hill, and in other respects continued to exercise their powers under the Act, until the year 1853, when the General Board of Health made a provisional order, which was confirmed by the statute 16 & 17 Vict. c. 24 (called "The Public Health Supplemental Act 1853, No. 1"), so far as the same was authorised by the Public Health Act. By this order and statute a local board of health was constituted in the town of Barnsley, and it was thereby provided, amongst other things, that the powers, properties and estates of the commissioners should be transferred to the local board of health, and also that the provisions (with certain exceptions) of the said Public Health Act should, whenever practicable, be applied to anything which should arise under the unrepealed parts of the said local Act, and such unrepealed parts should be incorporated with the said Public Health Act, and should extend to the whole of the said township.

The local board was duly elected and has since exercised the functions conferred upon them by the Public Health and Local Government Acts, and the property belonging to the commissioners became vested in them; among other property was the piece of land containing about 999 yards above referred to, and termed the Market-hill.

In the month of July 1860 a resolution was passed at a meeting of the owners and ratepayers of the district of the township of Barnsley (being the district of the said local board) that the local board should have power to do the following things, or any of them, within their district:—

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"To provide a market-place and construct a market-house and other conveniences for the purpose of holding markets in the said district," &c.

This resolution was carried upon a poll.

The local board thereupon completed an arrangement which they had been negotiating for the purchase of the rights to the markets and fairs belonging to the Duke of Leeds, and by a conveyance dated the 12th June 1861, between the trustees of the will of the late Duke of Leeds and the Local Board of Health of Barnsley, which was executed with the sanction of the Court of Ch., the said trustees, in consideration of the sum of 2700*l.* paid to them by the said local board, "Thirdly, all that waste or uninclosed land or ground situate in the township of Barnsley aforesaid, called or known by the name of May-day-green, together with all and all manner of lawful profits, commodities, privileges, and advantages whatsoever, coming, arising, renewing, increasing, or payable for or in respect of all and every the said fairs and markets and every of them hereafter to be holden and kept under or by virtue of these presents for the said town of Barnsley within the bounds, limits and precincts of the same."

As soon as the conveyance was executed and the local board obtained permission, they proceeded to frame bye-laws, and to settle tables of tolls for the markets and fairs. The bye-laws purported to be made and ordained by the Local Board of Health for the district of the township of Barnsley in the county of York, for the better regulation of the markets and fairs and market-places for the sale of cattle, animals and provisions and all other marketable commodities within the said district, pursuant to the powers and provisions contained in the Public Health Act 1848, the Public Health Supplemental Act 1853 (No. 1), and the Local Government Act 1858.

The notices required by the Public Health Act were duly given, and the bye-laws were submitted to and approved by the Secretary of State.

The certificate of two justices required by the 10 & 11 Vict. c. 34, s. 32 (the Markets and Fairs Clauses Act 1847) was also obtained, certifying that the Corn Exchange or market-house, Market-hill, May-day-green, Church-field, and other places to be used for fairs within the said district, were properly completed and fit for public use.

The 3rd and 4th bye-laws were as follows:—

"Appropriation of the Open Market, Market-hill.

"3. The open market, situate on Market-hill, in Barnsley aforesaid, shall be appropriated as a market for the sale therein on Wednesdays of butcher's meat, bacon, pork, cheese, eggs and butter in the firkin or 'laid down,' flower roots, plants, trees, shrubs, calicoes, cloth, linen, mercery, articles of dress, provisions, coopers' ware, pastry, spices, confectionery, hooks, nuts, brooms, besoms, and hardware; and on Saturdays the same shall be exclusively appropriated for the sale therein of butcher's meat, bacon, pork, cheese, eggs and butter in the firkin or 'laid down.'

"Appropriation of the Open Market, May-day-green.

"4. The open market situate on May-day-green, in Barnsley aforesaid, shall be appropriated for a market for the sale therein of horses, cattle of all kinds, calves, sheep, pigs, geese, fruit, vegetables of all sorts, fish, earthenware, potters' ware, glasses, hay, straw, grass and vetches, medical wares, old metal, images, pictures, cutlery, hardware and small ware, clothing, boots and shoes: provided, however, that these several appropriations shall be open to alterations and additions at any time hereafter as the said local board of health shall find requisite or convenient."

The 6th bye-law was as follows:—

"As to articles offered for sale.

"No article shall be offered for sale or sold in any

market, or kept, or brought into the same for sale, other than such for which the said market, or part of any such market, shall have been appropriated as hereinbefore set forth. Every person offending against this bye-law shall forfeit and pay for the first offence the sum of 5*s.*, for a second offence the sum of 10*s.*, and for every offence subsequent to a second offence the sum of 20*s.*"

The 12th and 13th bye-laws are as follows:—

"Stalls to be placed on the parts appropriated.

"12. No stall, bench, cart, hand-cart, wheelbarrow, hamper, basket, box, or tub, or other article, shall be placed otherwise than as and where the inspector of the market shall direct, and the several articles brought into the markets shall be sold and placed, and exposed for sale only at or in such parts of the market as shall be appropriated by the regulations hereinbefore specified for such articles respectively. Every person offending against this bye-law shall forfeit and pay for the first offence the sum of 2*s.* 6*d.*, for a second offence the sum of 5*s.*, and for any offence subsequent to a second offence the sum of 10*s.*

"13. Provided that the bye-laws shall not extend, or be deemed or construed to extend, to prohibit any person from exposing or offering for sale any marketable commodities in any shop or warehouse not being in one of the said markets, or in his or her dwelling-house, or to subject such person to any penalty for so doing."

The markets having thus been opened, and the bye-laws duly made, allowed and published as above stated, a person named Francis Brook, of Wakefield, in the West Riding, butcher, on Saturday, 6th June last, after the market-place had been opened to public use, placed and exposed for sale certain butcher's meat on the May-day-green, not being the place appropriated for the sale of butcher's meat by the bye-laws above referred to, and continued to expose the same for sale, notwithstanding the said bye-laws, and contrary to the directions of the local board, through their officer, namely, the inspector of the markets. The local board of health thereupon caused this information to be laid by George Savage, the inspector of the markets, before us, justices of the peace for the West Riding of the county of York, for a penalty for a breach of the bye-laws above set forth, and on the hearing the defendant contended that the above bye-laws, especially the 4th and 6th, were invalid and inoperative against him on the following ground, namely, that the above cited 64th section of the Act, 3 Geo. 4, c. xxv., not having been repealed, no person was liable to a penalty for exposing butcher's meat for sale in the public places in the town of Barnsley theretofore used for that purpose; that the bye-laws prohibiting the sale of butcher's meat on the May-day-green, and also the bye-law setting apart the Market-hill as the only place for the sale of butcher's meat, were not legal. For the informant it was contended that sect. 64 of the above-mentioned 3 Geo. 4, c. xxv., only referred to penalties under that Act, and had no operation in reference to the present penalty, which was incurred under the Public Health and Local Government Acts, for violating a bye-law made by the local board of health for the purpose of regulating the use of the markets vested in them by their purchase from the trustees of the Duke of Leeds, and by virtue of the powers contained in clause 9 of the provisional order hereinbefore inclosed, and in the Markets and Fairs Clauses Act 1847.

The justices were of opinion that the argument of the resp. was correct, and dismissed the information, subject to the decision of the Court of C. B. upon the following questions:—

First, whether, in consequence of the 64th section of the Act 3 Geo. 4, c. xxv., being unrepealed, the deft.

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was liable to a penalty for placing and exposing butcher's meat for sale on the May-day-green, under bye-law No. 12.

Secondly, whether the bye-law numbered 6, is a good and valid bye-law.

Thirdly, Whether the bye-laws numbered 3 and 4 are good and valid bye-laws.

And the judgment of the court is accordingly required upon these questions; it having been agreed that all the bye-laws made by the local board, and the whole of the statute 3 Geo. 4, c. xxv., and the conveyance from the trustees of the Duke of Leeds, with the map or plan thereupon indorsed not set out in the case, may be referred to if requisite, as if the same had been made part of this case for all the purposes of this case.

If the court should affirm the determination of the justices, the information shall stand dismissed; but if they should reverse it, a conviction for the penalty of 2s. 6d. shall be awarded against the deft., or such further order shall be made in the matter as to the Court of C. B. shall seem fit.

Dated this 21st day of Oct. 1863.

WALTER T. W. SPENCER STANHOPE.
THOS. TAYLOR.

Manisty, Q.C., appeared for the app.

Hayes, Serjt. (Beresford with him) for the resp.

Nov. 12.—ERLE, C.J.—I am of opinion that the bye-law is good and that the conviction would have been proper. The application was made to the Board of Health, which derives its powers from the 16 & 17 Vict. c. 24, having an order containing many provisions and incorporating clauses from public and private Acts, and the order of the Board of Health being enacted to be valid, it takes the force of an Act of Parliament. One of the clauses incorporated is a clause from the Market and Fairs Act, 10 & 11 Vict. c. 14, s. 42, whereby it is enacted that the persons holding the market shall make such byelaws as they think fit, for, among other things, regulating the use of the market-place, of the building stalls and standings there, and preventing nuisances; and they are directed to regulate the use of the market-place. Then in the town of Barnsley, a market was granted some 800 years ago. It is a market granted to be held in the town of Barnsley, and according to that the whole of the town of Barnsley was liable to become a market-place, and the usage would show what part of the town would be the market place which was so granted. It was granted to be holden on Wednesday, and the usage would also show that if by the course of practice it had been held on a Saturday, all that would have been presumed to be a lawful market held for the town of Barnsley, and the usage would show where it is to be so held. The town has greatly increased, and the number of persons resorting to the market, and the articles brought to the market, are likewise increased in number and value; and the Board of Health acting under the statute, as I have stated, have erected a building and made a regulation for persons resorting to the market to carry their wares there to the appointed places suitable for those wares. There is a covered market at the bottom for the sale of pork, fish, butter and eggs. The first floor has been dedicated to the sale of grain, seeds and the like of that; and then, with respect to the Market-hill, it is dedicated chiefly to what I may call the sale of provisions, confectionary, and the like of that; and May-day-green, which is the part now in question before us, under the regulation of the bye-law made by the Board of Health, is dedicated to the sale of live stock, horses, cattle, calves, sheep and pigs, and also to hay and straw, and brittle ware and hardware, and other articles of that description. It seems that the Board of Health have classified the different articles

in an extremely useful manner, and by that classification they have enabled the persons resorting to the market with articles to sell to have convenient accommodation, and buyers to know the places where the articles they want are classified and arranged, so as to render the market suitable for the purpose for which it was made. Now, such being the town of Barnsley, and such being the right of the Board of Health, and such being the market held over the town, whether it is in the covered house, on the Market-hill, or on May-day-green, which are all the places used heretofore for selling, they each constitute one market; the bye-law I have stated, and the party against whom the application was made was a butcher, to whom a place was assigned on Market-hill for the sale of his goods, and he determined to resort, in violation of this regulation, to May-day-green, where the live stock was to be sold; and this application was for penalties for violating the bye-law. It seems to me, that the bye-law was a reasonable one; beyond all question he violated it, and if it was a reasonable one, he was liable to the penalty. So the matter would have stood if the case had been taken affirmatively, on the creation of the Board of Health with power to make bye-laws, and they had made this bye-law, and the party had infringed it and been convicted under it. But the difficulty that has been raised, on which the magistrates acted, and which they felt to be extremely grave, arises from 3 Geo. 4, s. 64, the first local Act giving power to a body in Barnsley, to see to the lighting, paving and cleansing of the streets of the town—an ordinary Act for managing the town, and it specified certain nuisances that parties might be guilty of in the town of Barnsley. Among the nuisances were, selling in the streets contrary to the regulations, so as to obstruct the highway; and that would be *prima facie* a nuisance under the sections creating and specifying them; and sect. 64 contains a proviso that any penalty by virtue of this Act for selling in such parts of the street within the town as shall have been heretofore used for that purpose to hold the market within the said town shall not be levied. The butcher says "I have been used before the Board of Health made the bye-law to sell on May-day-green, and in effect you are trying to make me liable for a penalty for that which was a place where I had been accustomed and used to sell before the bye-law was made." Therefore the 64th section of the statute should be examined. The 64th section is incorporated with the 16 & 17 Vict. creating this Board of Health, and is incorporated with the several sections I have alluded to, and it is to be taken as if it was enacted in the 16 & 17 Vict. for the first time, that "no person shall be liable to a penalty for selling in any part of the public streets heretofore used for that purpose" and to be read as if it was "used before the passing of the 16 & 17 Vict." and not before the passing of the 3 Geo. 4. I assume, for the purpose of this judgment, the section to have been so worded, and so construed. It is material, because at the time of the 3 Geo. 4, May-day-green was not used as a market-place, and if the parties proceeded under that statute then no penalty would be payable; but if it is to be taken as incorporated with the 6 & 7 Vict., then we have to construe that statute and to see whether the bye-law is repugnant to that section of the statute; and it seems to me to contemplate this, that a party is guilty of a nuisance and liable to a penalty if he obstructs the use of a highway by selling. The provision in sect. 64 is, "You shall not enforce the penalty against parties selling in the highway on a market day, if those parts of the highway have been used by marketing people heretofore before the time of the body seeking to enforce penalties." It saves the use of a spot for marketing purposes; but, in my judgment, did not in the least

degree intend to save to any one individual a right to resort to any particular spot in the town of Barnsley, and to say, "That is where I have been used to come, and if a regulation is made that a tradesman and the like of me must go to another part of the town, I have been used to come to that part, and there could not be any such regulation." I do not think that was the meaning of the statute. It presumed the overflow of marketing people and marketing goods beyond the ordinary bounds of the market-place, and that nobody should be liable to penalties for using the highways of the town that had been heretofore used for marketing purposes, as one object to which the regulations are to be applied. Now, if that is the meaning of the statute, the bye-law in question does not prevent people using any part of the town of Barnsley that had been used before the time of the 16 & 17 Vict. for marketing purposes; on the contrary, with respect to May-day-green, it is regulated by the bye-law and devoted to the marketing people dealing with a great number of articles, live stock, earthenware, brittle ware, hay, straw, glass, watches, boots and shoes, &c. It is a bye-law devoting May-day-green to marketing purposes; not a colourable bye-law, saying these articles only shall be sold there, but it takes the market-house, market-hill and May-day-green as places used for marketing purposes, and regulates them so far as it can go with sole attention to the convenience of the public and those going to the market, that they shall all have in the most ample manner that can be obtained by regulation the privilege of the market. Then the complainants say, "When you have got one place assigned to you on Market-hill you determined to come among the live horses, &c., on May-day-green, and you have violated the regulation of the market-house. You are violating a reasonable regulation and the bye-law, and as you have violated the bye-law you have violated the regulation of the market, and that is why you are proceeded against, and it has nothing to do with the penalty for obstructing the highway by a nuisance in respect of sect. 64 exempting marketing people from any liability in the case of the accustomed use of the market." That I think is the way in which these two sections are to be construed. It is clear to me that they were to regulate the hours of the market, as it is very convenient that they should be regulated. They might say, nobody shall come to the market before a certain hour. The parties might have chosen to say, "The only time I come to the market is seven in the morning; the market now is not to be opened till nine, and if I come to May-day-green at seven in the morning as I have been accustomed to do, the 64th section saves me from any penalty for selling in any one of the places where it has been the custom to sell;" but there would be no doubt, if he came to the market-place but violated a reasonable bye-law in respect of time, he would be liable. He is thus made liable for selling at the place he was accustomed to sell in; but the time is regulated by a reasonable bye-law, and if reasonable he must conform to it, and is liable to a penalty which is totally distinct from the liability to a penalty for creating a nuisance in obstructing the highway, in respect of which he was exempted on marketing days, if he was a marketing person using a part of the highway for marketing purposes. I must say there is a difficulty in coming to a distinct opinion with a quantity of imperfectly recited Acts embodied and incorporated, and the power given under the Market and Fairs Act to make bye-laws, and of saying what is the exact limit of the rights. If they are apparently conflicting, I am obliged to reconcile them in the best way my powers will enable me to do; but if I see a public body, created for the convenience of the town, exercising powers entrusted to them for

public purposes in the most reasonable and honest manner, I conceive they could exercise their powers in regulating the market. I should require a strong case to be made out influencing me to the conclusion that all that was to be set aside, and the persons resorting to Barnsley market were to be without any order or regulation. If a man says, "I have used this for twelve months or two months, or I have used it for one month," and every man who says, "I have used it for a month," is in defiance of all regulations to come and take his stand, and say, "I set at defiance what the Board of Health has done;" I do not think that would be a convenience for the town, or desirable in any way, nor within the intention of the Legislature. I am well aware this is a case not belonging to the town of Barnsley alone, who are exercising the right of all the rest of the Queen's subjects who may wish to resort to the town of Barnsley on market-days. My attention has been drawn to the fact that, if I decided in favour of the applicants, who come to May-day-green, I should put a power in the hands of anybody who chose to vex the Board of Health to set at defiance any regulation they may make, and it would leave the streets of Barnsley open to all manner of disorder on market-days, to the great inconvenience of those buying and selling and using the market, and therefore, after great consideration, I have come to the conclusion I have expressed.

WILLIAMS, J.—I am of the same opinion for the same reasons.

BYLES, J.—I agree with my Lord and my brother Williams.

KEATING, J.—I entirely concur.

Judgment for the app.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Tuesday, Nov. 10.

PEEK (app.) v. THE WATERLOO WITH SEAFORTH LOCAL BOARD OF HEALTH (resps.)

The Public Health Act 1848 (11 & 12 Vict. c. 43)—The Local Government Act 1858 (21 & 22 Vict. c. 98, s. 62)—Meaning of "owner" therein—What a good service of notices on.

The Public Health 1848, s. 69, provides that in case any street (not being a highway) be not sewered, levelled, &c., to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting or abutting on the same, require them to sewer, &c., and if not complied with, the board may execute such necessary works, and the expenses incurred shall be paid by the owners in default, and may be recovered in a summary way.

By sect. 2 the word "owner" shall mean the person for the time being receiving the rack-rent, whether on his own account or as agent or trustee.

The Local Government Act 1858, by sect. 2, enacts that, where the local board have incurred expenses for the repayment whereof the owners of premises in respect of which the same are incurred is made liable, &c., the same may be recovered from the person who is "owner" of such premises when the works are completed for which such expenses have been incurred.

Certain premises requiring to be sewered, &c., the resps. inquired of the occupier who the landlord was, and who received the rent of the premises; the occupier said, as the fact was, that it was a Mr. R. Formby.

Due notice to Formby, on 15th May 1861, was accordingly given to sewer, &c.; he neglected to

[Ex.]

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[Ex.]

sewer, and the local board completed it on 13th March 1862. Formby received the rent up to the 2nd Feb. 1862. It afterwards appeared that the app. was the real owner on and subsequent to the 31st Oct. 1860, but had never really interfered with either Mr. Formby, the land rent, or occupier. The expenses of the resps. were 115l.:

Held, that as Formby received, for the time being, the rack-rent of the premises, and was *bona fide* treated by the occupier as his landlord, the service of the notice to sewer, &c., by the resps. on Formby was a sufficient service on the "owner" within the meaning of the above Acts, and that the app. was liable for the expenses incurred by the resps.

This was a case stated by magistrates under the 20 & 21 Vict. c. 43.

A local board of health for the resps.' district had been duly constituted under the Public Health Act 1848 (11 & 12 Vict. c. 63). By sect. 2 it is enacted that the word "owner" shall mean the person for the time being receiving the rack-rent of the land or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at rack-rent. Sect. 69 enacts, that in case any present or future street or any part thereof (not being a highway) be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, &c., require them to sewer, &c. the same within a time to be specified in such notice. And if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default.

By the 21 & 22 Vict. c. 98, s. 62 (the Local Government Act 1858), it is enacted, "Where the local board have incurred expenses for the repayment whereof the owners of the premises for or in respect of which the same are incurred, is made liable either by application or agreement with the owner, or by the Public Health Act 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred in the manner provided by the Public Health Act 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, with interest," &c.

The clerk to the resps. made, in Feb. 1863, an information, and preferred it to justices in the proper petty sessions, charging that one Richard Formby was, on the 15th May 1861, the owner of certain premises situate, &c., which road, on the day and year aforesaid, was not sewered, &c. to the satisfaction of the said local board of health, who had, by a certain writing dated 15th May 1861, sealed with the common seal, and signed by five of their members, given the said R. Formby notice, as owner of the said premises, they being premises fronting the said road, within the space of fourteen days from its date, to sewer, &c. so much of the said road as the said premises fronted; and that, in case the said R. Formby failed to comply with the notice within such time, the local board might execute the said sewerage, &c., and the expenses incurred must be paid by Formby, together with the costs in default, if any, as therein mentioned. Neither Formby or any other person did the requisite works within the time required, whereupon the local board executed the same, and they were completed on the 13th March 1862.

In the information it was alleged that Francis Peek, subsequently to the date and service of the notice dated 15th May 1861, became and was at the time of the completion of the said works the owner of the said premises; that the resps.' surveyor had apportioned the costs of executing such sewerage, &c., and he declared Peek's proportion to be 115l. 8s., which had been duly demanded of Peek, and which he refused to pay, and which the resps. had not declared to be private improvement expenses, contrary to the statute, &c. On the hearing the justices ordered the app. to pay the 115l. 8s., and 10s. costs, to be levied by distress, &c., or seven days' imprisonment.

Upon the hearing of the information the resps. proved that the road was not a highway repairable at the public expense at the date and service of the said notice; that Richard Formby did not reside in the resps.' district on the date or service of the said notice to sewer. The notice was served on Formby by being directed to him and transmitted through the post-office. It was proved that the land described was occupied by one John Caddick with other premises, and that Richard Formby received the rent of the whole at the date of the notice and up to 2nd Feb. 1862; that Richard Formby gave Caddick the tenant notice, dated 30th July 1861, to quit all the premises on 2nd Feb. then next, which Caddick did.

Formby received the rent of the whole up to Candlemas 1862, on the 15th April 1862, and the receipt for it was produced; it appeared as if he received such rent as absolute owner. On the hearing of the information it was admitted by the app. that the said notices had been served on R. Formby, the work properly done, and the apportionment correctly made, and it was proved also by the production of a conveyance dated 31st Oct. 1860 (admitted to be duly executed) that the app. became and was the owner thereunder of the said premises, having purchased the same from one James Formby, and that he never had any knowledge of the notice of the 15th May 1861 until the sewerage works had been executed. That he had by himself or servants driven cattle off the land which he had purchased as aforesaid after such purchase, believing that such cattle belonged to John Caddick, but he never told Caddick or resps. that he had purchased the land described in the notice to sewer. Such land consists of sand hills, on which star grass grows, but which is not of a pasturable nature for horned cattle, yet donkeys will graze there, and the app. turned his donkeys thereon, several of which he kept for domestic purposes, but which fact he did not communicate to Caddick. The said land has never been set apart or railed off by the app.

The justices were of opinion that Richard Formby was in receipt of the rent of all the said premises on 15th May 1861, the date of the said notice to sewer the premises described. And the app. was the owner thereof at the time of the completion of the said sewerage works on the 13th March 1862, and that the app. was liable for the payment of the costs of such sewerage works, and convicted him accordingly.

The question was, whether the app. was bound by the notice served on Richard Formby on the 15th May 1861?

Chas. Pollock, for the app., argued that the notice before mentioned, requiring the work to be executed, ought not to have been served upon Richard Formby, but upon the app., as he was clearly proved to be the owner, his conveyance being dated 31st Oct. 1860, when he immediately took possession thereof by putting in his own donkeys and driving off others. He had never authorised Richard Formby, or any other person, to act for him as trustee or agent, nor had, in fact, Formby ever accounted to him for the rent. Formby was not the owner in fact, or within the meaning of the Acts of Parliament in question, when the notice

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was served on him. The service of it upon him, therefore, was in no way binding upon Peek, nor did it affect his right or interest.

Leofric Temple for resps.—The notice requiring the works to be executed served upon Formby was properly served so as to bind the owner at the completion of the works. He was in receipt of the rent at the time the notices were given, and up to Candlemas, the 2nd Feb. 1862. Caddick, the occupier, was applied to and asked who was the person who received his rent for this land in question, who was his landlord and the owner, and he said it was Mr. Richard Formby, and the notice was then served on him accordingly; therefore he was the owner within the meaning of the Acts of Parliament at the time of the service of such notice. If not the owner, then he was agent or trustee for the owner (being in receipt of the rent), and the actual owner might sue him as for money had and received to his use. [FROGGATT, B.—Why did you not serve the occupier, the party in possession?] The same difficulty would arise. He might have been occupying wrongfully for a very short time, whilst the real and proper occupier had been temporarily out of possession, although but for a day or even less.

POLLOCK, C. B.—I am of opinion that the resps. are entitled to our judgment. The person who receives the rent of the premises from time to time, not only when the notice was served, but both before and after it and during the performance of the work done, now sought to be paid for, must be considered as "owner" within the meaning of these Acts of Parliament. I think therefore this was, under the circumstances, a sufficient notice served as upon the "owner," and that the app. is liable for those expenses, of which he gets the benefit.

BRAMWELL, B.—I am of the same opinion. It is admitted that, although Peek was owner at the time the notice was given, yet Formby was permitted to take the rents and profits of the land, and to act altogether as Caddick's landlord, and the owner of the premises for which the expenses were incurred; but Mr. Pollock's argument was, that the notice should have been served, not upon the apparent, but upon the real, owner, the rightful receiver of the rent, or he who was rightfully entitled to it; but, why more to a rightful owner than a rightful occupier? How are the parties desirous of serving such notices to find out who should rightfully, or who does wrongfully, receive the rents, or remain in possession? I do not think such a burden is, or ever was, intended to be thrown upon officers of local boards of health, and the meaning of these Acts of Parliament is, that the notice may be served upon the person who is *de facto* the occupier, or if served on the "owner," then it may be served upon the person who *de facto* receives the rent of such occupier, and appears to the occupier and others interested as the owner of the premises. "Owner" is defined by the 2nd section of the first Act to mean the person for the time being receiving the rack-rent of the premises in connection with which the work is used, whether on his own account or as agent, or trustee for any other person. To my mind, this refers to a *de facto* receiver of the rent, whether rightfully or wrongfully so. The app. contended that he was the actual owner, yet had no notice or knowledge of these proceedings by the local board of health; then, if so, whose fault was it? Clearly it is the fault of the true owner that he does not receive his own rent, or permit his own agent to do it for him on his behalf. It appears to me the service of the notice was a good service, and the decision of the justices right.

CHANNELL, B.—I also think our judgment should be for the resps. It seems perfectly clear that Peek was the real owner at the time the works were executed by the resps., and that he would be liable if

the notice served was a good notice properly served. It was served on a person who sufficiently answers the definition of "owner" in the Act of Parliament. It is treated as a rack-rent, and Formby acts throughout just as if he received it on his own account from the occupier, and so was the "owner." The notice appears to be a good notice to originate the proceedings. It may be a hardship upon the app. to have been served with the notice, as he was the actual owner, in fact, of the land; but I think the service made on Mr. Formby under the circumstances stated in the case was a sufficient compliance with the Acts of Parliament.

FROGGATT, B.—It was admitted that the notice had been served and the work properly done, and the only question in my mind was, whether it was not a condition precedent to the enforcing of these proceedings that Peek, as the actual owner, or the tenant or person *bond fide* in possession as occupier, should not have been served. I at first entertained some doubt about the matter, and it is not altogether removed now; but on the whole I incline to think service on the reputed owner, or person who receives the rent as owner, and is referred to and treated and considered by the occupier as the owner, is sufficient. If the actual owner suffers any detriment about this, he must consider it is entirely of his own making, and should blame himself only for not seeing to and looking after his own property.

Judgment for resps. with costs.

Attorneys for app., Lawrence and Markby, 6, Lincoln's-inn-fields.

Attorney for resps., Josh. Mason, Liverpool.

WAKLEY v. FROGGATT.

Cutting down growing trees of devisee of land under parol agreement with testator.

An owner of real estate can maintain an action against a person for, and prevent him from, entering on his land and cutting down his timber under an alleged verbal contract said to have been made with that person and the testator, although part of such timber may have been cut, carried away and paid for in the lifetime of the testator:

A plea alleging these facts by way of defence on equitable grounds,

Held, a bad plea.

Trespass to recover damage for cutting down and taking away 200 fir, oak, ash and elm trees belonging to the plt., and lately growing on his lands at Matlock Bath, Derbyshire. The estate upon which the trees were growing was formerly the property of the late Thomas Wakley (who died on the 16th May 1862), the father of the plt. The plt. was devisee of the estate under his father's will, and also executor. After the death of the late Thos. Wakley the trespasses complained of were committed of by deft., who attempted to justify them under an alleged parol agreement between himself and the late Mr. Wakley to purchase the trees in question, and some of which trees deft. alleges, in pursuance of such parol contract, he cut down and took away in the lifetime of the late T. Wakley. This is the contract which deft. sets up in his equitable plea as a justification for the trespasses, and the question raised is, whether such parol contract binds the land and the plt. as devisee thereof.

The declaration stated that the plt. was possessed of certain land and closes called Brunswick, or New-or's Allotment Key Pasture, and the Upper Holme, in the parish of Matlock, in the county of Derby, and the deft. on divers days and times broke and entered the same land and closes of the plt., and cut down, destroyed and carried away divers trees, underwood, and ornamental timber of the plt. then being and growing thereon, and converted the same to his own

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use, and by means of the premises the said land and closes have been and are greatly injured in value, and are rendered less valuable for building purposes, and the plt. has been hindered from enjoying the use of the same in the beneficial manner as formerly, and as he would otherwise have done, and has been and is otherwise injured; and the plt. claims 1000*l*.

Fourth plea.—For a defence on equitable grounds, deft. says that heretofore and before and at the time of the making of the agreement, bargain and sale hereinafter mentioned, one Thomas Wakley, since deceased, was possessed and seized in his demesne, as of fee, of and in the said lands and closes respectively in the said declaration mentioned, and that thereupon, afterwards and before the committing of the said alleged trespasses in the declaration mentioned, the said Thomas Wakley being so possessed and seized as aforesaid, by and under a certain agreement then made, bargained and sold to the deft. certain trees, underwood and ornamental timber then growing in and upon the said land and closes in the said declaration mentioned, including, amongst others, the said trees, underwood and ornamental timber in the declaration respectively mentioned, upon the terms that, in the event of the said land and closes being sold by the said Thomas Wakley within a certain time then in that behalf named (as he the said Thomas Wakley was then desirous to do), the said trees, underwood and ornamental timber so bargained and sold as aforesaid, should be cut down and carried away and paid for by the deft. within twelve months from the date of the said agreement, and that, in the event of the said T. Wakley failing to sell the said land and closes as aforesaid, then that the deft. might, from time to time, as to him (the deft.) should seem fit and convenient for that purpose, enter into and upon the said lands and closes respectively in the declaration mentioned, for the purpose of cutting down and carrying away, and should and might then and there cut down and carry away such of the said trees, underwood and ornamental timber so bargained and sold as aforesaid as he the deft. might think fit, and that the deft. should pay to the said T. Wakley, his executors or administrators, a certain price or sum at and after a certain rate then in that behalf agreed upon between them for and in respect of the said trees, underwood and ornamental timber so from time to time cut down and carried away as aforesaid; and deft. avers that the said T. Wakley failed to sell the said land and closes, and the same were not sold by the said T. Wakley within the said time in that behalf named; and that afterwards and after the making of the said agreement and bargain and sale before mentioned, and in the lifetime of the said T. Wakley, since deceased, and before the said times when, &c., the deft. did duly and under and in pursuance of the said agreement enter into and upon the said land and closes therein mentioned for the purpose of cutting down and carrying away, and did then and there cut down and carry away divers of the said trees, underwood and ornamental timber so bargained and sold as aforesaid, other than the said trees, underwood and ornamental timber in the declaration mentioned, and then duly paid for the same under and according to the terms of the said agreement in that behalf; and deft. further says that the said T. Wakley being so possessed and seized of the said land and closes as aforesaid, duly made and published his last will and testament in writing according to the form of the statute, &c., and thereby gave and devised the said lands and closes respectively in the declaration mentioned to the plt., and that afterwards and before the committing of the said trespasses, the said T. Wakley being so possessed and seized as aforesaid, departed this life without having in any way revoked

or altered the said devise to the plt.; and deft. further says, that afterwards and after the death of said T. Wakley, and within a reasonable time in that behalf, he (deft.) duly and under and by virtue of the said agreement and bargain and sale entered into and upon the said land and closes respectively in the said declaration respectively mentioned, for the purpose of cutting down and carrying away, and did then and there duly and under and according to the said terms of the said agreement, and within a reasonable time in that behalf, cut down and carry away the said trees, underwood and ornamental timber, the same respectively forming part of the said trees, underwood and ornamental timber so bargained and sold by the said T. Wakley in his lifetime as aforesaid, which are the said alleged trespasses in the said declaration mentioned.

Demurrer thereto and joinder.

Hayes, Serjt., in support of the demurrer, contended that a parol agreement made with the former owner of the plt.'s land, is no justification to the trespasses admitted by the plea, and is a matter concerning the executors of the former owner, and not concerning the plt.; that the fourth plea is bad, because the agreement therein mentioned is a personal agreement, and even if it binds the personal representatives of the testator, it does not bind the land in any way, either at law or in equity, or affect the owner of the land in any way whatever. That, supposing in equity the land is charged with the agreement, that fact would not entitle the deft. to take the law into his own hands and to commit the trespasses admitted in the fourth plea against the will of the owner of the land; it could only entitle him to apply to a court of equity to have the benefit of the charge carried out. That the agreement is a parol agreement relating to land, and is not to be performed within a year, and that there had been no such part performance as to take the case out of the Statute of Frauds. That it would be necessary for the personal representatives of the testator to be defts. in the suit in equity, and that consequently a court of common law could not do justice between the parties. He referred to

Sug. V. & P. 150;

Wodehouse v. Farebrother, 5 E. & B. 277;

Mines Royal Society v. Magnay, 10 Ex. 489;

Clark v. Lawrie (P. O.), 26 L. J. 36, Ex.

R. E. Turner, for deft., in support of the plea, argued that the plt. having become possessed of the land and closes mentioned in the declaration as the devisees of the Thomas Wakley mentioned in the plea, took and became possessed of the same subject in equity to precisely the same rights and incidents as those which attached to and were charged upon the estate and interest therein of the testator at the time of his death; and therefore that the plt. cannot in fraud and contravention of the contract entered into by his testator, and without any revocation or determination thereof, maintain this action in respect of the matters and acts which are admitted upon the record to have been done and committed under and according to the terms of such contract. That it is immaterial for the purpose of the plea whether the contract is or is not alleged to be in writing, inasmuch as the deft. is not seeking to charge the plt. on the contract, but merely to prevent him from maintaining this action against the deft. for matters done by him in conformity with the terms of the contract; for the Statute of Frauds does not vacate a contract of this description, though made by parol only, but merely precludes the bringing of an action to charge thereon either of the contracting parties; that the plt., as such devisee, cannot in equity revoke or take any objection to the nature of the contract with which his testator charged and bound in equity the lands and closes, upon the ground that the testator

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during his lifetime acquiesced in and suffered and permitted the deft. in part to carry out and perform such contract, and thus render it impossible that the deft. should, if such contract were now revoked, be placed in his original position with respect to the subject-matter of such contract. That the contract and the fact of it having been in part performed by the deft. with the acquiescence of the testator amounted to a parol licence, coupled with a valid grant of the trees in question, and therefore that the plt., who in equity stands in precisely the same position as his testator did at the time of his death, is in equity bound by and estopped from revoking or defeating his testator's act in the nature of a grant. He cited

Wood v. Leadbitter, 13 M. & W. 838, 842;

2 Storey Eq. Jur. sect. 761 and 783 (4th edit.)

POLLOCK, C.B.—I am of opinion that the deft.'s plea cannot be supported. It was no doubt a great benefit to suitors when the law became changed by which facts may be stated in a plea by way of equitable defence; but one of the first restrictions to a plea on equitable grounds in a court of law was, that unless it disclosed circumstances which would in equity entitle the deft. to a decree, and would do complete and final justice between the parties, such a plea would not be good, and that instead of filing a bill in equity to restrain the opposite party from committing a wrong, the object may be obtained at common law by giving the parties relief at once, and finally settling all other matters of the suit to terminate the litigation. If a plea were such as in a court of equity would be a complete answer to the plt.'s claim, this court would allow it, but we ought not to permit equitable doctrine to be thus applied to any new case so as to increase the equitable jurisdiction of courts of common law, and should listen with great caution to arguments extending the doctrine of equity in these courts. *Wood v. Leadbitter*, 13 M. & W. 838, was referred to, which decides that a right to come in and remain for a certain time on another's land can be granted only by deed, and that a parol licence to do so is revocable at any time without even refunding the money paid for it. What can one infer from that report but that the heirs to real estate may stop a man from entering on his land and cutting down his timber under an alleged contract, not in writing, made years before with his ancestor? I expected from the deft.'s learned counsel some authority to support his argument with reference to the Statute of Frauds, but none was cited. This plea would not settle the whole matter between the parties, or do complete justice between them, and on that ground alone, as it appears to me, the plea is bad.

BRAMWELL, B.—I think so too. Before the C. L. P. A. it was deemed very desirable that defences on equitable grounds should be allowed; it appeared to me inconvenience may attend it, and this confirms me in my view of it. This may be likened to an action on a bond under the stat. 8 & 9 Will. 3, c. 11, setting out the condition of a bond, and then assigning breaches. A plea to be good for defence on equitable grounds ought to show a complete defence in itself, and certainly this does not. If judgment were to be signed for the deft., and entry made that he do go thereof without day, &c., the greatest injustice might be done, as the deft. must clearly pay somebody in some way or other for the trees; but how is he to be made to pay for them if this plea is a good plea? The plt. as devisee here could not recover in this suit, nor could the executors of the deceased, he, deceased, being the person with whom the verbal contract is said to have been made; and so far from complete justice being done between the parties in this suit, it seems to me, if this plea were to be held good, that great

injustice would be done. The plea, I think, is a bad plea, and the plt. is entitled to our judgment on the demurrer.

CHANNELL, B.—I also am of opinion that the plt. is entitled to the judgment of the court. The facts shown here would not entitle the party to a perpetual injunction in equity, granted absolutely and without any conditions.

FIGOTT, B.—I am of the same opinion, and on this short ground, that the court, upon the statements in this plea, could not do final justice between the parties.

Judgment for the plt.

Plt.'s attorneys, *Francis and Blake*, 5, Serle-street, Lincoln's-inn.

Def't.'s attorneys, *Hawkins and Co.*, Boswell-court.

Friday, Nov. 13.

EASTON AND ANOTHER v. PRATT AND ANOTHER.

Leasing power—Repairing lease—Term of years—Construction of power.

A. devised his freehold house, sheds, yards and premises, used by him in the business of a fellmonger, at Bermondsey, to his three daughters, and the survivor of them, for life, with power to grant leases thereof for a term of years not exceeding twenty-one years at a rack-rent, and without taking any premiums for the same, or on building or repairing leases, for the term of sixty years; remainder, after the decease of the last tenant for life, to the testator's four sons in fee, as tenants in common. The surviving tenant for life, by an indenture of lease, dated 29th Sept. 1859, and purporting to be pursuant to and in exercise of the said power, devised the premises to H. for the term of forty years, at the yearly rent of 110L, payable quarterly, and H. covenanted for payment of rent and taxes, and also that he, his executors, administrators and assigns, would well and sufficiently repair, uphold, paint, maintain, amend and keep the premises, and all buildings thereafter erected, and all walls, &c., with all manner of necessary reparations, &c., and the said premises so being in all things well and sufficiently repaired, &c., at the expiration, &c., peaceably yield up, &c.; and the lease contained the other usual covenants. On the death of the surviving tenant for life, the remaindermen brought ejectment against the lessee, and it was proved that, at the date of the lease, some of the buildings had been recently rebuilt, and were in good repair, but the dwelling-house and other buildings, though habitable and in tenantable repair, were soold and decayed as to be likely to become ruinous from operation of time and ordinary wear and tear:

Held, that the lease was not a due execution of the power. It was not a lease at rack-rent, because it was for more than twenty-one years, and it was not, whether looking at the terms of the lease or the extrinsic circumstances given in evidence, as to the state of repairs, a repairing lease such as would satisfy the power.

Quære (per Pollock, C. B. and Channell, B.), whether, if the lease exceeded twenty-one years, it must be for the definite period of sixty years.

Per Bramwell, B.: That it need not be. The leasing power is in derogation of the remainderman's title, and therefore, in all reason, construing it thus, it is, "You may lease to the extent of sixty years": (*Isherwood v. Oldknow*, 3 M. & S. 382.)

Ejectment by plts. as remaindermen, against defts. as lessees under the tenant for life, to recover possession of messuages, workshops, warehouses and premises used in the business of a fellmonger at Bermondsey.

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EASTON AND ANOTHER v. PRATT AND ANOTHER.

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By his will, dated 4th Sept. 1828, Charles Easton devised his freehold house, sheds, yards and premises situate in the Grange-road, Bermondsey (the premises in question), "and at which he then resided, unto his three daughters, Sarah Smith Easton, Abigail Easton and Mary Easton, to hold to them and the survivors and survivor of them, during the term of their natural lives, with full power to them or her to grant leases thereof, or of any part thereof, for a term or terms of years not exceeding twenty-one years at a rack-rent, and without taking any premium or premiums for the same, or on building or repairing leases for the term of sixty years;" and from and after the decease of the longest liver of his said three daughters, testator devised the same premises unto his four sons, Samuel Easton, William Easton, Thomas Easton and John Easton, their heirs and assigns for ever as tenants in common, and died.

Mary Easton, having survived her two sisters, and being sole surviving tenant for life of the premises, by an indenture of lease, dated 29th Sept. 1859, in consideration of the rents, covenants and agreements in the said lease reserved and contained on the lessees' part, and purporting to be made by her pursuant to and in execution of the said power or authority given to her by the said will, demised and leased the premises to one Henry William Hunt, his executors, administrators and assigns, for the term of forty years, at the yearly rent of 110*l.*, payable quarterly to the said M. Easton, or her assigns, or unto the person or persons for the time being entitled to receive the same. And the said W. H. Hunt, for himself, his heirs, executors, administrators and assigns, thereby covenanted with the said M. Easton, her executors, administrators and assigns, and also with the person or persons entitled as aforesaid by these presents in manner following; that is to say, that he the said H. W. Hunt, his executors, &c., should and would, &c. pay rent, rates and taxes, &c.; and also should and would, at his and their own costs and charges, when and as often as need should require during the term, well and sufficiently repair, uphold, support, paint, maintain, amend and keep the demised premises and all buildings thereafter erected by him thereon, and all pavements, walls, fences, &c. belonging or which should belong to the same premises, in, by and with all manner of needful and necessary reparations, cleansings, &c. And the said demised premises so being in all things well and sufficiently repaired, upheld, supported, amended and kept together, with all doors, wainscots, &c., and all such things as then were or at any time thereafter during the said term thereby granted should be any ways fixed or fastened to or set up in or upon, or which should belong to the said demised premises, should and would at the expiration, &c., peaceably, &c., yield up unto the said M. Easton, or her assigns, or the person or persons entitled as aforesaid; and likewise, that it should be lawful for the said M. Easton, or her assigns, or the person or persons entitled as aforesaid, their stewards, surveyors and workmen, three times in every year, or oftener during the term, at proper times in the day, to enter, &c. (power of entry on demand to view the state of repairs, and to give notice of defects and needful amendments); and that he the said H. W. Hunt, his executors, &c., should and would within three months next after every such notice, well and sufficiently repair, amend and make good all such defects and wants of reparation whatever in the thereby demised premises."

Subsequently to the said lease M. Easton and H. W. Hunt mortgaged the premises to Messrs. London and Lane for 500*l.*, and by an indenture dated 3rd Aug. 1860 M. Easton demised the said premises to the said mortgagees (for subject to the said lease) 99 years, if she so long lived, and H. W. Hunt demised the same to them for the residue of the term granted

to him by the said lease except the last day, as a security for the repayment of the mortgage money and interest; since which mortgage Mary Easton, the tenant for life, has died.

The plts. (who claim as heir-at-law and devisees respectively of two of the said sons and ultimate devisees named in the said testator's will) contending that the lease granted by Mary Easton to H. W. Hunt was not a due execution of the power to lease given by the testator's will, brought ejectment against defts., who are tenants to the said mortgagees, to recover possession of the premises.

At the trial before Bramwell, B. and a special jury, at the last summer assizes at Croydon, a verdict was found for plts., with leave to defts. to move to enter the judgment in their favour, if the court should be of opinion that the lease in question was a valid one. It was also arranged between the parties that there should be an inquiry into the state of repair of the premises in question at the date of the lease, and that the result should be taken as proved at the trial. An order of reference to an arbitrator was accordingly made, and the arbitrator having heard evidence on the matter, made his certificate on the 14th Sept. last, whereby he found "that at the time when the said lease was granted the buildings marked H. on the plan in the margin of the lease had been recently rebuilt and were in good repair; but that the dwelling-house and other buildings comprised in the said lease, though habitable and in tenantable repair, were so old and decayed as to be likely at any time to become ruinous and unfit for the purposes for which they had theretofore been used, from the mere operation of time and ordinary wear and tear.

A rule was obtained in this term, pursuant to leave, to set aside the plts.' verdict and enter it for the defts., on the ground that the said lease was a due execution of the power to lease given by the will of Charles Easton; against that rule

Lush, Q. C. and Murphy now showed cause.—The power was twofold. First, there was a limitation of any term not exceeding twenty-one years at rack-rent; secondly, on a building or repairing lease for the term of sixty years. To come to a right construction of the power, it was needful to see what was the mind of the testator. The plan on the lease showed a large space of land unoccupied by any building. His mind was evidently that this would come in for building land, and he meant to give the tenants for life, his daughters, the power either to lease it for twenty-one years at a good rent, so that it might be used for its accustomed business purposes of a tanyard, or to let it out on building leases for such a term as would induce persons to build upon it, and so the reversioners, his sons, would get the benefit. Here the lease was neither for twenty-one nor sixty, but for forty years. The rent reserved was not a rack-rent, nor was it a twenty-one years' term, nor a building or repairing lease. First, it was submitted that the word "or" must be read "and," viz., "building and repairing lease;" otherwise there would be nothing to repair. It must be a lease compelling the lessee to build, and having built to repair. Secondly, testator intended a repairing lease. Was this a repairing lease? To come to a conclusion on that, the certificate of the arbitrator must be looked at. It was clear from that finding of the arbitrator that, under the covenants in this lease, the lessee was only bound to patch up. The replacing buildings decayed by the "wear and tear" of time would come upon the landlord under an ordinary lease, and the covenant here was no more than the ordinary form of covenant to repair. *Doe dem Dymoke v. Withers*, 2 B. & Ad. 896; 1 L. J., N. S., 38, K. B., showed the difference between a covenant to rebuild and to repair, and a distinction also between a covenant in a repairing lease and a covenant to repair in a lease at rack-

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EASTON AND ANOTHER V. PRATT AND ANOTHER.

[Ex.]

rent. In the absence of a specific covenant to do the act which formed the consideration for the lease the reversioners would come within the mischief mentioned by Taunton, J., in *Doe v. Withers*. The distinction in the will between the two terms was conclusive as to the testator's intention. Thirdly, the testator having prescribed "the term of sixty years," a forty years term did not comply with the power. On that point *Isherwood v. Oldknow*, 3 M. & S. 382, would be cited contra, where a power to demise for a longer term was held to involve a power to lease for a shorter one, but that was upon looking at the whole will. It was a question of intention therefore. In that case it was to be a *maximum*. Here "sixty years" was to be a *minimum*. It was contended, first, that the power must be read "building and repairing;" secondly, that if it was not meant to be a "repairing lease," it was not to be an ordinary lease, but one which would secure repairs being done for the benefit of the reversioners; and thirdly, that a specific long term was intended for their benefit. They referred also to Lord St. Leonards' comments on *Doe v. Withers*, 2 Sug. Pow. 472, 6th edit., as the only other authority on the point they had been able to find.

Raymond, contra, in support of the rule.—The lease was a due execution of the power. What was testator's intention? A will was a popular instrument, not to be construed so strictly as a deed. His first object was his three daughters; secondly, his four sons. He therefore postponed his sons and secured a benefit to the tenants for life, without damage to the reversioners: the property was not to go over to them in a worse condition, not to be wasted. There were three alternatives, viz., a lease at rack-rent, or a building lease, or a repairing lease—for the court would not turn "or" into "and" at the mere suggestion of the other side that such a construction would benefit their case. This was clearly a repairing lease; there was a covenant to repair. What had the testator in his mind? He had two states of things in his mind: if the premises were in good repair at the time of the lease, such as would command a good rent, then to lease them at the best rack-rent. But they might be in bad repair, and he might not know that a rack-rent lease contained a covenant to repair, and so if they were in bad repair at that time, then he would have a repairing lease, taking a premium from the lessee in the shape of a covenant to repair, which would bring up the premises to a condition which would command a good rack-rent. The covenant is not only to repair, but to keep in repair. Whether the lessee performed his covenant or not was not the point. The tenant for life had done all required of her in exacting the covenant. The term "repairing lease" had no defined meaning. Both in form and substance this lease complied with the power. The court were asked to construe the language of the will differently from that which testator had used. No doubt there were cases where that had been done, but in *Doe v. Withers* the very strain of the case and basis of the judgment was, that it was a covenant not to do one thing or the other, but to do both. *Isherwood v. Oldknow* was a *prima facie* authority in defendants' favour as to the forty years. As Lord Ellenborough there said, if the reversioner got his right sooner than later, it was rather to the prejudice of the tenant for life. On these grounds he contended the rule should be made absolute.

POLLOCK, C. B.—I agree with the rest of the court, and we are all of opinion that this rule must be discharged. On considering the mere question as to the length of the term, I own, both on looking at the document and considering the authorities on which the principle is decided, we could not determine merely upon the question of the length of lease. But a very clear ground of decision arises out of this: the lease must either be a lease at a rack-rent for twenty-one

years, or a building or repairing lease for something more. I assume, for the moment, it might be for fifty years, or sixty years, or anything short of sixty years; still it is not at a rack-rent; it is not good as a lease at a rack-rent because it is for more than twenty-one years; it is not good for more than twenty-one years because it is not a repairing lease. I am of opinion, therefore, that the rule must be discharged.

CHANNELL, B.—I am of the same opinion. This, being a lease for a term exceeding twenty-one years, cannot, in my judgment, be a good lease in execution of the power, unless it is either a building or repairing lease. I would rather not at present give any opinion on one of the points mooted, whether, if the lease exceeded twenty-one years, it must be for the definite period of sixty years, because I do not think it necessary; nor upon the question whether the word "or" in this lease should be read "and;" because, if I adopt my brother Pigott's argument that the word "or" must be read "or," it is not pretended that this was a building lease, and then the question is reduced to this, whether it is a repairing lease. I am of opinion, whether we look to the terms of the lease or to those extrinsic circumstances which were referred to in the course of the argument, that this cannot be considered a repairing lease, such as would satisfy the will.

PIGOTT, B.—I am quite of the same opinion. I think, in the language here used, which is "or building or repairing lease," the party meant by the word "repairing" to signify something different from an ordinary covenant to repair, which is to be found in an ordinary farming lease where premises are let at a rack-rent. Inasmuch as this lease contains only those ordinary covenants, I think it quite clear it is not within the language of the power, and therefore the lease is bad.

BRAMWELL, B.—I am of the same opinion. I do not want to express an opinion on a matter not necessarily to be decided, but at the trial I thought the point made, that this lease should have been for sixty years if not under the first part of the power, could not be supported. It seems to me that the leasing power is in derogation of the remainderman's title; therefore, construing it thus, it is, "You may lease to the extent of sixty years." It is quite a matter of speculation whether it is not as much worth while for the remainderman to have a short lease as a long one. I think the case of *Isherwood v. Oldknow* is in point. I say nothing more about that; but upon the other point it seems to me that this is not a good repairing lease. But then it is said, assuming this is not, on the face of it, a good repairing lease, when you look at the extrinsic circumstances it becomes so, because the premises cannot be kept in repair, under the ordinary covenant, unless they are previously repaired, as they would require to be under a repairing lease. Therefore it comes to the same thing. There are two answers to that. In the first place, the fact is not so, because it is not proved; in the next place, because, under a repairing lease, a man would not only have to repair at the outset, if necessary, but he would have to repair at the end of twenty years afterwards, and again twenty years after that. This does not apply to that. It seems to me this is not a repairing lease within the power, and consequently my view at the trial was right, and I think the rule must be discharged.

Rule discharged. (a)

Attorneys for plaintiffs, *R. G. and G. E. Hileary*, 5, Fenchurch-buildings, Fenchurch-street.

Attorneys for defendants, *Digby and Son*, 90, Chancery-lane.

(a) This case will, it is understood, be carried to the Ex. Ch.

Wednesday, Nov. 11.

PHILLIPS v. WARD AND OTHERS.

Pleading.—Joint contractors.—Prior action against a fourth joint contractor and judgment therein pleaded.

To a declaration in an action against three joint contractors for money payable by them to plt. for work, &c., done by him as an attorney upon their retainer, &c., defts. pleaded that the contract sued on was a joint contract made by plt. with defts. and one J. B. and not otherwise, and that before this suit plt. brought an action against J. B. for the same cause of action as in the declaration mentioned, and such proceedings were thereupon had in that action, that afterwards and before this suit it was considered by the judgment of the said court in the said action that the plt. did take nothing by his suit for or in respect of the said cause of action, and the said judgment still remained in force. Verification. Held, on demurrer, that it was a bad plea, as not showing that the prior action was successfully resisted on some ground common to all the joint contractors. It may have been on some personal matter, as bankruptcy or infancy.

Per Bramwell, B.—It was not necessary that any special point preventing the judgment from having its ordinary effect should be replied; the plea should be good in itself as a defence.

Per Pigott, B.—It is a plea of estoppel, and whether it were replied to or not, the deft. should have shown that it was good in omnibus.

Declaration for money payable by defts. to plt., for work, &c., done by plt. as the attorney and solicitor of, and otherwise for the defts. upon their retainer, and for fees due, and materials, &c. provided by plt. for defts., at their request; and for money lent and money paid; and on account stated.

Plea of defts. Ward and Bazalgette, that plt. ought not to be admitted to say that any money is payable by the said defts. to the plt. for the causes of action in the declaration mentioned, because they say that the said retainer in the declaration mentioned was a joint retainer by the defts. in this action and one J. B., and that the said fees became due, and that the said materials, &c., were provided by the plt. for the defts. under and in respect of the said joint retainer and not otherwise, and that the said money was lent by the plt. to and paid by the plt. for the defts. jointly with the said J. B., and not otherwise; and the said accounts were stated of and concerning the aforesaid transactions between the plt. and deft. jointly with the said J. B. and not otherwise; and that before this suit the plt. brought an action against the said J. B. in the Court of C. P. for the same causes of action as in the declaration mentioned and such proceedings were thereupon had in that action that afterwards, and before this suit, it was considered by the judgment of the said court in the said action that the plt. should take nothing by his suit for or in respect of the said causes of action, and the said judgment still remains in force, and this the defts. are ready to verify; wherefore they pray judgment, if the plt. ought to be admitted to say that any money is payable by the defts. to the plt. for the causes of action in the declaration mentioned.

Demurrer and joinder in demurrer.—A matter of law marked in the margin was that a plt. who has failed in an action brought by him on a joint contract against one of the joint contractors, is not thereby estopped from maintaining another action on the said contract against the other parties thereto whom he had omitted to join as defts. in the first action.

Plt.'s points:—1. The plea discloses no estoppel or other matter, either in abatement of the suit, or in bar of the action, or, if any, matter in abatement only, and

not in bar. 2. The matter alleged in the plea by way of estoppel, if an estoppel at all, would only be available as an estoppel to the deft. in the former action, and those claiming under him subsequent to the action. 3. That one of several joint contractors is not, as such, affected by or entitled to the benefit of an estoppel which has never arisen in favour of the other. 4. That the judgment is not an estoppel available to these defts. for want of mutuality. 5. That the matter alleged by the plea would not have been available as an estoppel even to J. B. had he been joined as a deft. in this action.

Deft.'s points:—1. The plea is good. 2. If a plt. elects to sue one of several joint contractors instead of all, the judgment in such action is final as to his rights under such contract, and the matter cannot be reopened in the form of actions against the other joint contractors. 3. The effect of a judgment in an action against one of several joint contractors in relieving the others from liability for the same cause of action must be the same, whether the judgment is in favour of the plt. or deft. 4. When an action is brought for a debt on a joint contract against one of several joint contractors, and judgment has been given against the plt., he is estopped in an action against the other joint contractors from saying that the money is due to him on the same cause of action.

*Hayes, Serjt., for plt., in support of the demurrer.—This was an action against three defts., and a plea that the contract sued on was a joint contract made with them and a fourth party. An action had been brought against the other party and judgment given for him. That would be an estoppel generally in the same proceedings and against the same party, but this was a novel plea, that having proceeded against the wrong party, plt. was estopped from proceeding against the right one. This case was the converse of *King v. Hoare*, 15 M. & W. 494; 14 L. J., N. S., 29, Ex., where it was held that judgment recovered against one of two joint debtors was a bar to an action against the other, and which proceeded on the ground that the matter had passed *in rem judicatum*, and the judgment was a bar to the original cause of action, because what was an uncertainty is turned into a certainty. Defts. should have pleaded in abatement. That was the conclusion to be drawn from *Henry v. Goldney*, 15 M. & W. 496; 15 L. J. 298, Ex., which distinguished it from *King v. Hoare*. [CHANNELL, B. referred to a recent case on that point in the C. P., *Buckland v. Johnson*, 15 C. B. 145; 32 L. J. 204, C.P.] Defts. here had not been vexed twice, which, as Alderson, B. said, in *Henry v. Goldney*, was the principle on which these cases rested. They could not be fixed or affected by the judgment. If all were sued, what might be a good defence as to one might be no defence as to the other, e. g. bankruptcy, insolvency, infancy, or some matter personal to the particular deft. All that was to be seen from this record was, that, on some ground or other, the plt. failed.*

*II. Bompas (with him Lush, Q. C.) contra, in support of the plea.—There were two points: first, of law, whether the action against one of four defts. was a sufficient bar and estoppel in an action against the others; and secondly, of form, whether the judgment was sufficiently pleaded. As to the first point, there was a distinction between the two cases *King v. Hoare* and *Henry v. Goldney* which had been cited; in the former judgment had actually been given, and the matter was *res judicata*; in the latter the action was still pending, and had never been tried. The argument consequently in that case was unavailing, and therefore it was, he submitted, that the court there would not allow the plea. But in the present case, if the judgment ought to have been pleaded more fully, and there were any special point which prevented its having its ordinary effect, that*

bought to have been replied. [CHANNELL, B.—Is it not a rule, in pleading an estoppel, to show everything which makes it an estoppel?] The plea said, the action was brought on the joint contract, and failed, which was *prima facie* an estoppel. [BRAMWELL, B.—Is *prima facie* sufficient in estoppel?] The plea was supportable as a plea in bar. Suppose, in an action for a debt of 100*l.*, a plt. recovered judgment for 1*s.* only, that would be a bar according to *King v. Hoare*. Then why, if a deft. were a little more successful and recovered nothing, should not that be a bar? [BRAMWELL, B.—Because he recovers nothing, because nothing is due.] The matter had been decided and could not be re-opened. It was the same matter, if not the same party. As a general rule, a plea in bar need only state a *prima facie* case, and matter preventing a *prima facie* case being a good defence should be replied. In point of form, it was submitted, defts. had made a sufficient case, calling on plts. to reply specially if there were any special reason why the judgment was no bar. One of the parties being out of the country, a plea in abatement could not be pleaded. [CHANNELL, B.—If then there be twenty joint contractors, and one goes out of the country, the plea is gone altogether?] That was the effect of the Act, 3 & 4 Will. c. 42, s. 8, and the courts had often stayed proceedings to prevent the same case being tried over and over again; but in this case stay of proceedings had been refused by this court. The ground of decision in *King v. Hoare* was not that a party should not be twice vexed, but that the matter had been tried and decided. Here it had been reduced to a certainty that the debt claimed amounted to nothing. He cited also

Gordon v. Whitehouse, 18 C. B. 747; 25 L. J. 300, C. P.;

Vorley v. Barrett, 1 C. B., N. S., 225; 26 L. J. 1, C. P.;

Stackwood v. Dunn, 3 Q. B. 822; 12 L. J., N. S., 3, Q. B.

POLLOCK, C. B.—We are all of opinion that this plea cannot be sustained. A person jointly liable with others, on being sued, defends himself as best he may, as did no doubt the joint debtor in the present case. The others being now sued claim the immunity of their co-deft., to which it is a sufficient answer that, for aught that appears on the face of the plea, he may have succeeded on a plea of which the others could not have availed themselves, and which would not therefore afford any defence to them in answer to the plt.'s action.

BRAMWELL, B.—I am also of opinion that the plea is bad. No doubt, if a man be sued and defends himself by a plea that he was jointly liable with one A. B., who was relieved by a release—a release to one of several joint debtors being a release to all of them—no doubt, after an action against one joint contractor defended successfully on such a plea, no action could be maintained against the other. But here this plea says nothing of the sort. It does not show that the action was successfully resisted on *some ground common to all* the joint contractors; it may have been on some purely personal matter, as bankruptcy, infancy, or what not. Then it has been said by Mr. Bompas, if there were any special point preventing the judgment having its ordinary effect, that should have been replied; but I think it is not so. The plea must be good in itself as a defence, and it is clear in my judgment that this is a bad plea. In my own mind, I have very little doubt that the successful plea in the former action was the general issue, and that the jury found that he did not promise.

CHANNELL, B.—I concur in thinking that this plea is bad, and that the plt. is entitled to judgment. I think deft. should have shown that the fact of plt. having taken nothing in his former action against one of the co-debtors is inconsistent with his having a right

of action against the others. That judgment may have been rightly given, and yet the plt. may not be barred from proceeding in the present action.

PIGOTT, B.—I agree with the rest of the court in coming to the conclusion that the plea is bad and that our judgment must be for the plt. This is a plea of estoppel, and I think, whether it were replied to or not, the deft. should have shown, which he has not done; that it was a good plea *in omnibus*.

Judgment for plt.

Plt.'s attorney, C. Tahourdin, 1, Victoria-street, Westminster.

Deft.'s attorneys: Bischoffe, Coze and Bompas, 19, Coleman-street, City.

COURT OF PROBATE.

Reported by DR. SWALEY, of Doctors'-common.

July 14, Nov. 3 and 10.

THE GUARDIANS OF THE POOR OF THE HAMLET OF MILE-END OLD TOWN AND OTHERS v. FINDLAY AND OTHERS.

In the Goods of JANE FINDLAY (Widow), deceased.

Nert of kin—Pauper lunatic—Administration under sect. 73 of Probate Act to guardians of the poor.

J. F. died intestate and a widow, leaving M. F. her daughter the only person entitled in distribution. M. F. had been for some years in the county lunatic asylum, maintained at the charge of the hamlet of Mile-end Old Town. No committee of person or estate had been appointed.

J. F. left a sum of money principally in the funds in the name of her late husband, under whose she was entitled to it.

After the proper citations the court, under sect. 73 of the Probate Act, granted administration of the goods of J. F. to the clerk of the guardians of the poor for the use and benefit of the lunatic, limited till the period of her lunacy; the sureties to justify.

This was an application for a grant of administration to E. J. Southwell, clerk to the above-named guardians, and their nominees for the present purpose, of the personal estate of the above deceased.

Jane Findlay died on the 19th Aug. 1856, intestate, a widow, leaving Mary Findlay, spinster, her natural and lawful only child, and the only person entitled in distribution. The deceased left about 450*l.*, principally funded property, standing in the name of her late husband William Findlay, who died on the 3rd Aug. 1856, and under whose will she derived the money.

Mary Findlay, aged about forty-eight, had since the year 1852 been of unsound mind, and was still confined in Middlesex County Lunatic Asylum at Colney Hatch, where she had been maintained as a pauper lunatic at the charge of the hamlet of Mile-end Old Town.

No committee of the person and estate of Mary Findlay had been appointed. The above named guardians had incurred charges in respect of the said Mary Findlay to the amount of 237*l.* 2*s.* 6*d.* up to the 6th Sept. 1861, the only security for which was an order of two justices of the peace for the county of Middlesex, under the 16 & 17 Vict. c. 97, s. 104, directing the said guardians, or Mr. E. J. Southwell, their clerk, or the relieving officers of the hamlet, to seize so much of any moneys, &c., of the said Mary Findlay, as may be necessary to pay the charges of the said guardians, and duly to account to the said justices for the same. Certain uncles and aunts were the only next of kin of the said Mary Findlay. They had been cited to take letters of administration of the personal estate of Jane Findlay for the use and benefit of the lunatic and during her lunacy, or show cause why the same should

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In the Goods of TYRRWHIT PULMAN.

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not be granted to E. J. Southwell, as clerk of the said guardians. None of the next of kin had appeared to this citation.

A citation had been served on Mary Findlay, the lunatic, in the presence of Mr. Marshall, surgeon of the Colney Hatch Lunatic Asylum, having charge of the said lunatic, and on Mr. W. Robinson, the only next of kin of the said lunatic residing in England. Inquiries had been made as to any creditors of William or Jane Findlay, but it did not appear that they left any debts owing at the time of their respective deaths.

Dr. Deane, Q.C. (*R. Pritchard* with him) moved the court accordingly, stating that he knew of no exact precedent.

Sir C. CRESSWELL.—If, as your statement is, Mary Findlay is a pauper lunatic, the parish is bound to maintain her. If the guardians apply as creditors, to whom do they stand in that position? I must take time to consider the application. *Cur. adv. vult.*

The motion was renewed before Sir Jas. P. Wilde, on the 3rd Nov.

Sir J. P. WILDE.—I think it is reasonable that the money which belongs to the pauper should be applied in payment of her subsistence; and if it can be done in no other than the mode now asked, I should wish, if I can with propriety, to grant this motion, but as no principle or conclusive authority has been cited, I must take time to consider. *Cur. adv. vult.*

Nov. 10.—Sir J. P. WILDE.—This is an application for letters of administration to be granted of the goods of Jane Findlay, who died a widow and intestate on the 19th Aug. 1856, to Mr. Southwell, as clerk to the guardians of the poor of the hamlet of Mile-end Old Town and others. It appears that Mary Findlay, spinster, was her only child, and the only person entitled to her personal estate. In 1852 Mary Findlay was admitted into the County Lunatic Asylum at Colney Hatch as a pauper, and from thence to the present time has been confined and maintained there at the expense of the before-mentioned hamlet. No committee of her person and estate has ever been appointed. The expenses incurred on her behalf by the hamlet amounted to 237*l.* 2*s.* 6*d.* On the 6th Sept. 1861 the guardians of the poor for the hamlet obtained an order from two magistrates to seize and sell so many of the goods of Mary Findlay as might be necessary to pay the above sum of 237*l.* 2*s.* 6*d.* The order recites that it has been proved on oath that the said Mary Findlay was entitled to a sum of money in the Bank of England, and another sum of money in the Poplar Savings Bank. It is also sworn on affidavit before the court that Jane Findlay, the mother, left personal estate of the value of 450*l.* It is also sworn by the nurse and the medical attendant at the asylum, that there is no hope of the recovery of Mary Findlay to soundness of mind. Search has been made for creditors of Jane Findlay, but none found. The next of kin of Mary Findlay have been cited, but have not appeared. It is under these very unusual circumstances that the court is asked for a very unusual grant. Those who apply for the grant are substantially creditors of the next of kin of the deceased. That character would not (so far as I have been able to discover) of itself entitle them, according to the practice of this court, to the grant they seek. There have no doubt been exceptional cases, though none that govern this; but the general rule would require something of a representative character in the person who seeks a grant on behalf of the next of kin. This character is here wanting, and if the court pronounces for this grant it must do so under the powers conferred by sect. 73 of the Probate Act. These powers are exercised with some reluctance; but the true function of the court is to facilitate the collection and distribution of the estates of deceased persons, and not by any technical rules to impede that distribution. If the

administration now asked is refused, to whom can the estate be confided? The next of kin of the lunatic refuse to interfere, and there is no one who represents her. She is lunatic, and therefore cannot act herself; the grant must therefore go as prayed. It will be made under the powers conferred by sect. 73; it will be for the use and benefit of the lunatic, and limited to the period of her lunacy; furthermore, an inventory and justified security will be required.

Proctors, *Pritchard and Son.*

Nov. 3 and 10.

In the Goods of TYRRWHIT PULMAN, deceased.

Will—Executors “in India”—“In England”—*Form of probate.*

P., by his will, appointed C. and D. “executors of my will in India,” and W. “sole executrix of my will in England.” On exemplification of probate granted in Calcutta to C. being sent home, probate was granted in the principal registry to W., as one of the executors of the will, reserving power of making a similar grant to the other executors in the will. The Bank of England objected to the reservation of this power. But the Court refused, on motion on behalf of W., to direct the probate to be altered.

In this case the deceased executed a will in India, which contained an appointment of executors in the following terms:—“I appoint my said aunt Anna Maria Walker, spinster, my sole executrix in England;” “Lieut.-Col. F. W. Swinhoe and Charles Richard Frances, executors of this my will in India.”

Probate was granted to Col. Swinhoe, at Calcutta, on the 26th May 1863. An exemplification of this probate was sent to England, and a grant was made at the principal registry to Miss Walker, as one of the executors of the will, power being reserved of making a similar grant to Swinhoe and Frances, the other executors in the will. On presenting this probate in the Bank of England it was objected that the reservation of the power of granting probate to Swinhoe and Frances was wrongly inserted, and the bank refused to act on the probate.

Dr. Spinks now moved the court to direct the probate to be altered by striking out the reservation of the power, or by issuing a fresh probate omitting it. Miss Walker is the only person entitled to represent the deceased in England. (a) It is understood that there is a difficulty felt in the registry as to the term “sole executrix in England,” viz., whether it is equivalent to “sole executrix for England.” It is submitted that it can only be construed as a full equivalent. If so the reservation of the power is wrongly inserted, and as the executors resident in India may under this power obtain probate in common form on their return to this country, Miss Walker is entitled to be protected against that. In case of her death leaving an executor it is submitted that such executor would be the proper representative of the deceased in this country, and not deceased’s executors in India, who under this power must take the grant.

Cur. adv. vult.

Nov. 10.—Sir W. P. WILDE.—This is an application made by Mrs. Anna Maria Walker to revoke a grant of probate, which was made to and accepted by her of the will of Mr. Tyrwhit Pulman, dated 6th Feb. 1863, and for the grant of a new probate of that will to her, or in the alternative for an alteration of the probate so already granted. The existing grant is “to Anna Maria Walker, one of the executors named in the will, etc.” And then follow these words: “Power is reserved of making the like grant to

(a) See Williams on Executors, 218, 5th edit.

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CHARLES ROBERT SPERLING—THE LONDON.

[ADM.]

F. W. S. and C. R. P., the other executors named in the said will." It is this reservation that she now objects to, and the substance of her prayer is that probate may be granted to her absolutely as sole executrix. Now the above persons are no doubt named in the will as executors, but her contention is that, according to the true construction of the will, they were intended to be executors for India only, and not for the assets in this country. The registrar of this court took a different view of the testator's meaning, and inserted the above reservation accordingly, in order that if the other executors at any time came forward and desired to act in this country, there should be no impediment in the way of such claim. The court does not propose to itself to decide on the present occasion which view of the testator's intention was correct, for it is unnecessary to do so. The grant already made to Mrs. Walker gives her every power which any probate can give her over the estate in this country, and by entering a caveat she can secure to herself the opportunity of challenging the right of the other executors to a similar grant, should they claim it. What then is the objection to the probate as it now stands? Why simply this, that the court has reserved a power of granting probate also to the other executors if they should claim it, and if the court should, after hearing their claim, consider them entitled to receive it. What Mrs. Walker asks is, that the court, without hearing the other executors, should bind itself not to entertain their claim. But, singular as this demand is, after she has already accepted the grant which she now wishes to alter, the reason for making the demand is more singular still; it is as follows: The court learns, with some surprise, that some person at the Bank of England has felt himself called upon to exercise his judgment in construing the will, and has come to the conclusion that Mrs. Walker's probate ought to have been granted in a different form, and entertaining this opinion he has therefore refused to act upon it. This is a misfortune, the remedy for which does not lie within the province of this court to point out, but it forms no reason whatever for the alteration of the present probate, and the application is therefore refused.

Clayton, solicitor.

Tuesday, Nov. 10.

CHARLES ROBERT SPERLING, deceased.

Will—Attestation.

A servant, the deceased having signed his will in his presence, subscribed "Servant to Mr. Sperling" without any name. A solicitor, the other attesting witness, had directed him to sign as servant to Mr. Sperling:

Held, a sufficient attestation and subscription.

In this case the deceased died on the 8th July 1863, leaving a will bearing date the 28th March 1863, to which there was a full attestation clause, followed by the signature "George W. Harris, Solicitor, Halstead, Essex," and then in a different handwriting the words "Servant to Mr. Sperling," but no name. Mr. Harris stated on affidavit that on the 28th March he attended at Stanmore manor-house to get the will executed, that Mr. Sperling was wheeled into the library, and that Thomas Saunders, who had been for some time in attendance upon Mr. Sperling, was called in, and informed that Mr. Sperling was about to execute his will, to which Thomas Saunders' signature as well as that of Mr. Harris would be required to be subscribed as witnesses. That deceased wrote his name in the presence of Harris and Saunders, and Mr. Harris having signed his own name, turned to Saunders and said, "Now sign yourself here as servant to Mr. Sperling," pointing to the part of the paper immediately below his own signature. That Saunders then wrote

the words "Servant to Mr. Sperling," and Mr. Harris being in a hurry to get to the train, folded up the paper without looking at it and placed it in an iron chest in deceased's library. Thomas Saunders stated that he wrote the words "Servant to Mr. Sperling," intending such words to be his signature, and because he believed from the direction given him by Mr. Harris, that it was the proper way of attesting the will.

Chitly moved for probate. He cited

The Goods of Oliver, deceased, 2 Ecc. & Adm. 57.

Sir J. P. WILDE.—I think that there is a sufficient attestation and subscription. I am satisfied that Saunders wrote the words, intending thereby an identification of himself as the person attesting.

Shepherd and Skipwith, proctors.

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

Tuesday, June 2.

THE LONDON.

Collision—Inevitable accident—Costs.

Under ordinary circumstances when it is found that the collision was the result of inevitable accident, the general rule is that no costs are given.

Collision the result of inevitable accident; plts. condemned in costs, the Court being of opinion that they might, before suit brought, have ascertained how the collision arose.

This was a suit brought by the owners of the brig *Hugh* against the schooner *London* and her owners, by reason of a collision which occurred between the two vessels on the 19th Oct. 1862 in Aldborough Bay.

The plts. alleged (amongst other things), that the brig was at anchor in Aldborough Bay, with a bright white light hung up on her forestay, the wind blowing a gale from S. W. by S., and that the schooner running before the wind came into collision with her.

The defs. alleged (amongst other things) that the brig was brought up in Aldborough Bay, and anchored by bending the starboard anchor on to the port chain, the fluke of the port anchor having previously been broken in consequence of the violence of the weather; that a bright light was fixed in the starboard fore-rigging; that the weather increased in violence, and all cable was veered away and the end secured round the mast; that the cable suddenly parted and the schooner drifted in an unmanageable condition and came into collision with the brig; that as regards the *London* and those on board of her the collision was inevitable.

On the 1st May last the case was heard before the court, assisted by Trinity Masters, when the court was of opinion that the collision was the result of inevitable accident. The question of costs was reserved, and was now argued by

The *Queen's Advocate* and *Deane*, Q.C. for the plts., and *Brett*, Q.C. and *Clarkson* for the defs.

Dr. LUSHINGTON.—The plt. has brought a suit for collision against another vessel, and the result—the opinion of the Trinity Masters concurring with that of the court—is, that the collision arose from inevitable accident. The question now arises, whether or not the plt. should be condemned in the costs arising from such a proceeding. I have caused inquiries to be made into what may be called the practice of the court in cases of this description, and it appears from such inquiry that in the case of the *Itinerant*, 2 W. R. 244, an examination was made into what was the practice of the court, and that it was truly declared there. The court declined to give costs, upon the ground that the course and practice had been otherwise in cases of inevitable accident. The defs. contend that costs

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WRIGHT v. —, M.P.—*Re* JAMES F. PEARSE.

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should follow the event of the suit; if the plt. fails, he should pay the costs, and the deft. in like manner, in case he should be unsuccessful. I cannot take upon myself to say that such a rule is applicable to cases of this kind, and even if it were the rule, it is certainly not without exceptions. In the case of the *Ebenezer*, reported in 7 Jur. 1118, I said: "In this case I shall not give costs, but it must be understood in these cases that costs must follow the decision; but I think there are some peculiar circumstances in the present case;" therefore, though there was a general rule, yet that it was not such a general rule that there was no exception to it, and I considered that the court was bound in justice, in a case which did not fall within that general rule, to make that exception. Therefore I have no doubt whatever that the state of the case is this, that, under all ordinary circumstances, where the collision was found to be the result of inevitable accident, the practice of the court has been that no costs should be given; as it has been equally the practice of the court, if there were special circumstances in a case, to examine those special circumstances and condemn the plt. in the costs if the justice of the case so required it. There were cases where no costs were given; they were all special cases, that was where vessels came into collision in the open ocean, and there were no questions as to collisions with other vessels in the neighbourhood; but this is just the case in which it is clear that the party who brought the action ought to have taken into consideration the whole of the circumstances. What was the fact? The evidence none of us can doubt was this, that the night in which the collision occurred was one of the most tempestuous that ever took place in that vicinity, that there were no less than seven vessels lost that night, and the lives of those on board them were sacrificed. Now under those circumstances so strong was the *a priori* probability that a collision would arise from the tempest and not from neglect, that I think the plt. ought not to have hastened in bringing the action. This is one of those cases in which I think the plt. was not bound to bring the action, and therefore I must condemn him in his costs.

Brett.—The costs of the motion will follow?

The COURT.—Yes.

COURT OF BANKRUPTCY.

Reported by A. A. DORR, Esq., Barrister-at-Law.

Wednesday, Nov. 4.

(Before Mr. Commissioner HOLROYD.)

WRIGHT v. —, M.P.

Judgment-debtor summons—Privilege of Parliament.

The 76th section of the B. A. 1861, whereby a judgment creditor is enabled to sue out a judgment-debtor summons in bankruptcy against his debtor, does not apply to a Member of Parliament, on the ground that neither a writ of *capias ad satisfaciendum* can be issued against him, nor can he be taken in execution.

Judgment-debtor summons. The summons in this case was issued under the 76th section of the B. A. 1861, calling upon the deft. to appear this day to be examined touching his ability to satisfy a debt claimed of him by Herbert Wright, upon a judgment recovered against him by the plt. in the Court of Ex. on the 14th Aug. 1863.

It appeared from an affidavit made by the deft. "that on the 14th Aug. last, the day upon which the judgment of the Court of Ex. was recovered against him, and upon which the summons was issued, the deft. was and from thence hitherto had been; and was then, a Member of the Commons House of Parliament of the United Kingdom of Great Britain and Ireland,

returned by, and sitting for the county of —, in that part of the United Kingdom called Ireland."

By the 76th section of the Act of 1861 it is provided, "that every judgment-creditor who is or shall be entitled to sue out against a debtor a writ of *capias ad satisfaciendum*, or to charge the debtor in execution, in respect of any debt amounting to fifty pounds, exclusive of costs, shall be entitled . . . to sue out against the debtor . . . not being a trader at the end of one calendar month, and whether he be in custody or not, a summons to be called a judgment-debtor summons, requiring him to appear and be examined respecting his ability to satisfy the debt."

Chidley (solicitor) appeared for the defendant to oppose the summons.

Wright, the plt. in person, took a preliminary objection that the deft. was not personally present in court, as it was his duty to be.

Mr. Commissioner HOLROYD expressed his opinion that, as the deft.'s objection to the summons was that it was irregular, and should never have been issued, he ought not to require the deft.'s presence, and overruled the objection.

Chidley contended that to issue a writ of *capias ad satisfaciendum* against a Member of Parliament, or to take him in execution, was irregular and could not be supported. He asked that the summons might be dismissed, and cited

Cassidy v. Steuart, 2 Scott's N. R. 432; s. c. 9 Dowl. 366; and 10 L. J., N. S., 1, C. B.; and *Ex parte Gibbons*, 8 L. T. Rep. N. S. 552.

Wright urged that the case of *Cassidy v. Steuart* having been decided before the passing of the B. A. 1861 must be considered as overruled.

Mr. Commissioner HOLROYD.—The case of *Cassidy v. Steuart* expressly decides that a writ of *ca. sa.* cannot be issued against a Member of Parliament, and as the 76th section of the B. A. 1861 requires that a creditor must be entitled to sue out against his debtor a writ of *ca. sa.* to entitle him to sue out a judgment-debtor summons, I must dismiss this summons.

Chidley asked for costs.

Mr. Commissioner HOLROYD.—Yes. I think so. The law is now so well settled upon this point, that I must give the deft. his costs.

Summons dismissed with costs.

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Wednesday, Nov. 11.

(Before Mr. Commissioner HOLBURN.)

Re JAMES F. PEARSE.

Order of discharge—Damages in breach of promise of marriage—Sect. 159 B. A. 1861.

Damages and costs recovered in an action for breach of promise of marriage form no ground of opposition to a bankrupt's order of discharge:

Quere, does the bankrupt, when in custody at the time of obtaining his order, become entitled to his immediate release; or is he to continue in prison until the expiration of the thirty days allowed for appeal?

This bankrupt, a cattle-dealer and butcher's assistant, over sixty years of age, had been in custody since the 29th Aug. last, for damages and costs amounting to 65*l.* in an action for breach of promise of marriage, and he now came up for his order of discharge.

Kenealy opposed for Miss Preston, the plt., at whose suit the bankrupt was detained, and produced the judgment and the record in the action, which he put in evidence.

His HONOUR said that by a decision of the Court of Appeal the power of the court to visit a bankrupt adversely, upon applying for his order of discharge under sect. 159 of the Bankruptcy Act 1861, was

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Ex parte DAY, re SPARKE AND BRIDGES.

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limited to the grounds of opposition specifically enumerated therein.

Kenealy referred to *Doria and Macrae's Practice*, and pointed out the words of the statute, "the court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances under which his debts have been contracted : " (sect. 159.)

His HONOUR said the appellate court held, that the subsequent words in that section limited and controlled these general expressions, so that in effect the commissioner had no discretion whatever.

Kenealy thought the Legislature could not have contemplated such a result. Here was a grievous wrong committed by the bankrupt, for which a jury had awarded competent damages, from which the bankrupt might immediately escape by the operation of this statute. The other debts only amounted to 12*l.*, so that the damages and costs in the action constituted almost the sole liability.

His HONOUR intimated that he could not go beyond the law; and the order of discharge must be granted.

Order accordingly.

At the close of the day the bankrupt said he had also given notice to the detaining creditor of an application to be released from custody, and he applied for an order for his release.

Mr. Commissioner GOULBURN doubted whether he had power to order the release of the bankrupt until the expiration of the thirty days allowed for appeal, and inquired of the registrar whether the Court of Appeal had laid down any rule on the subject?

Mr. Registrar HAZLITT referred to *Re Laforest, ex parte Bell*, 8 L. T. Rep. N.S. 481, in which the L. C. had decided that the discharge granted to a bankrupt under the provisions of the Bankruptcy Act 1861 takes effect from the date of the order made by the commissioner, and that its operation was not delayed for the thirty days before which the order could not be drawn up and delivered to the bankrupt.

His HONOUR said, that decision had reference only to the property of the debtor, but how was his personal liberty to be affected? He should decline to order an immediate release, but the bankrupt might have leave to renew the application, when the question might be argued and the point decided.

The bankrupt was accordingly removed to his previous custody.

(Before Mr. Commissioner HOLROYD.)

Ex parte DAY, re SPARKE AND BRIDGES.

Commission dated 1753—Joint and separate estate—Proof—Specialty debt—Interest—Costs—Sect. 197 of B. L. C. A.—Sect. 132 of 6 Geo. 4, c. 16.

Separate estate is to be distributed amongst separate creditors, and joint estate amongst joint creditors. Where there is a surplus after payment of joint debts, separate creditors are permitted to prove against such surplus for the amount of their separate debts.

Where proof is in respect of a debt secured by bond, the general rule in bankruptcy is that a specialty creditor cannot have interest beyond the penalty contained in his security, but up to the penalty of the bond he will be entitled to interest at the rate secured by the bond.

For interest beyond the penalty he may come in with creditors whose debts do not carry interest.

The general rule is, that costs of proof are to be paid by the creditor seeking to establish the claim.

This was an application for the payment of a dividend by the personal representative of a creditor who had been admitted to prove under the bankruptcy above 100 years ago, the date of the commission being the 13th Dec. 1753.

The facts, which are very singular, are these :—Mr. A. J. Head, solicitor, of 64, Chancery-lane, recently discovered the existence of a sum of 2663*l.* 4*s.* 10*d.* due to the estate of the bankrupt which had been lost to the estate for a period of 100 years and upwards, and he took the necessary steps to recover that sum, and it was paid into the hands of Mr. Stansfeld, the official assignee. Mr. Head claimed 399*l.* for the discovery, being equivalent to 15 per cent on the fund, and in June last Mr. Commissioner Fonblanque directed that amount to be paid to that gentleman.

In July Mr. Commissioner Goulburn, at the request of Mr. Stansfeld, adjourned the dividend meeting *sine die*, to enable a special advertisement to be inserted for creditors to come in and prove their debts. Upon this a petition was presented by Sarah Louisa Day, of Weymouth, praying to be at liberty to prove a debt due to her as the personal representative of Anne Ashe, from the separate estate of William Sparke, and be admitted a creditor under the joint commission, and that the costs of the application might be paid out of the moneys now in the hands of the official assignee acting in the matter of the bankruptcy.

The facts disclosed in the petition were in substance as follows :—

On the 20th Oct. 1746 William Sparke and Edmund Bridges entered into copartnership and carried on business as ironmongers in the Strand. On the 20th Jan. 1753 they dissolved partnership; after the dissolution Mr. Sparke carried on business alone, and on the 11th June 1753 Anne Ashe, of St. Clement's Dances, advanced him 150*l.* on his bond. On the 10th Dec. 1753 a joint commission issued against both partners and they were both declared bankrupt, and both joint and separate estates were seized under a commission. At a meeting held at Guildhall Coffee-house, on the 29th Sept. 1753, assignees were appointed, but they are now deceased. An assignment of the bankrupts' estate and effects was made to them at the time in the usual manner. Anne Ashe and another creditor applied to the commissioners to prove their debts, but, the commission being joint, the commissioners were of opinion that they could not be admitted, because they were separate creditors, without the order of the Lord Chancellor. On the 8th Feb. 1754 an application was made to the Lord Chancellor, and his Lordship made an order that Anne Ashe and the separate creditors should be at liberty to prove against, first, the separate estate, and then against the joint estate if any surplus should remain after all the joint creditors had been paid. A dividend of the separate estate of Sparkes was made, pursuant to the order of the Lord Chancellor, and a dividend of the separate estate of Sparkes of 9*s.* in the pound was made among the separate creditors. Search was made in the office of the secretary of bankrupts from the 16th March 1757 to the present time, but there was no evidence or trace of any further dividend having been made amongst the separate creditors of Sparkes.

The sum of 27*l.* 18*s.* 4*d.* interest was due to Anne Ashe on the bond at 5 per cent. per annum on the 16th March 1757, and after payment of the interest by the application of the dividend of 9*s.* in the pound, the principal sum of 150*l.* secured by the bond was by the payment of the balance reduced to 104*l.* 8*s.* 4*d.*

This sum, with interest at 5 per cent. from the 10th March 1756 to the day on which this petition was presented (10th July 1863), amounted altogether to 660*l.* 9*s.* 4*d.*, which was now due to the creditor, and which the petitioner Day sought to receive as her personal representative.

On the 20th Dec. 1785 certain moneys were transferred by the personal representative of John Carpenter, the surviving assignee of the bankrupts, into the Court of Ch. to the credit of a suit pending, intituled *Brussius v. Morgan*, and the money was invested in

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Re M'DOWELL.

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the purchase of Three per Cent. Consols Annuities, and remained so invested up to the 7th June 1862.

The original creditor Anne Ashe died on the 27th Dec. 1793, at Windmill-street, St. Pancras, having duly made her will and two codicils; executors were appointed. On the 11th June 1863 letters of administration were taken out by Sarah Louisa Day, by virtue of which she claimed to be the personal representative of Anne Ashe.

The large sum of money which had been locked up in Chancery has now been received by the official assignee, and it remains in his hands applicable in the first instance to the payment of joint creditors, and then, as directed by the L. C., to the payment of the separate creditors, of whom the petitioner claimed to be one. The official assignee had advertised for joint creditors, but none had come in.

Young appeared for the claimant petitioning the court, and

Bingley for the official assignee.

Young read an affidavit of the fruitless efforts made to find the proceedings in the bankruptcy, and to serve the creditors. The offices of the attorney, in which the proceedings originally were deposited in 1769, had been pulled down, and now formed the Treasury-office of the Temple. He submitted that, having exhausted every mode of inquiry, it was now time to make the order for payment of the dividend.

Mr. Commissioner HOLROYD said that what was wanted was an order to receive the difference between the amount already received and 20s. in the pound. In 1754 an order to prove was made by the Commissioners and the L. C. of that day. The amount being settled, and the interest payable by the bond being ascertained, an order might be made for payment.

Young suggested that, as there would be a surplus, the creditor would be entitled to interest from the date of the proof.

Bingley said that the 6 Geo. 4, c. 16, s. 132, was the first statute which gave a creditor interest who was not entitled to it by his contract, and that that law was not retrospective. This being a contract made long before the 6 Geo. 4, the creditor could only be entitled to interest upon the debt as secured by the bond.

Mr. Commissioner HOLROYD.—As to interest in case of a surplus, the general rule is, that a specially creditor cannot have interest beyond the penalty contained in his security (*Tew v. Earl of Minton*, 3 Bro. C. C. 489); but up to the penalty of the bond, he will be entitled to interest at the rate reserved by the bond, and for interest beyond the penalty he may come in with creditors whose debts do not carry interest. See *Eden Bank*, L. 367, and *Cooke*, 207; *Grant v. Grant*, 3 Russ. R. 598, as to interest beyond the penalty of the bond.

Bingley said that, beyond the amount of the penalty, the creditor would only be entitled to interest since the passing of the Act, but that would be a subject for future consideration if the official assignee declined to pay the interest demanded by the creditor.

The order made was, that Sarah Louisa Day be declared entitled to a further dividend of 11s. in the pound out of the estate of the said bankrupt on the debt due to her as the legal personal representative of Anne Ashe, and which debt the said Anne Ashe was admitted to prove as one of the separate creditors of the said Wm. Sparke, by an order of the L. C., dated the 8th Feb. 1754.

Young hoped that the costs of the application would be allowed out of the general fund.

Mr. Commissioner HOLROYD.—The general rule is, that each creditor must support the expense of maintaining his own proof. No costs can be allowed out of the estate.

[Note.—Where a joint commission is taken out and the usual order obtained for keeping distinct accounts of the separate estates of each partner, the creditors of the separate estates are not entitled to interest upon their debts after payment of 20s. in the pound, unless the joint creditors have also received 20s. in the pound, but the overplus of the separate estate must be applied to increase the joint fund: *Cooke*, 208; and see *Ex parte Reeve*, 9 Ves. 588; *Ex parte Wood*, 2 M. D. & D. 283.]

Thursday, Nov. 12.

(Before Mr. Commissioner HOLROYD.)

Re A. M'DOWELL.

Undue preference—Trading on fictitious capital—Contracting debts in trade without reasonable expectations of payment—Sect. 159 B. A. 1861.

An undue preference is no offence within the meaning of the Act of Parliament.

Carrying on business upon capital bonâ fide and not colourably borrowed, is not carrying on trade by means of fictitious capital.

Debts contracted in trade under such circumstances are not debts contracted without reasonable or probable ground of expectation of payment.

This was a sitting for the last examination and order of discharge. The bankrupt, a saddler and ironmonger in Southampton, was opposed by *Ernest Reed* for Messrs. Eldred, creditors for 80l. for goods in trade. His present debts amounted to 934l., including part of a sum borrowed in 1858 to pay a composition to his then creditors, when he owed 700l. or 800l., and paid a composition of 5s. in the pound. There were no assets for creditors, and the only good debt he had was one of 1l. 4s. 9d. In April he made an assignment to Mr. Aslatt of book-debts to the value of beyond 100l., and subsequently, by bill of sale, he assigned the whole of his stock as a saddle and harness maker to the same person, as a further security for the debt of 400l. or 500l. he owed him. He had asked for an account and had never had it. They sued him, and he consented to a judgment. The date of the bill of sale was April 22, 1863. Immediate possession was taken under the bill of sale, and the property, which was worth about 300l., was sold by Mr. Aslatt by public auction; but what it had realised he did not know. He alleged that Mr. Aslatt had threatened him with proceedings for the recovery of the debt, which was a running account for money lent, extending from the year 1858, when he had made a composition with his creditors, to the year 1863. This creditor was a next-door neighbour to the bankrupt, and, as he admitted, an intimate friend. He had been carrying on business the whole time since 1858. He had also accepted some accommodation bills, believing that the parties would have been able to pay them.

Ernest Reed submitted that the business had been carried on in a state of insolvency, and that his client Mr. Eldred's debt of 80l. had been contracted without any reasonable or probable ground of expectation of being able to pay it. He had only been able to carry on his business by means of borrowed capital, by means of which he had been enabled to keep up appearances as a substantial trader.

Mr. Commissioner HOLROYD said that the particular grounds upon which the conduct of the bankrupt was impugned was the manner in which he had disposed of his property; but that was no offence within the Act of Parliament. And as to the allegation of trading upon fictitious capital, what he had was his own, and at his own absolute disposal, and they all knew that traders carried on their business by means of credit, and if the loans were not colourable, that constituted no offence. Then, as the bankrupt was

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Re JAS. BURSLEM—MOSCROP v. SANDEMAN.

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carrying on a *bonâ fide* trade, and as the sale of the goods would of themselves produce a return, it could hardly be said that he had contracted debts without reasonable or probable ground of expectation of payment. The bankrupt might therefore pass his last examination, and receive his order of discharge.

Friday, Nov. 13.

(Before Mr. Commissioner HOLROYD.)

Re JAS. BURSLEM.

Trust-deed—Debtor in custody—Application for release—Documents to be filed in support of the application.

Where a debtor in custody who has executed a deed of arrangement under the 192nd section of the B. A. 1861, and obtained his certificate under sect. 198, applies for his release, the certificate of protection is not alone sufficient evidence of the due execution of the deed; there must be evidence on affidavit of compliance with the conditions imposed by the Act, and essential to the validity of the deed.

A copy of such deed, and the affidavit in support thereof, must be filed with the proceedings in this court prior to the application being made.

Notice of an application for release must be given to the detaining creditor according to the practice of the court to which it is to be made.

This was an application by *Barrow*, for a release of the debtor from custody, on the ground that he had executed a deed of composition under the terms of the Bankruptcy Act 1861, and obtained his protection. He had given notice to the two detaining creditors, and he simply relied upon the certificate of protection obtained by the debtor from the office of the chief registrar, which he produced.

Mr. Commissioner HOLROYD.—Have you an affidavit of all the facts which have taken place, so as to show that the deed is distinctly within the Act of Parliament?

Barrow.—Don't you think the certificate of the chief registrar sufficient?

Mr. Commissioner HOLROYD.—That is not conclusive. You must prepare an affidavit, showing that the conditions required by the Act have been complied with, and serve the proper notice upon the detaining creditors according to the practice of the court.

Barrow.—I have been misled by the practice in Mr. Commissioner Fane's court. I have made an application to him in precisely the same way as I made the present, and I therefore hope that under such circumstances there will be a short adjournment to prepare the affidavit.

Mr. Commissioner HOLROYD.—No. The summons is dismissed. You must come again in the ordinary way, according to the practice of the court, and give fresh notice.

Barrow.—Will your Honour permit short notice?

Mr. Commissioner HOLROYD.—No. You must give the usual notice for another application.

Barrow.—The registrars are not agreed as to what is proper notice. In one court it is two days, and in another it is two clear days, and in the third court it may be different also.

Mr. Commissioner HOLROYD.—It is two clear days. Apply to the registrar of my court.

Bagley and Reed for the detaining creditors.

Summons dismissed.

Nov. 17.—To-day the debtor renewed his application, he having made in the interval an affidavit that the conditions of the Act of Parliament had been complied with. The affidavit, however, was not filed, and no copy of the deed was filed. The application was again opposed by

Bagley and Reed, for the same creditors as before,

who objected that they had had no opportunity to inspect the deed or the affidavit which had been made in support of it.

Sargood, for the debtor, said, the original deed was filed in the proper office, and every creditor of the debtor was entitled to order a copy, and he proposed to read the affidavit in support of the application.

Mr. Commissioner HOLROYD said, he thought the creditors should not be put to the expense of obtaining a copy of the deed. The debtor ought to attach a copy to the proceedings in this court, and also a copy of the affidavit supporting the application. The creditors then would have a fair opportunity to read both documents. On looking at the proceedings, he should therefore adjourn the case in order that the necessary documents might be filed; and the case was accordingly adjourned for a week.

Equity Courts.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WENLOW, Esqrs., of Lincoln's-inn, Barristers-at-Law.

Wednesday, Nov. 11.

MOSCROP v. SANDEMAN.

Judgment-creditor—Release of hereditaments charged—22 & 23 Vict. c. 35, sect. 11.

A purchaser, after contracting for the purchase of certain mines for a specified sum, to be paid partly by instalments, made default in payment, and under a suit by the vendor for specific performance, the property was directed to be resold. This was done, and the original vendor repurchased the property. Certain judgment-creditors claiming under judgments prior in date to the decree for sale, and one of them refusing to disclaim or release the premises, a bill was filed against them praying that that suit might be taken as supplemental to the former, and that "the estate and premises directed to be sold might be declared free and absolutely discharged from all rights, interests, claims and demands of the defts. thereon or thereto."

Decree as prayed, with costs against the refusing defts.

The bill in this case stated that on the 19th April 1861 the plt. Edward Henry Moscrop filed his original bill against George Hudson, stating that, the plt., being seized in fee simple of undivided shares in certain coal-mines, called New Bowson, East Dean Deep, and Serridge, in the Forest of Dean, on the 25th Jan. 1854, by articles of agreement, agreed to convey the same to George Hudson in fee, subject to certain royalties and to the rules prescribed by Act of Parliament for regulating the property of the Forest of Dean; and it was agreed that the said George Hudson should, on the 1st March then next ensuing, and upon the execution of such conveyance, pay unto the plt., his executor, administrators, or assigns, the sum of 1000*l.*, and the further sums of 200*l.* in Jan. 1855, 200*l.* in Jan. 1856, and 200*l.* in Jan. 1857, for the purchase of the said coal-mines. The original bill further stated that Hudson had paid to the plt. the sum of 500*l.*, in part payment of the said sum of 1600*l.* agreed upon, and that he then refused to accept a conveyance of the said premises, or to pay the residue of the purchase-money, or to take any further step towards performing his part of the agreement; and prayed for a specific performance of the contract.

On the 11th March 1862, by a decree in the cause, it was ordered that the deft. Hudson should pay to the plt. the amount of the purchase-money, with interest and costs, and in default of such payment the

hereditaments were directed to be sold. Default having been made by Hudson, the property was, pursuant to the said decree, put up for sale by public auction, and the same was sold to the plt., who was declared the highest bidder, for 500*l*. The defts. to the present suit alleged that they, as judgment-creditors of Hudson, on judgments registered prior to the date of the decree of the 11th March 1862, were not bound thereby; and that they, under and by virtue of their judgments, claimed some estate, right, or interest in the property in question.

The plt. alleged that the property directed by the decree to be sold, and the amount realised thereby, was wholly insufficient to pay the amount due to him, and that whatever the rights or interests of the defts. the judgment-creditors of Hudson might be, they were subordinate to the lien of the plt., and that he, as vendor, by reason of the default of Hudson to perform his agreement, had a paramount right to have the premises sold for the purpose of satisfying his lien, freed and absolutely discharged from all rights and interests of the defts. in or to the premises, and that (if necessary) the judgment-creditors ought to release and convey their respective rights in such premises to the purchaser. Further, that if the defts. were desirous of enforcing their alleged rights and interests against the premises, they ought to have performed the agreement on the part of Hudson then remaining to be performed; and that the defts., if they had any interest in the premises, could only be permitted to enforce the same by submitting to perform Hudson's agreement, and paying and indemnifying the plt. for all losses and costs incurred by reason of the default of Hudson.

In March and April 1863 applications by letter were made by the plt. to the defts., in which they were invited to release or disclaim their interest in the mortgaged premises; and they were informed that, unless they did so, they would be made defts. to this suit. The defts. replied to these applications, but refused to disclaim or release, and the plt. charged that this suit had become necessary entirely by such refusal of the defts., and that they or some of them ought to have paid the costs of it.

The bill prayed, first, that the decree of the 11th March 1862 might be carried into effect, and that the plt. might have the benefit of the same decree of the proceedings thereunder against the defts., and that his suit might be taken as supplemental to the original suit; secondly, that the estate and premises directed by the said decree to be sold might be declared freed and absolutely discharged from all rights, interests, claims and demands of the defts., the judgment-creditors of G. Hudson, therein or thereto; and that, if necessary, the said defts. might be directed to release or convey, or join in releasing or conveying, their respective rights and interests in such estate and premises to the purchaser or purchasers thereof; and thirdly, that the moneys arising from such sale might be applied according to the decree, and that the defts. might pay the costs of the suit.

Subsequently to the institution of the suit, all the other defts. except Sandeman consented to release their charges in respect of the judgments, without costs.

Malins, Q. C. and Roxburgh, for the plt., argued that the deft. Sandeman, having only a small interest in the premises, ought, when applied to, to have disclaimed. He was the only one of the defts. who had refused to forego his interest. The law on the subject of judgment-creditors had undergone a change since the 22 & 23 Vict. c. 35, s. 11, by which it was enacted that "the release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice nevertheless to the rights of

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all persons interested in the hereditaments or property remaining unreleased and not concurring in or confirming the release." They submitted that the deft. Sandeman came within the meaning of the section of the Act, and that he ought to pay the whole costs of the suit.

Watson, for the deft. Sandeman, contended that the deft. could not reasonably have been expected to have done more than he had, and that he was entitled to costs as against the plt. See the cases of

Handcock v. Handcock, 1 Ir. Eq. Rep. 444; and *Hale v. Lord Beazley*, 17 Beav. 14; 20 Beav. 127.

B. E. Rogers appeared for the other defts.

The VICE-CHANCELLOR.—The deft. Sandeman has refused to do anything except at the point of a decree; he ought to have acted in the same manner as the other defts. The declaration will follow the language of the first part of the second paragraph of the prayer of the bill, namely, that the estate and premises directed by the said decree to be sold be declared freed and absolutely discharged from all rights, interests, claims and demands of the defts. the judgment-creditors of the said George Hudson therein or thereto; with costs against the deft. Sandeman.

[Similar declarations were made in two other suits of *Twynnam v. Sandeman*, in each of which there was a similar prayer.]

Solicitors for the plt., *Vizard and Anstie*.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

July 11 and 15, and Nov. 5 and 7.

(Before the LORD CHANCELLOR (Westbury).)

FLOYER v. BANKES.

16 & 17 Vict. c. 51, ss. 2, 17.—*Succession duty—Marriage-settlement—Jointure—Rentcharges—By whom duty payable.*

A marriage-settlement made in the year 1822 provided that a jointure by way of two rentcharges in lieu of dower thirds and freebench should be paid to the jointress, without any deduction or abatement whatsoever on account or in respect of any taxes, charges, impositions, or assessments already charged or to be charged on the estate out of which it was to issue, or on the jointure in respect thereof. A term of years was then also created and trusts declared of it to secure the jointure rentcharges, if in arrear, and the costs, damages and expenses arising from the nonpayment on the recovery thereof.

The 16 & 17 Vict. c. 51, s. 2, defines what dispositions and devolutions of property shall confer successions; and the 17th section provides (inter alia) that no contract made bona fide for valuable consideration in money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the persons making such contract and the person to or with whom the same shall be made.

The above-mentioned jointure by way of the rentcharges or annuities was made payable to the jointress if she survived her husband. The 16 & 17 Vict. c. 51, was passed in 1855. The husband died in 1856.

Romilly, M. R. held, that the words "money and money's worth," in the 17th section of that statute, included the consideration of marriage, and that the jointress was not therefore liable to pay succession duty in respect of her jointure. On appeal the decision was reversed:

Held, further, that as between the jointress and the owner of the estate, the former was entitled to be exonerated from the payment of the duty.

[CHAN.]

FLOYER v. BANKES.

[CHAN.]

This was an appeal from a decision of the M. R.

The facts of the case will be found fully stated in the report of the case in the court below, 8 L. T. Rep. N. S. 483.

The *Solicitor-General* (Sir R. Palmer, Q.C.) and *Hanson* appeared for the Crown.

Hobhouse, Q.C. and *Freeling* for Mrs. Bankes.

Selwyn, Q.C. and *G. Lovell*, for the infant defendants.

II. J. P. Bankes and W. J. Bankes.

Baggallay, Q.C. and *C. Hall* for the petitioners, the plaintiffs and trustees.

The *Solicitor-General* in reply.

The following cases were cited :—

Attorney-General v. Floyer, 9 H. L. C. 477 ;

Oldfield v. Preston, 5 L. T. Rep. N. S. 650 ;

Re Jenkinson's case, 24 Beav. 64 ;

Attorney-General v. Baker, 4 H. & N. 19 ;

17 Geo. 3, c. 26, ss. 3-18 ; 53 Geo. 3, c. 141, s. 10 ;

Morris v. Jones, 2 Barn. & Cr. 232 ;

Blake v. Attersoll, 2 Barn. & Cr. 875 ;

Lord Saltoun v. The Lord Advocate, 6 Jur.

N. S. 713 ;

Henniker v. The Attorney-General, 7 Ex. 331 ;

s. c. in error, 8 Ex. 259 ;

Successing v. Sweeting, 1 Dr. 331 ;

Attorney-General v. Yelverton, 7 H. & N. 319 ;

17 & 18 Vict. c. 51, s. 17. *Cur. adv. ult.*

Nov. 5.—THE LORD CHANCELLOR.—This case depends entirely on the proper construction of the 17th section of the Succession Duty Act. It is clear that the jointure rents charged appointed to Mrs. George Bankes by the marriage-settlement of 1822 are successions within the 2nd section of the Act, and that Mrs. George Bankes is the successor, and the appointors Henry Bankes and Wm. George Bankes are the predecessors, unless the case be taken out of the 2nd section by the operation of the 17th section. To explain the intention and effect of the 17th section, it is desirable to make a few remarks on the general object and design of the Succession Duty Act. In framing the Act the word "succession" was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bona fide* contract of purchase; money or property, the right to receive or possess which might arise upon death under a contract made *bona fide* in return for other money or property, was not, as between the contracting parties, to be treated as a succession. But it was not intended to except property arising upon death under contracts for valuable consideration generally. Marriage is by the law of England a valuable consideration for a contract, and that of the highest kind; but property arising under a contract in consideration of marriage is not excepted, even in favour of persons coming directly within that consideration. A contract to be excepted must be *bona fide* made in consideration of money or money's worth, words which appear to have been selected for the purpose of excluding the consideration of marriage. Where, under a contract, money or money's worth is to be received by one person from another on the expiration of some life or lives, and such contract is made *bona fide* for the consideration of money or money's worth, the 17th section declares that the relation of predecessor and successor shall not arise between the person contracting to pay or transfer and the person entitled to receive, otherwise post-obit bonds and contracts for the purchase of deferred annuities would create successions. So if the owner of a freehold estate in fee-simple contracts to sell it for a sum of money subject to and reserving a life-interest in himself, the relation of predecessor and successor will not arise between the vendor and the purchaser. So if two persons contract with a third for the purchase of

a freehold estate and pay for it, jointly directing the conveyance to be made to one for life, remainder to the other in fee, there will not be the relation of predecessor and successor between the vendor and the remainderman, although it is clear that the remainder in fee will be a succession. These are examples of the purposes which the 17th section was intended to answer. It is true that if the words of the 17th section do, according to their ordinary meaning, apply to and exclude other cases than those to which it was intended to be limited, the words being found in an Act taxing the subject must not be restrained by construction, even although the giving them their full latitude of meaning may defeat the object of the Act. On the other hand, the word "contract" in the 17th section must not for the purposes of exemption be extended beyond those limits which the contract plainly shows to be the true meaning and intent of the word. The essential requisites of a contract which is not to create a succession are clearly defined by the 17th section. First, it must be a contract by one person to pay money or money's worth to another. Secondly, it must be made *bona fide* for a valuable consideration existing in money or money's worth, the contract creating personal liability between the contracting parties. Thirdly, such a contract is prevented from creating a succession only as between the contracting parties, for all that the 17th section does is to declare that there shall be no relation of predecessor and successor between the person bound to pay and the person entitled to receive. As between any other persons the contract may create a succession, and the transmission of the property to be received under such contract by the death before the time of payment of the party entitled to it may also create a succession. The question then is, whether the settlement of 1822 is such a contract by Henry and William John Bankes as is described in this section. Between them and Mrs. George Bankes there is clearly by the 2nd section the relation of predecessor and successor, and the annuities (in the contingencies happening) would clearly be a succession in Mrs. George Bankes derived from these two predecessors on which duty would be payable, unless it can be reasonably held that the settlement of 1822 is, or proceeded on, such a contract between Henry Bankes and William John Bankes on the one hand and Mrs. George Bankes (then Miss Nugent) on the other as is described in the 17th section. This reduces the matter to the inquiry, is there any contract by Henry Bankes and William John Bankes to pay these annuities to Miss Nugent on her becoming the widow of George? Were they, or was either of them, to be in any way liable for such payment? The answer must be, that there is nothing of the kind. There is, indeed, an agreement by Henry and William John Bankes to exercise their joint power of appointment, and to appoint the estates so as that, in the events specified, the two rents charged may issue out of them—an agreement which is performed by the settlement of 1822; but there is no contract, either express or implied, to pay the annuities by the appointees, or either of them. If the settlement of 1822 could, by possibility, be construed to be such a contract between George Bankes and his intended wife, or her trustees, as the 17th section describes and exempts, it would be immaterial so long as there is the relation of predecessor and successor between the appointors and the jointress. But if the appointment could be held to be a contract to pay, which would be an abuse of language, a valuable consideration in money, or money's worth, would still be required. The M. R. seems to have thought that the implied agreement, assuming that the appointment was such a contract by Mrs. George Bankes to release her dower or freebench,

would be a consideration in money's worth within the meaning of the 17th section. This, perhaps, might be so if it were shown (which it is not) that George was, at the time of the contract, possessed of or entitled to an estate out of which his wife would become dowable; but a bare possibility of future dower or freebench in non-existing estates would not have been a subject of value at the time of the settlement; the release of such a possibility would not, in my judgment, answer and satisfy the words "valuable consideration in money's worth." If the note which I have seen of the judgment of the M. R. is correct, and I have rightly understood it, his Honour appears also to have given an opinion that a contract for the valuable consideration of marriage alone, without money or money's worth by might, by force of the 17th section, be taken out of the operation of the 2nd section. If any such opinion was expressed by his Honour, I desire it to be understood that I entirely dissent from it. Such a construction would strike the words "in money or money's worth," which are annexed and are restrictive of the words "valuable consideration," out of the section. I reserved my judgment in this case out of respect to his Honour's opinion, and have from the same motive deliberately reconsidered the case, but I cannot find any ground for doubt; therefore reverse the decision of the M. R., and declare that under the settlement of 1822 the two rentcharges became and are a succession in Mrs. George Bankes, derived from the appointors Henry and Wm. John Bankes as predecessors, and are chargeable with duty accordingly.

Nov. 7.—Secondly, with respect to the question, by whom the succession duty was to be borne, whether by the jointress or the owners of the estate,

Selwyn, Q.C. and *George Lovell* appeared for the parties interested in the estates subject to the jointure.

Hobhouse, Q.C. and *Freeling* for the jointress Mrs. Bankes.

Baggallay, Q.C. and *C. Hall* for the trustees.

Selwyn in reply.

The following cases were cited:—

The Marchioness of Blandford v. The Duchess of Marlborough, 2 Atk. 542, 558, 559;

Festing v. Taylor, 31 L. J., N. S., 36, Q. B.; a. c. on appeal, 32 L. J., N. S., 41, Ex. Ch.; 7 L. T. Rep. N. S. 429;

Brewster v. Kitchin, 1 Lord Raym. 317;

Smith v. Anderson, 4 Russ. 352;

Lowth v. Peters, 1 Myl. & K. 489;

Sadler v. Rickards, 4 K. & J. 302;

Turner v. Molyneux, 1 J. & H. 334;

Colborn v. Travers, 31 L. J. 257, C. P.; 6 L. T. Rep. N. S. 287;

Williams v. Ashton, 1 J. & H. 115.

The LORD CHANCELLOR—It was the intent and design of this marriage-settlement of 1822 that the jointress should enjoy her jointure rentcharge without any diminution whatever in respect of any tax, charge, assessment, or imposition then existing or that might be imposed, that should in any way affect either of the estates out of which the rentcharge was to issue, or the rentcharge itself, or the person of the jointress in respect of that rentcharge. Now the form in which the rentcharge is given is by way of use, and the use will extend and be governed according to the intention of the parties. If the intention of the parties was, therefore, that which I have expressed, the use granted to the jointress would extend to enable the jointress to require payment from the land of any tax, charge, or assessment, by which the jointure rentcharges was subjected to any abatement. I have no difficulty in holding, therefore, that the words that follow the words "without any deduction or abatement" are words to be taken in connection with the declaration that the use shall arise, and that the words, therefore, define the

extent and comprehension of the grant to make it include any abatement of the description that I have mentioned. That reduces the cases simply to the question whether upon the words that are found here, the succession duty tax, at that time unknown and unexpected, is to be included. I am pressed by the authority of Lord Hardwicke in the case of *Blandford v. The Duchess of Marlborough* (*ubi sup.*) and the language attributed to him with regard to the interpretation of a different deed. If those words were used by Lord Hardwicke and the language of the deed is found to be the same with the deed before me, I am sorry to say that I cannot follow that interpretation, because it is a question about which any man is competent to form a judgment. Do the words "any taxes, charges, imposition, or assessments already taxed, charged, assessed, or imposed, or hereafter to be taxed, charged, assessed, or imposed" (that would be as long as the rentcharge continued), comprehend the succession duty? The answer to that simply depends on the inquiry whether the succession duty be a tax, or a charge, or an assessment, or an imposition. The answer further depends upon the inquiry whether that tax, charge, assessment, or imposition affects the lands, affects the rentcharge, or affects the jointress. Now there can be no doubt that, according to the common meaning of language, it is a tax and an imposition, and there can be no doubt that, according to the common meaning of language, it is an imposition upon the rentcharge itself, and also upon the person of the jointress, who receives the rentcharge in the character of a successor. I have determined that she stands in the light of a successor within the meaning of the Succession Duty Act; and it follows immediately from that, that this imposition affects her personally, and affects also the succession she receives; there can be no doubt, therefore, that she is entitled under the extent of the grant made to her, that is, by virtue of the use which is directed to arise, to receive these rentcharges; and *plus* the rentcharges, she is entitled also to receive the amount of any deduction or abatement consequent upon any existing or any future imposition, the effect of which would be to diminish her rentcharge; and the same thing also extends to the trusts of the term, because the trustees, in the event of nonpayment, are directed to raise the annuity, and to raise it in such a manner that it would be paid without any such deduction or any such abatement. If, therefore, it follows that in the hands of the trustees the rentcharge, when raised, would be liable to the succession duty, and they would be under an obligation to see to its payment, it follows immediately, from the 44th section of the Succession Duty Act, that the trustees, in respect of their own liability, as well as in respect of the rights of the jointress, would have a right to raise, under the trusts of the term, the amount of the deduction or abatement, and to take care that it should be paid without any diminution of the rentcharge. I am therefore of opinion, on the clear meaning of the settlement and the clear legal effect and operation of the mode in which the rentcharge is created, that this is an additional grant (if I may so call it) to the grant of the rentcharge itself; or rather it is an integral part of the grant of the rentcharge, conveying to the jointress the right of having any such deduction raised, and imposing on the trustees the obligation of having the rentcharge paid without any such deduction, that deduction being left to be satisfied out of the other rents of the estate, which they would have a right to raise *plus* the amount necessary to satisfy the rentcharge. I declare, therefore, that the jointress is entitled to receive the rentcharge free from any deduction in respect of the succession duty, and that the succession duty must be a charge upon the estate.

Solicitors for the several parties: *The Solicitor for Inland Revenue; Gregory and Co.; M. and F. Davidson; Lovell and Co.*

Tuesday, Nov. 10.

(Before the LORDS JUSTICES.)

HEYS V. ASTLEY AND OTHERS.

Specific performance—Statute of Frauds—Pleading—Agreement—Mutuality of contract.

The defts., in their answer to a bill for the specific performance of an agreement to sell lands, did not claim the benefit of the Statute of Frauds, although they denied the validity of the agreement in toto:

Held, that, as the statute was not specially pleaded, they could not resort to it as a defence to the suit.

The plts. had entered into an agreement with the defts.' vendor to become lessees of premises with the option of purchasing within a given period at a sum fixed. A second memorandum was afterwards signed by the lessor alone, prolonging the term, and giving the plts. the chance of purchasing during the enlarged term, but not fixing any price:

Held, that the Statute of Frauds being out of the question, the agreement was not void for want of mutuality, but was in all respects good and valid.

This case came before their Lordships on an appeal by the mayor, aldermen and burgesses of the borough of Burnley, against a decision of Wm. M. James, Esq., Q.C., the Vice-Chancellor of the County Palatine of Lancaster, under the following circumstances:—

John Heys and other persons, who, with him, were the plts. in the suit, on the 23rd July 1859, entered into an agreement with one James Hodgson, since deceased, which was reduced to writing, and was to this effect:—

“Memorandum of agreement, dated the 23rd day of July 1859.—This is to certify that I, the undersigned James Hodgson, am willing to let the school-house and its appurtenances, situate in Coke-street, Lane-bridge, for the term of one year or more from the date, at the rate of 3s. per week, the rent to be paid fortnightly. And we the undersigned John Heys (and the others by name) agree to take the said school at the above rent for the above terms, and at the expiration for each side to give or take six months' notice before leaving the premises. That we commence on this day, the 23rd July 1859. I, the said James Hodgson, also agree to sell the said property to the said parties for the sum of 60*l*., should they feel disposed to purchase the same within ten calendar months from the present date.”

Upon the execution of this agreement the plts. at once entered into possession of the premises, and soon afterwards negotiations were commenced for an extension of the period for which the buildings and premises were let, and a further memorandum was on the 16th March 1860 signed by Mr. Hodgson alone:—

“I am willing that the letting of the schoolroom be prolonged to five years instead of one, at the usual rent of three shillings per week, and the parties now holding the same to have the chance of purchasing the same school during that time.”

James Hodgson died in the month of Sept. 1861, having by his will devised the premises in question to one John Astley, who was made a deft. to this suit. John Astley on the 3rd Feb. 1862 sold the property to John Tomlinson, another of the defts., for 235*l*. Soon after that purchase John Tomlinson resold the property to the Burnley Improvement Commissioners, and they, in pursuance of the Municipal Corporations Act, transferred all their rights, powers, estates, property and liabilities in the premises to the present app., the mayor, aldermen and burgesses of the town of Burnley.

Before the sale to John Tomlinson, however, namely, on the 17th March 1862, the plts., in ignorance of the sale by Mr. Astley, the devise, gave to him a notice in writing of their desire to purchase the premises according to the agreement, but no attention appeared to have been paid to this notice, and on the 30th April 1862, the plts. having in the meanwhile received information of the sale by Astley to Tomlinson, gave to the latter a written notice to the same effect as that which they had given to Astley. Mr. Tomlinson, however, who had by that time sold the property to the Burnley Improvement Commissioners, altogether declined to recognise any right in the plts., contending that he had purchased without notice of any such agreement as that on which the plts. relied. The plts. continued in occupation of the school-house and premises.

The plts., on the 8th June 1862, filed their original bill to obtain specific performance of the agreement mentioned, that is the second agreement. That bill was against Mr. Astley and Mr. Tomlinson alone, for at the date when it was filed the plts. were entirely unaware of the subsequent conveyances to the improvement commissioners, and by them to the mayor, aldermen and burgesses of the borough. Upon discovery of these facts, however, the bill was amended, and the corporation were added as defts., and the bill as amended charged that Tomlinson had express notice of the agreement entered into by James Hodgson. The corporation by their answer alleged that they were purchasers for value without notice, and they altogether denied the agreement, and claimed the same benefit as if they had demurred, but they did not by their answer or otherwise plead the Statute of Frauds to the bill.

The learned V. C. of the County Palatine by his decree dated the 15th May 1863 dismissed the bill as against the defts. Astley and Tomlinson with costs, but ordered specific performance of the agreement by the other defts., the mayor, aldermen and burgesses, who now appealed against that order.

Little and Edmund R. Turner supported the appeal, contending that the second agreement was void, for want of mutuality. Secondly, it was void under the Statute of Frauds, as no amount of purchase-money was stated on the face of it, and there was no direct reference to the earlier agreement, nor could parol evidence connecting the two documents be admitted. It was true that the statute was not expressly mentioned in the answer, but the validity of the agreement was thereby wholly denied, and anything which would show its invalidity was therefore admissible. They referred to

Ridgway v. Wharton, 3 De G. M. & G. 677;

s. c. 6 H. of L. Cas. 238;

Clinan v. Cooke, 1 Ech. & Lef. 22;

Wood v. Midgley, 5 De G. M. & G. 41;

Dobell v. Hutchinson, 3 Ad. & Ell. 355;

Price v. Griffith, 1 De G. M. & G. 80;

Peck v. The North Staffordshire Railway Company, 8 L. T. Rep. N. S. 768;

Tyke v. Northwood, 1 Beav. 152;

Pegg v. Wisden, 16 Beav. 239;

Lord St. Leonards' V. & P. 111 & 122 (13th edit.)

R. Copley Christie appeared for the plts., but was not called on.

Lord Justice KNIGHT BRUCE said, that, even upon the assumption that the doctrine of part performance had not any application to the present case, he was still not satisfied that upon any view whatever the Statute of Frauds had any application to it. But if it would or might have been useful to the defts. to ask for the benefit of that statute, he thought that it was incumbent on the defts. to ask for it, and they had not done so, and he was of opinion that, according to the rules and course of this court, as this had not been done, the Statute of Frauds could not be resorted to as a

defence, whatever might be said of the agreement. In this state of circumstances he was of opinion that the agreement was, upon the evidence in the cause, plainly and clearly proved and valid. He further thought that the apps. should not have been here before this court, and he was by no means sure that they had not been dealt with too leniently. But however that might be, he considered that even if there might have been properly some consideration as to costs in respect of the presence of the other deft. who had been mentioned in the proceedings, the matter was too trivial to be attended to. To him it appeared that not a word could be usefully said on behalf of those who had appealed against the decree which had been made. The costs, however, he would leave to depend upon the opinion of his learned brother; but if he concurred in the opinion he had just expressed, the dismissal of the appeal would be with costs.

Lord Justice TURNER said, that in the view which he had taken of this case, it appeared quite unnecessary for him to give any opinion upon that of *Ridgway v. Wharton*, although he would express his concurrence in the conclusions arrived at in that case, having regard to the uniform course of pleading which had always prevailed in this court. Nor did he express any opinion on the point whether there was in the second agreement a sufficient reference to the first, but he would give to the defts. appealing the full benefit of the argument on that subject. He would even go further, and would give to them the benefit of the argument that that agreement was to be considered as an independent agreement; for when the case came to be considered, the question was, what that independent agreement was in effect. The agreement on the part of Hodgson was to extend the term of the lease, and to extend the time for the purchase for a correlative period. It was possible that the agreement might be capable of being enforced only so far as respected the extension of the time for the duration of the lease. It was possible that if the tenants had not observed the conditions of the agreement, it would not have been in their power to avail themselves of the provisions which were contained in the agreement extending the period for purchase. But no such case as this was alleged on the part of the defts., nor was it alleged that the payments were not made. There was nothing whatever to destroy the effect which the last clause of the agreement might have on the period of duration contained in the original agreement, and therefore it appeared to him that the case was complete on that point. There was nothing in the argument that the agreement in question might have reference to a different agreement. The whole of the agreements were before the court, and they must do justice upon the whole case as it stood on the record. The prayer for general relief would be sufficient to enable this court to deal with the whole case, and he concurred entirely in the opinion of his learned brother, that the appeal must be dismissed with costs.

Solicitor for the plts., *W. P. Roberts.*

Solicitors for the defts. appealing, *Shaw and Co., agents for Shaw, Sutcliffe, Tattersall and Handsley, of Burnley, Lancashire.*

Nov. 5, 6 and 14.

(Before the LORDS JUSTICES.)

WALSHAM v. STAINTON.

Fraud—Agent or trustee—General demurrer—Multifariousness.

Two agents of a company (brothers) conspired to conceal the true state of its affairs, whereby H., one of them, was enabled, in 1817, to buy shares of G. at a price much below their real value. The fraud was

not discovered till 1860, soon after which time G.'s representative filed one bill against the representatives of both, praying a retransfer of the shares, and payment of the intermediate dividends. It was not pretended that J., the other agent, derived any pecuniary benefit from the sale to H. The bill was demurred to by J.'s representative, for want of equity and for multifariousness; but

Their Lordships (differing from Wood, V.C.) overruled the demurrer on both points.

In such a case agents are in a sense trustees for their principal, and they are liable for the frauds by either, with the privity of the other, against the principal. Being thus trustees, the lapse of time was not material. Though an action would lie for deceit against the conniving agent, who derived no pecuniary benefit from the purchase, there is a concurrent jurisdiction in equity.

Although there were separate sales and separate purchasers, the fraud was common to both cases, and in a single bill filed against the representatives of both of the agents, there was nothing multifarious.

This was an appeal by the plt. in the suit against a decision of Wood, V.C., whereby his Honour had allowed a demurrer to the bill on the grounds of want of equity and of multifariousness, and had refused leave to amend, the demurring deft. being the personal representative of one Joseph Stainton. The facts are sufficiently stated in the judgment of the court below, 8 L. T. Rep. N. S. 633.

The plt. appealed against the decision.

Giffard, Q. C. and Eddis supported the appeal.—The whole of the matters complained of were one sole system of fraud concocted by the Staintons. They had been agents for the Carron Company, in which the plt.'s testator was a shareholder; by fraudulent accounts, misrepresentations and concealments, they induced him to sell his shares to them, or one of them, greatly below their value, and for the purpose of this bill they would be treated as trustees. Joseph Stainton would have been liable to an action for the deceit practised, and there was a concurrent jurisdiction in equity. The two sales were parts of the same transaction, and therefore the bill was not multifarious.

Sir *Hugh Cairns* and *John Pearson* appeared for the demurring deft.—The persons who sold the shares were the mortgagees, Messrs. Glyn and Co., and they, if any, were the persons injured by the under prices, but the bill contained no allegation that they were deceived or injured. A court of equity could not interfere, for the remedy against Joseph was simply by an action for his deceit; whereas in Henry's case it was asked that the sale might be set aside and the shares retransferred. Neither of the Staintons was alleged to have derived any benefit from the purchase by the other. The two transactions were indeed separate and distinct, and the demurrer must also be allowed on the ground of multifariousness, for neither estate ought to be mixed up with the case against the other. The authorities referred to were

The Attorney-General v. Cradock, 3 Myl. & Cr. 85;

Pasley v. Freeman, 3 T. R. 51;

Blair v. Bromley, 2 Ph. 354;

The Bishop of Winchester v. Knight, 1 P. Wms. 406;

Powell v. Aiken, 4 K. & Joh. 343.

Giffard, Q.C. having been heard in reply, their Lordships reserved judgment until the 14th Nov., when Lord Justice KNIGHT BRUCE said, that the allegations contained in this bill, if taken as true, appeared to him to show that a relation of confidence as to the property with which the suit was concerned existed between the person whom the plt. represented and Joseph Stainton and Henry Stainton, the former of whom was represented by the demurring deft., and the

other by the deft. who had not demurred; and further, that acts of fraud were committed by Joseph Stainton and Henry Stainton in respect of that property, by means of an abuse of that confidence during the course of that relation, and that the acts of both the Messrs. Stainton were so associated together that the plt. was entitled to combine all the matters in one suit in equity against the personal representatives of both Joseph and Henry Stainton. Being of that opinion, the demurrer must be overruled, although he would have no objection to reserve to the deft. the benefit of it at the hearing of the cause—a course which, whatever its meaning or effect might be, had on several occasions been adopted in the Court of Ch.

Lord Justice TURNER.—The demurrer was one by the personal representative of Joseph Stainton, on the grounds of want of equity and multifariousness. As to the former ground it was only necessary to consider the case relating to the forty shares purchased by Henry Stainton, and the case as to these forty shares could not be stated lower than this, that the two confidential agents of the partnership conspired together to keep the shares at an undervalue, in order to conceal from the partners the true value of the shares; and his Lordship considered that it was by means of this fraudulent conspiracy between the two Messrs. Stainton that these forty shares were procured from Francis Garbett by Henry Stainton at a price far below their real value. They, therefore, had to consider whether, under these circumstances, the estate of Joseph Stainton was or was not liable in equity for the true price of the shares, with the dividends and bonuses which had accrued, and he was of opinion that that estate was thus liable. A grosser breach of duty on the part of an agent towards his principal could not be imagined. It was not denied that there would be a remedy at law against Joseph Stainton and his estate in respect of this gross misconduct, and the V.C. appeared to have felt no doubt that that was the proper remedy; but with all deference to his Honour's judgment, it appeared to him that there was concurrent jurisdiction in equity to set right acts of fraud and breaches of trust by an agent towards his principal. He was certainly not disposed to assent to the argument that, where two agents had conspired together to commit a fraud, each was not liable in equity for the acts of the other. Agents were, in a sense, trustees for their principals; and if this had been the case of an ordinary trust, there could be no doubt that the *cestuis que trust* would have had sufficient equity to sustain a bill. Therefore as to the forty shares the demurrer must be overruled, and in this view it became no longer necessary to consider the case of the other fifteen shares which had been purchased by Joseph Stainton, in respect of which, however, he thought that it might be desirable for the plt. to amend his bill. The length of time which had elapsed since the transaction was not, in his opinion, material to this consideration. Then there remained only the demurrer for multifariousness, and he thought that that demurrer failed also. It was quite true that there were separate purchasers of the forty shares and of the fifteen shares, but the fraud was common to both transactions, and consequently the rule against multifariousness had no application. The demurrer must be overruled, and the proper course, in his opinion, of dealing with the costs would be to direct that the costs in the court below, and on appeal, should remain for the decision of the judge by whom the cause should be heard.

Solicitors for the plt., *Tatham and Proctor*.

Solicitors for the demurring deft., *Williams and James*.

Nov. 4 and 11.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte WILLIAMS, re WILLIAMS.

Bankruptcy—Practice—Order of discharge.

When an order of a commissioner refusing the bankrupt's order of discharge is reversed by the Court of Appeal, it is not competent to the court to confine its order to simply reversing the decision of the court below; it must proceed further and grant the bankrupt his order of discharge.

This was an appeal against an order of Mr. Commissioner Perry, of the Liverpool District Court, dated the 7th Aug. last, whereby he suspended the bankrupt's discharge for twelve months, and refused protection for four months.

The bankrupt, William Williams, was a publican at Birkenhead, and also the agent for the sale of ale of Pinchin and Co., brewers, of Bath. He originally occupied a public-house called "The Crown," and three years ago he left this and took a larger house called "The Clarendon Hotel." The latter he purchased, with some adjoining property, and then mortgaged the whole. The premises were fitted up at great expense, and the business flourished; but the bankrupt had not sufficient capital to represent the outlay he had made. He was in good credit up to the date of his bankruptcy, which took place on the 11th April last.

Messrs. Gardner and Stretch, brewers, at Liverpool, were the principal creditors, and on the 3rd March last the bankrupt contracted to sell to them his public-house, with the fixtures as it stood, for 5000*l*. They were also to take the stock at a valuation, and out of the purchase-money to be paid the whole amount due to them, and for any ale they might supply in the interval between that date and the completion of the contract, which was fixed for the 1st April. During this interval they sent him three parcels of ale, amounting to 110*l*.

A day or two after the delivery of the last parcel another creditor demanded an investigation, when it was found that the bankrupt had not more than 7*s*. or 8*s*. in the pound to carry on business with.

The bankrupt's solicitor thereupon, who also represented the body of creditors, would not allow the sale to Gardner and Stretch to be completed, except on the terms of their coming in with the rest in respect of their trade-debt, they being allowed other sums for advances. This they agreed to do, and the sale of the premises was then completed, Gardner and Stretch paying over a balance of 616*l*. to the bankrupt's solicitor, by whom it was repaid to Stretch, as the creditors' assignee.

The commissioner founded his judgment on the opinion that when the bankrupt on the 4th, 10th and 17th March contracted the portions of his entire debt due to Messrs. Gardner, he could not have had any reasonable or probable ground or expectation of being able to pay the same, in justice to his other creditors, whom he called together about the 19th of the same month. He also commented on the fact that a statement made by the bankrupt to Messrs. Gardner in the preceding December, that his liabilities were only 1495*l*., was an incorrect statement, and an aggravation of his offence, though his Honour thought it could not be visited with punishment after his Lordship's decision in *Re Mew and Thorne*, and upon the peculiar language of the 159th section, which did not repeal the provision of the Consolidation Act of 1849 as to the contracting of debts "by any manner of fraud, or by means of false pretences."

Bacon, Q.C. and Charles Russell supported the appeal.

Bagley and North, on behalf of John Stretch and Nathaniel Cook, the assignees, supported the commissioner's order.

CHAN.]

GODFREY V. SACREE. GODFREY V. TUCKER.

[ROLLS.]

The LORD CHANCELLOR.—It is the duty of the commissioner to grant or to refuse a discharge. It is the duty of this court to determine upon appeal whether he has rightly done so. I cannot look at either facts or conduct on the part of the bankrupt which have not been objected to before the commissioner, and which to his mind have been sufficiently proved, so as to become the foundation for his judgment in refusing the order of discharge. No original evidence can be produced on appeal without the special leave of the court; and my judgment must be solely limited to the reasons which the commissioner has assigned for refusing this order of discharge. The facts appear to be quite clear and undisputed. I have no wish to lessen the stringency of this particular enactment, or to adjudicate upon it otherwise than with strictness, or with any disposition to abate the effect of the language by any lenient interpretation. The bankrupt was carrying on business as a publican, and the debt arose in the course of his dealings with a firm of brewers with regard to goods to be supplied by them. In Dec. 1862, some of his creditors having applied to him, he made them a statement of his affairs. In that statement he did not comprise the whole of the debts due from him. It is nowhere found by the commissioner that this was done with any intention to deceive. It has not even been found or ascertained that he made this statement deliberately or with a knowledge of its falsehood at the time. It is not proved that any existing debt to any creditor was omitted or incorrectly stated which, directly or indirectly, in consequence of that incorrect statement made on the part of the bankrupt, caused any creditor to be deceived, because the creditor who has opposed has no such ground of opposition. He is a brewer, who, having contracted with the bankrupt for the purchase of his public-house and fixtures on the 3rd March, and having by that contract agreed to pay 3000*l.* to the bankrupt, supplied him with goods on the 4th, 10th and 17th March, which goods were necessary, in common honesty, for the purpose of keeping up his credit and goodwill, and were supplied expressly on the terms that payment should be made out of the purchase-money. It is impossible, therefore, that I can say that, when this money was advanced, or when goods were supplied upon this security, the debt was incurred by the bankrupt without reasonable or probable ground or expectation of being able to repay it. In reality, the creditor well knew what he had to trust to, and he did trust to it; and though he is willing to account for the whole of the purchase-money, that does not alter the arrangement which was at first made, that the creditor should deduct the price of the goods out of the purchase-money. Then it was said, that if he had known the circumstances of the bankrupt, he would not have entered into the contract. It is impossible I can listen to that, because I find that the purchaser has not attempted to get rid of the contract, as having been obtained by any false representation. The case, therefore, is one of the barest and narrowest that can be imagined. It is sufficient to say that in this particular case the bankrupt cannot be said to have contracted the debt without reasonable or probable expectation of payment. I do not mean, however, to make an order of discharge, or to interfere with any other application that may be made to the commissioner. I reverse the order, and refer the matter back to the commissioner.

Bacon, Q.C. contended that it was incumbent on the Court of Appeal, if it reversed the order of a commissioner refusing a discharge, to proceed to order the discharge of the bankrupt.

The LORD CHANCELLOR said he would look into the statute, and the matter was mentioned again on Wednesday the 11th, when his Lordship said, that after consideration he did not think he had the power

to make the order as at first proposed, nor did he intend to do so. He considered it necessary that the whole case for or against a bankrupt, either for granting or suspending a discharge, should be brought forward at once. Any other course would lead to great inconvenience. The assignees would have their costs out of the estate, the apps. taking back their deposit. The order of discharge of the bankrupt would issue at once, and be dated the 4th Nov.

Solicitors: for the apps., *Loftus and Young*, agents for *Yates*, Liverpool; for the assignees, *Charles Pemberton*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Nov. 5 and 7.

GODFREY V. SACREE.

GODFREY V. TUCKER.

Charge upon land—Judgment-creditor—Suit by, to redeem—Answer—Costs.

A court of equity entertains two kinds of suits in relation to charges on land: one, where there is merely an equitable lien, and the other, where there is a legal charge. In the former kind of suit, the proceedings are entirely in equity, and there is nothing to be done elsewhere. In the latter, this court only gives its aid to enforce the legal lien. That aid is quite independent of the jurisdiction of this court to protect property pending litigation. A plt. filed his original bill as a judgment-creditor of the mortgagor seeking to redeem a mortgage. He afterwards paid off the mortgage, amended his bill, and prayed an account and payment by the mortgagor:

Held, that the suit was nevertheless a judgment-creditor's suit, and must fail.

The deflt. took an objection, by her answer in the suit, which she should have taken by demurrer:

Held, that she must pay the plt.'s costs up to, but not including, the answer and the costs of the day.

In 1854 Emma Tucker mortgaged certain freehold premises to Thomas Sacree to secure 100*l.* and interest at 5 per cent.; and in 1857 she further charged them in his favour with another sum of 100*l.* at the like rate of interest. In 1859 the plt. agreed to advance Emma Tucker 250*l.* to pay off the aforesaid mortgage and charge; and in fact advanced to her a sum of 50*l.* on account thereof.

The repayment of the 250*l.* was to be secured to the plt. by a mortgage to him of the premises previously charged by Emma Tucker with the 200*l.* in favour of Thomas Sacree. In 1861 the plt. brought an action at law against Emma Tucker for the recovery of the 50*l.* with interest; and on the 18th Dec. 1861 obtained judgment in that action for the sum of 46*l.* and costs, amounting in the whole to 89*l.* 17*s.* That judgment was duly registered on the 15th Jan. 1862. The 89*l.* 17*s.* was not paid. Some correspondence took place between the parties, and ultimately the bill in the first of the above suits was filed by the plt. praying an account of what was due to Thomas Sacree upon his mortgage and charge; that upon payment by the plt. to him of what might be found due, he should be ordered to convey the mortgaged premises to the plt.; an account of what was due to the plt. under the agreement of 1859 and his registered judgment; and for payment by Emma Tucker to the plt. of what he should pay to Thomas Sacree, and what should be found due from her to the plt.; or for foreclosure of her equity of redemption in the premises. That bill was subsequently amended; or, to speak strictly, the bill in the second suit was filed, stating the facts already mentioned; that in 1863 Thomas Sacree, in consideration of 210*l.* paid to him by the plt., transferred his

ROLLS.]

Re BOUGHTON—ROBERTS v. EDWARDS.

[ROLLS.]

mortgage securities to him; that there was due to the plt. on the security of the said mortgaged premises the aforesaid charges of 100% and 100% with interest; and praying an account of what was due to the plt. in respect thereof, of the agreement of 1859, and of the registered judgment; and for payment by Emma Tucker of what might be so found due to the plt., with costs.

The deft. Emma Tucker, by her answer in the first suit, submitted that the plt. was too late to obtain the relief he sought with respect to the agreement of 1859; and that as the judgment in the action had not been registered for twelve months, he was not entitled to any relief as to that.

Dickinson and Dixon appeared for the plt., and argued that he came into equity to redeem a prior mortgage, by virtue of a lien on the mortgaged premises created by the judgment which he had registered. The second objection taken by the deft.'s answer ought to have been taken by demurrer. They concluded by insisting that the plt. was entitled to the relief he prayed by his amended bill. They cited

Mitford on Pleadings in Equity, 148;

Powell on Mortgages, 282, n. (a);

Neale v. The Duke of Marlborough, 3 M. & Cr. 407, 416;

Seton on Decrees (last edit.), 456;

Smith v. Hurst, 10 Hare, 30.

J. Pearson and Horsey appeared for the deft. Emma Tucker, and contended that no judgment-creditor could come into equity to redeem a mortgage, without having first sued out a writ of *elegit* on his judgment. They cited

Mitford on Pleadings on Equity (*ubi supra*);

2 Fonblanque's Eq. 269;

1 Madd. Ch. Pr. 522;

1 & 2 Vict. c. 110, s. 3;

Attorney-General v. Portreeve, Aldermen and Burgesses of Avon, 8 L. T. Rep. N. S. 594.

The MASTER of the ROLLS.—Upon fully considering this case, I am of opinion that the bill fails. The principles upon which the court proceeds in cases of this nature are these. The court entertains two kinds of suits in relation to charges on land. One class of those suits is that in which there is merely an equitable lien on the land; there the proceedings are entirely in equity and there is nothing to be done elsewhere. The other class is where there is a legal charge on the land. There a court of equity only gives its assistance to enforce the legal lien if the plt. is unable to get at law all to which he is entitled. That aid is quite independent of the jurisdiction of this court to protect property pending litigation. But those considerations explain the observations of Lord Cottenham, in *Neale v. The Duke of Marlborough*. It is true that this court has regarded a legal lien in a suit for foreclosure and redemption, because it cannot deal with the property without regarding all the charges upon it. But the moment a person comes here to enforce a legal right he must show that the law will not give him the assistance he requires. It is for this purpose that, under Lord Campbell's Act, the judgment-creditor has power to take proceedings in equity. As it is necessary, when proceeding under that Act, to comply with certain formalities and rules, and as it is admitted that in this case those formalities and rules have not been complied with, the statute does not apply. The court is therefore thrown back on the rules of equity. The case of *Neale v. The Duke of Marlborough*, and all the statements of the most eminent writers, confirm the observations which I have made. What I then have to consider is this: is this suit, properly speaking, a suit by a judgment-creditor, or is it the suit of a mortgagee? As the suit stands on the amended bill, the plt. is a mortgagee. He obtained the assignment of the legal

mortgage, and he is also a judgment-creditor. If, as mortgagee, he had filed a bill to foreclose, and had afterwards paid off the judgment, he could have tacked, and the mortgagee could not have paid off one without the other. But this suit was originally a judgment-creditor's suit. The plt. then got in a mortgage. He does not, therefore, seek to tack a judgment to a mortgage, but a mortgage to a judgment. It is my duty to look at the whole scope of the bill, and I must say that I think the plt. has not bettered his case by what has taken place since the filing of the bill. I consider that the suit is still a judgment-creditor's suit, and must fail. I am, however, in favour of the plt. to this extent, that the second objection taken by the answer of the deft. ought to have been taken by demurrer. She must therefore give the plt. the benefit of that. The bill must be dismissed, and the plt. must pay the deft.'s costs up to, but not including, the answer, and the costs of the day.

Solicitors for the plt., *Thrupp and Dixon*.

Solicitor for the deft., *R. G. Chipperfield*.

Saturday, Nov. 7.

Re BOUGHTON.

Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), s. 17—*Petition—Trustees—Cestuis que trust—Service*.

Cestuis que trust of a term for raising portions must be served with a copy of a petition presented under the above Act, although their trustees, who have powers of sale and of giving receipts for the purchase-money of the property, appear and consent to the prayer of the petition.

This was a petition presented under the Leases and Sales of Settled Estates Act, 19 & 20 Vict. c. 120. It appeared that the property which was the subject of the petition consisted of mines, vested in trustees for a term of years upon trusts for raising certain portions for five *cestuis que trust*.

The petition prayed that a lease of the property might be executed under the direction of the court. The trustees of the property had powers of sale, and of giving receipts, and they appeared and consented to the prayer of the petition. The five *cestuis que trust*, however, had not been served with it; and the question was whether they ought to be served?

Wolstenholme, for the petitioner, contended that the *cestuis que trust* were sufficiently represented by their trustees, who appeared and consented to the order asked for:

Gray v. Jenkins, 26 Beav. 351;

19 & 20 Vict. c. 120, s. 17.

F. Bacon for other parties.

The MASTER of the ROLLS.—I think the case cited does not apply to the present one. The Act is, in my opinion, imperative, and the *cestuis que trust* must be served with the petition.

Solicitors: *Domville, Laurence and Graham*.

Monday, Nov. 9.

ROBERTS v. EDWARDS.

Will—Construction—Policy—Bonuses—The word "heirs" read "children."

A bequest of a policy of assurance on the life of a testator, was

Held to carry the bonuses declared upon it.

In a devise and bequest of property after the death of A., "to be divided between B. and C. or their heirs, in proportion to the number of children each may have, then living, share and share alike," the word "heirs" was

Held to mean children; and that the number of heirs

was to be measured by the number of children B. and C. might have on the death of A.

The Rev. William Edwards, by his will dated 20th Nov. 1807, bequeathed to his wife "the 2000*l.* insured on my life with the Hope Insurance Company." He then devised and bequeathed all his property, after the death of his wife (except such part as was disposed of otherwise) as follows: "To be divided between my two brothers, namely, Thomas Edwards and Evan Edwards, or their heirs, in proportion to the number of children each may have then living, share and share alike."

Evan Edwards died in May 1826, leaving three children. The testator died in 1827. Thomas Edwards died in 1830, leaving seven children. The widow of the testator died in 1862, at which time there were living four children of Thomas Edwards and two children of Evan Edwards.

At the date of the testator's death he had but one policy on his life in the Hope Insurance Office, for 1000*l.*, upon which some bonuses had been declared, amounting to 112*l.* 10*s.*

The questions were, first, whether the widow's estate was entitled to the bonuses declared on the policy? and, secondly, whether the word "heirs" in the residuary bequest was to be read "children?" And if so, how they were to take the property?

T. A. Roberts, for the plts., the representatives of the widow, claimed the bonuses.

Hobhouse, Q. C. and G. N. Colt, for the children of Thomas Edwards, cited *Norris v. Harrison*, 2 Mad. 268. They contended that the widow's estate was not entitled to the bonuses; and that the word "heirs" ought to be read "children."

E. G. White appeared for the heir-at-law of Evan Edwards, and insisted that the word "heirs" ought not to be read "children;" but to be restricted to its regular meaning. He cited

Bull v. Cumberback, 25 Beav. 540;

De Beauvoir v. De Beauvoir, 3 H. of L. Cas. 524;

Selwyn, Q. C. and Boys, for the next of kin of the testator, argued that the residuary bequest was so ambiguous as to create an intestacy. They cited

Waite v. Templar, 2 Sim. 524;

Baggallay, Q. C. and E. F. Smith appeared for the other children of Evan Edwards.

The MASTER of the ROLLS.—As to the first question in this case, it appears to me that the distinction between the present one and that of *Norris v. Harrison* is this: Bank stock was the subject-matter of that case; and as to bank stock no one can tell whether any money in the nature of a bonus will ever become payable upon it. It is not so, however, with respect to assurances on lives; for, as to them, it may generally be predicated, and with truth, that bonuses will be paid on them. I am of opinion that the bonuses in this case belong to the widow's estate. As to the second question, I think that the word "heirs" should be read "children." I think the testator intended that every one of "the heirs" of his brothers should take equal shares in his property. The number of the heirs must be ascertained or measured by the number of children whom each brother left living at the death of Mrs. Edwards. In the events which have happened, the property is therefore divisible into sixths, four sixths of which belong to the four children of Thomas, who were alive at the death of the testator's widow, and the remaining two-sixths to the two children of Evan, who were then living.

Solicitors: *Cooper*; and *Dymes and Harvey*.

Tuesday, Nov. 10.

WETENHALL v. DENNIS.

Legatee's suit—Deficiency of assets—Costs.

Where a legatee filed a bill for the administration of his testator's estate, and the assets were not sufficient to pay his debts and (probably) the costs of the suit, the costs of all parties (other than the administrator) were ordered to be taxed as between party and party only, and without giving any preference to those of the plt.

An heir-at-law was allowed his costs of appearance and of executing some deeds.

The bill in this suit was filed by a pecuniary legatee for the administration of his testator's estate. Administration with the will annexed had been granted. The assets of the testator were not sufficient to pay his debts, and probably would not pay the costs of the suit. Under those circumstances, the question was upon what principle the costs should be taxed?

G. N. Colt appeared for the plt., and contended that all the parties to the suit were entitled to their costs as between solicitor and client, and that the plt.'s costs ought to be paid in priority to all others, except the administrator's. He cited

Tipping v. Power, 1 Hare, 405.

Langworthy appeared for a specialty creditor, and insisted that, in a legatee's suit, no party (except the executor or administrator of the testator) was entitled to other costs than those between party and party. He cited

Seton on Decrees, 3rd edit. 165;

Weston v. Clowes, 15 Sim. 610;

Thomas v. Jones, 1 Dr. & Sm. 134; 2 L. T. Rep. N. S. 77;

Cross v. Kensington, 11 Beav. 89;

and denied the plt.'s priority as to his costs.

Bristowe, for the heir-at-law of the testator, asked for his costs of appearing, and of executing certain deeds. He also cited

Ford v. Lord Chesterfield, 21 Beav. 426.

Everitt appeared for another creditor.

The MASTER of the ROLLS.—I neither understand what difference there is in principle between this case and that in which a simple contract creditor files a bill and the assets prove insufficient to pay the specialty creditors, nor how the costs are increased by a legatee being the plt. instead of a creditor. I must, however, follow the cases which have been cited from *Seton*, and only give the costs (except those of the administrator) as between party and party. With respect to the priority claimed by the plt. here, I think he is not entitled to any such preference. The costs allowed to him must include the expenses of realising the estate. I think the heir-at-law should have the costs he asks for.

Solicitors for the plt., *Nethersole and Speechly*.

Thursday, Nov. 12.

INGLE v. PARTRIDGE.

General Order xxxiii., r. 10—*Motion to dismiss bill for want of prosecution—Costs.*

Where a deft. moved, regularly, under the above order to dismiss the plt.'s bill for want of prosecution, but the plt. proved that he had exercised reasonable diligence in the suit, though he had not told the deft. what he was doing, no order was made on the motion, but the plt. was not allowed his costs of it.

This was a motion by a deft. to dismiss the plt.'s bill for want of prosecution. It appeared that answers had been put in, but no subsequent steps had been taken by the plt. The four weeks mentioned in the General Order xxxiii. rule 10, had elapsed.

The plt. filed an affidavit in opposition to the motion, giving all the history of the suit; and stating that

although no further steps had been taken on his part, his solicitor had nevertheless been engaged since the filing of the answers in examining the deft.'s documents, and preparing the necessary materials with a view to the amendment of the bill.

Baggallay, Q.C. and *Cracknell*, in support of the motion, cited Gen. Ord. xxxiii. r. 10.

Selwyn, Q.C. and *Beavan*, for the plt., contra, relied on his affidavit, and asked for a month's time to amend the bill.

Southgate, Q.C., *Surrage* and *E. K. Karlake* for other parties.

The MASTER of the ROLLS.—I think the plt. has shown reasonable activity in the prosecution of the suit. If he had given notice of what he was doing to the deft., I should have given him the costs of this motion; but, as he has not given any such notice, and it does not appear that the deft. knew how he was employed, no costs can be given to either party. I will make no order on the motion; but the plt. may have one month's time to amend his bill.

Solicitor for plt., *H. Taylor*.

Solicitors for deft., *Field and Co.*

Saturday, Nov. 14.

M'LEOD v. BUCHANAN.

Fund in court—Stop-orders—Priorities.

A general stop-order upon a fund in court does not give any priority to the person who has obtained the order, except as to incumbrances existing on the fund when the order is made.

B., C., D. and E. were entitled to reversionary interests in a fund in court. A. purchased the interests of B., C. and D., and then obtained a general stop-order as to the whole fund. A. subsequently purchased the interest of E., but did not then obtain any fresh stop-order. E. afterwards mortgaged his interest to X., without notice of the sale of it to A. X. then obtained a stop-order on the fund as to the share of E. in it:

Held, when the fund fell into possession, that X. was entitled to priority over A. in the distribution of it.

Peter Buchanan, by his will, bequeathed (*inter alia*) a sum of 3402l. 5s. 1d. Three per Cent. Consolidated Bank Annuities to trustees upon trust for a Mrs. Jane M'Leod for her life; and after her death upon trust for her children. The testator died, and the fund was paid into court. Mrs. M'Leod had four children: viz., Mary Ann, George, Thomas Harrison, and Henry Robert. In the months of Aug. and Sept. 1845 the General Reversionary Interest Society purchased the then reversionary interests in the fund in court of Mary Ann, George and Thomas; and on the 13th March 1846 the society obtained a general stop-order upon the whole fund in court.

In April 1847 the society purchased the then reversionary interest in the fund of Henry Robert; but they did not obtain a fresh stop-order on the fund with respect to that interest.

In Sept. 1860 Henry Robert mortgaged his interest in the fund in court to a Mons. Charles Rouselle, without notice of the sale of his interest to the Reversionary Society. On the 11th July 1862 Mons. Rouselle obtained a stop-order upon the fund in court in respect of the reversionary interest therein of Henry Robert.

The tenant for life died. The fund was now to be paid out of court; and the question was whether, under the circumstances above stated, the General Reversionary Society or Mons. Rouselle was entitled in priority to the interest of Henry Robert M'Leod?

Selwyn, Q. C. and *Beavan* appeared for the society, and argued that the effect of a stop-order was merely to ensure to the assignee of a fund subject to it, that the assignor should not get it out of court without notice

to him. A general stop-order on a fund applied to the whole of it. When, therefore, an assignee had got a stop-order upon the whole of a fund in court, it was unnecessary, if he afterwards purchased a further part of the fund, to get another order as to that part. No subsequent stop-order as to that part would affect the priority acquired under the previous stop-order on the whole fund. They cited *Greening v. Beckford*, 5 Sim. 195; and further insisted that Mons. Rouselle had been guilty of laches.

Baggallay, Q. C. and *G. Simpson*, for Mons. Rouselle, were not called upon.

Hobhouse, Q. C. and *Whitehead* appeared for other parties.

The MASTER of the ROLLS.—I am clearly of opinion that a stop-order, in general terms, does not give any priority except as to the incumbrances existing at the date of the order. If that were not so, a monstrous evil would arise. If a person stating the existence of a 100l. debt as the ground of his application, and obtaining a general stop-order on a fund in court, could found on that any number of additional charges without the court being aware of them, it would open the door to the greatest fraud. A stop-order has been treated by the court on various occasions in the same light as notice to a trustee. In the case of trust property, which is already in mortgage, where a person proposes to make another advance upon it, he goes and inquires as to prior charges—not to the mortgagee, but to the trustee of the property. So, where there is a stop-order on a fund in court, a mortgagee should go, not to the owner of the stop-order, but to the records of the court, where, by searching, he would discover from the affidavit, which must have been made prior to the order being pronounced, in respect of what claim the stop-order has been obtained. The court never makes a stop-order except upon a specific statement of the security in respect of which it is sought. If M. Rouselle had adopted that course in this case, he would have found that a general stop-order had been made in respect of the shares in the general fund of Mary Ann, George and Thomas Harrison; but the share of Henry Robert would have appeared to be unincumbered. M. Rouselle, not being interested in any share except that of Henry Robert, would have naturally considered it safe to advance his money upon it; yet, if the argument which has been addressed to me is correct, the prior incumbrancers upon the other shares might make an advance on that of Henry Robert's alone, and under their general stop-order on the whole fund, might claim priority over M. Rouselle in respect of their other charges. That, however, cannot be permitted. I am decidedly of opinion that a general as well as a particular stop-order on a fund in court is confined in its operation to the incumbrances in respect of which it was founded, and cannot extend beyond that. The reversionary society, therefore, must take subject to M. Rouselle's mortgage on Henry Robert's share of the fund in court.

Solicitors: *Anderson and Showbridge*; *T. Kennedy*.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA MITCHELL and G. T. EDWARDS, Esqrs., Barristers-at-Law.

Nov. 19 and 20.

FOXWELL v. WEBSTER.

Infringement of patent—Motion by deft. before answer put in—Issue to try validity of patent.

The plt. filed 134 bills against the same number of defts., for infringement of his patent; 77 of the defts. formed themselves into four distinct batches, and before any answers had been put in, a motion was made on behalf of each batch, which asked

in effect that the court would direct an issue to try the validity of the plt.'s patent before any further proceedings were taken in the suits, and that in the meantime the time to put in the answers might be enlarged. The four motions being substantially, though not identically, the same, were heard together, and were refused with costs.

These were four separate motions: the first made on behalf of the defts. in nineteen suits; the second on behalf of the defts. in seven suits; the third on behalf of defts. in eleven suits; and the last on behalf of defts. in forty suits. All these seventy-seven suits had, with fifty-seven others, been instituted against as many separate defts. by Daniel Foxwell, the purchaser of the letters patent of the 16th Oct. 1852, obtained by Charles Tiot Judkins for his sewing machines, and the object of the whole 134 suits was, that the several defts. might account to the plt. for all profits realised by them for the manufacture, use and sale of certain sewing machines, which the plt. alleged were infringements of the said letters patent; and the bills in each case further prayed, that the several defts. might be decreed to indorse, or otherwise duly assign and hand over to the plt. the several bills of exchange, promissory notes and other securities held by the defts. as security, for the payment of any moneys due or remaining unpaid for or in respect of the sale and use of the said sewing machines, or any or either of them, and also to account to the plt. for all moneys otherwise outstanding and not yet received by the defts. in respect of the sale or use of such, or any or either of such machines, and that (at the plt.'s option) the defts. might be decreed to pay to the plt. by way of liquidated damages the sum of 5*l.* in respect of every sewing machine at any time manufactured, used, or sold by the defts., their agents or servants, or that the damages sustained by the plt. by reason of the defts.' infringement of the said letters patent, and by the manufacture, use and sale by the defts., their agents, servants and workpeople, of such sewing machines might be assessed in such manner as the court might direct, and that the defts. might be decreed to pay the amount of such damages when assessed to the plt., and that the defts. might be ordered to deliver up or procure to be delivered up to the plt., to be broken up or destroyed, all such sewing machines being infringements of the said letters patent as were then in the possession or power of the defts., their agents, servants and workpeople, or any or either of them. And that the defts., their agents, servants and workpeople, might be respectively restrained by the order and injunction of the court from manufacturing, using, or selling any machines with such movements, arrangements and combination of machinery as were described in a certain specification of the 15th April 1853 as amended by a certain disclaimer and memorandum of alteration, or any of such movements, arrangements and combination of machinery, and from using or adopting such movements, arrangements and combination of machinery or any of such movements, arrangements and combination of machinery to any sewing and stitching or sewing or stitching machine, whether then already made or constructed, or partly made or constructed, or thereafter to be made or constructed, and from in any manner infringing the said letters patent, and that the plt. might be at liberty by himself or such other competent person or persons as the court might appoint for that purpose to inspect all such machines as were then in the possession or power of the defts., whether wholly or partly constructed. And that for the purposes therein aforesaid all proper accounts might be taken, inquiries made and directions given. And that the several defts. might be decreed to pay the costs of the respective suits; and that the plt. might have such further or other relief as the nature of the case might require.

It is necessary to state shortly the facts as set forth in the bill and affidavits filed on behalf of the defts.

Charles Tiot Judkins, of the Britannia Works, Manchester, was the inventor of "improvements in machinery or apparatus for sewing and stitching," and on the 16th Oct. 1852, letters patent in the form contained in the schedule of the Patent Law Amendment Act 1852 were granted to Mr. Judkins for the above-mentioned invention. Prior to the granting of the letters patent Mr. Judkins had left at the office of the Commissioners of Patents for Inventions with his petition for such letters patent, a statement in writing according to the Act, called "The Provisional Specification," describing the nature of his invention.

On the 30th Dec. 1854 Mr. Judkins deposited his letters patent with Mr. Cunningham, the manager of the National Provincial Banking Company, by way of equitable mortgage. Judkins was adjudicated a bankrupt on the 14th June 1854, and Mr. Fraser was appointed official assignee, and Messrs. Hughes and Curtis trade assignees of his estate and effects.

By an indenture of the 18th May 1859, the said letters patent and all the rights, privileges, powers and authorities thereby granted were in consideration of the sum of 50*l.* assigned by Mr. Cunningham, the mortgagee, and Messrs. Fraser, Hughes and Curtis, the assignees, to the said Daniel Foxwell, his executors, administrators and assigns, for the residue of the term of fourteen years, granted by the letters patent. The petition upon which Judkins had been adjudicated bankrupt, the appointment of assignees, and the assignment to Foxwell were severally duly registered in the Great Seal Patent Office, pursuant to the Patent Law Amendment Act. The plt. applied to the Attorney-General for leave to file a disclaimer and memorandum of alteration, and the fiat for that purpose was granted on the 10th March 1862. This disclaimer was fully set out in the bill with reference to the drawings annexed, and it claimed as new and of the plt.'s invention, the combination and arrangement of the various parts of machinery for sewing or stitching with the use of a needle and shuttle. The memorandum was signed, sealed and delivered by the plt., and was duly enrolled in the Enrolment-office of the Court of Ch.; it did not, however, extend the right granted by the letters patent. The invention was described as of great public utility, and had never prior to the date of the patent been known to or used by any person within this realm except Judkins, who, with the mortgagee, assignees and plt., had successively the sole and exclusive privilege to use and vend the invention within the United Kingdom and the Channel Islands, and the plt. now claimed the sole use and privilege, and he alleged that ever since the date of the said indenture of assignment the manufacture of Judkins's sewing machines had been and then was a branch of his trade. The plt. had granted to Wm. Fred. Thomas a licence to make and vend Judkins's sewing machines, and the plt. had been paid by various persons for metal plates, 5*l.* for each machine used before the 25th June last and 2*l.* since by way of royalty. The bill described Judkins's invention, and the alleged improvements of the plt. In 1860 the plt. brought an action against the said W. F. Thomas for an infringement, when the jury found a verdict for the deft. In 1862 he brought a second action against Thomas on the same grounds, which, after six days' trial ended in the discharge of the jury, as they could not agree. On the 16th June 1863 the same action was again tried, and ended in a compromise for 4250*l.* On the 11th July 1863 the plt.'s solicitor sent letters to all the several defts., by which he required the immediate payment of royalties on all machines having a needle and shuttle, or any of the principal movements

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secured by Judkins's patent, and he required them within three days from the receipt thereof to make a correct return to him, stating the total number of all such machines, and proceedings were threatened in case of non-compliance. Interrogatories had been filed to the bill, and it was, as the defts. alleged, to save the enormous expense of putting in answers, and a vast amount of litigation, that certain of them had combined to make applications to the court upon the matter.

Roll, Q.C. (with him *E. E. Kay* and *W. H. G. Bagshaw*) moved in nineteen suits, that the plt. might proceed in such one only of such suits as he should select for that purpose until such suit should have been determined, or until the validity of the patent therein should have been finally decided, or until the court should otherwise order, and that the proceedings in the other eighteen suits might in the meantime be stayed, or that time for answering or production of documents therein might be enlarged; the several defts. to the said suits thereby undertaking to be bound, and to abide by the result of the said suit so to be selected, so far as the validity of the said patent was concerned, in like manner as if the same result had been arrived at in the said several suits, or that such other order might be made as should be just for the purpose of deciding the validity of the said patent, so as to bind the defts. in all the said suits by means of one proceeding only.

Osborne, Q. C. and *C. M. Roupell* appeared on another motion, differing only from that which had been heard inasmuch as it did not ask that the time for answering and production of documents might be enlarged.

Freeling appeared on the third motion, which was in substance the same as the first.

Osborne, Q. C. and *Waller* appeared on the fourth motion, which was in the same terms as the former motions as to determining the question in one suit, but did not ask for an issue as to the validity of the patent. Two of the defts., parties to this motion, were makers of the machines, the others purchasers and users only. An affidavit of the solicitor, Mr. Edwin Storer, of Manchester, was read, and it stated that in each suit the costs of the plt. already amounted to 50*l*.

C. Locock Webb, for the plt., read in reply an affidavit of Mr. Wickens, his solicitor, stating that these proceedings were the result of a combination of an association called "The Makers, Dealers and Users of Sewing Machines Central Association," with a subscription of 5*s*. a month, which association had passed resolutions to resist a monopoly and obtain information as to patents, &c., and that its object was directly pointed at plt.'s patent.

Affidavits were in each case read in support of the motions.

The arguments principally relied on by the counsel in the case were that it was clear from the facts of the case that the plt. had not so established the validity of his patent as to be entitled to stop the defts. from infringing it. The validity of the patent was the preliminary question common to all the suits, for if it could be proved that there was no valid patent, there could be no infringement of that patent. The case was analogous to the cases of ejectments at law, underwriters' suits and bills of peace. If the court directed that the validity of the patent should be tried as a preliminary question, once for all the suits, then came the question whether the defts. were entitled to have the answers to their interrogatories delayed till that preliminary question had been tried. There were no cases in which the court had directed such an issue to be tried, because it was only lately that the court had obtained the privilege to try those questions. So great a number of bills

on one subject-matter was a fact not only unprecedented, but so vexatious and enormous an evil, that the court, having in itself the power of trying the validity of the patent, or the discretionary power of directing an issue, could also in its discretion stay all proceedings in the majority of the suits until the question governing the whole was decided, viz., the validity of the patent.

The following cases were cited in support of the argument:—

Goulden v. Lydiat, cited in note in 4 Y. & C. Ex. 374;

Middleton v. Sherburne, 4 Y. & C. Ex. 374;

Kent v. Burgess, 11 Sim. 377;

Fullagar v. Clark, 18 Ves. 481;

Bacon v. Jones, 4 Myl. & C. 433;

Lord Tenham v. Herbert, 2 Atk. 483;

Evelme Hospital v. Andover, 1 Vern. 265;

How v. Tenants of Bromsgrove, 1 Vern. 22;

Filewood v. Palmer, Mos. 169;

Mayor of York v. Pilkington, 1 Atk. 282;

Mayer v. Spence, 1 J. & H. 87;

Damer v. Portarlington, 2 Ph. 262;

Peacock v. Peacock, 16 Ves. 49;

Lewis v. Thomas, 3 Hare 29;

Lancashire v. Lancashire, 9 Beav. 259;

Delarue v. Dickinson, 3 K. & J. 388.

Glass, Q. C., *Locock Webb* and *Theodore Aston* (of the common law bar), for the plt., were not called upon.

THE VICE-CHANCELLOR (having ascertained from the plt.'s counsel that there would be no objection on the plt.'s part to the dismissal of the motion without prejudice to any application after the answers had been put in), said, that notwithstanding the ingenious arguments which he had heard on these motions, he could not come to the conclusion that any such motion could in common justice be granted, having regard to the persons and the circumstances under which they arose. The plt. was the proprietor of a certain patent for sewing machines; the defts. in various cases appeared to be persons whom the plt. alleged had infringed his patent, and it certainly appeared from one of the motions that a great many persons were combined or associated in using machines for the purpose of sewing and stitching. This, at all events, was the case, that the persons who were alleged to have infringed the patent were very numerous, and the law was, that if many of them were combined as defts. in one suit, any one of them could say, "What have I to do with the others?" and could insist upon not being joined with them, and he could succeed in that objection, as the plt. had no right to join in one suit any number of persons who were infringing his patent? What then could the plt. do? It had been suggested, why did he not file a bill against one or two, and see what became of them, and he would then know what to do with the others? For every bill which the plt. filed he had to pay about 50*l*.; that was so asserted. No doubt he would have been too glad to do this, unless he had some interest the other way. The rules of this court in cases of injunction did not allow a person to slumber on his rights. A plt. under such circumstances who wished to exercise his rights against any individuals had to proceed against them all. If he abstained, knowing that an infringement was taking place, he would lose his remedy, as the other defts. would repudiate any connection with those who were sued. It would be no answer to say that, in case any one deft. was not sued in the first instance, he might be speedily sued after the result of the previous suits became known. He would say, that he had nothing to do with the other suits. Assuming then, as he must do for the purposes of the argument, that the plt.'s patent was a valid patent, he had a right to proceed, insisting

on its validity, and it might turn out that each of these 134 individuals were separately infringing it. One counsel characterised this as a case of gross oppression; he took the liberty of asking who the oppressed party was. He did not see any ground for the suggestion. The fact of an association with a common fund was another question, which could not then be considered. It had also been suggested that it was an oppression on the public. Beyond all doubt, if there were 134 different suits by one plt. founded on the same right, he quite agreed with the abstract proposition, that the court should willingly attempt to have the matter tried at once, and so *toties quoties* should struggle to accomplish that object, but only consistently with the plain recognised rights of the plt. in this court. What was the nature of these motions? The first three were substantially the same; the fourth had a more perceptible difference from the others. He would take the first motion. It was a motion on behalf of defts., in nineteen suits, that the plt. might proceed, &c. [His Honour then read the motion.] It asked that all the suits might be stopped till one of them (whichever the plt. pleased) had been disposed of. The second part of the motion gave a kind of undertaking, and then came the alternative, like the analogous part of the prayer of a bill, viz. that such other order might be made as should be just. These motions were argued upon what the gentleman who prepared them probably never thought of. The notices of motion were substantially this: "Choose some one of us, and compel him to put in an answer; but do not make all of us put in answers till the one suit has been decided." His Honour then read the fourth motion, and said that it was a more stringent and defined application, and differed essentially from the others in one respect, but in another respect it was the same, and it said in effect, "Do not compel us to take any proceedings till a selected suit has been decided." Supposing that all these motions were granted, fifty-seven suits would still remain, and all the defts. in those might make similar applications, and the evil would still exist. It should now be considered how far the plt. is entitled to the relief asked. It had been said that the court ought to direct an issue to try the validity of the patent; that, however, was not the motion; and cases had been cited to prove that, where justice required it, the court had directed the trial of some question necessary to give the plt. relief; and no doubt the court had done so over and over again where there had been an interlocutory application for an injunction, or for appointing a receiver, not only in one, but in a great number of suits, and that it would do so where there was a single deft. In the present case, the motion was not by the plt. for an injunction or appointment of a receiver, but by the defts.; and, assuming that the defts. might be entitled to come with their own motion, it was not merely this that was asked in the present case, but it was that the defts. should not be obliged to put in an answer. The questions between the plt. and each deft. were probably the same in all the cases. There might, however, be different questions in some of them. There were two heads: first, the validity of the patent; secondly, its infringement. And it has been said, if the plt.'s patent was bad, what remedy could he have for an infringement of it? The defts. have said, "Try the question of validity first, before putting as to try the question which depends upon it." The plt. did not want to proceed with the suits until the validity of the patent was decided; but he did want answers to show whether he would be entitled to a decree. He says in effect to the defts., "Either admit infringement, or let me have your answers, in order that I may know what machines you have been making," &c. The defts., on the other hand, say, "We dispute your patent, but we are willing

to allow you to inspect our machines." The rule of the court with regard to answers was, that the deft. must fully answer everything in the interrogatories that is pertinent and relevant. That was the general rule. The court, however, sometimes so far modified that rule that if it came to a question whether or not the deft. was to set out a long and burdensome account, it occasionally relieved him from that burden. That was all that was decided in *Delarue v. Dickinson*, the nearest case that has been cited in semblance to this. It was not sufficient simply to deny infringement; such an answer would be excepted to. What was now asked was infinitely stronger than that; it was, that the deft. should not be compelled to put in an answer at all. He was at a loss to understand how the putting in an answer could affect or prejudice any one deft. Had not the plt., as against each one of the defts., a right to know what particular instrument or machine, and of what structure, &c., each was manufacturing or selling? He could not understand how the question whether there were one or two or 150 defts. made any difference to the decree at the hearing. He did not base his conclusions upon any assumption that the plt. had established either the validity of the patent or its infringement. Assuming that there had been no decision upon the validity of the plt.'s patent, he did not express himself further upon that question. He would accede to the abstract proposition that where, as in the present case, the plt. had taken proceedings against a number of individuals whom he alleged were infringing his right, that court would do all in its power to simplify the matter; but then it must do so consistently with justice. He would not do it on an application of the plt. to infringe the rights of the defts., nor would he do it on the motion of the defts. to infringe any rights of the plt. The elementary right of the plt. was to a discovery from the defts. of those matters in respect of which he might get a decree at the hearing; and therefore what was asked, although in itself reasonable, was at the expense of the rights of the plt., which that court would not take from him. It would not take from him the right to obtain facts from the defts. as to the infringement of his patents, &c. He did not bind the defts. to the terms of their notice of motion; he considered the matter as argued by counsel. The mistake had been to apply in this form, at this stage of the case, and therefore, in dismissing the motion with costs, there must be a direction that the order should be without prejudice to any proceeding which the defts. or any of them might be advised to take after answer. When they had put in their answers, they might make their application with a good grace. He decided that the defts. could not come with such an application as the present before the answers had been put in.

Solicitor for the plt., *H. Wickens*.

Solicitors for the defts., *Field, Roscoe and Co.; Slee and Robinson; Peacock; Thos. White and Sons*.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW,
Esqrs. of Lincoln's Inn, Barristers-at-Law.

Monday, Nov. 9.

BARGENT v. THOMSON.

Landlord and tenant—Breach of covenant—
Relief.

A lessee, under covenant to repair on three months' notice with penalty of re-entry, received notice on the 16th Sept. to repair according to a specification, and out of the twenty-two items specified, only two were not commenced, and eight not completely finished, on the 18th Dec, the latter having been delayed by

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the state of the weather. There was no entry by the lessors to inspect, and no notice from them to expedite the works during the interval; and the whole of the works were completely finished in the second week in January:

Held, that, under the circumstances, the lessee was entitled to be relieved by injunction against ejectment for the breach of covenant.

This bill was filed by Hannah Bargent, widow, for an injunction to restrain the defts. Thomas R. J. G. Thomson and Edward Tew Thomson, the tenants in common in fee-simple of certain messuages and premises situate in High-street, Eton, "from prosecuting the action or actions commenced by them, and from commencing or prosecuting any other action or proceedings to recover possession of the said demised premises or any part thereof, by reason or on account of a forfeiture by the noncompliance by the plt. with the therein-mentioned notice of the 16th Sept. 1862.

Richard Bargent, the late husband of the plt., became the lessee for a term of twenty-eight years of the said premises, under an indenture dated the 22nd Oct. 1846. The lease contained a covenant on the part of the said R. Bargent, from time to time, and at all times as often as occasion should require, well and sufficiently to repair, &c. the premises; and also that it should be lawful for the said John Sturges, at all reasonable times, to enter into and upon the said premises to view and see the condition of the same, and of all defects and want of reparation then and there found to give or leave notice in writing for the said R. Bargent, his executors, administrators and assigns, to repair, amend and make good the same within the space of three calendar months then next ensuing, within which time the said R. Bargent, his executors, administrators, or assigns, should and would repair amend, new make, paint, and make good the same. And it was further agreed that, "if the said R. Bargent, his executors or administrators, or his or their assigns, should not in all things well and truly observe, perform, fulfil and keep all and singular the covenants and agreements therein contained on his and their part to be observed and performed," &c., it should be lawful for the said John Sturges, his heirs or assigns, to re-enter, &c.

R. Bargent entered, and (it was alleged) expended a considerable sum upon the premises. He died in 1853, and the plt. became his sole personal representative.

The plt., on the 16th Sept. 1862, received a notice in writing requiring her to perform certain repairs to the said premises according to an annexed schedule or specification of dilapidations made by the deft.'s surveyor on the 8th Sept. 1862. The schedule contained twenty-two items, many of which (it was alleged) were expressed in very vague and comprehensive terms, and comprised works which the plt. was not under the terms of the lease bound to do.

Immediately after receiving the notice the plt. directed a builder to put the whole of the premises in a state of thorough repair so far as related to the carpenter's work necessary to be done, and the works were commenced and completed before the 16th Dec. At the same time the plt. also employed a bricklayer and plasterer to do all the necessary bricklayer's and plasterer's work, but owing to unfavourable weather a portion of the work remained uncompleted. The whole of the repairs were completed by the end of the second week in Jan. 1863.

On the 18th Dec. the deft. E. T. Thompson called upon Mrs. Bargent, and saw that some works were in progress. He seemed, however, on very friendly terms, and said, "I am not come on business this time."

On the 20th Dec. 1862 the plt. received a letter from the defts.' solicitor informing her that he was instructed to point out to her that "by omission to

repair according to her notice her lease had become forfeited, and that it had therefore been deemed advisable to obtain possession of the premises comprised in it." The writer added that "it was fair to infer from the steadfast determination she had shown to disregard the notice that she intended to forfeit the lease, and he therefore presumed that she was ready to deliver up possession at once." In case of non-compliance he threatened her with legal proceedings.

The plt.'s solicitor answered on the 22nd Dec. stating that the plt., after receiving the notice, had proceeded with the repairs, and that they were then substantially completed; that the weather had occasioned unavoidable delays; that the premises had been repaired according to the covenant, and that there was no reasonable ground of complaint.

To this the solicitor for the defts. replied that his clients intended to insist on the forfeiture, and on the 30th Dec. an action of ejectment was commenced against the plt. and others, on the sole ground of a breach of covenant by the plt. in not completing the repairs required by the notice on or before the 16th Dec. Between the 16th Sept., when the notice was given, and the 30th Dec. and the 2nd Jan., on which days the writ was issued, no one ever visited or inspected the premises on behalf of the defts. for the purpose of examining and reporting on their state and condition.

On the 8th Jan. the plt.'s son tendered on her behalf a quarter's rent to one of the defts., but he objected to accept it, and in course of conversation respecting the action, said, "What we are going to try is the time in which you ought to have done the repairs." And further added, "We say you did not repair within the three months, and that the lease is forfeited, and we are determined to try it out."

Craig, Q.C. and E. Haviland Burks supported the prayer of the bill.—They submitted that the action was oppressive, and that it would be contrary to equity to enforce the covenant in the lease. They referred to the case of

Bamford v. Creasy, 7 L. T. Rep. N. S. 187; s. c.

8 Jur. N. S. 1147; and 22 & 23 Vict. c. 35.

(They were stopped by the Court.)

Bacon, Q.C. (C. T. Simpson with him) contended that the plt. had not completed the necessary repairs by the time stipulated, and that time was of the essence of the contract. The deft. was therefore entitled to be indemnified for all the costs.

Buchanan appeared for certain mortgagees and asked for their costs.

THE VICE-CHANCELLOR.—The bill in this case is filed upon an equity which has always been recognised in this court—that of a tenant who has bound himself by covenants to repair, and who can show to the court equitable circumstances sufficient to entitle him either to a relief from a strict performance of the covenants, or to ensure him against a forfeiture of the lease by reason of neglect to perform them. In this case, taking it upon the statement of the defts. themselves, it appears they gave notice upon the 16th Sept. to make certain repairs according to a specification, within three months from the date of the notice. Those three months expired on the 16th Dec. No one was sent in the capacity of a surveyor—not even the person whose specification bound the plt.—to examine the premises and see whether the repairs had been completed within the time mentioned in the notice. But one of the defts. (the lessors), on the 18th Dec., two days after the three months had expired, went upon the premises and (without informing the plt. that he had come to take notice of the state of the works), found that out of twenty-two items, two had not been commenced and six not completely finished. There was no objection taken by him as to the rest, and without complaining or sending the plt. further notice to complete the

repairs, he went back, and twelve days after issued a writ in an action of ejectment, on which he claimed to eject the plt. for the nonperformance of the covenants to repair. The case made by the plt. is, that she proceeded to repair, but that the repairs were delayed by the state of the weather. No notice was given to the plt. to remind her that the repairs ought to be expedited, but this action was commenced, in which long affidavits have been filed, containing conflicting evidence as to the state of the weather. The court cannot approve of the conduct of a lessor who acts in this way. It would be an extremely harsh thing, while out of twenty-two items, all of which except two, relating to out-of-door work, had been proceeded with, and all but eight entirely completed, to eject a tenant and not to give the relief asked. The court no doubt is bound to respect the obligations contained in a lease, and to hold an even hand between landlord and tenant. Tenants are expected to perform the covenants in their leases, and the court will not permit a tenant to evade the stipulations he has entered into; but if he honestly endeavours to perform them, the court will not allow the lessor to insist upon an omission of a day, unless there be something in the covenants that makes time of the essence of the contract. I think the defts. in this case proceeded with undue precipitation, and I by no means approve of their conduct. The commencement of this action was a harsh and severe proceeding, but the going on with it down to the notice of trial, after an offer had been made, was still more so. Besides, there were two actions, one against this poor woman herself and the other against the parties in possession. The mortgagees very properly kept themselves aloof from this indiscreet litigation. The plt. filed this bill because of the notice of trial, and because there was no choice left but either to come here or go before a jury. The day upon which the bill was filed the plt. in equity offered to forego her costs both at law and in equity, were her offer accepted. I have heard no good reason why that offer was rejected, and I am sorry that I cannot now saddle the costs upon the person who ought to pay them. The duty of the court will be to direct an inquiry as to whether all the repairs have been done as required by the covenants, if the defts. are not satisfied.

Bacon, Q.C.—The defts. ask for no such an inquiry.

The VICE-CHANCELLOR.—The order will be that the injunction must be continued, and that each party be left to bear her and their own costs.

Solicitors for the plt., Poole and Gamlen, agents for Darvill, Son and Poulton, Windsor.

Solicitor for the defts., R. C. Dewy.

Wednesday, Nov. 11.

GURNELL v. GARDNER.

Equitable lien—Parol authority to receive a debt, without assignment.

Parol authority by a debtor to a creditor to go and take certain goods and sell them, and pay himself a particular debt out of the proceeds.

Held, to amount to the creation of an equitable lien upon such goods, and as such to be valid as against a claim by the personal representative of the debtor after his death.

This was a bill filed for the purpose of establishing the right of the plt. to a certain quantity of wool, or to the proceeds thereof, under the following circumstances:—

Joseph Gledhill, late of Ashby, in the county of Lincoln, cattle dealer, became indebted to the plt. George Gurnell, a farmer, in the sum of 218*l.* 10*s.*, in respect of the proceeds of certain cattle and stock which he had sold for and on behalf of the plt., and for money lent to him by the plt. Joseph Gledhill pre-

viously to July 1862 had purchased of a Mr. Bradley a certain clip of wool, for which he paid the sum of 140*l.* in part of the purchase-money, leaving a balance due to Bradley. The wool was allowed to remain on Bradley's premises. On the 27th July 1862 Joseph Gledhill, who was about to leave home to attend a cattle fair, requested the plt. during his absence to superintend the weighing, packing and delivery of the above-mentioned wool, which the plt. agreed to do. The balance due to Bradley was 75*l.*, and the plt. informed Bradley that the wool was going to be sold, and that he should then receive such balance.

The wool was forwarded to Doncaster by a barge belonging to the deft. John Gardner, who was a wharfinger, and was landed at his wharf. The plt. had employed Joseph Gledhill to sell some cattle for him at the above-mentioned fair, which Gledhill accordingly did, and received the proceeds of the sale.

The bill alleged (par. 9) as follows:—"On the morning of Saturday, the 2nd Aug. 1862, the plt. had an interview with the said Joseph Gledhill, who had then only just returned from the said fair in Yorkshire, at his residence, and the said Joseph Gledhill informed the plt. (as the facts were) that he had sold the plt.'s said beasts, and that one Chatterton had got his money (meaning thereby that he Joseph Gledhill had paid away the money produced by the sale of the plt.'s cattle to Chatterton); and the said Joseph Gledhill being indebted to the plt. as aforesaid, and in consideration of the said debt of 218*l.* 10*s.*, and for the purpose of securing to the plt. the payment of part of such debt, and for the purpose and with the intention of assigning and making over the said wool to the plt., and of vesting such wool in the plt., then said to the plt., 'There is the wool which has gone to Doncaster; go and sell that wool, pay Bradley the balance due to him on such wool and keep the remainder yourself.'"

At the time of this interview Joseph Gledhill was ill in bed, but the bill alleged that he knew perfectly well what he was doing. The plt. did not see Joseph Gledhill again, as he died in the night of the 2nd Aug. 1862. On the following Monday, the 4th Aug., the plt. went to the deceased's residence, and there met Bradley and one of Joseph Gledhill's brothers, who told him that he was not to sell the wool for the present. Notwithstanding this the plt. and Bradley went to the deft. Gardner's wharf at Doncaster and claimed the wool. They did not then see the deft. Gardner, but they were informed that a brother of Joseph Gledhill had given directions to Gardner to keep the wool and not to let it go out of his possession.

On the 5th Aug. the plt. and Bradley again went to the wharf of the deft. Gardner, took possession of the wool, and sold it at the wool fair at Doncaster for 218*l.* On the same day the plt. paid to Bradley the balance of 75*l.* which was due to him; and after paying the freight and wharfage, kept the balance in part satisfaction of the debt due to him by Joseph Gledhill.

Joseph Gledhill died intestate, and on the 11th Nov. 1862 letters of administration were granted to his brothers, the defts. John and James Gledhill. They called upon the plt. to pay over to them the amount received by him in respect of the wool, which he declined to do.

The plt. did not hear anything more respecting the matter until March last, when an action was commenced against him by the deft. Gardner to recover the sum of 216*l.* 4*s.* for 94½ tods of wool.

The plt. on the 15th April filed this bill on the ground that he was an assignee in equity for value of the wool, and entitled to retain the moneys produced by the sale thereof.

The plt. agreed to give judgment in the sum of

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GURNELL v. GARDNER.

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218*l.* 4*s.*, but on condition that no execution should issue on such judgment until the 8th May 1863, so that the rights of all the parties should be determined by this court.

On the 24th April 1863 Bramwell, B. made the following order: "Upon hearing the attorneys or agents on both sides, and by consent, I do order that upon payment of 218*l.* 4*s.*, being the debt and damages due from the deft. to the plt., for which this action is brought, being 2*l.* for damages on the count for trespass, and 216*l.* 4*s.* on the money counts and costs to be taxed and paid on the 8th May next, the plt. being at liberty to sign judgment for the said debt and damages and costs forthwith, all further proceedings in this cause be stayed; and I further order, that in case default be made in payment as aforesaid, the plt. shall be at liberty to issue execution for the whole amount remaining unpaid at the time of such default, with costs of execution, sheriffs' poundage, officers' fees, and all other incidental expenses, whether by *ft. fa.* or *ca. sa.*."

On the 24th April 1863 the solicitor of the deft. Gardner sent to the plt.'s solicitors a copy of the above order with the following letter:—"Gardner v. Gurnell.—Inclosed I send you copy order to stay herein, which it is expressly understood shall not in any way prejudice the rights of either party in the suit in Chancery."

Nothing was due to the deft. J. Gardner for freight or wharfage, or otherwise, in respect of the said wool. The defts. John and James Gledhill claimed to be entitled to the proceeds, as the personal representatives of Joseph Gledhill, and the action at law was commenced by the deft. Gardner as a mere stakeholder, at their instigation and request. The deft. Gardner on the 22nd April 1863 demurred to the plt.'s original bill (which was filed against him alone) for want of equity, and on the ground that John and James Gledhill ought to have been made parties.

The plt. submitted to the demurrer, and obtained the usual order to amend his bill. The deft. Gardner had signed judgment in the action, and threatened to issue execution upon the judgment on the 8th May.

The plt. prayed for a declaration that he was entitled to the said wool and to the proceeds thereof, and that the defts. respectively had not any right or title to the said wool, or the proceeds thereof, and that the plt. was entitled to retain the proceeds for his own benefit. The bill also prayed for an injunction to restrain all proceedings at law, and for the costs of the action.

Certain pencil memoranda as to the weight, &c., of the wool, and purporting to give authority to the plt. to take it, came out of the plt.'s possession, and the plt. in his affidavit said they were given to him at the time by the intestate; but this was disputed.

Malins, Q.C. and *Nalder*, for the plt., were stopped by the court.

Bacon, Q.C. (with him *C. T. Simpson*) and *Stirling* argued that there was no assignment on the part of Joseph Gledhill to which this court could give effect. Even if he had been living, the court would not have carried out a mere parol assignment; and *a fortiori*, it would not do so when any authority which may have been given by Joseph Gledhill was revoked by his death. They further commented upon the suspicious character of the plt.'s statement, and that it was wholly uncorroborated. They cited

Lepard v. Vernon, 2 V. & B. 53; and

Watson v. King, 4 Camp. 272.

The VICE-CHANCELLOR.—Upon the question of fact I think the plt. on the weight of evidence must be considered as having proved what is alleged in the 9th paragraph of his bill. I asked whether the defts. Gledhill have positively denied upon oath the truth of that statement, and I was informed that they have not,

whilst on the other hand the plt.'s own evidence is perfectly clear and explicit. Giving full weight to all that has been stated by the witnesses of the defts., their evidence amounts only to this: that they do not know that such a conversation as alleged by the plt. took place. Every person in court might make the same statement. Negative evidence goes for very little as against evidence of a positive character. The law compels me to accept the plt. as a witness in his own behalf, and in this case the plt.'s evidence is wholly uncontradicted by any positive evidence on the part of the defts. It has been argued that the circumstances of the case are against the plt., but they seem to me to be very much in his favour. Certainly one of the defts.' witnesses has deposed that certain documents were delivered to the plt. after the death of Joseph Gledhill; but that I do not believe. There is conflicting evidence as to the time when they were delivered; but all the probabilities of the case are in favour of what the plt. has sworn to. My belief is that the plt.'s statement as to the delivery of these documents is perfectly accurate, and the evidence produced on the part of the defts. is not sufficient to countervail that which the law compels me to accept, namely, the evidence of the plt. That is as to the facts. But the important question in this case is as to the law. I should have considered that an equitable lien can be created by parol, and, subject to what has been said upon the case of *Lepard v. Vernon*, I should have said that it is beyond a doubt that if in this case what the intestate said to the plt. had been put into writing, and signed by the intestate, it would have been a perfectly valid equitable assignment, and it would have created an equitable lien wholly irrevocable by the death of Joseph Gledhill. What was decided in the case of *Lepard v. Vernon* was this, that where there is a bare power of attorney to receive a debt not accompanying any assignment of it, although given by a written instrument under the hand and seal of the person giving it, it is no more than a naked authority, and that authority is clearly revoked by death. That was an intelligible decision. The authority there, given cannot be said to have been by parol. I asked whether Sir W. Grant, in the case of *Lepard v. Vernon*, said anything to show that if the power had embodied a declaration that it was given to enable the creditors to apply the money to their debt (of which there was parol evidence in the case), it would not have operated as against the general creditors of the debtor; and, as I expected, the counsel for the defts. could not say that he did. I find no warrant for departing from the decision in *Lepard v. Vernon*, nor for saying that if what passed by parol had been incorporated into the written instrument, Sir W. Grant would not have felt himself bound to hold that the right to the property in that case passed, and that the right of the person claiming under the power of attorney, coupled with the declaration, would have prevailed. In this case everything was by parol; the words are clear; and that, coupled with the conduct of the intestate, amounts to the creation of a valid equitable lien. It seems to me to be impossible to resist the plt.'s claim on the ground that this was not a valid equitable assignment in writing. I find no law which says that a valid equitable lien cannot be created by parol, and the conclusion, if these premises be just, is inevitable, that where all things are by parol and associated together for the purpose of giving an authority, where all is one transaction, and the power and the purpose are coupled together by the same evidence, they operate to confer a valid right which this court is bound to enforce. At the same time it is impossible to say that the case is beyond argument or free from difficulty. I wish it, however, to be understood that if what is alleged in the 9th paragraph of the bill had been put into writing and

signed by the intestate, I think it would have given a right to the plt. which the defts., the administrators, could not have successfully countervailed. Upon the whole, therefore, I am of opinion that the plt. is entitled to a declaration that he has an equitable right to the proceeds of the wool. Then comes the question as to costs. I am not entirely satisfied with the conduct of the plt., or with the way in which the wool was removed from the custody of the deft. Gardner. On the other hand, letters of administration were taken out by the defts., the brothers and some of the next of kin of the intestate, for the purpose of offering a determined resistance to the claim of the plt., who has proved that he had an equitable lien. There can be no doubt about the legal right of the deft. Gardner to retain possession of the wool; and he has merely been put forward by his co-defts. to contest the equitable right of the plt. But it should be observed that, if a man takes an imperfect security, it will have an important bearing in deciding the question of costs, whether in the suit or at law.

Malins, Q. C. and Bacon, Q. C. were both heard on the question of costs, the latter contending that the common law judge's order had decided the matter.

THE VICE-CHANCELLOR.—I shall make no order as to costs, but leave the costs in equity and at law to be borne by each party. The plt. has established his equitable lien, but the plt., who had an equitable lien, having seized and forcibly taken possession of the property as against the right of the person in whose custody it was placed, I cannot give him any costs.

Solicitors for the plt., *Scott and Co.*, agents for *Henry Thomas Chambers*, Lincoln; for the deft., *G. Bower*.

Thursday, Nov. 12.

JONES v. GREGORY.

Demurrer—*Bill by heir-at-law to set aside a will—Jurisdiction.*

A bill by an heir-at-law, charged that an alleged will (which had been duly proved) having been obtained by undue influence and misrepresentation, and having been made and executed by the alleged testator when he was bedridden and imbecile, ought to be declared void for the purpose of passing real estate, and prayed that such part of the will might be declared void and be cancelled, and for a receiver:

Demurrer allowed.

This was a demurrer.

The bill was filed by Thomas Jones, of New-inn-gate, near Ross, in the county of Hereford, claiming as heir-at-law of the alleged testator Wm. Jones, late of Stroud, in the county of Gloucester, against Jane Gregory and Thomas Palling Little.

The bill alleged, that in the year 1840 Wm. Jones was attacked by paralysis, and that in 1842 he was visited with a second and more violent stroke, which deprived him of the use of the left side of his body, and also of his speech, and very much weakened his mental faculties; that he died without issue on the 10th March 1851, having continued from the time of his aforesaid illness until his death perfectly imbecile; that whilst he was so afflicted he resided at his house in the High-street, Stroud, up to his death, attended by his servants Elizabeth Taylor (deceased) and her sister and the deft. Jane Gregory, who were his sole and constant attendants; that these persons acquired so great an influence and control over him that he was subject to, and in great bodily fear of them, and was obliged by them to permit them to attend to and regulate his business and affairs; and that during such time they used every endeavour, by misrepresentation and otherwise, to prejudice him unfavourably against his relatives.

Further that, in Sept. 1849, Elizabeth Taylor and the deft. Jane Gregory, expecting William Jones's decease to be approaching, sent for Mr. Edward Carruthers Little, a solicitor, and either instructed the solicitor, or unduly influenced or overawed William Jones in such a manner as to induce him to make divers signs and sounds, which the solicitor believed to be, or Elizabeth Taylor and the deft. Jane Gregory interpreted to be, instructions to prepare a written paper purporting to be the will of the said William Jones, whereby, after directing the payment of his just debts, &c., he purported to give the following legacies: To his niece Elizabeth Dike, 100*l.*; to his nephew Samuel Dike, 1000*l.*; to his nephew Samuel Llewellyn, 100*l.*; to his housekeeper, the said Elizabeth Gregory (meaning thereby throughout the will the said Elizabeth Taylor), 7500*l.*; to his housekeeper the deft. Jane Gregory, 5500*l.*; and to the treasurer of the Gloucester Infirmary, 200*l.* After bequeathing to Elizabeth Gregory his household goods, gold watch, chain and seals, silver plate and watches of every description, and all his wearing apparel, he purported to give and bequeath all his freehold and leasehold messuages, lands, tenements and hereditaments, and all other his real estate whatsoever and wheresoever, and also all the rest and residue of his personal estate, to and to the use of his friends the Rev. John Williams, of Woodchester, in the county of Gloucester, D.D., and the deft. the Rev. Thomas Palling Little, of Oxenball, near Newent, in the same county, their heirs, executors, administrators and assigns, upon trust, within six calendar months after his decease, to sell and convert the same, and hold the proceeds upon trust, after payment of costs, charges and expenses, and from and after payment thereof, in trust to pay, divide, assign and transfer the residue of the moneys arising from such sale or sales, and all other the residue of his personal estate, unto, between and amongst the said Elizabeth Dike, Samuel Dike, Samuel Llewellyn, Elizabeth Gregory and Jane Gregory, in equal shares and proportions, share and share alike; the legacies thereinbefore bequeathed, and the shares lastly mentioned, to be paid to the said Elizabeth Gregory and Jane Gregory respectively, to their separate use. The same writing contained a trustee's receipt clause, a power of appointing new trustees, a devise of trust and mortgage estates, an appointment of the said Dr. Williams, the deft. Thomas Palling Little, Elizabeth Gregory and the deft. Jane Gregory, executors and executrixes of such pretended will, and ended with a gift of 50*l.* each to Dr. Williams and the deft. T. P. Little.

That, on the 29th Sept. 1849, Elizabeth Taylor and the deft. Jane Gregory caused three persons to attend as witnesses at William Jones's house, and in their presence guided his hand or otherwise assisted him to make a mark or signature to the said written paper purporting to be a will, and induced or overawed him so to do, he being at the time in the extremity of illness, and incapable of writing or speaking intelligibly, and utterly ignorant of or unable to comprehend the contents of the paper.

The bill further alleged, that Dr. Williams refused to act as trustee or executor of the said pretended will; that the same was duly proved in the Prerogative Court of Canterbury by the deft. Thomas Palling Little (who was a brother of Edward Carruthers Little) and the deft. Jane Gregory; but that the plt. was not cited to attend the proceedings, and did not know of them, he being at that time absent abroad.

The bill then alleged various dealings with the estate on the part of the defts. and Elizabeth Taylor; also that the two houses in the High-street, Stroud, aforesaid, were purchased by Elizabeth Taylor and the deft. Jane Gregory, and were conveyed to them or to a trustee for them for their sole and separate use.

It was further alleged that Elizabeth Taylor (then Gregory) on the 11th April 1844 married Edward

Taylor, and concealed her marriage during Wm. Jones's lifetime, fearing it might displease him, and in order to influence him in the disposition of his property.

Elizabeth Taylor died in April 1855, having by will or deed (executed under a power contained in a deed executed on a separation between herself and her husband) bequeathed or assigned all her property, both real and personal, unto her sister Jane Gregory.

The plt. charged that the said pretended will of Wm. Jones having been obtained from him by undue influence and misrepresentation, and having been made and executed by him when he was not capable of exercising his judgment in such matters, and when he was bed-ridden and perfectly imbecile, and otherwise in such state of body and mind as aforesaid, ought to be declared void for the purpose of passing real estate.

It also alleged that the defts. threatened and intended, unless restrained, to sell the two houses, and to receive and get in and dispose of the rents and profits thereof; and prayed, first, that such part of the will as related to the two houses, High-street, Stroud, might be declared void and be cancelled, or, if necessary, an issue might be had or directed to try whether the freehold estates of the said Wm. Jones were by the said pretended will devised or not, or that the plt. might be at liberty to proceed by ejectment; secondly, that the defts. might, if necessary, be restrained from selling the said houses, and from receiving the rents and profits thereof, and for a receiver, and for consequential relief.

Bacon, Q. C. and C. Hall, in support of the demurrer was not called upon.

George R. Harding, for the plt., submitted that the court had full jurisdiction in this case. The will was obtained by fraud, and though it might be good at law, the plt. (the heir-at-law of the testator) was entitled to come to a court of equity, and ask to have it set aside. He referred to the following cases:—

Lord Donegal's case, 2 Ves. sen. 408;
Pemberton v. Pemberton, 13 Ves. 290;
Maundy v. Maundy, Reps. in Ch. 66;
Welby v. Thornagh, Pre. Ch. 123;
Goss v. Tracey, 1 P. Wms. 287;
Kerrick v. Bransby, 7 Bro. P. C. 437;
Webb v. Claverden, 2 Atk. 424;
Middleton v. Sherburne, 4 Y. & C. Ex. 358;
Bennet v. Vade, 2 Atk. 324;
Andrews v. Powys, 2 Bro. P. C. 504;
Raworth v. Marriott, 1 My. & K. 643;
Hopwood v. The Earl of Derby, 1 K. & J. 255;
Mudd v. Suckermore, 4 De G. & S. 13 (n.);
Seafie v. Seafie, 4 Russ. 309;
Tatham v. Wright, 2 Russ. & My. 31;
Boysse v. Rossborough, 1 Kay, 71; 3 De G. M. & G. 817; 6 H. of L. 1.

He also referred to the
 21 & 22 Vict. c. 27;
 25 & 26 Vict. c. 42,

and argued that if the court, after the authorities above enumerated, should consider that it had no jurisdiction, the Legislature had provided a remedy under the above statutes. He further contended that the plt. was entitled, at least, to a receiver, and cited

Jones v. Jones, 3 Mer. 161; 7 Hare, 19 (n.);
Jones v. Frost, 3 Madd. 1;
Mordant v. Hooper, 1 Amb. 311;
Knight v. Duplessis, 1 Ves. sen. 324; s. c. 2 Ves. sen. 360;
Lloyd v. Passingham, 16 Ves. 69;
Clark v. Dew, 1 Russ. & Myl. 183;
Tollervy v. Colt, 1 Y. & C. C. C. 642;
Buckland v. Soltan, Registrar's Book L, 1824, A folio, 186;
Lancashire v. Lancashire, 9 Beav. 127;
Earl of Fingal v. Blake, 2 Moll. 50;

Lloyd v. Trimleston, 2 Moll. 81;

Bainbridge v. Baddeley, 3 M. & G. 419, 420.

The VICE-CHANCELLOR.—I understand from a series of authorities to which the counsel for the plt. has referred, that this court has no inherent jurisdiction to entertain a bill at the suit of an heir-at-law, for the mere purpose of setting aside a will obtained by fraud. It has been said that more than a hundred years ago such a jurisdiction was, by judges of great authority, said to exist, and what is now proposed for me to do is, to treat this jurisdiction as having been latent, and to set it up as against the authorities cited. I am not strong enough to do that. There is no warrant for me to set up such a jurisdiction, as against the decisions of judges of the highest authority; but I was much struck with this, that it is only recently, by a decision of one of the V. C.'s, and by a decision of the Court of Appeal, that this court has, at the suit of a mere legal devisee, entertained jurisdiction simply to establish a will. That decision was much questioned at the time, and gave, I know, great dissatisfaction to many lawyers of the highest experience and authority. I confess I was not one of the number of those who expressed that dissatisfaction, for I consider it a useful jurisdiction; and if I were at liberty to make the law, and to disregard the decision of judges who have sat in this court during the last hundred years, I should be disposed to think that it would be very beneficial to the public, and a proper thing, that this court, which entertains jurisdiction to adjudicate upon a question of fraud as to other instruments, should also assume a jurisdiction to decide questions of fraud as to wills, whether of real or personal estate; and that it should give directions to try an issue at law, or should try it here, in order that the questions might be decided. It has been said that the present Lord Chancellor, when Attorney-General, treated the case of *Boysse v. Rossborough*, which sanctioned a bill by a mere devisee to establish a will against the heir-at-law, as assuming the existence of a jurisdiction in the converse case—that of allowing the heir-at-law to vindicate his right to set aside a will. But there being no express authority for this doctrine, I cannot act upon it. As to that part of the prayer of the bill which prays for a receiver and an injunction, it is not supported by any allegation as to the necessity of preserving the property pending litigation in this court, or in an action at law, which the plt. is clearly entitled to bring. There is no allegation in the bill which would justify the court in entertaining such a case as it attempts to set up. Therefore, I am bound to allow this demurrer, and with the usual result as to costs—the plt. must pay them.

Leave to amend was refused.

Solicitors: for the plt., *A. Chaffers*; for the defts., *Gregory and Rowcliffe*.

V. O. WOOD'S COURT.

Reported by W. H. BENNETT and EDWARD LLOYD, Esqrs.,
 Barristers-at-Law.

Nov. 8 and 4.

DAVENPORT v. DAVENPORT.

Executory trust—Devise in trust for settlement—Estates for life—Usual and proper powers—Waste.

The right of a tenant for life of estates devised upon an executory trust for settlement to take them without impeachment of waste depends upon the intention of the testator, to be gathered from his will, to give to the objects of his devise the fullest possible enjoyment of its subject short of the power of alienation.

The question in this case was, whether or not, in making a settlement of an estate called the Foxley

estate, in pursuance of an executory trust contained in the will of John Davenport, the first and succeeding estates for life should be limited without impeachment of waste, so as to entitle the tenants for life to cut timber, that forming a considerable part of the value of the estate.

The bill was filed by a future tenant for life under the proposed settlement, against the deft., the first tenant for life, and also heir-at-law and sole executor of the testator.

By his will, dated the 28th April 1862, the testator devised his residuary real and personal estate to the deft. his eldest son, with a direction that he should, within twelve months after the testator's death, "make and execute good and valid assurances in the law for settling all that the testator's estate of Foxley to the use of the deft. G. H. Davenport for life, with remainder to his first and other sons successively in tail male, or in tail general, or in tail male with remainder in tail general, or otherwise in tail as the deft. should think proper, with remainder to the plt. for life, with the like remainders to his first and other sons in tail, with remainder to the first and every other daughter of the deft. successively in tail general, with remainder to the first and every other daughter of the plt. successively in tail general, with remainder unto the survivor of them the deft. and the plt., his heirs and assigns for ever. And the testator directed that such settlement should contain such powers of jointuring, of charging with portions for younger children, of sale and exchange, for appointment of new trustees and other powers of the like nature, and for giving effect to such former powers as the deft. should direct, and that the same should also contain all other usual and proper provisions for giving effect to his intention as therein expressed, and all such other powers and provisions as counsel should advise.

It appeared that the testator had bought the Foxley estate in 1855, and that at that time the timber on it was valued at about 40,000*l.*, or one-fifth of the whole purchase-money. Evidence was also brought to show the circumstances under which the testator executed his will, from which it appeared that a draft will had, some time before his death, been prepared by counsel, but that when the draft was brought to him to be read previous to its execution, he was found to be in so precarious a condition that it was probable he would not live long enough to execute it, and therefore the short will set out above was then drawn out on the spot and executed by the testator, who died a few hours afterwards. Evidence was also tendered to show the terms of the draft will, and that in it the estates for life were limited without impeachment of waste, but the court held that such evidence was not admissible. It was admitted on both sides that if the life-estates were to be limited subject to waste, there must still be some provision in the settlement for the cutting of timber for the benefit of the estate. The deft. had procured a settlement to be drawn by counsel in pursuance of the trusts of the will, in which the estates were limited without impeachment of waste, and containing provisions for the felling and sale of timber.

The bill therefore prayed a declaration of the opinion of the court whether or not the estates for life should be limited without impeachment of waste, and if not whether the provisions for the felling and sale of timber so prepared were proper, or whether any, and if any, what other provisions as to timber should be inserted in the intended settlement.

Rolt, Q.C. and *C. Hall*, for the plt., argued that the words of the testator giving a mere tenancy for life were clear; were there then in other parts of the will any expressions which would show an intention to give that estate without impeachment of waste? The direction that the settlement should contain such

powers "as the deft. should direct," could refer only to powers ordinarily incidental to a tenancy for life. The same sense must be put upon the words "usual and proper powers," and a power to commit waste was not one of them. Nor could "such powers as counsel should advise" mean any other than those ministerial powers proper for carrying into effect the intentions elsewhere expressed.

Amphlett, Q.C. and *Martindale*, for the deft., contended that this will was in the form of heads for a settlement, and the question for the court was, what sort of settlement would a conveyancer have drawn if instructions in such a form had been laid before him? The testator had given the very largest discretionary powers of charging the estate, so as to show an intention of giving him the fullest enjoyment of the property, on the sole condition that it should be handed down to the successive donees. The case was thus brought within the principle of

Leonard v. Lord Sussex, 2 Vern. 525;

Bantes v. Lord Le Despencer, 11 Sim. 508; and

White v. Briggs, 15 Sim. 17; s. c. 2 Ph. 583.

Besides, the circumstances of the estate and the course of management pursued by the testator showed that he must have contemplated the regular felling and sale of timber. They also referred to the comments on

Leonard v. Lord Sussex, Fearné Con. Rem. 115; and

Woolman v. Burrows, 1 Sim. 512.

Rolt, in reply, contended that the main element in all the cases cited (that is, an intention to give the fullest possible enjoyment of the estate, consistently with preserving it in the family) was entirely wanting here. There were two sorts of executory trusts for settlements: first, where a testator had prescribed certain limitations, which the court was called on to make legally operative—where he was, as was said, "his own conveyancer"—this was the present case; secondly, where property was merely given "in settlement," or by some such form of words, and it was left to the court or other referee to say what reasonable limitations and provisions should be introduced.

The VICE-CHANCELLOR said, he had no doubt but that the devise in this case was executory in the strict meaning of the term, namely, a devise that could not be carried into operation as it stood, but required a further deed to be drawn up. Where a man was, as is said, "his own conveyancer," no further deed was required, and all the court had to do was to construe his intention and carry it into effect, according to the rules of construction which it had from time to time laid down. But in the case of an executory devise it was different; there the court had power to deal with the limitations to be inserted in the deed, which was, under its direction, to carry out the purpose of the testator. The reason of this distinction was clearly shown from the case of *Papillon v. Voice*, 2 P. Wms. 471; and arose from the fact that the rules of construction as applied to a will and to a deed were different, and that certain alterations must be made in the wording of the latter in order to secure the results which were intended by the former. No doubt the great number of cases of this sort has arisen from the application of the rule in *Shelley's* case, and the limitations contained in the will had been restricted so as to give effect to the general intention—an intention which in the case of marriage articles the court had always presumed from the nature of the contract, but which was not quite so well ascertained in wills;—but generally it was to keep the estate in the family, and subject to that restriction to give the largest possible powers of enjoyment to the persons successively entitled. This was the principle on which all the cases cited in court depended. *Bantes v. Lord Le Despencer* was the strongest case, because there the

two persons to whom estates for life were first given were made punishable for voluntary waste; and yet the court, in drawing up a settlement of the estates after their death, made the tenant for life punishable of waste. This decision might, to some extent, have been influenced by the occurrence in the will of the words "in strict settlement," which had attained a certain technical meaning, and were considered by conveyancers to authorise a settlement of estates without impeachment of waste. He could not, however, gather from this will any intention that the devisee was to take, as against his children, an estate which would enable him to deprive them of a large part of their property; no such intention could be implied from the powers to charge the estates, nor from the devise in fee, for that was immediately connected with the trust to settle; on the contrary, there was a clear and express gift of an estate for life. Again, "powers to be inserted by counsel," "usual and proper powers," must be governed by the general scope of the will; looking at that, and at the nature of the property, and at the fact that powers of exchange were directed to be inserted, so that the tenant for life might cut down timber on the present estate and exchange it for other property also well timbered, and then continue the same course of waste,—there seemed to him to be no such presumption of intent to give the fullest possible enjoyment as had been found in all the former cases. Declare, that the will be established and the trusts thereof carried into execution. A settlement to be made to be approved by the judge in chambers, and which should contain proper powers to trustees to enable them to cut timber in a clear course of management for the benefit of all persons connected with the estate.

Solicitors for plt., *T. White and Sons*, for *Ward, Son and Cooper*, Newcastle-under-Lyme.

Solicitors for deft., *White and Sons*.

Nov. 7 and 17.

Re 22 & 23 VICT. C. 35, and *Re Box's TRUSTS*.

Will—Construction—Shares in public company—Specific legatee—Liability for calls.

When there is a gift of a general residue to one for life, and then over, part of the property consisting of shares not fully paid up, as a general rule, legatees of such shares specifically bequeathed will be liable to pay calls made after the testator's death. But the rule does not apply where there is an intention to be collected from the form of the will that no severance of the property should take place during the life of the tenant for life.

The question in this case arose upon the will of J. Box, dated 30th Dec. 1859, by which, after certain other provisions, the testator gave the residue of his personal estate to trustees, upon trust to permit his wife to enjoy the annual income thereof for her life, without power of anticipation, for her sole and separate use, "and from and after the decease of my said wife, I direct my said trustees and executors to transfer into the name or names of my brother Charles Box, his executors, administrators, or assigns, twenty-six shares in the Phoenix Gas Company, Bankside, and to for his and their own use and benefit absolutely; and to transfer into the names of each of my nieces, Elizabeth Johnson and Martha Johnson, of Stanhope-street, Regent's-park, their executors, administrators, or assigns, fifty New Imperial Gas shares, to and for their own use and benefit absolutely; and into the name or names of my nephew John Box, son of my brother Charles Box, his executors, administrators, or assigns, the remaining fifty shares in the said New Imperial Gas Company, to and for his and their own use and

benefit absolutely. I expressly empower and authorise my trustees to permit my personal estate invested at my decease in or upon any shares, stocks, funds, or securities whatsoever yielding interest, to continue in the same state of investment as long as they shall think fit; but, subject to such discretionary power, I direct them to get in my residuary personal estate not consisting of investments in or upon the public stocks, funds, or other Government securities of the United Kingdom, and to invest the proceeds in their names in or upon such stocks, funds and securities as last aforesaid." The testator then gives certain annuities out of his residuary estate, and ultimately gave the residue of his personal estate, including the stocks, funds, or other securities set apart to answer the annuities when the same should fall in, to the following societies or charitable institutions and in the following proportions: an equal half part thereof to the Aged Pilgrims' Friend Society, an equal fourth part thereof to the Baptist Missionary Society and the remaining equal fourth part thereof to the Baptist Home Mission Society.

At the time of the testator's death he was the holder of 150 new shares in the Imperial Gaslight Company, sixty-six shares in the Phoenix Gaslight Company and other gas companies' shares as to which the main arguments in the case did not apply.

The tenant for life (now eighty-four years of age) presented this petition to obtain the opinion of the court as to whether the testator's estate was to be liable for calls already made, or hereafter to be made, in respect of such of these shares as were not fully paid up, so that the specific legatees of such of these shares as were specifically bequeathed might have all such calls paid out of the residuary estate, or at any rate all calls made during the life of the petitioner; or whether such specific legatees were liable to make good to the residuary estate all sums paid in respect of such calls since the death of the testator, or any part of such sum.

10*l.* per share was still unpaid on the Imperial Gas shares, but it did not appear that any call was apprehended. 2*l.* per share was also unpaid on the Phoenix Gas shares and a final call to that amount had been duly made, which was payable on the 21st Oct. last.

Hanson, for the petitioner, referred to

Clive v. Clive, 1 Kay, 600;

Jaques v. Chambers, 2 Coll. C. C. 435; s. c. 4 Rail. Cas. 499;

Blount v. Hopkins, 7 Sim. 51;

Wright v. Warren, 4 De G. & Sm. 367;

Armstrong v. Burnett, 20 Beav. 424.

Ersine, for the three legatees of the Imperial Gas shares, argued that all the cases had turned upon the point, that the time for severance was the death of the testator, and the reason of this was from the inconvenience which would arise from keeping the estate longer tied up. Here there was no severance till the death of the tenant for life; nor was the gift in the ordinary form subject to her life-interest.

G. L. Russell, for the Aged Pilgrims' Society, contended that the respective liabilities must be fixed as from the time of the testator's death, and that as to the Phoenix Gas shares, the gift over was not specific; while as to the Imperial Gas shares no call had been made or was expected. He cited

Armstrong v. Burnett (*vide sup.*);

Day v. Day, 1 Dr. & Sm. 261; s. c. 3 L. T. Rep. N. S. 167.

F. J. Wood, for the Baptist Missionary Society and the Baptist Home Mission Society, followed on the same side, and cited

Addams v. Ferrick, 26 Beav. 384.

Hanson in reply.

The VICE-CHANCELLOR said, that if this were the simple case of the gift of a general residue to one for life, with a gift over to specific legatees of shares which constituted a part of that residue, although there was some conflict of authority on the point, yet it must be held to be settled by the cases of *Armstrong v. Barnett* and *Day v. Day*, and to be concluded by the principle laid down in *Fitzwilliam v. Kelly*, 10 Hare, 266, and the legatees would take the shares specifically given to them, *cum onere*. This case, however, differed from those cited before him, and must turn on the framing of the will. Here the testator had first given the life-interest to his wife, had then given the shares specifically, and after that had swept the whole of his personal property into a general residue. He had also given the trustees a discretionary power to delay the conversion of existing investments of his estate. He thought this indicated an intention that the wife should have the enjoyment of the property *en masse*; and that upon her death, and not till then, the several parts should be taken out and allotted to the specific legatees. There was no doubt some question as to whether the gift of the twenty-six shares in the Phoenix Gas Company was specific; but he thought that, looking at the whole frame of the will, it was so. A strong argument in some of the cases cited had been, that much inconvenience might arise from the necessity of keeping the estate together; but here the testator expressly contemplated such a condition of things, and it might well be that he did not wish the income of the tenant for life to suffer by the compulsory sale of any of these shares. It was clear that the intention was that these shares should not be sold till after the death of the tenant for life. The answer to the question would therefore be, that the calls on the shares during the life of the testator's wife must be paid out of his general residuary estate. His Honour expressed some hesitation as to whether this was a proper question to be decided upon petition under the Act.

Solicitor for all parties, *L. Mole*.

Tuesday, Nov. 17.

EDYE v. ADDISON.

Covenant—Marriage-settlement—After-acquired property.

A marriage-settlement contained the now usual covenants to settle after-acquired property of either husband or wife to the uses and upon the trusts of the settlement.

A brother of the wife, by his will, devised and bequeathed all his real and personal estate to the husband and wife, their heirs, executors, administrators and assigns, as joint tenants:

Held, that this property was not subject to the trusts of the settlement or the covenants therein contained.

This was a bill filed by the wife named in the following settlement, and it raised the question, whether certain real and personal estate left by the will of her brother to her and her husband jointly was subject to the trusts of that marriage-settlement in pursuance of the covenants therein contained.

The marriage-settlement, dated the 22nd July 1845, on the marriage of John Edey and his wife, the present plt., after reciting that an agreement that any future fortune or property to which the wife might thereafter become entitled (being of the amount therein mentioned) should be settled upon the trusts and for the purposes thereafter expressed, contained certain trust; the first trust being for the benefit of the wife during the joint lives of husband and wife, and for her separate use. There was also a joint covenant, and also separate covenants by both, "that if at any

time during the coverture they, or either of them in her right, should, by descent, succession, or otherwise howsoever, become entitled to any real or personal property or effects of the value or to the amount of 100*l.* or upwards at any one time (other than and except interests which should be restricted to the life of the wife, or which, whether so restricted or not, should be limited and settled to her separate use), then the same should be settled upon the foregoing trusts.

A brother of the wife, John Bell, by his will dated the 22nd Aug. 1861, gave all his real and personal estate, &c. unto and to the use of the wife and her husband, their heirs, executors, administrators and assigns, as joint tenants.

Giffard, Q. C. and Hemming, for the plt.

Rolt, Q. C. and Druce, for the husband, contended that husband and wife could not take as joint tenants, it was a mere absurdity; there could be no severance. They cited

Co. Litt. 187 a;

Atcheson v. Atcheson, 11 Beav. 485;

Warrington v. Warrington, 2 Hare, 54;

Cole v. Wade, 16 Ves. 27.

Osborne, Q. C. and W. W. Cooper, for the trustees of the settlement, submitted that the wife had a present right, which might take effect on the death of the husband, assuming she should survive him, and therefore could be the object of settlement under the covenant.

Logan v. Weinhold, 1 Cl. & Fin. 611;

Ripley v. Woods, 2 Sim. 165:

Attorney-General v. Bacchus, 9 Pri. 30, and 11 Pri. 547.

They also relied on

Atcheson v. Atcheson, ubi supra.

Rolt in reply.

The VICE-CHANCELLOR said, he considered that property passing by a gift of this peculiar description was not contemplated by the framers of the covenant contained in the settlement, and that it did not comprise it. The intention was to deal only with property accruing in the wife's right. There were three classes of property comprised in the covenant; but this property could not be brought within the terms of any one. It was not property coming to them both in her right, but in right of both of them as an entirety, nor did it accrue to either of them singly, in her right. It was, therefore, wholly omitted from the words of the covenant. Nor did it come within the scope or spirit of the covenant. *Primâ facie* the covenant would not embrace property not accruing in possession during the coverture; and this view was strengthened by the exception of property settled to the wife's separate use, as it was by the first trust in the deed and by the recital, which together showed the intention to be merely to guard against the husband's marital right, but to leave the wife to take anything she might take as a discoverer. It was true that the wife might become entitled to this property by survivorship; but then the coverture would be at an end, and the property would be in the same condition as property settled to her separate use during the coverture.

The decree must therefore contain a declaration that the property given by Joseph Bell's will was not subject to the trusts of the settlement or the covenant contained in it.

Solicitors: *Davis and Co.; Johnston.*

Thursday, Nov. 19.

Re HAMPSTEAD JUNCTION RAILWAY COMPANY, *ex parte* BUCK.

Practice—Taxation of costs, L. C. C. A. 1845, s. 82—Landowner's costs.

The costs of surveyors and solicitors in fixing the amount of rent to be apportioned between landowners and a railway company taking land subject to leases, will not be allowed under sect. 82 of the Lands Clauses Act 1845, as costs, charges and expenses of conveyance. Neither do such costs come within the expression (in the deed of apportionment) "of and incidental to the conveyance."

This was a motion by certain landowners to vary the certificate of the taxing master, by which several items were disallowed in their bill of costs relating to the costs, charges and expenses of and incidental to the apportionment of the ground-rents payable in respect of the property taken by the Hampstead Junction Railway, and of and incidental to the preparation of the deed of apportionment of those rents. The special Act of the company was opposed by the landowners, and in consequence an agreement, dated 19th Aug. 1853, was entered into between their agent and the agent of the company, by which it was agreed "that the company should pay for property required a sum equalling thirty-five years' purchase on the ground-rent." In order to carry out this agreement, considerable costs and expenses were incurred in fees to surveyors and solicitors who were employed by the landowners, with the concurrence of the surveyor of the company, in effecting an apportionment of the rents.

A deed of apportionment was subsequently (in Sept. 1857) executed by all parties, which contained a provision that the company "should bear and pay all and singular the costs, charges and expenses of and incidental to the preparation of these presents and the execution thereof." This deed was accompanied by a schedule setting out the several amounts of rents apportioned and the parties to whom they were payable. The items comprising the costs and expenses of ascertaining the amounts of apportioned rents were disallowed by the taxing master by his certificate of the 20th June 1863, and the objections taken to his decision by the landowners were, that these costs and expenses related to the agreement for apportionment which was entered into in pursuance of the imperative directions of the L. C. C. A. 1845, s. 119, and properly came within sect. 82 of the same Act; or that at any rate they came within the special proviso in the deed of apportionment itself.

Giffard, Q.C. and Colt, in support of the motion, argued that the Lands Clauses Act was intended to give the largest protection to the landowner. Now, by sect. 119, an apportionment was imperative; the costs of this apportionment were in fact costs of conveyance, just as, on a sale of an estate subject to a mortgage, was the obtaining the concurrence of the mortgagee. Sect. 82 was intended to give all costs of conveyance in the widest sense; but if these costs were not given by the Act, they were, by agreement between the parties, to be allowed. They were costs incurred in the preparation of the schedule to the deed of apportionment, without which that schedule could not have been drawn, the schedule being an essential part of the deed. They cited

Re Spooner's Estate, 1 K. & J. 220;

Ex parte Phillips, 32 L. J. 102, Ch.; 7 L. T. Rep. N. S. 668.

Cairns, Q.C. and Speed, for the railway company, maintained that the items could not be allowed under the provisions of sect. 82, because they were, in fact, the cost of ascertaining the amount of purchase-money, or were, at any rate, the cost of arranging the

terms upon which the land was to be taken, or consequent upon taking the land. They pointed out the distinction between costs to be paid by the company under this section and costs to be paid under sect. 80 on the compulsory taking of land. Then, upon the provision in the deed of apportionment, the intention was only to provide for the cost of preparing and approving the instrument, and not for the cost of any negotiations which took place before the deed was drawn up. The schedule was merely a statement of conclusions arrived at long before. They cited

Re South Wales Railway Company, 14 Beav. 418. *Giffard* in reply.

The VICE-CHANCELLOR said that he could not under the Act allow the items now sought to be restored to the landowner's bill of costs. Sect. 82 applied only to costs of conveyance, and these costs did not begin to arise until after the subject of conveyance had been ascertained. It might be necessary that the schedule should be examined by the surveyor to see that it corresponded with the facts as ascertained by him from previous investigations, and the costs of perusal might be fairly allowed; but the items which had been disallowed were mainly in respect of costs incurred in arriving at an estimate of the price of the land; sect. 82 was never intended to apply to costs of ascertaining this, or of fixing the subject-matter of the contract. All these items would have been included under sect. 80, and this difference was clearly intended between the provisions of the two sections. He should make no order on the motion; there would therefore be no costs on either side, as he would not give costs against the landowners.

Solicitors for the landowners, *Langley and Gibson*; for the railway company, *N. Carter*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs., Barristers-at-Law.

Saturday, Nov. 7.

REG. v. THE BOARD OF WORKS FOR THE STRAND DISTRICT.

Parochial boundary—Abutting upon a highway.

Where the boundary of property is described as abutting upon a highway, such boundary must be taken (in the absence of evidence the other way) to extend to the middle of such highway.

The northern boundary of the parish of St. Ann, Soho, extends to the middle of the road in Oxford-street.

This was a special case stated upon an application for a rule for a new trial on an issue taken upon a return to a *mandamus*. The *mandamus* issued, on the prosecution of the vestry of the parish of St. Marylebone, the Board of Works for the Strand district to pay certain sums of money required for the expenses of executing the Metropolis Local Management Act (18 & 19 Vict. c. 120) in the parish of St. Ann, Soho; and the question raised was, whether the northern boundary of the said parish of St. Ann, Soho, ran along the middle of the road of Oxford-street, or included only the houses on the south side of that street; the parish of St. Marylebone contending for the former, and the parish of St. Ann, Soho, for the latter.

It appeared, from the facts stated upon the case, that, by the statute of 30 Car. 2, the parish of St. Ann, Soho, was carved out of the parish of St. Martin-in-the-Fields, and it described the boundary of the former as all that precinct included within the bounds hereinafter expressed, viz. "all the houses, &c.

Q. B.]

REG. v. THE RECEIVER OF THE METROPOLITAN POLICE DISTRICT.

[Q. B.]

beginning at the sign of 'The Crooked Billet,' near St. Giles's pound, &c., with all the houses and ground abutting on and upon the said road (Oxford-street) leading from the sign of 'The Red Cow' to 'The Crooked Billet.'" By the 2 Will. & M. c. 8, all streets were to be paved "at the cost of the householders, inhabitants in any such street, by each householder paving the street before his house unto the middle of such street." By the 10 Geo. 3, c. 23, s. 10, that part of Oxford-street was put under the control of commissioners with reference to paving, lighting and cleansing. From the year 1771 to the year 1855, rates were made by the parish of St. Marylebone, under the statutes, upon the occupiers of the houses on the south side of Oxford-street, towards the paving of the street. It appeared that, for the last thirty years, the parishioners of St. Marylebone had perambulated the boundaries of their parish to the middle of the road in Oxford-street, whilst, on the other hand, the parishioners of St. Ann, Soho, had perambulated the boundaries of their parish only to the pavement of the south side. An old map, dated 1771, in the possession of the parish of St. Marylebone, shows the line to be drawn along the centre of Oxford-street.

By sect. 140 of the 18 & 19 Vict. c. 120, powers are given to the board to put the exclusive management of a street which is in more than one parish under one vestry as regards paving, cleansing and lighting, and accordingly in 1857 the board placed the whole of this road under the control of the vestry of St. Marylebone. In the year 1858 the vestry of St. Marylebone made orders on the Strand district (which includes the parish of St. Ann, Soho), requiring such board to pay 436*l.* 10*s.* and 174*l.* 2*s.* required for defraying the expenses of executing the Metropolis Local Management Act. By each of such orders the said Strand district had been charged a sum bearing the same ratio to the whole sum expended in maintaining the southern half of Oxford-street that the length of the part between Crown-street and Wardour-street measured according to lineal frontage bears to the whole length of the said southern side of Oxford-street so measured.

Keane (Petersdorff, Serjt. with him) argued that the evidence and presumption of law went to show that the boundary line of the parish of St. Ann, Soho, was the middle of the road in Oxford-street.

Batterby v. Gingsell, 1 Ex. 315;

Berridge v. Ward, 10 C. B., N. S., 400;

St. Botolph v. Whitechapel, 29 L. J. 228, M. C.;

18 & 19 Vict. c. 120, ss. 140, 160;

2 Will. & M. c. 8, s. 6;

8 & 9 Will. 3, c. 137;

10 Will. 3, c. 23, ss. 10, 66, 70, 71, 72;

35 Geo. 3.

Macnamara (Bovill, Q.C. with him) contended that the question must depend upon the language of the 30 Car. 2, which created the parish of St. Ann, Soho, and which clearly defined the northern boundary as "the houses abutting on the said road," which therefore excluded the boundary of the middle of the road as contended for by the other side.

Keane in reply.

Cockburn, C. J.—I am of opinion that the judgment of the court must be for the Crown. As to the first point, the *defts.* rely entirely upon the words of the statute of 30 Car. 2, which carved the parish of St. Ann, Soho, out of the parish of St. Martin-in-the-fields, and the question turns upon this, whether, by the statutory description of the boundary, as being the houses abutting on the street, we are to understand that the boundary was in reality the middle of the street or highway—the *medium flum*? Now, it is quite clear that, to put any other construction upon the statute would lead to the greatest inconvenience;

for, according to the contention of the *defts.*, if the southern half of Oxford-street is not in St. Ann's parish, it must still be in the parish of St. Martin-in-the-fields, seeing that the boundary of the parish of St. Marylebone only includes the northern half of Oxford-street. In all acts and conveyances of land which abut on a river or a highway, it is never the practice to describe the boundary as being the middle line of the stream or highway, though in legal effect it always is so, unless the contrary is expressed. Therefore that is *prima facie* the right construction here also. So far as the evidence goes as to perambulations, St. Marylebone parish goes along the *medium flum* of the road, and therefore the legal presumption is very strong that St. Ann's parish includes the other half. Moreover, it has been the practice of the parish of St. Marylebone to repair the whole street, and call upon St. Ann's to contribute its proportion. Therefore, both upon principle and according to the practice which has prevailed, we must hold that the southern half of Oxford-street was part of the parish of St. Ann, Soho.

WIGHTMAN, BLACKBURN and MELLOR, JJ. gave similar judgments.

Judgment for the Crown.

Saturday, Nov. 14.

REG. v. THE RECEIVER OF THE METROPOLITAN POLICE DISTRICT.

Metropolitan police—Superannuation allowance—
2 & 3 Vict. c. 47, ss. 22, 23.

The superannuation allowances to the metropolitan police constables, granted by the Secretary of State under the provisions of the 2 & 3 Vict. c. 47, s. 23, are revocable at his pleasure.

On the 28th April 1862 a rule was granted calling on the Receiver for the Metropolitan Police District, to show cause why a *mandamus* should not issue directed to him commanding him to pay or issue a warrant or order for the payment to Colin Alexander Milne Grant of two several sums of 15*l.* 15*s.* and 15*l.* 15*s.*, being two quarterly instalments of a certain pension or superannuation allowance granted to him under and by virtue of the statute 2 & 3 Vict. c. 47; and upon the said rule coming on to be argued it was ordered by the court that the writ should issue, and that a special case should be stated for the opinion of the court, the only question therein to be whether the said grant to the said C. A. M. Grant of the said superannuation allowance is permanent or revocable.

The following is the case as stated:—

The said C. A. M. Grant was a constable, and served as such continuously and with diligence and fidelity in the Metropolitan Police Force for upwards of twenty years; that is to say, from the 9th March 1840 until he was in the year 1850 appointed to the rank of inspector in the said force, and from thence as such inspector up to and until the 1st Sept. 1860. He was admitted into the police force upon the conditions applicable to all members of the force, and made known to him at the time of his appointment, that the commissioners might, if they thought fit, dismiss him without assigning any reason. After the passing of the 2 & 3 Vict. c. 47, a fund called the "Police Superannuation Fund" was duly formed and invested in the name of the said receiver under and according to the provisions of the said statute, and during the whole of the said service of the said C. A. M. Grant there was, in pursuance of the said provisions, compulsorily deducted from his pay a sum at the rate of 2*l.* 10*s.* per cent. towards and for the purposes of the said fund. By the rules and practice on the said 1st Sept. and still in force with respect to the payment of pensions and superannuation allowances to constables of the said force and of the office of the said receiver, all pensions and superannuation allowances ordered by the Secretary of State to be paid out of

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the said fund in pursuance of the said statute were payable by the said receiver by quarterly instalments. For some years previous to the said 30th Aug. 1860 the said C. A. M. Grant had suffered severely from repeated attacks of bronchitis and rheumatism, and in consequence thereof had been frequently incapacitated from the performance of his duty and placed on the sick-list of the surgeon of the division of police to which he was then attached; and on the 16th Aug. 1860 he was examined by his then divisional surgeon, who then gave the said Commissioners of Police the following certificate:—

"Divisional Surgeon.

"The 16th day of Aug. 1860.

"I certify that police inspector Colin Alexander Milne Grant, No. —, of the C division, is incapable of the further discharge of the duties of his office from an infirmity of body arising from frequent attacks of bronchitis, with chronic rheumatism, affecting the large joints.

(Signed)

"F. D. TOTHILL, Surgeon.

"To the Commissioners of Police."

And on the 17th Aug. 1860 the said C. A. M. Grant was examined by the surgeon-in-chief of the said police force, Sir John William Fisher, who then told him that he would have to be re-examined at the end of twelve months, and gave to the said Commissioners of Police the following certificate:—

"Surgeon-in-Chief.

"The 17th day of Aug. 1860.

"I certify that inspector C. A. M. Grant, No. —, of the C division, is permanently incapable of the further discharge of the duties of his office, from an infirmity of body arising from chronic bronchitis and chronic rheumatism. To be re-examined at the expiration of twelve months.

(Signed)

"F. W. FISHER,
Surgeon-in-Chief.

"To the Commissioners of Police."

And thereupon the then Commissioner of Police, D. Labalmondiere, Esq., sent to the then Secretary of State the medical certificates above set forth, together with a recommendation and certificate respecting the said C. A. M. Grant, which said recommendation and certificate are in the words and figures following:—

"Metropolitan Police-office, 4, Whitehall-place,
Aug. 24, 1860.

"Sir,—I have the honour to state for the information of Secretary Sir George Lewis, that the police constables named in the annexed list have applied for leave to retire upon superannuation allowances under the provisions of 2 & 3 Vict. c. 47, s. 23, and the medical certificates of their unfitness for further service in the police are inclosed. The constables have served in the police for the period stated in the list in which their respective ages and yearly amount of pay are also specified. I beg leave to recommend that superannuation allowances may be granted to these constables, who have performed their duty with diligence and fidelity, and whom I certify to be incapable from the causes stated in the respective medical certificates to discharge the duties of their office.—I have the honour to be, &c., &c.

"D. LABALMONDIERE.

"H. Waddington, Esq."

Then followed a schedule of names, in which that of C. A. M. Grant appeared, with the date and length of his service, his age (forty-nine years), and his rank in the force, and the amount of his pay, with this note appended:—

"To be re-examined by the surgeon-in-chief at the expiration of twelve months."

And thereupon, on the said 30th Aug. 1860, the then Secretary of State wrote the following letter to the Receiver of Police:—

"Whitehall, 30th Aug. 1860.

"I am directed by Secretary Sir George Lewis to inform you, for your guidance, that upon the recommendation of the Commissioners of Police he has been pleased to grant allowances to the following officers, who are certified to be worn out and unfit for further duty, after a police service of above fifteen years:

"Superannuation Allowance.

"Inspector Colin Alexander Milne Grant, 63*l*.

"I am, &c.,

"The Receiver of Police." "H. WADDINGTON.

The pay of the said C. A. M. Grant, at the time of the making of the said order, amounted to 118*l*. 6*s*. per annum. Thereupon the said C. A. M. Grant received from the said Commissioners of Police a certificate, of which the following is a copy:—

"Metropolitan Police.

"This is to certify that C. A. M. Grant, C division, joined the Metropolitan Police, as constable, on the 9th March 1848, and resigned his appointment as inspector on the 1st Sept. 1860, having been allowed a pension of 63*l*. per annum. His conduct was very good.

"Given under our hands and seal of the Metropolitan Police,

"SOLOMON HANMANT,

"Superintendent.

"WM. C. HARRIS,

"Commissioner of Police of the Metropolis.

"Whitehall-place, 5th Sept. 1860."

The retirement of the said C. A. M. Grant was notified according to the usual practice in such cases in the general police orders signed by the chief of the said commissioners as follows:—

"Pensions: C. Inspector Grant. Worn out."

"Resignations: C. Inspector Grant. Certificate, No. 1."

In accordance with the custom of the said police force, upon the permanent retirement of an inspector, which custom is acquiesced in but not officially sanctioned by the said chief commissioner, a voluntary contribution was made by the greater part of the inspectors of the said force, amounting to the sum of 39*l*. 15*s*., for the benefit of the said C. A. M. Grant. It is not the custom to make such contributions in cases of mere temporary retirement. The said superannuation allowance was duly paid by the said receiver to the said C. A. M. Grant up to the end of the year 1861, by quarterly instalments. After the expiration of a year from the granting of the said allowance, viz., on the 24th Oct. 1861, the said C. A. M. Grant was again examined by the said Sir J. W. Foster, who was of opinion, and reported to the Commissioner of Police, that the said C. A. M. Grant was able to resume his duty, and the said C. A. M. Grant was then required to resume duty, but refused to do so, and therefore the said commissioner reported to the then Secretary of State that the said C. A. M. Grant had been re-examined by the chief surgeon of the said force, and had been reported by him to be fit to resume his duty in the said force, but refused to do so. And the then Secretary of State then authorised the said receiver to discontinue the payment of the said superannuation allowance. Subject to the effect (if any) of such authority of the said Secretary of State as before mentioned two sums of 15*l*. 15*s*. and 15*l*. 15*s*., being two further quarterly instalments of the said allowance, became payable respectively on the 1st Jan. 1862 and the 1st April 1862, and the payment of the same was afterwards duly demanded of the said receiver by the said C. A. M. Grant. It is admitted for the purposes of this case, although not as a fact for any other purpose, that at the times when the said sums so became due, and at the time of such demand of payment, the said receiver had in his hands funds properly and in pursuance of the statutes in that behalf applicable to the payment of all such superannuation allowances suffi-

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cient for the payment of the said allowance of the said two sums above mentioned, but the said receiver, when payment was so demanded absolutely refused, and still refuses, to pay the same respectively, on the ground of the said authority from the said Secretary of State to discontinue the said allowance.

The question for the court is, whether the grant of the superannuation allowance was permanent?

By the 2 & 3 Vict. c. 47 (An Act for further improving the police in and near the Metropolis), it is enacted by sect. 22 that a superannuation fund shall be provided by a deduction from the pay of each constable not exceeding 2*l.* 10*s.* in the 100*l.*, &c., which fund is to be invested in Government stock by and in the name of the receiver, which fund is to be applied from time to time for payment of such superannuation or retiring allowances or gratuities as may be ordered by the Secretary of State at any time, to any of the said constables as hereinafter provided.

Sect. 23 enacts, "That it shall be lawful for the Secretary of State to order that any of the said constables may be superannuated and receive thereupon out of the police superannuation fund a yearly allowance subject to the following conditions, and not exceeding the following proportions; that is to say, if he shall have served with diligence and fidelity for fifteen years and less than twenty years, an annual sum not more than half his pay; if for twenty years or upwards an annual sum not more than two-thirds of his pay; provided that if he shall be under sixty years of age it shall not be lawful to grant any such allowance unless upon the certificate of the said commissioners of police that he is incapable from infirmity of mind or body to discharge the duties of his office; provided also, that if any constable shall be disabled by any wound or injury received in the actual execution of the duty of his office it shall be lawful to grant to him any allowance not more than the whole of his pay; but nothing herein contained shall be construed to entitle any constable absolutely to any superannuation allowance or to prevent him from being dismissed without superannuation allowance."

Hawkins, Q.C. and *Holl* appeared for the prosecutor, C. A. M. Grant, and argued that the superannuation allowance being once granted it could not be revoked, for although it may be discretionary in the Secretary of State to grant the allowance, yet the statute clearly contemplates that such grant is to be permanent. That having ceased to be a constable he could not be required to resume his duties, and that the Commissioners of Police had no longer any jurisdiction over him. [BLACKBURN, J.—The question is whether the order of the Secretary of State is revocable. In ordinary cases it may well be imagined that the pension once granted will not be withdrawn, but there may be exceptional cases, and it is said this is such a case.] The prosecutor's resignation was actually received, and he no longer belonged to the force. It is hard upon him that having for more than twenty years contributed to the fund from his pay, he should now be deprived of his allowance.

Field, contra, contended that the superannuation allowance was revocable, and only payable at pleasure; that it being admitted that the constable may be discharged at pleasure there is no greater hardship than though he had been discharged without an allowance.

Rea v. The Lords Commissioners of the Treasury, re Hand, 4 A. & E. 984; 10 Geo. 4, c. 44, ss. 5, 12; 20 & 21 Vict. c. 64, s. 15.

The fact that he was to be re-examined at the end of twelve months shows that there was a reservation. There are good reasons why the allowance should be revocable; he might commit a crime, or come into a large fortune, or obtain another lucrative office.

Hodgson v. The Mayor of Hull, 4 Ell. & Bl. 986.

Hawkins, Q.C. in reply.

BLACKBURN, J. (a)—I think, in this case, looking at the section of the Act of Parliament, we are bound to give our decision for the deft., on the ground that there is no legal right in the constable to insist on the payment of this annuity. The question very much turns upon the 12th section of the 10 Geo. 4, c. 44, by which the Secretary of State was first authorised to grant an allowance to such constables as should be disabled by bodily injury received, or should be worn out by length of service; and under that statute it is clear that such allowances were paid, not as a matter of right, but upon orders which, in legal effect, would be precarious. Then comes the 2 & 3 Vict. c. 47, and the 22nd section constitutes a superannuation fund, which is derived from deductions from the pay of the constables and some other sources; and the next section gives the Secretary of State a power to order superannuation allowances in certain cases. Then we must see if the Secretary of State has given an allowance in this case which is irrevocable. Now, the police constable holds his office not as of right or to be continued, but it is an office from which he may retire upon giving a month's notice, and also he may be dismissed without any grounds being assigned. It is therefore fair to assume that the allowance is only a gratuity. The deduction from the pay of the constable would certainly lead to the belief that he has a right to the allowance. It is, however, answered that all the constables have to contribute to this deduction, and yet they may be dismissed without cause. In looking at the *Hull* case, there there was a superannuation fund, and the party was, by the words of the statute, entitled as of right; but here it is not so. The Legislature by sect. 23 says that "it shall be lawful for the Secretary of State," &c., which shows that the grant of an allowance is not imperative; and the section points out the proportions in which the allowance is to be made, with the condition, that if the constable is under sixty years of age he must appear to be incapable from infirmity of mind or body. It stands then, that the Secretary of State may order, but is not bound to order, a superannuation allowance. But we must look at the Act to see what are the express words and general meaning. Now there are no words certainly which say it shall be as of right, and at the close of the section it says, "but nothing herein contained shall be construed to entitle any constable absolutely to any superannuation allowance, or to prevent him from being dismissed without superannuation allowance." It seems, therefore, to me, that the Secretary of State has power to revoke the allowance, although we may feel assured that he never would revoke it without some good and sufficient reason. In this case there is a reason, for the Secretary of State seems to think that there having been a qualification that the constable should be again examined, and upon his examination he being certified to be fit to resume his duty and refusing to go back to his duty, he had a fair ground for revoking the allowance, which allowance being so revoked, the receiver was justified in not paying it. It seems to me that these superannuation allowances may be revoked, and that this court cannot review the decision of the Secretary of State upon the subject.

MELLOR, J. delivered a similar judgment.

Judgment for the deft.

(a) The Chief Justice was absent from indisposition, and Wightman, J. was sitting in the Court for Crown Cases Reserved.

Friday, Nov. 13.

LAYCOCK v. PICKLES AND OTHERS.

Account stated—Executory consideration.

At a meeting between plt. and defts., one of the defts. made out a written statement of the accounts between them, from which it appeared that plt. owed defts. 111l., and the defts. owed the plt. 67l. It was verbally agreed between them that plt.'s interest in land upon which the defts. had an equitable mortgage by deposit of the deeds should be taken by defts. at 70l. and that amount added to the 67l., which would leave a balance of 26l. against the defts. It was ultimately agreed that the balance should be fixed at 22l.:

Held, that this statement of account was sufficient to entitle the plt. to recover the balance on an account stated, the plt. having before action conveyed the land:

Held, also, that it was not avoided, because there was no written agreement by which defts. agreed to purchase the plt.'s interest in the mortgaged land for 70l.

This action was brought in the County Court of Leeds, Yorkshire, to recover 22l., stated in the particulars of demand to be due for work and labour done and performed and materials found and provided by the plt. for the use and on account of the defts. at their request, and also upon an account stated.

The case came on for trial on the 2nd Feb. 1863, and was adjourned from time to time to the 1st day of April following, when it was heard for judgment, before T. H. Marshall, Esq., judge. On the trial the plt.'s attorney stated that he should proceed on the account stated only; and the facts proved, so far as they are material to this appeal, are as follows:—

The plt. previous to 1860 purchased of D. Metcalf a plot of land by an agreement in writing for 123l. 12s. He paid a deposit on the purchase and subsequently several instalments of the purchase-money and interest on the balance owing from time to time. The vendor, however, never executed a conveyance to him.

In 1860 the plt. was indebted to the defts. and their copartner Edward Taylor (who carried on business under the firm of Pickles and Co.) in a considerable sum, and being required to pay the same, he deposited with them the purchase agreement before mentioned, and executed an indenture bearing date the 26th April 1861, whereby he charged his interest in the said land with the sum of 100l. stated to be owing from him to said defts. In 1861 the plt. made a contract with the said Pickles and Co. to build certain houses for them. He also did other work for and supplied materials to them. During the progress of the contract the plt. became embarrassed and called his creditors together, and along with his principal creditors he had an interview with G. E. Taylor, one of the defts., and at such interview a builder named Wilks was appointed by all parties concerned to value the work done by the plt. on the contract, and to ascertain the sum due in respect thereof. The valuation was completed, and on the 6th Feb. 1861 the plt., the defts. and Wilks met together, and Wilks made out a statement in writing for the purpose of ascertaining the state of accounts between the plt. and the said firm of Pickles and Co. From that account and the evidence it appeared that the said firm were at the time of taking such account creditors of the plt. to the extent of 111l. and owed him 67l. for work done for them, leaving plt. indebted to the said firm on the cross-accounts before mentioned 44l. or thereabouts. These accounts having been ascertained and agreed to at the interview above named, the value of the plt.'s interest in the land which he had bought of Metcalf, and on which the defts. held the equitable security as before mentioned, was also calculated and fixed at 70l., which sum being added to the credit of the plt.'s said account with

the defts. created a balance in the plt.'s favour of 26l. It was proved in the judge's opinion (though the fact was denied by the defts.), that the deft. G. E. Taylor, on behalf of the said firm, at the said interview, verbally agreed to take the plt.'s interest in the land at the above-named sum of 70l., but having made some objection to the balance of 26l. as being too great a sum, he agreed that such balance should be taken at the sum of 22l., to which the plt. assented. The plt. had not sued E. Taylor, the third partner in the said firm of Pickles and Co., the County Court Act, 9 & 10 Vict. c. 95, s. 68, enabling the plt. to sue any one or more of joint debtors without being subject to a plea of non-joinder.

It was admitted by all parties that no memorandum in writing either before, at, or after the said interview had been entered into or signed by the plt. or the defts., or any of them, or by any one on their or his behalf, for the purchase of the plt.'s interest in the land before mentioned, or that they would pay the said balance to the plt.

The land so verbally agreed to be purchased of the plt. was subsequently sold by the said defts., and conveyed by them to W. K. Duxbury, the deed of conveyance bearing date the 15th Oct. 1862, and made between the above-named D. Metcalf of the first part, the said T. Laycock of the second part, the said G. E. Taylor and D. Pickles of the third part, one John Jackson of the fourth part. and the said W. K. Duxbury on the fifth part.

It was contended for the defts. that there was no legal evidence to support the plt.'s demand for 22l. on an account stated; that any assent to or adoption of that balance by the defts. formed in reality one of the terms of a contract for a sale of lands, or some interest concerning them, and was required by the Statute of Frauds to be in writing signed by the parties charged therewith, or by some person lawfully authorized thereto, and that no such memorandum in writing had been proved; that, in point of law, there was not sufficient evidence of the said account stated; that there was no evidence of any subsisting debt to support the same, but that the contrary was proved.

On the above facts the judge of the said County Court held that there was sufficient evidence of an account stated between the parties on which the plt. was entitled to recover the sum of 22l., for which sum a verdict was accordingly entered, overruling the points raised on behalf of the defts.

The question for the opinion of the Court of Q. B. was, whether the said ruling and determination of the judge of the County Court was correct in law.

Quain for the defts., and

T. Jones for the plt.

Cases cited:—

Porter v. Cooper, 1 C. M. & R. 387;

Cocking v. Ward, 1 C. B. 858;

Lemere v. Elkott, 6 H. & N. 656; 4 L. T.

Rep. N. S. 304;

Hopkins v. Logan, 5 M. & W. 241;

Gough v. Finden, 7 Ex. 50;

Earl of Falmouth v. Thomas, 1 C. & M. 89;

Kelly v. Webster, 12 C. B. 283;

Dawson v. Reynolds, 6 Esp. 24;

Pickard v. Sears, 2 C. M. & R. 48;

Guthing v. Lynn, 2 B. & Ad. 232;

Bradburne v. Bradburne, Cro. Eliz. 149;

Com. Dig. "Action on the Case," "Assumpsit," B. 13.

WIGHTMAN, J.—It appears that there were debits and credits on both sides, and the parties seem to have been desirous of settling all the accounts between them, and of striking a balance, and it was agreed that the amount to be paid for the conveyance of the lands should be fixed at 70l. and reckoned in the account which was stated, subject to a deduction which was

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allowed by the plt. The conveyance which may be said to be the consideration for that payment was afterwards duly made; but the agreed sum was to be regarded between them as due and payable then. If the consideration of the account stated had failed, that might no doubt have been an answer to an action for the balance of that account stated; but it seems to me that, after the consideration has been executed, the account stated cannot be avoided by showing that "the assent to or adoption of that balance by the defts. formed in reality one of the terms of a contract for the sale of lands, or some interest concerning them, and so was required by the Statute of Frauds to be in writing, signed by the party to be charged therewith." It is said, in some of the cases, that an account stated cannot be founded upon an executory agreement. But this case differs from those cited in this respect, that here the item of the purchase-money was in effect treated by agreement as if it had been actually paid by defts. It is for the balance agreed to be due upon the whole account that the action is brought. The settlement of the whole account included many matters which may have been of very great advantage to the defts. I therefore think that the stating of the account itself was a sufficient consideration to support an action upon it, subject, however, to its being defeasible by the nonperformance of the conveyance, the execution of which was the consideration of one of the items.

BLACKBURN, J.—I am of the same opinion. The question is, whether the balance of 22*l.* can be recovered on an account stated. We are apt to treat an account stated as a mere admission of a debt; but strictly speaking, an admission of a debt is merely evidence of an account stated. An account stated is properly equivalent to what used to be in the old law *insimul computasset*, where there were several items of claim brought into account, and these were set against each other and a balance struck, and in that case the consideration for the promise was the different items being discharged. It is exactly as if each of these discharged items had been paid and the money handed over and handed back again, and a mutual discharge given, and in consideration of the discharge on each side the balance had been agreed to. I do not think that in order to make a valid account stated the debts should be due *in presenti*, or that all the claims brought into the account should be legal claims; equitable claims will do, and I am not certain that they need be enforceable in law or equity. I think that claims founded merely upon moral obligations might be taken into account, and the balance might then be struck, subject to this, that if the nature of some of the items be such that supposing the party had really paid the money he would be entitled to recover it back as upon a failure of consideration, then the court may inquire into the account stated and invalidate it. That view of the law is consistent with Com. Dig. tit. "Pleader" 2 G. 11, where it is said, "So to an *assumpsit* the deft. may plead that since the promise made he and the plt. *insimul computaverunt et super computationem illam ipse inventus fuit* in arrear so much which he has paid." And further on, referring to a case in Levinz, "But an account without payment or release is no plea to an *indebitatus assumpsit* (R. 3 Lev. 238), for a *chose in action* cannot discharge a matter executed." Where there are several cross-claims, then it is an account stated discharging the items on each side. That was decided in the case of *Milward v. Ingram*, 2 Mod. 44, by North, C. J., and I apprehend that is good law at the present day. The same principle was applied in the decision of the case of *Dawson v. Remnant*, 6 Esp. 24, where there is an intelligible principle laid down. I have no doubt that it is a true report of what Sir James Mansfield said, with one exception, that the reporter makes

him speak of a "set-off" when it is clear from facts that he spoke of a "settlement of account." I take it to have been arranged between the parties that the equity of redemption of the mortgaged premises should be considered as worth 70*l.*, and that the 70*l.* should be considered as paid by the defts. to the plt., and immediately paid back by the plt. to the defts. in part discharge of 111*l.* due from the plt. to the defts., and that the residue of the 111*l.* should be paid by the plt. to the defts., and the sum of 67*l.* due from defts. to plt. should be also paid, and that in consideration, and as the result of all this, the defts. should pay the plt. 22*l.* Had the plt. really paid the 70*l.*, and it had been actually returned, he could not now have recovered it back I think. The objection made is, that the defts. could not enforce the agreement for the transfer of the equity of redemption because it was merely by word of mouth. That is true, but if the 70*l.* had been actually paid down, the defts. could never have recovered it back without showing that the plt. had been requested to convey the equity of redemption and had refused. But there was nothing at the trial before the County Court judge to show that the plt. had been asked to convey the equity of redemption and had refused, and I think that the fact probably was, that the conveyance executed was intended by the plt. as a fulfilment of that bargain. But whether that be so or not, I am of opinion, for the reasons I have stated, that there was a sufficient account stated, and that the plt. is entitled to our judgment.

MELLOR, J.—I confess that at first I doubted whether or not, upon the finding of the County Court judge, this balance of the 22*l.* was the result of a real accounting, so far as the price of the equity of the redemption was concerned. But, upon a more careful consideration of the effect of that finding, I think that abundant reason is disclosed to show why it should be reasonable and proper that the price should be brought into the account which the parties were stating. Therefore, there being a real account and a real statement of cross-items, I entirely agree with the conclusion which my brothers have come to, and I do not think it necessary to add anything to the reasons which were assigned for coming to the conclusion at which they have arrived.

Judgment for the plt.

Attorney for the plt., *Fiddey*.

Attorneys for the defts., *Torr, Janeway and Taggart*.

Monday, Nov. 16.

PARRY v. THE GREAT SHIP COMPANY (LIMITED).

Judgment and execution—Agreement to stay proceedings—Breach of.

An action having been brought to recover a sum of money, it was agreed that the defts. should withdraw their plea, and all further proceedings be stayed upon the terms (inter alia) that the defts. should insure and keep insured a certain ship. The ship was accordingly insured for a certain voyage, and on the expiration of the policy, slips of policies for other policies were signed, but the policies themselves were not effected until three days after the expiration of the former policy. The plt. having signed judgment and issued execution for his debt on the ground of a breach of the agreement:

Held, that the slips of policies were not a binding legal insurance, and that the plt. was entitled to retain his judgment.

This was a rule calling upon the plt. to show cause why the judgment signed therein and the execution issued thereon should not be respectively set aside.

It appeared that the plt. having brought an action

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against the defts. the following agreement was come to between them:—

"In the Queen's Bench, between Robert Lorton Parry, plt., and the Great Ship Company (Limited) defts.

"We hereby consent that all further proceedings herein be stayed, the defts. withdrawing pleas, no judgment to be signed if mortgage for 5350*l.* (on same terms as to interest and insurance as present debentures, the insurance policies to be in common form) be delivered to the plt. within one week, and the costs be paid on taxation and so long as the amount above mentioned is kept insured.

"M. N. LEVERSON,
"Defts.' attorney."

A policy was then effected for the voyage then contemplated, and on the 20th Sept. the ship arrived at Liverpool, the existing policy expiring three days after, viz. the 23rd. On the 22nd slips of policies were signed by the Oriental and General Marine Insurance Company on the ship for 5000*l.*, and by Lloyd's for 350*l.*, but no actual policies were tendered to the plt. until the 30th, when two policies, one for 5000*l.*, bearing date the 27th, and the other for 350*l.*, bearing date the 24th Sept., were tendered. It further appeared that on the 28th the plt. made application by a clerk to the defts.' secretary for the policies, and was informed that in consequence of some delays, which were explained, they were not obtained, but that they should be handed over as soon as received. The plt. had been previously made acquainted with the fact of slips of policies having been signed. On the 28th judgment was signed and execution issued, and on the following day possession was taken.

M. Smith, Q. C. and J. M. Morgan showed cause, and argued that the judgment and execution were perfectly regular and justified; for that, as the condition of staying proceedings was the keeping of the ship insured, that condition was broken by there being no insurance covering the three days from the 23rd to the 27th Sept., the slips of policies not being any security in themselves, and not having any legal binding effect upon the insurance companies.

Lush, Q. C., contra, contended that, according to the understanding of mercantile men, the ship was insured as soon as the slips of policies were signed, such documents always being treated as an effectual insurance, though not perhaps effectual at law. There must be time allowed for getting the formal policies made out and executed. [COCKBURN, C.J.—That would no doubt be if this were merely an agreement to insure; in such a case the slips would first be given and then in due time the policies themselves would be delivered; but here the agreement is to *keep insured*, and there seems no reason why the insurance should have not been effected before.] Even if this be so, the court will in the exercise of its equitable jurisdiction give relief when it finds that the parties have acted *bona fide*, and no damage has resulted.

Arnould on Insurance, p. 95.

COCKBURN, C.J.—I am of opinion that this rule should be discharged. We are not called upon to say whether this is a handsome or an honourable proceeding on the part of the plt., but whether he is entitled to retain his judgment. Now it appears that the plt. brought his action against the defts. to recover a debt which was due, and it was agreed that judgment and execution should not be enforced on certain terms. These terms were, that the plt. should be put in the same position with other mortgagees with respect to their debentures, and to deliver certain policies of insurance, which insurance is to be kept up, and the question is, whether the policy has in fact been kept up? But it appears that upon the original policy expiring, several days elapsed before any new policy was executed. Certainly "slips" were signed,

and no doubt such slips are in the mercantile world considered as binding; but still they did not constitute a legal obligation. They constituted only an honorary obligation, and could not be made available at law. The vessel, therefore, was not, correctly speaking, insured. I do not know what a court of equity might say; but, sitting here in a court of law, we cannot say that the vessel was legally insured. I see no evidence of bad faith on the part of the plt. to warrant our setting aside the judgment. It may be a question, whether or not the plt.'s conduct has been as generous and liberal as it might have been; but it is quite clear that the agreement has not been fulfilled, and that, therefore, the plt. is entitled to keep his judgment.

WIGHTMAN, J.—The agreement was absolutely to keep the vessel insured: this has not been done. The defts. might have taken the necessary steps for the purpose earlier, and so have avoided the difficulty.

BLACKBURN, J.—The agreement is, that judgment shall not be signed so long as the ship is kept insured: not that reasonable efforts shall be made to effect an insurance, but be absolutely insured. It is true, as a fact, that the plt. has sustained no damage, and no doubt, if an action had been brought for the default, he would have recovered only nominal damages; and it seems hard that, such being the case, he should be allowed to seize and sell the ship; but in a mere case of hardship this court cannot interfere. This is not an abuse in the sense in which that term is understood. There has been no fraud.

MELLOR, J.—Mr. Lush says this agreement must be construed according to mercantile usage; but that is not so, for here an action had been brought which is stayed upon certain terms being agreed to for an insurance, and we are all agreed that "keeping insured" means keeping "actually insured."

Rule discharged.

Wednesday, Nov. 18.

HALL (app.) v. KNOX (resp.)

Poaching—Proceeding under 25 & 26 Vict. c. 114, s. 2—Search.

To entitle a constable to summon a party under 25 & 26 Vict. c. 114, s. 2, whom he has reason to suspect of coming from land where he shall have been unlawfully in search or pursuit of game, it is not necessary to make an actual search of his person, if, after having heard reports of a gun, he sees him with a gun in the direction of the reports, and in the act of picking up game (though in a highway), and the offender then runs away.

Case stated by justices of the peace in petty sessions at Alnwick, Northumberland, on the dismissal of an information preferred by William Hall against William Knox.

The information charged "that the said W. Knox on the 20th June last, at &c., having been found by the said W. Hall, a constable of the said county, in a certain public place, to wit, a footway leading from &c., who then and there had good cause to suspect the said W. K. of coming from land where he had been unlawfully in search or pursuit of game, and having in his possession a certain gun which had been used for unlawfully killing and taking game."

It appeared that the constable heard the report of a gun, and went along a public footpath in the direction of the report, when he heard a second report, and proceeding further he heard another report, saw the smoke, and immediately afterwards saw the resp. with a gun in his hand on a public footpath; he also saw a person inside the inclosed land adjoining, who threw a rabbit on to the footpath close to the resp., who then changed the gun from his right to left hand, and was in the act of picking up the rabbit, but before doing it he saw the constable and ran away. The

constable seized the rabbit and followed the resp., but was not able to get hold of him.

On these facts it was contended that an actual search of the person of the resp. was not necessary to bring the case within the 25 & 26 Vict. c. 114, s. 2, and that if it was, a constable might search with his eyes as well as with his hands, and that the constable had seen all that was necessary to constitute the offence.

On the other hand it was contended that, to give jurisdiction to summon or hear and determine a case under this Act, an actual search was necessary, and then, if the constable finds game unlawfully taken or a gun unlawfully used, he may apply for a summons, and that if the constable cannot make the search by reason of the offender running off, he may proceed under the Game Act against him for poaching or trespass in pursuit of game.

The majority of the bench considering an actual search necessary, dismissed the information.

The 25 & 26 Vict. c. 114, s. 2, enacts, "That it shall be lawful for any constable or peace officer in any county, &c., in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid, upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices in petty sessions as provided by 18 & 19 Vict. c. 126, and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, &c. (then follows a liability on conviction to a penalty not exceeding 5*l.* and forfeiture of the game, guns, nets and engines.)

Kempsey for the app.—The offence under sect. 2 is the unlawfully going on land in pursuit of game, and this clause was intended to give police officers the additional power of search, and not to alter the character of the offence. Searching is not a condition precedent to the laying of an information under the section under the 1 & 2 Will. 4, c. 32, ss. 30 to 36. Here the man is seen with the gun and in the act of picking up the game, and in such a case no search was necessary.

COCKBURN, C. J.—Suppose the constable had seen the man with rabbits hanging on his person before and behind him and carrying the gun over his shoulder, it could never have been intended that in that case the constable should go through the process of searching him. If the constable reasonably suspected the man then he might search. The search is merely a means of finding out, and the statute is satisfied if the game is seen and the gun found upon the man as in this case.

WIGHTMAN, J. concurred.

BLACKBURN, J.—The statute gives a right to search, that the constable might have the means of actually finding the game.

MILLAR, J.—The statute is abundantly satisfied by finding the game and things under the circumstances in this case.

Appeal affirmed.

DANT (app.) v. MOORE (resp.)

Toll—Copolrites not stone or manure under a canal Act.

*The Cam Navigation Act gave a toll of 1*d.* per ton on "stone, pebbles, sand, clay, manure, limestone," and of 3*d.* per ton on "other goods, wares and merchandise" not before mentioned:*

Held, that coprolites, which are fossil substances generally supposed to be the dung of animals, and which produce when mixed with acid 60 per cent. of phosphate of lime and 40 per cent. refuse, and are then used as manure, were not stone or manure within the above Act, but came within the class of "goods, wares and merchandise."

Case stated by justices upon a conviction of David Dant for unlawfully resisting Samuel Moore, a toll-collector acting in the due execution of the River Cam Navigation Act 1851, 14 & 15 Vict. c. xcii.

On 1st Aug. 1863 Dant came down the Cam with 80 tons of coprolites in boats, for which Moore, the toll-collector, demanded toll at 3*d.* per ton. Dant offered 1*d.* per ton. This was refused, and the collector went to draw the chain against the boats and lock it. Dant obstructed him and prevented him from locking it.

It was contended before the magistrates that the proper toll for coprolites was 1*d.* per ton, and that they came within the clause in sect. 53:

"For every ton of coals, culm, coke, charcoal, or other fuel, road materials, stone, pebbles, sand, clay, manure, limestone..... 1*d.*"

On the other hand it was contended for the complainant that they did not come within that clause, but were within this one:

"And for every ton weight of other goods, wares, or merchandise whatsoever not hereinbefore mentioned 3*d.*"

The coprolites were the fossil substances known by that name in science, and are generally supposed to be the dung of animals, and therefore organic, whilst stone, pebbles and limestone are not organic, and, as admitted before the justices, generally produced, when ground, 60 per cent. of phosphate of lime, which, when mixed with acid, is used as manure, and 40 per cent. of refuse which may be had for other purposes.

The justices determined that there was no evidence to satisfy them that coprolites were either stone, pebbles, manure, or limestone, or any other article for which a toll of 1*d.* per ton was payable, and that therefore they came under the general words of "other goods, wares, or merchandise whatsoever," for which a toll of 3*d.* per ton was payable.

The question asked of the Court was, whether the toll for coprolites was 1*d.* or 3*d.* per ton.

W. G. HARRISON in support of the conviction.—It is a question of fact, what are coprolites? In commerce they are used in the manufacture of soap, and in glazing earthenware. In their simple state they are not used for manure. It lies on the other side to show that they fall within the word "stones" or "manure."

D. D. KEANE for the app.—They are either "dung" or "stone," and if so, they are liable to the 1*d.* toll only. In *Pratt v. Brown*, 8 C. & P. 244, uncrushed bones carried through a turnpike to a farm, for the purpose of being crushed and part used as manure, were held to be exempt from toll under the word "manure," in 3 Geo. 4, c. 126, s. 32, and 9 & 6 Will. 4, c. 18, s. 1. So stone railway sleepers were held to come under the word "stone" in *Fisher v. Lee*, 12 A. & E. 622. Coprolites are stone, and before their value for the purpose of manure was discovered, were used for repairing roads: (5 E. & B. 944.)

COCKBURN, C. J.—I think that the conviction in this case was right, and that the toll applicable to the conveyance of coprolites on this navigation was 3*d.*

Q. B.]

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[Q. B.]

per ton, and not 1d. per ton. To come within the penny toll, coprolites must come under either the word "stone" or the word "manure" in the Act. It is not contended that any other of the things specified in the Act would comprehend it. I do not think that they can be considered within the meaning of the word "stone" in this Act, which words follows the words "road materials," and precedes "pebbles, sand, clay." It is true that coprolites are supposed to be organic matter petrified, but they are not in the category of the things specified "road materials, pebbles, sand," &c. I further think that they do not come under the word "manure," for they are not used for that purpose until they have undergone chemical decomposition by the introduction of sulphuric acid. Therefore, it seems to me that they come under the description of goods or merchandise not before mentioned.

WIGHTMAN, J. concurred.

BLACKBURN, J.—Coprolites are the raw material from which superphosphate of lime is to be manufactured, and do not come within the meaning of the words "stone" or "manure" in the Act.

MELLOR, J. concurred. Conviction affirmed.

HAYDON (app.) v. TAYLOR (resp.)

Factory Acts—Winding cotton yarn—Duty to register premises so used.

Premises were used solely for the purpose of winding by machinery moved by steam power sewing thread from hanks sent to the premises on to large bobbins called cops, and from the cops on to other bobbins much smaller called spools:

Held, that these premises came within the Factory Acts, 3 & 4 Will. 4, c. 103, and 7 & 8 Vict. c. 15, and that the owner was bound to keep a register of young persons employed therein.

Case stated by justices of Leicester on the dismissal of a summons taken out by the app., a sub-inspector of factories, against the resp., a manufacturer of cotton sewing thread, for neglecting to keep a register of young persons employed in his factory, contrary to the 7 & 8 Vict. c. 15, s. 27.

The resp. is a manufacturer of cotton sewing thread, and is owner of a factory at Mansfield, in the county of Nottingham, and of premises in Mansfield-street, Leicester.

At the factory at Mansfield, the resp. doubles cotton yarn, or the article which is purchased in Manchester market as twist, into sewing thread, which is sent out from thence to the premises at Leicester in hanks, which are packed in large parcels called bundles, and which are there, for the purpose of meeting the convenience of the retail traders and small consumers, wound by machinery moved by steam first through wire guides on to large bobbins called cops; and, secondly, from the cops through other guides on to other bobbins of much smaller dimensions called spools.

The premises at Leicester, to which this case alone relates, are worked by steam power, and the only process carried on therein is that of winding the sewing thread so sent from Mansfield or other places from the hanks on to the cops, and from the cops on to the spools. The sewing thread when it leaves the factory at Mansfield in hanks is ready for the wholesale market, and is sold in the same state in which it is received at Leicester. The winding from larger into smaller quantities renders the article more saleable to the ordinary small consumers of sewing thread, and the thread exhibits a brighter appearance.

The resp. keeps at his factory at Mansfield a register of young persons employed therein according to the form prescribed in schedule B. annexed to the 7 & 8 Vict. c. 15, and in pursuance of the provisions contained in sect. 27 of the same Act, but he does not keep such a register at his premises at Leicester.

The statute 3 & 4 Will. 4, c. 103, enacts (*inter alia*), "that from and after the 1st Jan. 1834, no person under eighteen years of age shall be allowed to work in the night (that is to say) between the hours of half-past eight o'clock in the evening and half-past five o'clock in the morning, except as thereinafter provided, in or about any cotton, woollen, worsted, hemp, flax, tow, linen, or silk mill or factory wherein steam or water, or any other mechanical power is or shall be used to propel or work the machinery in such mill or factory, either in scutching, carding, roving, spinning, piecing, twisting, winding, throwing, doubling, netting, making thread, dressing or weaving of cotton, wool, worsted, hemp, flax, tow, or silk, either separately or mixed, in any such mill or factory, situate in any part of the United Kingdom of Great Britain and Ireland."

The 7 & 8 Vict. s. 73 (hereinafter called the Amending Act), enacts (*inter alia*) that the 3 & 4 Will. 4, c. 103 (the Factory Act), as amended by the Amending Act, and the Amending Act shall be construed together as one Act, and that so much of the Factory Act, and of any rule or regulation theretofore made by any inspector as is inconsistent with the Amending Act, shall be taken to be repealed.

The said Amending Act, sect. 73, further enacts (*inter alia*) that any person who shall work in any factory, whether for wages or not, or as a learner or otherwise, either in any manufacturing process, or in any labour incident to any manufacturing process, or in cleaning any part of the factory, or in cleaning or in oiling any part of the machinery, or in any other kind of work whatsoever, save in the cases thereafter excepted, shall be deemed, notwithstanding any other description, limitation, or exception of employment in the Factory Act, to be employed therein within the meaning of the Amending Act; that the word factory, notwithstanding any provision or exemption in the Factory Act, shall be taken to be all buildings and premises situated within any part of the United Kingdom and Ireland wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, flax, silk, hemp, jute, or tow, either separately or mixed together, or mixed with any other material, or any fabric made thereof.

The said Amending Act also by sect. 27 enacts (*inter alia*) that registers shall be kept in the factory to which they relate by the occupier of every factory according to the forms and directions given in schedule B. to that Act annexed. And that the registers, certificates and other documents required by the said Amending Act to be received or kept shall be forthwith produced to the inspector or sub-inspector on his demanding to examine the same when the factory is at work.

On the 2nd Feb. 1863 the app. called at the premises of the resp., situate in Mansfield-street, in the borough of Leicester as aforesaid, whilst the machinery employed therein was at work, and required the said resp. to produce a register of young persons according to the form prescribed in schedule B. sect. 27 of the said Amending Act, and demanded to examine the same. The resp. failed to produce any such register, and admitted that he did not keep one.

Upon the state of facts set out above, it was argued by the app. before us that the resp.'s premises at Leicester were a cotton-mill or factory within the meaning of the Factory Act, 3 & 4 Will. 4, c. 103, s. 1, and that the word "winding" mentioned in that Act included the process carried on by the resp. of winding by machinery worked by steam power sewing cotton from hanks on to cops, and from cops on to spools, and that inasmuch as the principles comprised in the Factory Act, 3 & 4 Will. 4, c. 103, were incorporated into

7 & 8 Vict. c. 15, and were explained by sect. 73, the resp. had rendered himself liable to a penalty for not keeping a register as required by sect. 27 of the said Amending Act.

On behalf of the resp. it was contended that the winding of sewing thread which was carried on by him at his premises at Leicester is not the winding referred to in the preamble of 3 & 4 Will. 4, c. 103; that being winding incidental to the manufacture of the sewing thread from the yarn or twist of which it is composed, and which is all done at the resp.'s factory at Mansfield, and that the premises of the resp. at Leicester were not a cotton mill or factory within the meaning of the 7 & 8 Vict. c. 15, as no steam, water, or any other mechanical power is used there for moving or working any machinery employed in the manufacturing or finishing, or in any process incident to the manufacture of cotton or of any of the other articles referred to in the said Act, and therefore resp. was not bound to keep the register therein according to the forms and directions given in schedule B to said Amending Act annexed.

The magistrates dismissed the summons, subject to the opinion of this Court; and if the court should be of opinion that their decision was wrong, the resp. is to stand convicted in the penalty of 2*l.* and costs.

Welsby for the app.

Field for the resp.

The arguments were the same as those set out in the case *supra*.

COCKBURN, C. J.—I think that the process of winding in this case is within the language of both statutes; it is within the word "winding" in 3 & 4 Will. 4, c. 103, s. 1, and within the words "manufacturing process" in the 7 & 8 Vict. c. 15, s. 73. The case is certainly within the mischief both Acts were intended to provide against.

The rest of the Court concurring,

Appeal allowed.

HILTON (app.) v. HILL (resp.)

Benefit building society—Arbitration—Notice from arbitrators, how to be sent.

A rule of a benefit building society provided that all summonses, circulars and notices should be deemed duly served by putting the same into the post, addressed to the members according to the last entry on the register given by them for this purpose:

Held, that this rule only related to the ordinary business of the society, and did not apply to the case of notices of appointments by arbitrators for the purpose of proceeding with a reference.

Case stated by the Stipendiary Magistrate of Manchester.

The app. was a shareholder in the Golden Eagle Third Equitable Benefit Building Society, and had had his shares advanced to him on mortgage security, and redeemed the same and had his deeds redelivered to him.

The society was not terminated at the anticipated period, and it was resolved that the members should be called upon to pay a sum of money each. The app. was called upon to pay 60*l.* on the ground that he had not paid the amount he ought to have done by that sum. This he did not admit. The trustees of the society referred this dispute to arbitration, but without the knowledge of the app. (as he alleged).

The arbitrators appointed under the rules of the society fixed a day for hearing the parties, and notice of this was sent to the app. by post, according to rule 21 of the society. The app. not appearing, the arbitrators proceeded *ex parte*, and awarded the app. to pay 80*l.* 10*s.* 6*d.* to the trustees, being the 60*l.* with interest from Dec. 1857 to April 1863, and the arbitrators' fees, 4*l.* 4*s.*

The app. not having complied with the award, the trustees took out a summons before the stipendiary magistrate of Manchester, under 10 Geo. 4, c. 56, s. 27, to enforce the award; and the magistrate having heard the parties, decided to enforce the award.

The case stated for the opinion of the court raised several important questions in relation to building societies, but as the case was decided on the point as to the sufficiency of the notice from the arbitrators to proceed *ex parte*, it is only necessary to set out the above facts.

The rule of the society respecting notices is the following:—

"Rule 21. The secretary shall issue all summonses, circulars and notices, which shall be deemed duly served by putting the same into the Manchester Post-office, addressed to the member for whom the same is intended, according to the last entry on the register, given by virtue of the rule for this purpose contained."

Pope for the resps.—There is no provision in the Benefit Building Society Acts, nor in the rules of this society, entitling the arbitrators to proceed *ex parte* when one party refuses to proceed; but it is an implied condition in all arbitrations that the arbitrator may proceed *ex parte* for good cause, and it is a good cause for so proceeding if a party has notice that the arbitrator will so proceed if he does not attend at the time appointed. Here the only question raised is, whether the notice of the appointment by the arbitrators was properly sent. The app. says he never received it, and the trustees cannot contradict him; but they contend that all the arbitrators were bound to do was to post the notice according to rule 21.

Holker, for the app., was not called upon to argue the points.

COCKBURN, C. J.—That rule does not apply to notices from the arbitrators, but only to notices from the society. It is, therefore, as if the arbitrators had not given notice, and they could not proceed *ex parte* against the app. without giving him notice.

WIGHTMAN, J.—In point of fact, this notice was posted by the secretary and sent to an address which the app. had given to the society five years before.

MELLOB, J.—Rule 21 is for summonses, circulars and notices incidental to the ordinary meetings and business of the society, and not for notices from the arbitrators.

Appeal allowed.

OVERSEERS OF NEITHROP v. WHIDCOAT.

Justices' clerk's fees—Vagrant cases—Order for payment on overseers.

An order under the 5 & 6 Vict. c. 109, s. 17, and 12 & 13 Vict. c. 20, s. 2 on overseers, requiring them to pay a sum of money to W., the superintendent of police, "for fees due to him," is not supported by evidence that the fees were those really due to the clerk of the justices in vagrant cases, and had been paid in the first instance to him (a) by the superintendent, who sought the order in question as a means of reimbursing himself, and therefore justices are not authorised to enforce such an order.

On the 13th Feb. 1862, two justices of the Banbury and Bloxham Petty Sessional Division (Oxford) made an order under 5 & 6 Vict. c. 109, and 12 & 13 Vict. c. 20, s. 2, upon the overseers of the poor of the township Neithrop, in the said division, in these words:—

"County of Oxford, } To the overseers of the poor of
to wit. } the township of Neithrop, in
the said county.

"In pursuance of the Act of Parliament, made and

(a) The case was argued on the assumption that the magistrates' clerk had received these fees from the superintendent; but, from the statements and counter statements of counsel in court, this was not at all clear.

passed for the appointment and payment of parish constables, we, the undersigned, two of Her Majesty's justices of the peace in and for the said county, do hereby order and require you forthwith to pay to Mr. William Whitcoat, superintendent of police, the sum of 4*l.* 5*s.* for fees now due to him, and that you do pay the same out of the moneys in your hands collected for the relief of the poor. Given under our hands, &c.,

"H. NORRIS,
"C. T. WYATT."

The above sum of 4*l.* 5*s.* consisted of magistrates' clerk's fees in cases of the apprehension of vagrants, duly comprised in the annexed table now in force for the county, which fees were properly incurred by the superintendent of police of the division in prosecuting vagrants and drunkards for offences committed within the township of Neithrop.

In these prosecutions the prisoners were either committed to goal without a fine, or they had no means whereby to pay the expenses incurred.

The justices before signing the order were satisfied that the fees had been properly incurred, and they had the items comprised in the amount before them, which they examined and allowed, and then signed the order for the total sum of 4*l.* 5*s.*

The overseers did not have notice to attend when the order was made, and when the money was afterwards demanded of them the particulars of the amount mentioned in the order were not furnished to them. The overseers refused to obey the order, and were duly summoned to a subsequent meeting of the said justices to show cause why they should not pay.

The overseers appeared both personally and by their attorney, and it was argued on their behalf that the overseers should have been summoned to attend, when the order was proposed to be made, so that they might have been present to examine the account, and if they thought proper object to the making of the order, and that the different items or particulars of the amount mentioned in the order should have been annexed to it when presented for payment, and it was also contended for the overseers, that the superintendent of police should have kept an account, and produced it in vestry, according to the old statute 18 Geo. 3, c. 19, and that such account must have been allowed and passed in vestry before the magistrates could legally make the order.

The justices considered that these objections were invalid, inasmuch as the statutes above mentioned (5 & 6 Vict. c. 109, s. 17, and 12 & 13 Vict. c. 20, s. 2) enact that when the duties have been performed the expenses shall be paid by the overseers of the parish out of the poor-rate upon the order of justices in petty sessions assembled; and the 11 & 12 Vict. c. 91, s. 6, further enacts that any money paid by an overseer to a constable in obedience to an order purporting to be made as this one was made shall not be disallowed by any auditor or other authority competent to examine overseers' accounts on any ground whatever. Under these statutes the justices considered that, having satisfied themselves that the fees had been actually and properly incurred by the constable, all that was required of the justices was to embody the sum in one order, and then direct the overseers to pay it as above set out. The justices informed the overseers that this was their view of the case, and expressed their determination to enforce the payment by the overseers of the said sum mentioned in the said order, *e.g.* so much for warrant, so much for examination, so much for order of discharge, &c.

The overseers thereupon expressed their dissatisfaction at this determination as being erroneous in point of law, and applied to the justices to state a case for the opinion of this court, which the justices consented to grant. The opinion of the court is requested whether the justices were right or wrong in their

determination to enforce the payment by the overseers.

Tuzer, Serjt. for the resp.—The objection before the magistrate was that the superintendent ought to have proceeded under the 18 Geo. 3, c. 19, as stated in the case. The fees in question were authorised by the scale of fees settled by the justices under 5 & 6 Vict. c. 109, s. 17; see also 13 & 14 Vict. c. 20, s. 2. [WIGHTMAN, J.—The order of the justices calls upon the overseers to pay 4*l.* 5*s.* for fees due to the superintendent. Now these particular fees are not due to him, but to the clerk to the justices.] The language of the order cannot be supported; but this is not the objection made before the magistrates.

Huddleston (*Sawyer* with him) intimated that they would rely on that objection now.

COCKBURN, C. J.—Suppose the magistrates' clerk gave credit for those fees instead of getting them paid at the time, is there any power by which the justices can make the overseers pay those fees. And, assuming such fees to have been paid by the constable, what authority had the constable to pay money on behalf of the overseers? The order is manifestly wrong, for the fees are in fact due to the clerk to the justices. The question asked the court is, whether the justices ought to enforce the order, and we say no. The 18 Geo. 3, c. 19, is still alive as regards constables' "expenses," and by the subsequent statutes the justices have authority to make orders on the overseers for the payment of constables and magistrates' clerks' fees.

The rest of the Court concurring,

Appeal allowed.

Friday, Nov. 20.

THE EARL OF COVENTRY AND OTHERS v. WILLES.

Trespass—Pleas—Common right to enter land to witness horse-races.

To a declaration in trespass for breaking and entering certain lands of the pte., the deft. pleaded that at the time of the alleged trespasses there was a common and public highway over and along the said land for all persons to go and return at such times of the year as horse-races were holden on the said land at their free will and pleasure for the purpose of witnessing the said races, and that the alleged trespasses were a use by the deft. of the said highway for the purposes aforesaid:

The deft. by other pleas alleged a common right for all persons to go and remain for a reasonable time for the purpose of witnessing the said horse-races:

Held, that the pleas were bad.

This was a demurrer to certain pleas of the deft.

The declaration stated that the deft. on divers days and times broke and entered certain land of the pte. called or known as The Flat, in the parish of Burwell, in the county of Cambridge.

The 4th plea of the deft. was, that at the time of the alleged trespasses there was and of right ought to have been a common and public highway over and along the said land of the pte. for all persons to go and return on foot at such times of the year as horse-races were holden on the said land at their free will and pleasure, for the purpose of witnessing the said races, and that the alleged trespasses were a use by the deft. of the said highway for the purpose aforesaid.

5th, that the close or flat mentioned is part or parcel of certain open or uninclosed lands commonly called and known by the name of Newmarket Heath, in the county aforesaid, and that from time whereof the memory of man runneth not to the contrary, horse-races have been and of right ought to have been, and still of right ought to be, holden on the said lands at certain reasonable times, to wit, on certain days in the months of April, July and October in each

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and every year; and that at the time of the committing of the alleged trespasses there was, and of right ought to have been, a common public highway for all persons on foot at the said times of the year at which the said horse-races were so holden as aforesaid, at their free will and pleasure, to go and remain for a reasonable time for the purpose of witnessing the said horse-races, and to return over, along, and upon all such parts of the said lands not being inclosures, as were commonly used by the public for the purpose of witnessing the said horse-races, and the deft. says, that at the time of the alleged trespasses horse-races were being holden upon the said lands at one of the times aforesaid, and that the alleged trespasses were a use by the deft. of the said highway for the purposes aforesaid.

The 6th plea alleged the same facts as to the horse-races, and alleged a common right for all persons to go and remain for a reasonable time for the purpose of witnessing the said horse-races, &c.

The 7th plea was the same in substance as the 5th, but alleging the right of the deft. as founded upon a custom.

There were other pleas in substance the same as the foregoing.

Mellish, Q.C. (Hannen with him) appeared for the plts., and contended that the pleas were bad; that there could neither be such a highway as is pleaded, since the deft. claims, not merely to pass along, but to stop and witness the horse-races; nor a custom of which all the Queen's subjects have a right to the enjoyment; that a custom for all persons, for the time being, to enjoy the privilege set up is bad, for that a custom must, in their nature, be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom:

Reg. v. The Inhabitants of Northampton, 2 M. & S. 162;

Fitch v. Rawling, 2 H. Bl. 393.

Quain (Hawkins, Q.C. with him), for the deft., argued in support of the pleas, that there might be such a highway and such a custom; that these races having been held from time immemorial—there being distinct evidence of their having been in existence in the reign of Hen. VIII.—there may have been originally a limited dedication to the public of a right to use and be present upon the land during the period of the horse-races:

Dyce v. Lady Hay, 1 Mac. 405, Lord St. Leonards' judgment;

Edwards v. Bullock, 6 Q. B. 383, 409;

The Marquis of Stafford v. Cogney, 7 B. & C. 257.

Edwards v. Bullock, 6 Q. B. 409, shows there may be a highway over a close and over also every part of it. [BLACKBURN, J.—Your real difficulty is that you do not want a right of way, but a right to stay and witness the races on Newmarket common.]

Mumsey v. Imray, 32 L. J. 94; 7 L. T. Rep. N. S. 717, Ex.;

Fisher v. Froud, 31 L. J. 212; 6 L. T. Rep. N. S. 711, Q. B.;

Morant v. Chamberlain, 6 Hur. & Nor. 541;

Tyson v. Smith, 9 A. & E. 406;

Prince v. Lewis, 5 B. & C. 371, Bayley's judgment;

Blundell v. Catterall, 5 B. & Ald. 268.

This right is similar to that of the public to attend a market or fair:

Mayor of Northampton v. Ward, 2 Str. 1238.

COCKBURN, C. J.—I think that our judgment must be for the plts. The claims set up are much too general, for there can be no customary right for all the Queen's subjects to be present and to go and remain upon the land. A customary right can only be applicable to certain inhabitants of the district where

the custom is alleged to exist, and cannot be claimed in respect of the public at large. For this there is the authority of *Fitch v. Rawling*, which is binding upon us.

WIGHTMAN, BLACKBURN and MELLOR, JJ. concurred. *Judgment for the plts.*

Saturday, Nov. 21.

REG. v. HOW.

Highway district—Excluded parish—25 & 26 Vict. c. 61, s. 7—*Highway board under 5 & 6 Will. 4, c. 50, s. 18*—*Appointment—Vestry meeting.*

A parish claimed to be exempted from being included in a highway district under 25 & 26 Vict. c. 61, s. 5, by reason of its highways being under the superintendence of a board established under 5 & 6 Will. 4, c. 50, s. 18. The 25 & 26 Vict. c. 61, passed in July 1862, and the highway board under 5 & 6 Will. 4, c. 50, s. 18, was alleged to have been constituted at a vestry meeting in Nov. 1862 by a majority of two-thirds of the vestrymen present, the chairman having refused to grant a poll which was demanded at the meeting:

Held, that a poll ought to have been granted, and that therefore the highway board under sect. 18 of 5 & 6 Will. 4, c. 50, was not properly created, and so the parish was not exempted from being included in the highway district under 25 & 26 Vict. c. 61, s. 5.

This was a rule to quash an order of quarter sessions of the county of Kent, annexing the parish of Bromley to the Bromley highway district under the provisions of the 25 & 26 Vict. c. 61 (the New Highway Act), on the ground that the sessions had no jurisdiction to deal with such parish under the Act, inasmuch as it was under the management of a board constituted under sect. 18 of the 5 & 6 Will. 4, c. 50, and by sect. 7 of the former Act was exempt from being so annexed.

By sect. 5 of the 25 & 26 Vict. c. 61 (An Act for the better Management of Highways in England), powers are conferred upon the quarter sessions to form highway districts; but by sect. 7 certain restrictions are imposed upon such powers, and it is enacted, "Firstly, there shall not be included in any highway district formed in pursuance of this Act, any of the following places: that is to say (*inter alia*), any parish or place, the highways of which are at the time of the passing of this Act, or may be within six months afterwards, under the superintendence of a board established in pursuance of sect. 18 of the principal Act, unless with the consent of such board."

By sect. 18 of such principal Act, the 5 & 6 Will. 4, c. 50 (the General Highway Act), it is enacted, "That in any parish where the population by the then last census taken from the returns made to Parliament exceeds the number of 5000, if it shall be determined by a majority of two-thirds of the votes of the vestrymen present at such meeting as aforesaid to form a board for the superintendence of the highways of the said parish, and for the purpose of carrying the provisions of this Act into effect, it shall be lawful for the said vestry to nominate and elect any number of persons not exceeding twenty, nor less than five, being respectively householders, and residing in and assessed to the rate for the relief of the poor of the said parish . . . to serve the office of surveyors of highways for the year ensuing; and such persons so to be nominated and elected as such surveyors, or any three of them shall, and are hereby authorised to act as a board, and to be called 'The Board for Repair of the Highways in the Parish of —,' &c."

It appeared from the minute-book of the proceedings that in Nov. 1862 a vestry meeting was held in

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the parish of Bromley, with the view of forming a highway board under sect. 18 of the 5 & 6 Will. 4, c. 50, so as to avoid being included in a district under the 25 & 26 Vict. c. 61; at that meeting there were eighteen vestrymen, two-thirds of whom would have been twelve. Upon the resolution being put for the formation of a highway board eleven voted for it and four against it, three having declined to vote. Upon this a poll was demanded and refused, the chairman holding that the resolution had been carried by a majority of two-thirds of the votes of the vestrymen present as provided by the statute. A board was accordingly formed.

Nov. 11.—*Manisty*, Q.C. and *Poland* now showed cause, and contended that the board formed under sect. 18 of the 5 & 6 Will. 4, c. 50, was not properly brought into existence, inasmuch as, first, the resolution was not carried by a majority of two-thirds of the votes of the vestrymen present at the meeting, as the three vestrymen who did not vote ought still to be reckoned; secondly, that the resolution was not legally adopted, inasmuch as the poll upon it was refused.

On the application of *Welsby*, who was in support of the rule, the case was adjourned for the production of affidavits as to the real number of voters at the vestry meeting.

Nov. 21.—To-day additional affidavits were produced on both sides, and *Welsby* proposed to show that the minutes were not correct, and that thirty persons were present at the meeting, of whom twenty-one voted in favour of the establishment of the highway board. *Manisty*, contra, objected that it ought not to be allowed to impugn the accuracy of the minute-book in that way, particularly when the rule nisi was obtained on affidavits relying on the entries in the minute-book.

Considerable discussion took place upon this point, but the case was ultimately decided on the refusal of a poll by the chairman, and it became unnecessary to decide whether the question of the establishment of the highway board was carried by a majority of two-thirds of the vestrymen present at the meeting.

Manisty.—The real question is whether the highway board was duly constituted under sect. 18 of 5 & 6 Will. 4, c. 50. It is submitted that it was not because the chairman of the meeting had no right to refuse a poll which was lawfully demanded. The Act regulating parish vestries is the 58 Geo. 3, c. 60, and there is nothing in the Act to exclude the common law right to demand a poll.

Reg. v. St. Mary, Lambeth, 8 A. & E. 356; and *Reg. v. D'Oyley*, 12 A. & E. 139.

Welsby (*Waddy* with him), in support of the rule, contended that the object of sect. 18 of 5 & 6 Will. 4, c. 50, was, that the question of the formation of a highway board should be decided by a majority of two-thirds of the vestrymen present at the meeting, and that the chairman was not bound to grant a poll.

COCKBURN, C.J.—The vestry-rooms of populous parishes are not large enough to hold a hundredth part of the inhabitants, and it would be monstrous to conclude a whole parish by the votes of those only assembled in the room. In *Campbell v. Maund*, 8 A. & E. 565, it was decided that the common law right to a poll could not be taken away except by express words. The case of *Reg. v. D'Oyley* is also singularly in point. A poll, therefore, having been demanded and refused, the highway board was not properly constituted, and this rule must be discharged.

The rest of the Court concurring,

Rule discharged.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

ERRATUM.—In the case reported at page 334, for *Surage* v. *Surage* read *Surage* v. *Brook*.

Nov. 7 and 13.

BOOTH v. GAIR.

Policy of insurance—Average loss—Liability of underwriter.

On a marine policy of insurance free of "average loss," the underwriter is not liable, in case of an average loss, for expenses incurred in surveying and warehousing the goods at a port of distress, or in respect of the extra freight in and about forwarding the cargo to the port of destination. Nor can any custom to pay those expenses make him liable.

This was a case stated for the opinion of the court without pleadings under the C. L. P. A. 1852.

The plt. is consignee and owner of 118 boxes of bacon, which were shipped on board the ship *Plantagenet* at New York, which vessel was bound for Liverpool.

The deft. on the 15th Jan. 1862 insured the said bacon by a policy which contained a clause that in case of any loss or misfortune it should be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandise and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof the assurers should contribute each one according to the rate and quantity of his sum assured. The policy was also warranted free from average unless general or the ship be sunk, stranded, or burnt. The *Plantagenet* sailed from New York on the 11th Jan. 1862, in due prosecution of her voyage, but met with heavy gales and the ship worked and strained very much, and leaked so as to require all hands at the pumps, notwithstanding which the water gained on the pumps, and for the preservation of the ship and cargo she bore away on the 21st to Bermuda as a port of refuge, where she came to anchor on the 1st Feb. following. When the ship arrived at Bermuda, and under the advice of competent surveyors, the cargo was discharged, and on a careful examination of the ship it was found that she was so badly damaged that she could only be repaired at Bermuda, at an expense exceeding her value when repaired, and the vessel was accordingly condemned to be sold. Surveys were then held upon the cargo in order to ascertain its state and to determine what should be sent on and what should be sold, parts of it, including a portion of the bacon the subject of this case, were found to be too much damaged for reshipment and were sold by the advice of the surveyors, and the remainder, including the remainder of the bacon, the subject of this case, was transhipped on board two vessels, the *Magnet* and *Surprise*, for Liverpool, at which port it afterwards arrived.

The portion of the bacon so sent on was partially damaged by the perils insured against.

It is admitted that all the above acts were proper under the circumstances. The expense of transhipment of the part of the bacon so shipped and the freight of the *Magnet* and *Surprise* exceed the freight originally agreed to be paid to the *Plantagenet* by 1*l.* 12*s.* 7*d.*, which sum the plt. had paid.

The warehouse rent at Bermuda for the whole cargo was the sum of 24*l.* 14*s.* 8*d.*, a proportion of which, viz. the sum of 10*l.* 6*s.* 6*d.*, has been paid by the plt. in respect of his bacon, of which amount part, viz. 6*l.* 16*s.* 6*d.*, was so paid in respect of the part of the said bacon so sent forward by the *Magnet* and *Surprise*, and 3*l.* 10*s.*, the remainder thereof, in respect

of the part of the said bacon so sold as aforesaid; the expenses of the surveys held upon the cargo at Bermuda in order to ascertain its state and to determine what should be sent on and what sold amounted to the sum of 8*l.* 14*s.* 0*d.*, a proportion of which, viz. the sum of 7*s.*, the plt. has paid in respect of the said bacon sent forward by the *Magnet* and *Surprise* as aforesaid, and 2*d.* in respect of the part sold as aforesaid. The sum of 16*l.* 8*s.* was also paid at Bermuda for cooerage of the goods reshipped, a proportion of which, viz. the sum of 13*s.*, the plt. has paid in respect of the said bacon, of which sum of 13*s.* part, viz. the sum of 12*s.* 9*d.*, was so paid in respect of the part of the said bacon so sent forward as aforesaid, and 3*d.* in respect of the bacon so sold as aforesaid.

It is admitted that there was no constructive total loss of the bacon.

The plt. seeks to recover from the deft. under the said policy the difference between the amount of the freight by the *Plantagenet* and the sum total of the freight by the *Magnet* and *Surprise* and the transshipping charges, viz. 1*l.* 12*s.* 7*d.*, and also a proportion of the other three items of expense incurred in respect of the cargo by reason of the vessel putting into Bermuda, and the transference of the cargo.

It is also admitted that down to the date of the policy in this case it was the custom of underwriters to pay charges on cargo of the nature of the items the subject of this case, except cooerage, under policies in the form of the policy in this case, under the name of "particular charges."

The deft. contends that under the clause in the margin of the policy, "warranted free from average unless general or the ship be stranded, sunk, or burnt," the *Plantagenet* not having been stranded, sunk, or burnt, and it being further admitted for the purpose of this case that none of the above items of claim are general average charges, he is not liable for any of the items sought to be recovered by the plt.

The plt. contends that under the above circumstances the amounts so claimed by him are not within the warranty by the said clause, but that the deft. is liable to make them good.

The court is to be allowed to draw inferences of fact in the same way as a jury would, and the questions for their opinion are: 1. Whether the before-mentioned four items, or any part and which of them, are within the said warranty clause of the said policy. 2. Whether the plt. is, under the circumstances of the case, entitled to recover the said four items, or any and which of them, from the deft.

Quain for the plt.—I contend that there may be a total loss in two ways; namely, a constructive total loss of part, or an actual total loss of part. It may be said that the loss at Bermuda determined the underwriters' liability, but I apprehend that that is not so, for after that there might be a total loss for which the underwriters' would be liable. This cargo being perishable might have become bad and good for nothing, and then there would have been a total loss:

Rouse v. Salvador, 3 Bing. 266.

[*Mellish*.—The goods were in no risk of total loss at the time the expenses were incurred.] If a cargo was sent on shore for the purpose of transshipment to its port of destination, and was destroyed when on shore, surely that would be within the policy, though it was not subject to sea risk at the time. A constructive total loss of the goods sent on appears on the face of the case; and as all the expenses incurred relate to the part sent on, the plt. is entitled to recover them: (*Lewis v. Janson*, 12 East, 655.) He also cited

Ralli v. Janson, 25 L. J. 200, Q. B.;

Shipton v. Thornton, 9 A. & E. 314;

Rosetto v. Gurney, 11 C. B. 176;

Great India and Peninsula Railway Company v.

Saunders, 31 L. J. 206, Q. B.; 6 L. T. Rep. N. S. 297.

Phillips on Insurance.

Mellish, Q. C. (*Cohen* with him) for the deft.—The question is, were these expenses incurred for the benefit of the underwriters or shipowners? It is clear that they were incurred for the benefit of the shipowners, and the case of the *Great India and Peninsula v. Saunders* is expressly in point, the only difference being, that in that case the ship put into the port from which she sailed. If the goods had been sold at Bermuda, it would have been for the benefit of the underwriters, but the sending them on made it a benefit to the shipowners. The expenses for which the underwriters would be liable would be for the saving the ship, and not the goods only, and the master, in sending the goods on, is acting as the agent of the assured. If the expense of transshipment to port of destination exceeds the original freight, the transshipment would be for the owner of the goods, and not for the shipowners; and if the expense exceeds the original freight it would be a constructive total loss: (*Rosetto v. Gurney*, 11 C. B. 176.) If, however, the underwriters were liable for average, then they might have been liable to some extent for these expenses, as they were to some degree caused by perils of the sea. They also referred to

2 *Emerigon on Insurance*, c. 17;

Edie v. East India Company, 1 Wm. Bl. 292.

Quain, in reply, contended that the case of the *Great India and Peninsula v. Saunders* was distinguishable from the present one, as in the former case the goods were not perishable.

ERLE, C. J.—In this case the action was on a policy from New York to London on a cargo of bacon, containing a clause "warranted free from average unless general, or the ship is stranded, sunk, or burned," and other usual terms. In the course of the voyage there was a constructive total loss of the ship; but the cargo was landed in common course and warehoused. A portion was found worthless, but the residue was sent to Liverpool, and in due course arrived safely. The plt. claimed from the underwriters the expenses incidental to this transshipment of the cargo; and although he admitted that the law must be taken, for the purposes of his present argument, to be correctly laid down in the case of the *Great India and Peninsula Railway Company v. Saunders*; and, although under the circumstances of the case, the warranty exempted the underwriters from liability for an ordinary average loss, yet the assured might recover under the clause authorising the assured to labour for the safety of the cargo and charge the expenses, inasmuch as they were incurred to prevent a total loss. The plt. in this action contended that the circumstances here made a distinction and gave the assured a right to recover under the last-mentioned clause. But we are unable to find any substantial distinction between the two cases. There the goods were iron returned to the assured at the port of loading in an undamaged state and sent on by them; here they were perishable goods landed at a port on the voyage in a damaged state and sent on by the master. What the master did in this case was in the discharge of his duty in the ordinary course, and there was no peril creating the residue a total loss from which the underwriter was saved by the expenses in question. There was no other peril than such as is always attendant on a transshipment of goods by a voyage in common course. If the assured intended to confine the warranty to partial loss from damage to the cargo, and to make the underwriters liable for expenses of transshipment, we are of opinion that this policy does not express that intention. Therefore there will be judgment for the deft.

Judgment for deft.

C. B.]

WHITE AND OTHERS V. PHILLIPS AND OTHERS.

[C. B.]

Friday, Nov. 13.

WHITE AND OTHERS V. PHILLIPS AND OTHERS.
Obstruction in navigable river—Duty of owner—
Nuisance.

The defts. were possessed of a wharf on the bank of the river Thames, and of a campshed which had been placed there by the lessors of the defts. before the defts. came to occupy the wharf, for the purpose of maintaining a sufficient depth of water there. The campshed was placed between high and low water marks, and at high water it was covered by the water and concealed from view. It was of unusual and improper construction and out of repair and dangerous to persons navigating the river or coming to the wharf. There was no buoy or signal to warn such persons of the existence of the campshed during those hours of the day when it was covered by the tide. The plts.' barge coming to the wharf at high water for the purpose of loading a cargo of marble, sank with the tide, and came into collision with the campshed and was injured. The plts. servants, who were navigating the barge, did not know of the existence of the campshed. The defts. knew that it was out of repair and dangerous, and had repaired it inefficiently before the accident and repaired it after the accident:

Held, that the above facts showed a breach of duty on the part of defts., and that they were bound either to keep the campshed in proper repair, so as not to be dangerous, or to give proper notice and take proper precautions to prevent accident to persons navigating the river or coming to the wharf:

Held, also, per Erle, C. J., Byles and Keating, JJ., that the campshed was a public nuisance.

Declaration: For that the defts. before, up to, and after the happening of the damage hereinafter mentioned were in possession of and had the care and management of a certain wharf on the banks of a certain navigable tidal river, to wit, the Thames, commonly called and known as the St. Bride's wharf, and which said wharf was used by the defts. for the reception thereof of the barges and goods of customers in the defts.' trade of wharfingers, and the said navigable river was the usual and ordinary means of approach to the said wharf for such barges and goods, and the defts. being in the possession of and having the care and management of the said wharf as aforesaid, wrongfully and negligently erected or caused to be erected or kept erected in the bed of the said river, and close against the wall of the said wharf, and adjoining the said navigable river, and driven into the ground at the outside base of the said wall, a certain campshed or mass of piles at such a height and in such manner as that the same was at the time of high tide on the said river covered with water and concealed and out of view, and in such a position and at such a depth that vessels and barges coming into or lying alongside the said wharf at high tide, would necessarily be and were in danger (unless the persons navigating and directing the same had notice of the said campshed or mass of piles so lying and being there) of striking and being dashed against the same at the fall of the tide, and thereby of being greatly injured and damaged; of all which premises the defts. always had due notice, and could, might and ought to have done their duty therein; yet they suffered and permitted the said campshed and mass of piles to be and continue at the time of high tide wholly covered and concealed and out of view, and in such a position and at such a depth as aforesaid, and the same did continue wholly covered and concealed and out of view, and in such a position and at such a depth as aforesaid, without the defts. taking or causing to be taken any proper care or precaution in that behalf, and without using or causing to be

used any proper means to prevent or guard against the said danger, or whereby the said danger might be prevented or guarded against to vessels, ships, or barges at high tide coming to or lying alongside the said wharf, or without putting or causing to be put or placed near the said campshed or mass of piles any proper or sufficient buoy or other sufficient mark or signal to give due notice or warning of the said danger. And the plts. further say that whilst the said campshed or mass of piles was continued to be so covered or concealed as aforesaid without any proper or sufficient buoy or other proper or sufficient signal, or any other due and proper means being used to give notice or warning of the said danger, and whilst the said campshed or mass of piles and the said wharf and wall were in the possession and control of the defts., the plts. were lawfully possessed of a certain barge with certain goods of the plts. on board thereof, which was then lawfully navigating the said river under the care, direction and management of certain mariners and servants in that behalf of the plts., and the plts. by the permission and at the request of the defts., just before the time when, &c., for reward and payment to them the defts. brought the said barge with the said goods on board by their said mariners and servants unto and alongside the said wharf of the defts. at high tide for the purpose of loading there as customers of the defts. as such wharfingers a certain cargo on the said barge, and the said barge being then so brought and at the time of high tide lying alongside the said wharf, and the plts. and the said mariners and servants of the plts. not having any knowledge or sufficient means of knowledge of the said danger, and no due or proper care being taken by the defts. to guard against the same, and the plts. by their said mariners and servants then having lawful occasion, and being directed by the defts. for the purpose aforesaid, to place and moor and to keep placed and moored their said barge at such high tide with the said goods of the plts. on board immediately over the place where the said campshed or mass of piles so lay covered and concealed as aforesaid, the plts. by their said mariners and servants did then at such high tide place and moor their said barge immediately over the said place, and kept it so placed and moored; and thereby afterwards, and by means of the premises and of the said misconduct, omission and neglect of the defts., and without any neglect or default of the plts., or their said mariners and servants, the said barge, whilst the said campshed or mass of piles, and the said wharf and walls were respectively in the possession and control of the defts., at and by reason of the fall of the tide, struck with great force and violence upon and against the said campshed or mass of piles, whereby the barge heeled over and was swamped and stove in, and the said goods of the plts. greatly injured, and the plts. incurred great expense in clearing the water from the said barge, and in surveying and repairing the damage done to the same, and in recovering and repairing the said goods of the plts., and the plts. lost the use of the said barge for a long time, and the freight and profits which they might have derived therefrom; and the plts. claim 300*l.*

Pleas:—1. Not guilty. 2. Denial that defts. erected the campshed, or kept it erected. 3. That defts. had not notice as alleged. 4. That plts. did not bring the barge to the wharf at high tide for the purpose alleged. 5. That plts. had due and timely notice of the campshed and the danger arising therefrom. 6. That plts. had not lawful occasion and were not directed by defts. to moor the barge as alleged. Issue.

At the trial before Erle, C.J. at the sittings in Middlesex after Trinity Term last, the plts. proved the material allegations contained in the declaration. With respect to the ownership of the campshed, it was proved that

it had been erected by the defts.' lessees, who had preceded them in the occupation of the wharf. A campshed in its ordinary construction consists of a platform of planks supported on piles, carried out from the wharf to low-water mark, and then sloped off. The campshed in question was not carried out as far as low-water mark, and terminated abruptly. It was covered at high-water and completely hidden from view, but uncovered at low-water. It was also out of repair, and the attention of the defts. had before the accident been drawn to its improper construction and to its requiring repairs; and they had had an estimate made of the expense of repairing it, but had refused to execute the repairs on the ground that the wharf had already cost them a large sum. A hoarding was indeed put round the campshed, and some trifling repairs done, but the hoarding was swept away by the first barge which came to the wharf. The surveyor to the Conservators of the Thames, who examined it after the accident, said that the campshed was in a dangerous condition, and that it had probably escaped his notice, owing to its being surrounded by vessels, or he would have had it repaired by the defts. After the accident the defts. did put it into proper repair.

As to the fourth plea it was proved that the barge came to the wharf to receive some marble slabs from a schooner which was unloading there, and for greater convenience the slabs were unloaded from the schooner on to the wharf, and then the schooner drew back and the barge came up to the wharf and the slabs were lowered into it by a crane. This was done at high water, and as the tide ebbed the barge settled upon the campshed and a hole was made in it. From its heeling over, the marble slabs were thrown down and injured. The defts.' contended at the trial that the p'ts.' lighterman who was in charge of the barge had notice of the position of the campshed and of the danger to be apprehended from it, and that the accident arose from a want of due care on his part in mooring the barge. These were the only two points eventually left to the jury, who found them for the p'ts. A verdict was thereupon entered for the p'ts., the defts. having leave to move to enter a verdict for them if the court should be of opinion that the facts stated in the declaration and proved at the trial did not show any breach of duty on the part of the defts.

Parry nisi having been obtained accordingly,

Parry, Serjt. and Garth showed cause.—The facts proved at the trial showed a breach of duty on the part of the defts. If they chose to keep a campshed in the bed of the river, they were bound to keep it in such a manner as not to do damage to persons using the river: (*White v. Crisp*, 10 Ex. 312.) The campshed was in fact a nuisance.

M. Chambers, Q. C. supported the rule.—The campshed being placed in the bed of the river between high and low water mark, the defts. could not legally do anything to it without the consent of the Conservators of the Thames. The barge did not come to the wharf as a customer to the wharf, but as a customer to the schooner: (*Chapman v. Rothwell*, E. B. & E. 168.) On the general question of breach of duty were cited:

Todd v. Flight, 30 L. J. 21, C. P.; 3 L. T. Rep. N. S. 325;

Hancock v. The York, Newcastle and Berwick Railway, 10 C. B. 348;

Brown v. Mallett, 5 C. B. 599.

ENLÉ, O. J.—I am of opinion that this rule should be discharged. The main question seems to be, whether the facts proved at the trial showed a breach of duty on the part of the defts. The substantive facts proved I take to be these: that the defts. had a wharf adjoining a navigable river, and that for the more convenient use of his wharf they had deepened the bed of the river opposite to it, and had placed a camp-

shed there to prevent the soil from coming in and filling up the excavation which he had made. This campshed was not carried out, in what was shown to be the ordinary way, to the low-water mark, and then sloped off, but it was carried out a few feet from the wharf and then abruptly terminated. The barge came down upon it and was injured. The defts. appear to me to have had the duty cast upon them, either of giving notice that the campshed was there, or of taking proper care to repair it. The campshed had, it is true, been put out by their predecessors; but the defts. succeeded to the wharf and to the benefit of the campshed. There was evidence that they had the control of it, for, at the request of their neighbours, they had had an estimate made of the cost of putting it into proper repair, but the repairs had not had done. They had, indeed, attempted to repair it, but had done so in an inefficient manner, and there was the subsequent fact that after the accident they had repaired it and made it safe. It was clear from this that they might have executed the required repairs without incurring the liability adverted to of being treated as trespassers by the Thames Conservators. I am therefore of opinion that there was a breach of a private duty on the part of the defts. But, on a second ground, I am also of opinion that judgment should be for the p'ts. In a navigable river, open to all persons to use it when the tide is up, was placed a construction making the use of the highway dangerous. Perhaps by the custom of the city of London, as has been contended, the placing of campsheds in the river is not to be considered as a nuisance; but such a privilege, if it exists, can only amount to a privilege to place in the river a campshed kept in proper repair, and duly guarded to prevent accidents to the Queen's subjects using the highway. On both grounds I give my judgment for the p'ts. It has been said that the p'ts.' barge was at the wharf without profit to the defts., and that therefore the p'ts. could have no greater claim against the defts. for damage sustained than a private visitor would have against a friend, in whose house he was staying, for injuries received in consequence of his premises being dangerous. This point was not made at the trial, but it was proved that the schooner was there in the ordinary course of wharfage business, and was a customer of the wharf, and she got permission to draw back and let the barge come up and load from the wharf instead of loading directly from her. This was a use of the wharf in the ordinary course of the wharfage business, and the wharfingers are answerable to the owners of the barge.

WILLIAMS, J.—I think that sufficient of the allegations contained in the declaration have been proved to sustain the action. I do not rest my judgment upon the second ground mentioned by *ERLE, C.J.*, because I think that we do not know enough of the circumstances of the case to enable us to decide that this campshed was a public nuisance. It is sufficient to decide the case on the first ground. The campshed was placed there for the more convenient use of the wharf by the owners, and it was kept by the defts., and the defts. had so conducted themselves as to show that they considered themselves to be the owners of it. The barge, sinking in the ordinary course of nature, came into collision with the rough part of the campshed. The p'ts. were not aware of the danger, and the defts. were. I think that the defts. were bound to give notice of it to persons who came to their wharf in the ordinary course of business, and that if they neglected this they must be responsible for the consequences of their neglect.

BYLES, J.—I think that judgment should be for the p'ts. on both grounds. There is no doubt upon the evidence that the campshed was improperly con-

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structed, that it was out of repair, that no notice of its being so was given, and that it was a public nuisance. The schooner was being unloaded at the wharf, and part of its cargo discharged into the barge through the medium of the wharf; so that the barge was there at the request of the defts., and therefore an additional burden of duty was thrown upon them.

KRATING. J. concurred. *Rules discharged.*

Wednesday, Nov. 18.

SHAND AND ANOTHER v. GRANT AND ANOTHER.

Money paid under a mistake of fact—Bills of lading.

Cotton was shipped at Madras, consigned to London for the plts., merchants residing at Liverpool. The bills of lading expressed the freight to be "at the rate of 2l. 5s. per ton of fifty cubic feet as per margin." The margin contained a note of the measurement of the cotton, and of the amount of freight calculated accordingly. On the arrival of the ship the cotton was bonded at a wharf in London, and the plts.' brokers sent copies of the bills of lading to the wharfinger, and also to the plts. at Liverpool. The wharfinger in the ordinary course of business measured the cotton and sent a note of the measurement to the defts., who were the ship's brokers, one of them being the sole owner of the ship. The defts. thereupon made out a freight note, calculating the freight according to the London measurement, which was larger than the Madras measurement, and forwarded it to the plts.' brokers, who paid the amount and were credited therewith by the plts., their principals, the latter having the bills of lading in their possession at the time. After the lapse of nearly two years the plts. settled their accounts with their agents at Madras, and the mistake was discovered. The plts. then sued the defts. for the amount of freight overpaid. The defts. had in the meantime settled the ship's account for the voyage with the owner. There was perfect bona fides on both sides:

Held, that the money having been paid by the plts. under a mistake, they were entitled to recover it back from the owner of the ship, but not from the defts. the ship's brokers.

Money paid. Plea, never indebted.

The action was brought to recover 88l. 8s. 3d. for freight alleged to have been paid by the plts. to the defts. under a mistake of fact. At the trial before Erie, C.J., at the sittings in London after last term, the facts proved were as follows:—

The plts. were merchants at Liverpool. The defts. J. and R. Grant were brokers in London, and one of them, J. Grant, was sole owner of the ship *Comet*, which in Jan. 1861 was at Madras, loading a general cargo on account of her owner for London. Shand and Co. of Madras shipped on board 700 bales of cotton, consigned to London for the plts. The captain signed four bills of lading which were similar in form with the exception that one was for 100 bales and the others were for 200 bales each. The bills of lading stated the freight to be "at the rate of 2l. 5s. per ton of fifty cubic feet, as per margin, with primage and average accustomed."

The margin of each bill contained a note of the weight and measurement of the bales mentioned in the bill, and a calculation of the amount of freight payable in respect thereof, the amounts being 36l. 7s. 5d. for the 100 bales, and 112l. 14s. 11d. for each lot of 200 bales. The aggregate amount of the whole freight payable for the 700 bales was therefore 394l. 12s. 2d. The ship arrived in the Victoria Docks in April 1861. The plts.' brokers, Tetley and Co., bonded the cotton at Cotton's Wharf, and sent copies of the bills of lading to the wharfinger and to the plts. The wharfinger in the ordinary course of business

measured the bales and made out a note of the measurement, which he delivered to the defts. the ship's brokers. The defts. thereupon, also in the ordinary course of business, made out a freight-note at the rate of freight mentioned in the bills of lading, adopting the measurements of the wharfinger. The cotton measured more in London than it did at Madras, and the consequent increase in the amount of freight calculated according to the London measurement was 88l. 8s. 3d. The defts. sent the freight-note to the plts.' brokers, who paid the amount in May 1861, not having the bills of lading in their possession at the time. The plts. subsequently credited their brokers with the amount paid by them, making no objection that too much freight had been paid. The accounts of the ship were wound-up for the voyage and settled by the defts. as ship's brokers with J. Grant, one of the defts., as ship's owner.

At the end of the year 1862 the plts. sent their account sales to the firm of Shand and Co. at Madras, and that firm then pointed out that more freight had been paid by the Liverpool house for the cotton than was payable according to the calculations in the margins of the bills of lading. The plts. thereupon claimed a return of the excess from the defts., who refused to repay it, and this action was consequently brought. There was evidence that the entries in the margins of the bills of lading had been made in accordance with a rule of the Madras Chamber of Commerce made some twelve years ago for the express purpose of preventing the disputes which arose from the difference in the measurements of cotton before and after the voyage from India to England. It did not appear that the plts. knew of the rule. It was admitted that both the plts. and defts. had acted perfectly bona fide throughout.

It was objected by the defts.' counsel that although the plts.' brokers had paid the sum in dispute under a mistake of fact, the plts. themselves had not done so, they having the bills of lading in their possession at the time. It was also objected that the action would not lie against the defts. as ship's brokers, they having settled their account for the voyage with their principal, the ship's owner. To this last objection it was replied that one of the defts. was in fact the ship's owner, and as such liable to repay the overpaid freight; and that the record could be amended by striking out the name of the other deft. Erie, C.J. directed a verdict to be entered for the plts. for the amount claimed, giving the defts. leave to move to enter a nonsuit or a verdict for them, the court to have power to amend the record by striking out the name of one of the defts.

Lush, Q.C. having moved accordingly,

M. Smith, Q.C. showed cause.—It is against equity that this money should be retained. At one time it was assumed, in consequence of a *dictum* of Bayley, J., that where there had been laches on the part of the claimant he could not recover it back, but the sounder view is, that where the person holding the money has no right to hold it, the claimant is entitled to recover it back, although at the time when he paid it he had within his reach the means of knowing that he ought not to pay it. The leading case on the subject is *Kelly v. Solari*, 9 M. & W. 54, which is a very strong case. It has been followed in

Townsend v. Crowley, 8 C. B., N. S., 477; 2 L.

T. Rep. N. S. 537;

Bell v. Gardiner, 4 M. & G. 11;

Holland v. Russell, 1 B. & S. 424; 4 L. T. Rep. N. S. 547.

Lush, Q.C. and Sir G. Honyman supported the rule.—The plts. adopted the payment which had been made for them by their brokers, and there is no evidence that they were ignorant of the entries in the margins of the bills of lading which they had in their possession.

They may not have known the legal effect of the bills; but payment made under a mistaken construction of the bills would be made under a mistake of law, and not under a mistake of facts, and they would not be entitled to recover it back. At any rate R. Grant cannot be liable in this action, for he, as broker, had discharged himself. If his name is struck out, it must be on the terms that he has a moiety of the whole costs of the defence.

By the COURT.—Upon the authorities cited the plts. are entitled to recover back the money which they claim from the shipowner, but not from the defts. as ship brokers. The name of the deft. R. Grant must be struck out of the record, leaving the name of J. Grant, the owner of the ship. The deft. R. Grant must have his costs, which will be taxed by the master; but it is not necessary for the court to state now the principle upon which they will be taxed.

Rule discharged.

REGISTRATION APPEALS.

Saturday, Nov. 21.

CAUNTER (app.) v. ADDAMS (resp.)

Election law—Parliament—Borough vote—Assistant-overseer—59 Geo. 3, s. 12, c. 7.

The resp. claimed to be retained upon the list of voters for the borough of A., on the ground that he had duly served a claim to be rated on Y., the assistant-overseer, and had been rated accordingly. It was objected by the app. that the resp. was not duly qualified, on the ground that the claim made to Y. was of no effect, the appointment of Y. as assistant-overseer having been revoked. Y. had, in 1859, been duly elected and nominated by the inhabitants in vestry assembled to be assistant-overseer of the parish of A., which was co-extensive with the borough of A., at a certain fixed salary. He was subsequently duly appointed assistant-overseer by two justices pursuant to 59 Geo. 3, s. 12, c. 7. In March 1861 he gave notice of resignation to the board of guardians, but recalled his said notice prior to Lady-day 1861, on which day, by a resolution of the inhabitants in vestry assembled, his salary was increased by a fixed sum. The sanction of two justices to this increase was not obtained, and there was no re-appointment of Y. by justices. Y. continued to act as assistant-overseer. The app. contended that there had been a fresh election and nomination of Y. by the inhabitants in vestry on Lady-day 1861, and a fresh appointment by justices was required. The revising barrister overruled the objection and allowed the vote:

Held, upon appeal, that his decision was right.

Appeal from the decision of the revising barrister for the borough of Ashburton, allowing the name of the resp. to be retained upon the list of persons entitled to vote in the election of a member of Parliament for that borough.

The case stated the following following facts:—

The borough of Ashburton is co-extensive with the parish. There are two churchwardens and four overseers. At a vestry meeting of the parish of Ashburton, held on the 21st April 1859 Stephen Yolland was nominated and elected to be an assistant-overseer of the said parish under the provisions of the 59 Geo. 3, c. 12, at a salary of 15*l.* per year, with a further salary of 3*l.* 5*s.* for the making and collecting of way rates.

On the 30th Aug. 1859 the election of Stephen Yolland was confirmed by a warrant of appointment by justices in petty sessions.

Subsequent to this election by the parish vestry and before his appointment by the justices, the said Stephen Yolland gave the usual bond to the guardians of the

Newton Abbott Union (of which union the parish of Ashburton forms part) for the due performance of his duties. Sometime before the 25th March 1861 Stephen Yolland gave notice to the board of guardians of the said union of his intention to resign the office, but he did not give notice to any one else. Prior, however, to Lady-day, he withdrew this notice by letter addressed to the board of guardians. Stephen Yolland's nomination and election was not by the board of guardians, but by the inhabitants in vestry. On the 25th March 1861 a vestry meeting was held at Ashburton pursuant to notice "to take into consideration the necessity of advancing the assistant-overseer's salary;" and at that meeting a resolution was passed that his salary should be increased from 15*l.* to 25*l.*, with 5*l.* for making and collecting way rates in lieu of 3*l.* 5*s.*

From that time to the present Mr. Yolland has continued to perform all the duties of assistant-overseer, and has received the increased salary of 25*l.* per annum, but has never applied for or received any fresh warrant of appointment by justices.

On the 15th Nov. 1862 the said Joseph Addams and others, the undermentioned voters, served a claim on Stephen Yolland to be put upon the then existing rate, which was the first rate for the electoral year, at which time all arrears of rates in respect of the property on which they claim to vote were paid to him as such assistant-overseer. They were not put upon that rate, but were put upon all subsequent rates, which rates, as well as the existing rate, were duly made and allowed by the justices, and also signed by Stephen Yolland as assistant-overseer.

Stephen Yolland made out, and in conjunction with the churchwardens and overseers signed, the list of voters for the borough of Ashburton for the present year.

At the revision of the said borough the name of the said Joseph Addams was objected to by the app. as not being qualified, upon the ground that he was not duly rated, and that the claim to Stephen Yolland was of no effect, inasmuch as his appointment was revoked by the vestry of 1861.

I held that the claim to be rated to Stephen Yolland was a valid claim, and overruled the objection, whereupon the said Joseph Addams duly proved his qualification, and I allowed the vote.

If the court shall be of opinion that the service of the claim on Stephen Yolland was not a due service of a claim to be rated within the 30th section of the Reform Act, the name of Joseph Addams is to be expunged from the register of voters of the borough of Ashburton.

Karslake, Q.C. for the app.—The case turns upon the construction of 59 Geo. 3, c. 12, s. 7. The short point is, whether or not a second appointment by justices was needed after the assistant-overseer's salary was increased. He had virtually resigned his office and been reappointed, but his second appointment had not been sanctioned by justices, as was necessary:

Burn's Justice, tit. "Poor," p. 1335;

Bamford v. Iles, 3 Ex. 380.

Coleridge, Q.C. (*Bullar* with him) for the resp., was not called on.

ERLE, C.J.—We think that the revising barrister was right. The question is, whether Yolland was assistant-overseer? He had a valid appointment as assistant-overseer, at 15*l.* per annum, and he gave notice of resignation, but before the time came for him to resign he withdrew that notice. That is a matter that anybody may cancel, and before the resignation had been accepted and the office vacated, he gave due notice in time, and continued in the office of overseer. A further ground of impeaching his title is, that the vestry raised his salary from 15*l.* to 25*l.* It is possible that he might not be able to recover that increased

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amount unless the justices had confirmed the increase, but the parish have paid it to him, and the absence of confirmation by justices does not invalidate his title or prevent his being assistant-overseer. Therefore, the notices given to him were valid notices, and the revising barrister was right in holding them to be valid.

WILLIAMS and KEATING, JJ. concurred.

Judgment for the resp. with costs.

HENNETTE (app.) v. BOOTH (resp.)

Election law—Borough vote—Nature of occupation.

The app. occupied the upper floor of a house, communicating with the landing of the staircase by an outer door, over which he had complete control. The other floors were occupied by other tenants. At the bottom of the staircase, and in the common passage, was a door which separated the passage from the street. This door had no fastening, and ordinarily stood open night and day, though it fell to occasionally at night, and so remained closed by its own weight. The app. claimed to be retained upon the list of voters for the borough in which he resided, on the ground that he occupied a separate house within the meaning of the Reform Act, 2 Will. 4, c. 45, s. 27. The revising barrister disallowed the claim:

Held, on appeal, that the app. did occupy a separate house, and was entitled to vote in respect thereof.

Appeal from the decision of the revising barrister for the city of London, disallowing the app.'s claim to vote. The barrister stated the following case:—

At a court of revision held before me A. H., barrister-at-law, duly appointed to revise the lists of voters for the city of London, Thomas Woodgate Booth, on the list of voters of the livery of the Company of Distillers, duly objected to the name of Peter Henrette being retained on the list of persons entitled to vote in the election of members for the city of London, in the parish of St. Giles without, Cripplegate, under the following circumstances:

It was conceded by the objector, and proved before me, that the qualification of Peter Henrette (who is hereinafter termed the app.) fulfilled all the conditions precedent to registration required by the Reform and Registration Acts, with the exceptions, if such the court shall adjudge them to be, hereunder detailed.

The app. occupied for the statutory period as tenant, the whole of the upper floor, consisting of two rooms, of a tenement in No. 4, Honeysuckle-square. He uses one room as a tailor's shop, and the other as a sitting and bed room. His only residence is in the premises, which, taken together, are of the requisite value to confer a qualification, but neither of the rooms taken singly is of the requisite value. They consist of an inner and outer room, opening the one into the other, and communicating with the landing on the staircase by one outer door, over which the tenant occupier has exclusive control. The floors below are occupied by other tenants, and all have access to their several holdings from the street through a doorway at the entrance of a passage leading to the common staircase of the building. At this entrance is a door open all day, but generally, although not invariably, allowed to swing to at night, and having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street.

It was under this state of circumstances contended before me for the app.: 1. That the subject of occupation was a "house." 2. That if not a house, it was a building within the meaning of the qualifying clauses of the Reform Act. 3. That if not a house or building, the use for commercial or business purposes as a workshop of one of the two rooms not severed in any way from the rest of the premises, constituted the whole subject

of occupation a "shop," within the meaning of the qualifying clauses of the Reform Act.

On the other hand it was contended by the objector: 1. That the facts did not show such a severance of the qualifying premises from the rest of the tenement of which they formed the upper floor as to constitute them a house. 2. That the one room used as a workshop was not of sufficient value to confer the franchise. 3. That the use of one of the rooms for the purposes of trade did not impart the character of a "shop" to the whole premises the subject of occupation. 4. That the nature of the occupation did not warrant their designation as a "building" within the meaning of the Reform Act. 5. That the use of one of the rooms for habitation rendered the whole premises a residence insufficient to confer a qualification because not a "house" within the meaning of the Reform Act.

I sustained the objection and expunged the name of the app. from the list of voters on the ground that the whole premises the subject of occupation did not constitute in law a house or building or a shop within the meaning of the Reform Act.

If the court shall be of opinion that this decision was erroneous, the name of the app. Peter Henrette is to be reinstated in the list of voters in the parish of St. Giles without, Cripplegate.

Kingleake, Serjt. (*Underdown* with him) for the app., cited

Score v. Huggett, 7 M. & G. 95;

Cook v. Humber and *Wilson v. Roberts*, 11 C. D., N. S., 30, 50; 5 L. T. Rep. N. S. 838;

Toms v. Luckett, 5 C. B. 23;

Kearney's case, *Alcock's Registry Cases* decided by the Twelve Judges for Ireland, 22;

Downing v. Luckett, 5 C. B. 40.

Overend, Q.C. (*Fawcett* with him) appeared for the resp.

ERLE, C. J.—I am of opinion that the revising barrister was wrong, and that the claimant obtained his franchise and was an occupier of "a house" within the meaning of the judgment in the case of *Cook v. Humber*. He occupied the whole of the upper floor which communicated with a landing on the staircase by an outer door, over which the claimant had exclusive control; and the case goes on to find that there were other floors occupied by other tenants, and that there was a common passage to which there was a door that was capable of falling to, but, in practice, was kept open night and day, and if it was closed at night it was closed only by the door falling to. In the case of *Cook v. Humber* the court felt very great difficulty in trying to come to some definite idea of what should constitute "a house" as contradistinguished from a "part of a house." But when it assumed that there might be several houses under one roof, the court was compelled to hold that the several houses under one roof might be divided either vertically by a party wall or horizontally by floors carried out with the intention of creating a separate tenement on each floor; and the court were further of opinion that a house being so constructed and each flat being a complete and separate house, yet that there might be, for the protection of all the houses, the additional defence of an outer door—a door to the passage, or a door to the bottom of the court in which the houses were, or some such contrivance, without its preventing each house from being a separate house. That having been laid down in the course of the judgment, and the case of flats having been considered, the court endeavoured to point out that the question, whether or not there was a separate house, did not depend upon the presence or absence of the landlord, or upon the handing over or keeping back of the key of the same outer door, but that it depended

upon whether or not there was a severance of the part of the house occupied. A more definite description of what should constitute a separate house, where all is under one roof, I am unable to give. Upon the finding of the revising barrister here, the case is in complete analogy with that of chambers in the Temple, or the divisions of houses in Lincoln's-inn-fields, where there are separate rooms occupied by separate tenants and there is a common staircase and sometimes an additional outer door and sometimes none. This case falls, to my mind, precisely within those cases where the place is open to the street, and the claimant is the exclusive possessor of a floor and has an exclusive control over the outer door of that floor. In the case of *Roberts v. Wilson* the question turned upon what should be called the outer door. The claimant occupied the first floor of a London house; there was not the least distinction in the nature of his occupation from that of any other lodger in any other house let out in lodgings; the landlord had the ground-floor, and the first-floor was occupied by Roberts, and though he had a key to every door of every room in his lodgings, that did not, in the opinion of this court, create a separate house, there being an outer door and he living on the first floor. The doctrine we attempted to lay down in the case of *Cook v. Humber* appears to be sanctioned by the opinion of the twelve judges in *Kearney's* case in the court in Ireland, where the question arose in a different form. I am of opinion, upon the facts, that this appeal ought to be sustained.

WILLIAMS, J.—I am of the same opinion. I think that we are bound to abide by the doctrine that was laid down after great deliberation in the case of *Cook v. Humber*. That doctrine is found in the judgment there to the effect that a part of a house may give a franchise, provided it be occupied as an independent occupation and there be a complete severance between it and the remainder of the house. Having regard to the cases which have been decided upon this subject, it is not an easy thing to say what is a natural severance so as to come within the rule; but it is admitted on all hands that a flat occupied as chambers in an Inn of Court does come within the rule. It seems to me that the occupation would not be different because the occupiers of the different chambers might have agreed that they would have, at the bottom of the stairs, a gate, or an iron railing, or something that, if they should be so minded, might protect the common staircase from intruders. I do not see that this case differs in principle from the ordinary case of chambers occupied in an Inn of Court, and I think that there was an actual severance within the meaning of the Reform Act.

KEATING, J.—I am of the same opinion. The cases no doubt do, and necessarily must, run very close to one another and the distinction between them must necessarily be slight; but, taking, the facts as found by the revising barrister, I come to the conclusion that this is not part of a house, but a house in the sense in which the term is intended to be used in the Reform Act. The only outer door of which the barrister speaks, or which he specifies as an outer door, is the door over which the app. had exclusive control; that is, the outer door of his floor or set of rooms. Practically, there was no other outer door. The revising barrister does not call anything else the outer door. He does say that, at the end of the passage leading to the rooms, there was a door, but it was without any means of fastening and without any of the essentials requisite to an outer door. It could not be used, as the revising barrister says, to secure the premises from intrusion from the street. It is as though the door had been taken off the hinges and left lying at the side of the door-post: then it would be no outer door. So, here, there is practically

no outer door, and the revising barrister most correctly abstained from calling it an outer door, but says that the door of the premises of the app. was the outer door. On these facts there was such a severance as this court thought existed in the case of *Cook v. Humber*, and therefore the voter occupied not part of a house, but a house within the meaning of the Reform Act.
Judgment for the app.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LIGCH, Esqrs., Barristers-at-Law.

May 29, and Nov. 3 and 10.

HOLMES v. MORRIS.

Breach of contract—Waiver—Substituted contract.

Plt. contracted with deflt. to supply him with 1000 pieces of English oak scantling, cut into certain specified dimensions; 100 pieces to be submitted as a sample, inspected and approved by deflt., and the remainder to be equal to sample. Plt. never sent any sample, but delivered a quantity of oak blocks, some of which did not accord with the contract, and were rejected. Deflt. offered to pay for the good that suited him, if plt. would send an invoice of it, and take away the rejected part. This not being complied with, deflt. afterwards withdrew this offer, and rejected the blocks. Subsequently the plt. sent in a new invoice, abating for the bad blocks, which in invoice deflt. returned, and declined further negotiation:

Held, that the original contract was not performed, and there was no substituted contract, therefore the plt. was not entitled to recover.

Declaration for goods sold and delivered, and for money due from deflt. to plt. on account stated.

The plt. by his particulars claimed 43*l.* 17*s.* 6*d.*

Plens.—Except as to 21*l.* 15*s.*, never indebted. As to the 21*l.* 15*s.*, payment thereof into court, and that such sum was sufficient to satisfy the plt.'s claim. Issue thereon.

It appeared that plt. was a timber merchant at Bath, and the deflt. carried on a similar business in Bristol. The following contract for the supply of timber by the plt. to the deflt. was entered into by them: "We hereby agree to deliver to R. W. Morris's timber yard at Cumberland-road 1000 pieces of English oak timber cut into scantling of the following dimensions, viz., 2 feet long by 6, 7, or 8 inches square, free from any rotten sap or unsound knots, 100 pieces to be submitted as a sample, and inspected and approved of by R. W. Morris, and the remainder to be equal to such approved sample. Payment 1*s.* 8*d.* per cube foot, by an acceptance of three months' date from day of delivery, or 5*s.* off the amount of invoice for net cash, the whole quantity to be delivered on or before the 25th of this present month.

"Bristol, Oct. 8, 1861.

"To R. W. Morris.

"HOLMES and Co.

"W. HOLMES."

Some of the scantling supplied deflt. said was of chesnut and other wood, not oak—this the plt. denied; and some that were oak were defective in the particulars required by the contract. None was ever cut for sample or submitted to deflt.'s inspection; some of the scantling was not of the stipulated size, and much was wholly useless for the deflt.'s purposes. He had a survey made of it by a timber measurer, who certified to him that the good contained 261 feet cube, which, at 1*s.* 8*d.*, would amount to 21*l.* 15*s.*, the sum paid into court by deflt.

There was a long correspondence between the parties, of which the following are the most material:—

Oct. 30, 1861. Deflt. to plt. "There are a great many of the oak blocks that will not do. I cannot

[Ex.]

HOLMES v. MORRIS.

[Ex.]

tell you the exact quantity, as I am only just returned from, &c. . . . You ought to have sent me a notice when you had cut one hundred pieces, and then I would have shown you such as would not answer. You must make up the quantity of good and approved pieces to the 1000, and I think you will have upwards of 300 to cut more to make the contract complete, and which must be done at once."

On 9th Dec. 1861 deft. wrote plt.:—"I shall be glad if you will come to some decision in reference to rejected scantling; at any rate, I should feel obliged for a corrected invoice, charging me with the quantity approved of as given you."

Plt. wrote deft. expressing his surprise that any complaint should be made, whereupon deft. referred plt. to their contract, and on the 3rd Feb. wrote plt., saying, "As soon as you will render me a correct invoice for the oak scantling I will settle the account. You are aware that a great portion of it is not cut to contract, and of which I advised you immediately on same being landed." Plt. then required deft. to appoint a day to meet and inspect the oak squares. Deft. did not, but declined the scantling not in accordance with the specification. Plt. then offered to replace one or more not to size by others, but deft. refused, and refused to take possession of that sent not to order. Plt. then wrote deft. referring him to his letter of the 30th Oct., saying, "As you wish us in your letter to select and send you a corrected invoice, we have selected 203 from 1059, and hand you a credit note of the same," &c. Deft. returned the account, and declined in future to answer any letter on the subject.

It was contended, on behalf of the plt., that the correspondence and subsequent conduct constituted a waiver of the original contract, and amounted to a substituted contract to accept such of the blocks as were in accordance with the specification; whilst it was contended, on behalf of the deft., that, as there was merely an offer to pay upon having a corrected invoice, which offer plt. did not accept, it led only to a negotiation for inspecting the blocks, which ended in deft.'s retracting the offer altogether, and that it did not amount to a substituted contract.

The cause was tried before Byles, J., at the last Bristol spring assizes, when the jury found a verdict for the plt. for 16l. 12s. 5d. beyond the amount paid into court, leave being reserved to move to set aside the verdict and enter it for the deft. And a rule nisi having been obtained accordingly on the ground that there was no evidence of a new and substituted contract to take the goods, or that the terms of any such contract, if made, were complied with,

Prideaux (Speke with him) showed cause and referred to

Chapman v. Morton, 11 M. & W. 534;
Gordon v. Whitehouse, 18 C. B. 747;
Watts v. Ainsworth, 1 H. & C. 83;
Leri v. Green, 8 E. & B. 580, and in error, 1 E. B. & E.

M. Smith, Q. C. (*Rowley* with him), in support of the rule, referred to

Key v. Cotesworth, 7 Ex. 595;
Morrell v. Frith, 3 M. & W. 402;
Coles v. Cotterell, 15 Ves.;
Aldridge v. Johnson, 7 E. & B. 898;
Livington v. Higgins, 4 H. & N. 410;
Gibbett v. Hill, 2 C. & M. 535;
Cunliffe v. Harrison, 6 Ex. 906.

The Court directed subsequently that the question should be reargued by one counsel only on each side.

Nov. 3.—*Prideaux* reargued it for the plt.

M. Smith, Q. C., contra, was stopped by the Court.

Cur. adv. vult.

Nov. 10.—*BRAMWELL*, B. delivered judgment.—In this case we do not think it necessary to hear *Mr. Montague Smith*, as the court are all of opinion that the

rule should be made absolute to enter the verdict for the deft. The question was whether, the declaration being for goods sold and delivered, there was any evidence to show that the property in the goods, the subject of the action, had passed from the plt. to the deft. There was a contract to sell certain oak timber cut into scantling by the plt. to the deft., a sample of which he was first of all to send to the deft. for approval. He never sent a sample, but delivered a quantity of oak blocks which, it was admitted, were not in entire conformity with the contract, and if so, the deft. had a right to reject them. He did reject them. The question then was, whether any new contract was made between him and the plt. with reference to any of the blocks. It was stated, on the part of the plt., that there was and for this reason: there was a letter stating that deft. thought upwards of 300 were not in conformity with the contract, and he was willing to take the rest, provided the plt. would select the bad oak blocks and send in a fresh invoice. It was said the plt. had accepted the offer. The truth is, he never had done so. He wrote to the deft. in return, saying that he would call and look over the blocks, never saying that he admitted some were not in conformity with the contract, and that he would go and pick them out and send in a new invoice; but he offered to meet the deft. and go over the blocks, thus, therefore, merely giving himself a right to say, "I have never agreed that these blocks are not in conformity with the original contract." The deft. immediately wrote in reply, repeating, in fact, what he had said before, not saying, in so many words, but in effect, "I am not going there; you go and select the bad blocks, and then send in an invoice of the good ones." Nothing more was done (except that there were some letters written by the plt., not finding the deft. at the place); he did not at any time select the bad blocks. He wrote several letters saying that the account was overdue, always receiving the same answer from the deft. He did not set the matter right until at length the deft., tired of this, withdrew the offer and said—"Now, I wholly reject all the blocks, and will have nothing further to do with them." Then the plt., some time after, did what, if he had done at first, would have given him a cause of action against the deft., he went to the place and selected the bad blocks and sent in a new invoice in which he abated the price of the bad blocks from the offer. If he had done that when the offer was first made, it would have been a good cause of action; but he did not do so until the offer was withdrawn; all that he did in consequence of that offer was to say, "Meet me, and let us see whether any of these blocks vary from the contract." The result therefore is, that the original contract not having been fulfilled by the plt., though there was a new offer on the part of the deft., that offer was never accepted by the plt. till the deft. had withdrawn from the contract; then it was accepted, but too late. The fact is, that the plt., perhaps not unreasonably, desired to reserve to himself the right to say "I have complied with the contract." Of course, as long as he did reserve that right, he was not accepting the offer based on the notion that he had not done it and he must take the consequences of not making up his mind; and it would not appear that he had complied with the original contract, therefore the rule ought to be made absolute.

Rule absolute to enter verdict for deft.

Plt.'s attorney, *G. F. Prideaux*, Bristol.

Deft.'s attorneys, *King and Plummer*, Bristol.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 14.

(Before ERLE, C. J., WIGHTMAN and WILLIAMS, JJ.,
MARTIN and BRAMWELL, BB.)

REG. V. RINALDI.

*Forgery—Photographic impression on glass—Note of
foreign country.**The making on a glass plate a positive impression of
an undertaking of a foreign state for the payment of
money by means of photography, without lawful
authority or excuse, is a felony within the 24 & 25
Vict. c. 98, s. 19.*Case stated by Keating, J. for the opinion of this
Court.

Peter Rinaldi was tried before me at the last August Session of the Central Criminal Court, upon an indictment framed upon the statute 24 & 25 Vict. c. 98, s. 19, which charged that he did feloniously, &c., "make upon a certain plate, to wit, a plate of glass," &c., an Austrian note for the payment of one guilder.

The indictment, which was to be considered a part of the case, contained fourteen counts.

The first was as follows:—

Central Criminal Court, to wit. The jurors for our Sovereign Lady the Queen upon their oath present that, in a certain foreign state, that is to say, the empire of Austria, for a long time previous to the commission of the felony and offence hereinafter charged, and at the time when the said felony and offence was committed, and since, hitherto and up to the present time, divers undertakings for the payment of money of the said foreign state, that is to say, the said empire of Austria, were made, issued, negotiated and circulated, and were lawfully current in the said foreign state, and that the said undertakings for the payment of money were, and each of them respectively was, during all the time aforesaid, made, issued, negotiated and circulated, and were current as aforesaid for payment of a certain amount of foreign money, that is to say, for payment of one piece of coin called a guilder, of the currency of the said foreign state, to wit, the empire of Austria, the said piece of coin being lawfully current in the said foreign state, and being, during all the time aforesaid, of great value, to wit, each guilder being of the value of two shillings in English money, and each of the said undertakings for the payment of money being for the payment of one guilder. And the jurors aforesaid, upon their oath aforesaid, do further present that Peter Rinaldi, late of the city of London, labourer, well knowing the premises, and whilst the said undertakings were so as aforesaid lawfully current in the said foreign state, to wit, the empire of Austria as aforesaid, to wit, on the 23rd day of June, A. D. 1863, in the city of London, and within the jurisdiction of the Central Criminal Court, wilfully and feloniously and without the authority of the said foreign state, and without lawful authority and without lawful excuse, did make upon a certain plate, to wit, a plate of glass, an undertaking for payment of money, to wit, for payment of one guilder, purporting to be one of the said undertakings for payment of money of the foreign state aforesaid, to wit, the said empire of Austria, so made, issued, negotiated and circulated, and lawfully current in the said foreign state as aforesaid, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

It was proved that the prisoner employed a photographer to counterfeit Austrian bank notes, his directions being to take the impression of the note on glass by means of the photographic process, and then get it engraved on metal or wood, so as afterwards to strike

off the notes when the proper bank-note paper could be procured from the Continent. The photographer accordingly took off on a glass plate a "positive" impression of the note and showed it to the prisoner, who was apprehended whilst approving of the impression and giving further directions with respect to it. It appears that the process of photography consists in exposing to the light a plate of glass properly prepared with collodion, with the note opposite, by which means the shadow or impression of the note is produced upon the glass. This impression is called "a positive," and by converting it into a "negative," which is easily done, notes can either be printed by photography to any extent on properly prepared sensitive paper, or may be engraved from, as directed to be done by the prisoner; but the impression of the note could not be printed or engraved until the positive was converted into a negative. The impression was described by the witness as a mere shadow on the surface of the glass, and easily washed off until fixed, and it was found necessary to varnish the impression taken in order to fix it for production at the trial. The counsel for the prisoner objected that no offence was proved, that the statute did not contemplate the use of photography, but an "engraving or making," by cutting into the surface of some material for the purpose of taking impressions therefrom, that producing an evanescent shadow of the note upon glass, though intended to be subsequently used for the purpose of engraving, was not within the statute, and that the engraving of the note, which was ultimately contemplated and directed by the prisoner, never was made.

I thought the case within the statute, and so directed the jury, who found the prisoner guilty, and I respited the judgment for the opinion of the Court of Criminal Appeal.

H. S. KEATING.

Metcalf's for the prisoner.—The procuring of the copy of the note to be photographed in the "positive," was not engraving, or making an undertaking for payment of money within the meaning of sect. 18 of 24 & 25 Vict. c. 98, which enacts that "whosoever, without lawful authority, or excuse (the proof whereof shall lie on the party accused), shall engrave, or in anywise make upon any plate whatsoever, or upon any wood, stone or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be, or be intended to be under the seal purporting to be the bill, note, undertaking or order, or part of the bill, note, undertaking or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of Her Majesty, or shall use or knowingly have in his custody or possession any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of or put off, or have in his custody or possession, any paper upon which part of such foreign bill, note, undertaking or order shall be made or printed, shall be guilty of felony." This was a mere shadow on glass, which had to be varnished in order to preserve it for the sake of its being used as evidence in the case. It required another process to be gone through before it could be converted into an "engraving" or used for "making." No doubt what was done was an element in the process; but from a "positive" you could not engrave a copy of the undertaking. It might have been an overt act, showing that the prisoner intended to engrave, but it was not

complete so as to come within this section. *Gambert v. Bull*, 32 L. J. 166, C.P., which decided that photographic copies of an engraving were piracies within the Copyright Acts, has no application to this case.

Foland, for the prosecution, was not called upon.

ERLE, C. J.—I am of opinion that this conviction was right. [His Lordship then read the language of the section.] The prisoner clearly made on a plate of glass an undertaking for the payment of money. An undertaking for the payment of money lies in a certain form of words. The process adopted in taking off on a plate the positive impression of the note, is to put on the plate the exact words more perfectly than could have been done before the discovery of photography. The object of the statute upon which this indictment is founded is to prevent the counterfeiting of foreign securities. Leaving out of consideration the question of intent, this is a copying of an undertaking for the payment of money; and the prisoner does that without authority or excuse. And I am of opinion that the case is within the words, as it is clearly within the intention of the statute. It has been pressed upon the Court that this photographic impression was merely a preliminary process, and in an evanescent form. But the statute may apply to any stage of the process, and though this photographic copy was in the first stage only, and in the evanescent form, the prisoner was clearly guilty of the offence of forgery within the statute.

The rest of the Court concurring,

Conviction affirmed.

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

Saturday, Nov. 14.

THE BLACK DIAMOND.

Collision—Vessels crossing—English and foreign vessels.

The foreign steam-vessel B. O. saw the green and white lights of another steamer (the English steam-vessel B. D.) distant about a mile and a half, and a point on the starboard bow. The B. O. ported. The B. D. kept her course, and at the last moment starboarded:

Held, that the B. O. ought either to have kept her course, or to have slowed until the precise situation of the other vessel had been ascertained; that the B. O. improperly ported, and was therefore to blame.

The paddle-steamer *Baron Ozy*, 502 tons, from Antwerp for London, and the British screw-steamship *Black Diamond*, 399 tons, from London for Sunderland, came into collision off the Mouse Light, in the Thames, about 3. a.m. on the 4th Dec. last.

On behalf of the *Baron Ozy* it was represented that she was steering W. $\frac{1}{2}$ N., carrying her proper lights, when the white and green lights of the *Black Diamond* were seen nearly ahead, half a point on her starboard bow, and about a mile off, whereupon her helm was ported; that shortly afterwards, as the red light of the *Black Diamond* did not appear, the helm of the *Baron Ozy* was put hard a-port, and that, when the ships were nearing, her engines were stopped and reversed, and the *Black Diamond* was hailed, but that, nevertheless, the *Black Diamond* struck the *Baron Ozy* with her stern on the port side before the paddle-box, smashing the red lantern and doing considerable damage.

The case on behalf of the *Black Diamond* was, that she was steering E. $\frac{1}{2}$ N., showing her regulation lights, when the masthead light of the *Baron Ozy* was perceived two to three points on her starboard bow, two miles off; that shortly afterwards the green light appeared broader on her starboard bow; that she kept her course, but that the *Baron Ozy* improperly ported her helm and rendered the collision inevitable; and

that thereupon the helm of the *Black Diamond* was put to starboard to ease the blow, and her engines were stopped, but that, notwithstanding, the *Baron Ozy*, with her port paddle-wheel knuckle, struck the *Black Diamond* on her starboard beam, knocked in two of her plates, then struck her further forward and near her starboard bow, doing great damage.

The witnesses on both sides were examined *vis voce*.

The Court was assisted by Captain Bax and Captain Arrow.

Karslake, Q.C. and *V. Lushington* appeared for the *Baron Ozy*.

Brett, Q.C. and *E. C. Clarkson* for the *Black Diamond*.

DR. LUSHINGTON, addressing the Elder Brethren, said:—Gentlemen, the most important part of this case for your consideration is, what occurred upon these vessels mutually sighting each other, and the circumstances which led to the measures which each of them adopted at that time. It is proved to my mind, by the whole of the evidence in the case, and by the production of the iron plates, that the collision took place by the *Black Diamond* striking the *Baron Ozy* with her stern. Can you, from the mode of collision, form any opinion as to what did occur, or not? for if the mode of collision does not furnish you with any information as to the proceeding facts which did occur, it is of very little importance in this case. One of the most essential parts of the case is—was the *Baron Ozy*, on her own showing, to blame? Taking the facts as alleged, that, according to her own statement, she descried a green and white light about half a point on her starboard bow, distant about a mile, and that, on so descriing these green and white lights, she ported her helm, was she right or was she wrong? The statute does not apply at all, and the case must be decided according to the rule of the sea and maritime law, which I take to be to a certain extent in accordance with the provisions of the statute, that when two vessels are meeting each other nearly end on, each vessel shall port her helm. If the case stood there simply, I should have no difficulty whatever; but she saw the white and saw the green light. Well, then, the question is this—if, seeing a vessel nearly ahead, and seeing the green light and the white light, whether that does not alter the state of things most materially; I presume not to venture upon that part of the case, upon which I am not so competent to give a judgment as you, gentlemen, are; but I should imagine that seeing the green and white lights must have afforded information to those who saw them that the vessel was passing on, not coming in a direct line, but passing on in the straight line in which you would apprehend her to be upon so seeing the white and green lights. That is an important consideration for you, because we must not weaken the rule of port helm unless the circumstances are such as to render it perfectly clear to those who are conducting the navigation of the seas that following that rule is likely to bring on mischief and not to avoid it. I do not trouble you with respect to what was done afterwards—whether the helm was put to port, hard a-port, and the engines stopped and reversed, and so on, because I think it all hinges on the first. I see no reason to say the *Baron Ozy* was to blame in anything she did afterwards if she was right in porting her helm. As to the *Black Diamond*, her statement is, she saw originally the white lights, and then having watched, saw the green light, and upon so doing she kept her course, and soon afterwards starboarded her helm. Was she right or wrong upon her own statement? That she starboarded is a fact in the case. Was she wrong or right upon that measure. It is useless for me to comment upon that, it is for you to determine.

After consultation with the Trinity Masters,

Dr. LUSHINGTON said:—The gentlemen with whose assistance I have been favoured are of opinion that the *Baron Ory* was solely to blame for this collision. They are of opinion that when the pilot saw this vessel, the *Black Diamond*, according to their own statement, only half a point upon the starboard bow, but at the same time saw the green and white light, he ought either to have kept his course, or ought to have slowed until he ascertained the precise situation of the other vessel, and not have ported at once without any consideration.

Decree accordingly.

Tuesday, Nov. 17.

THE ELÉONORE.

*Salvors arrested a vessel in an action instituted in the sum of 800*l*. The owners appeared absolutely and filed affidavits of value, and the vessel was immediately released. The sum of 10*l*. was subsequently awarded by magistrates to the plts. in respect of the salvage services. The court condemned the salvors in the costs of the suit for salvage, and the vessel having been eight days under arrest in the suit, in the sum of 20*l*. as damages.*

The schooner *Eléonore*, on the 11th July last, with a cargo of nut cakes on board, was lying alongside a wharf in the port of Hull and discharging her cargo, when a fire broke out in some premises adjoining, and the plts.' steam-vessel *Harkaway* dragged the *Eléonore* clear of the conflagration and safely moored her.

For these services an action was entered in the sum of 800*l*., and on July 16th the schooner was arrested in that action. On July 18th an absolute appearance was entered on behalf of the owners of the schooner, and affidavits that the schooner and cargo were worth only 832*l*. having been filed on the 22nd July, the plts. on the 24th July withdrew their arrest, and offered to pay the defts.' costs then due. The plts. subsequently made a claim for salvage before the magistrates at Hull, who awarded them the sum of 10*l*. The defts.' vessel having, owing to their being unable to obtain bail, remained under arrest from the 16th to the 24th July, the court was now moved that the plts. be condemned in costs and damages, and affidavits were filed on behalf of the plts., showing that in consequence of the detention of the vessel her owners had lost the sum of 67*l*. 10*s*. 7*d*.

V. Lushington appeared for the owners of the *Eléonore*, and

Spinks for the salvors.

The COURT expressed its disapprobation of the action having been entered in the large sum of 800*l*., the vessel and cargo being worth only 832*l*., and held that it was incumbent on the party making the arrest in such a case to take the proper measures to ascertain the value of the property, and to be careful not to arrest when the court had no jurisdiction. The Court was clearly of opinion that the plts. were liable for costs and damages in consequence of the illegal detention, but that the defts.' account of his loss so occasioned was unsatisfactory. The Court considered that, under the circumstances, the expense of a reference to the registrar and merchants to ascertain the precise amount of loss was inadvisable, and from the proofs before the court condemned the plts. in the sum of 20*l*. as damages and in costs.

Tuesday, Nov. 17.

THE TIMOR.

Wages—Payment to consul.

In a suit for wages by foreign seamen, if their consul interferences and asks that payment of the wages due to them be made to him on their behalf, the court usually grants the application.

An action of wages, in the sum of 700*l*., had been

instituted by the master against the above-named vessel belonging to the port of Boston in America, and under a decree in the suit the vessel had been sold, and the net proceeds, amounting to 1689*l*. 17*s*. 3*d*. paid into court.

An appearance had been entered on behalf of the owners of one-eighth share of the vessel, and also on behalf of the American consul.

Deane, Q.C. on behalf of the American consul, and upon an affidavit of consent by owners of six-eighth shares of the vessel, and on the consent of the other defts., moved the court to decree that the proceeds be paid to the consul, he undertaking to apportion them amongst the parties entitled.

Dr. LUSHINGTON.—A motion on behalf of a foreign consul, that the amount claimed in a suit for wages by seamen belonging to the country which he represents, may be paid to him for their use is, under circumstances like the present, granted as of course. If the consul objects to the court entertaining a suit of this nature on behalf of mariners belonging to his country, the court always orders that the suit be discontinued; and if the consul himself undertakes to do justice between the parties, the court is always satisfied with that assurance, and transfers the matter to him altogether.

Motion granted.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Oct. 19 and 26.

(Before Mr. Commissioner GOULBURN.)

Ex parte MARIA LADD, *re* MARIA LADD.

Release from custody—Married woman.

The court will not release from custody a bankrupt who, being a married woman, has traded as a feme sole, and incurred the detaining creditor's debt by representations that she was so.

Release from custody. The bankrupt was described as "of No. 74, Wells-street, Oxford-street, Middlesex, out of business, and previously of No. 24, Stangate, Lambeth, Surrey, baker, being the wife of Benjamin Ladd, and living apart from her husband, a prisoner for debt in the debtors' prison for London and Middlesex, in the city of London."

The bankrupt was arrested on the 3rd Oct. 1863, at the suit of Isaac Wilcox, for 69*l*. 13*s*., recovered by him in an action upon a bill of exchange for 66*l*. in the Court of C. B. She then took out a summons before Byles, J., at chambers, to set aside the proceedings in the action *Wilcox v. Ladd*, and for her release from custody, upon the ground that at the time the debt was contracted she was a lawfully married woman, and that her husband then lived and was then living, carrying on business as a baker in Grange-road, Bermondsey, whilst she lived separate from him in Wells-street, Oxford-street. On the other hand, the plt. in the action and three other witnesses swore positively that she had always represented herself to them as being a widow, and that her late husband, who was in the habit of ill-using her in his lifetime, had died some years since; that she had for seventeen years past carried on the business of a baker on her own account at Stangate aforesaid, and had a son then sixteen years of age whom she had just articulated, and that the payment of the premium had left her short of cash. She also represented that she was possessed in her own right of a valuable lease of premises in Stangate, which she was about to sell, and that out of the proceeds of the sale she would repay the amount of the loan. Upon these representations the plt. was induced to discount her acceptance, which was the subject of the action, and at the same time he received from her the following order:—

[BANK.]

Ex parte MARIA LADD, vs MARIA LADD.

[BANK.]

"To Mr. Griffiths, Gray's-inn.

"Please retain and pay Mr. Wilcox, of Moorgate-street, out of the balance of purchase-money coming to me for purchase of my premises at Stangate, the sum of 66*l*.

MARIA LADD.

"2nd April 1863."

Upon this evidence the learned judge dismissed the summons upon the ground that, as the plt. was induced to part with his money by reason of her representations, and she had not pleaded her coverture in bar to the action, she was not entitled to any assistance from the court.

The bankrupt thereupon presented her petition to this court on the 15th Oct., upon which she was adjudicated the same day. Upon her application to the commissioner for her release, she was opposed by the detaining creditor upon the same evidence that was adduced before the judge at chambers. The case was adjourned to enable her to answer the affidavits, which was accordingly done. In her affidavit filed in reply, it was stated that she had supported herself for a great many years by her own exertions, having been separated from her husband, who had contributed nothing for her support; and that she had for five years carried on business as a *feme sole*, at Stangate, Lambeth. She denied that she had ever represented herself as a widow to either of the parties, or that she had ever been asked the question, and stated her belief that the circumstance of her separation from her husband was well known to one of the witnesses, it having more than once formed the subject of conversation between them; that it was well known in the neighbourhood where she resided that she had a husband living, as he had molested her upon one occasion, when she was obliged to avail herself of the protection of the police.

Need now applied that the bankrupt might be released from custody. She was a trader within the meaning of the bankrupt law, having carried on business as a baker for five years. She had been duly adjudged bankrupt as a trader, and was therefore entitled to the benefits accorded to bankrupts, more especially if she were to be held responsible for the debt she had contracted, and upon which she had been arrested. There was nothing within the exception of the 112th section of the Act of 1849 which disentitled her to her discharge. If she were not liable for the debt, neither was she a proper subject for imprisonment; so that, in any case, she ought not to be detained.

Bagley appeared for the detaining creditor.—He contended that the debt had been contracted by misrepresentation and fraud. The question was, whether a married woman who had contracted a debt whilst living separate and apart from her husband, without any process in the Matrimonial Court, was entitled to be released from custody, she being a bankrupt, but not having traded as a *feme sole* in either London or Bristol. It was well known that a married woman living apart from her husband and having a separate maintenance, could not enter into a contract, or be sued as a *feme sole*: (*Marshall v. Rutton*, 8 T. R. 545.) In conformity with this principle, the Insolvent Debtors' Court had refused to discharge a married woman who was in custody for debt contracted by her prior to her marriage, upon the ground that, being a *feme covert*, she could not execute the assignment or warrant of attorney required as a condition for her discharge: (*Cooke's Insolvent Law*, 260, 268.) That was the law under the 1 Geo. 4, c. 119, which was superseded by the 3 Geo. 4, c. 123, and continued in the 1 & 2 Vict. c. 110, s. 101. This last Act being repealed by the B. A. 1861, the state of the law reverted back to what it had been previously. He contended that the bankrupt was not a proper subject of the bankrupt law, inasmuch as her husband was liable for her debts, and that this debt had

been contracted during coverture. The court, therefore, ought to follow the course pursued by Byles, J., and refuse to release her.

Reed in reply.—The bankrupt was entitled to come to this court to be released from her debts which she had incurred in trade as a *feme sole*, and in respect of which she was liable to the bankrupt law, and consequently entitled to the benefit of all interlocutory proceedings. [The Commissioner.—The question is, whether under the 112th section she is not entitled to her release. The words of the section are, "and where any person has been adjudged bankrupt," &c. The point you have to consider is, whether the words "any person" exclude any person not subject to the bankrupt law.] The question was not, whether or not she might be a bankrupt. That question must be discussed at some future time. [The Commissioner.—The question is, whether this woman is to take advantage of her own wrong by holding herself out as a *feme sole*, and when she can have no property of any kind apart from her husband. To hold that would be a monstrous anomaly.] If the bankrupt were in custody for debt within the meaning of the Act of Parliament. That was apparent by the whole proceedings in the action. That being so, he submitted she was entitled to be released. This principle had been acted upon by Mr. Commissioner Fane in *Re Mary Smith* (20th April 1862, not reported), and by Mr. Commissioner Holroyd in *Re Butler*, 7 L. T. Rep. N. S. 867. The time when the debt was contracted, whether before or after marriage, was immaterial in considering the question of principle, which was not when the debts were contracted, but whether the bankrupt being a married woman and in custody, the words of the 112th section were large enough to embrace her. If the court should be of opinion that they were not sufficiently elastic for that purpose, the necessary effect would be to retain her in prison for an indefinite period, which the Legislature never could have contemplated.

Mr. Commissioner GOULBURN.—All these cases must depend upon the particular facts of each case. The principle involved is not so much one of bankrupt law, as it is well established that no person shall be allowed to take advantage of his own wrong. The question here is, whether the debtor, who being a married woman, holds herself out to the world as a *feme sole*, and says that her husband is dead, and that she is possessed of property which she is about to dispose of, and so contracts debts with every one who may be able and willing to trust her, should turn round and say to those creditors who have been so deceived and defrauded, that notwithstanding all this, she is a married woman, that her husband is liable for her debts, and that she is entitled to be released from prison whither she has been taken by a creditor who has trusted her solely upon the belief and representation that she was able to contract debts. It would be a very dangerous thing to say that such a person should be in as good a position as if she had spoken the truth and nothing but the truth. I think that such a person must take the consequences of her own acts. Byles, J. acted upon this principle when he said that, having done all this and held herself out to the world as a single woman, he could not release her. It is said that it is a great hardship not to release her; but in my opinion it would be a great hardship upon the creditors if she were now to be released. The truth is, it is no hardship at all. As well might a pickpocket say that it is a great hardship that he cannot have his liberty; he, however, as well as the other, has lost his liberty through his own misconduct, of which the law will not permit him to take advantage. But I do not refuse the application solely upon this ground. It has been

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established by the case of *Marshall v. Rutton*, more than sixty years ago, that a *feme covert* cannot contract, sue, or be sued as a *feme sole*, though living apart from her husband, and having her maintenance secured by deed. Nor do I think that the construction sought to be put upon this Act of Parliament is correct, or that it gets rid of the principle of law upon which this case must be decided. It must not be forgotten that this court is mainly for the purpose of distributing assets amongst the creditors. Surely it is grossly fraudulent for a married woman to say she is a *feme sole*, and, as such, able to trade and contract debts. Suppose that the debtor is entitled to property in contingency, remainder, or expectancy, that would ordinarily pass to the assignees of a bankrupt, and an inquiry made respecting it. In this case the answer would be, "I am a married woman, and had or have no power to contract debts." It is obvious that in such case all the advantages of the bankrupt law would be with the debtor." That would be a monstrous violation of justice and of common sense; and I cannot help thinking that such is not the primary object of this Act of Parliament. The court must take care, so far as it can, to do justice between the debtor and his creditors, and this property of the bankrupt might be very beneficial to creditors. If, as is here contended, this woman is entitled to the benefit of the bankrupt laws, surely the creditors are entitled to ask to have the benefit of her property secured to them. But the creditors in this case cannot acquire any right to property to which this bankrupt is entitled. Again, it is said that the words of the 112th section, "any person who has been adjudged bankrupt," are large enough to include this case, and entitle this bankrupt to the benefit of this section. In some sense I agree that this is so, and in some cases these words may well apply. But it is said that the court should give a liberal interpretation to the statute and release the bankrupt. I do not think so at all. Nor do I think that I ought to strain the discretion which the law has reposed in me, to enable the debtor to set the creditors at defiance. The law has given me a discretion in the matter, and, having that discretion, I shall decline to exercise it in ordering the release of this bankrupt. *Application refused.*

Reported by DAVID CATO MACRAE, Esq., Barrister-at-Law.

Wednesday, Nov. 18.

(Before Mr. Commissioner GOULBURN.)

Re WILLIAM BALLARD.

Costs of prosecution of bankrupt—Jurisdiction—
Sec. 12 of the B. L. C. A. 1849.

The court in the exercise of its primary jurisdiction may, under exceptional and special circumstances, order payment of the costs of a prosecution of the bankrupt instituted under the direction of the court out of the estate in the hands of the trade assignee.

Robertson Griffiths moved that the costs of prosecuting the above-named bankrupt for misdemeanors alleged to have been committed under the 221st section of the Bankruptcy Act 1861 be allowed and paid to the trade assignee of the estate of the bankrupt. He read an affidavit in support of the motion as follows:—"John Ward, of ———, managing clerk to Messrs. Moseley, Taylor and Moseley, solicitors for Wm. Udall, &c., the creditors' assignee, &c., maketh oath and saith—1. That he has had the conduct of the proceedings in the above bankruptcy and of the prosecution arising thereout. 2. That on the 2nd March 1863, being the day appointed for the last examination and discharge of the above-named bankrupt Wm. B., an application was made to this honour-

able court to have the bankrupt prosecuted under the 221st section of the B. A. 1861, and that the assignee might have an opportunity of taking the bankrupt before a magistrate and instituting such prosecution if he was so advised and thought fit, Edward Goulburn, Esq., the commissioner acting in the prosecution of the said petition, did adjourn such sitting until the 28th May 1863. 3. That the said creditors' assignee accordingly laid the depositions of various witnesses, and a case containing a statement of facts, before J. W. H., Esq., one of Her Majesty's counsel, for his opinion, who advised that there was ample evidence upon which to charge the bankrupt criminally under the 221st section of the Bankruptcy Act 1861. 4. That the said creditors' assignee, in the month of May 1863, accordingly charged the said bankrupt before a police magistrate of the metropolis, at Southwark Police-court, in the county of Surrey, with offences committed by the said bankrupt under the said 221st section of the said Act of Parliament. 5. That after several adjournments made by the said magistrate for the purpose of completing the evidence, the said bankrupt W. B. was committed by Boyce Combe, Esq., one of the police magistrates aforesaid, for trial at the last July session of the Central Criminal Court for misdemeanor under the said Act of Parliament, and the said Wm. Udall was bound over to prosecute. 6. That on the 1st July last, by an order of this honourable court, made in the matter of the said Wm. Ballard, the said Edward Goulburn, Esq., as such commissioner as aforesaid, did sanction the carrying on of the said prosecution by the said creditors' assignee, and did order that the consideration of the costs, charges and expenses then already incurred, and to be incurred, of and incidental to such prosecution, should be reserved for the further order of this honourable court. 7. That a bill of indictment was preferred by the said Wm. Udall at the last July session of the Central Criminal Court against the said Wm. Ballard, before the grand jury sitting there, and a true bill found against him, the said Wm. Ballard, for offences committed under the 221st section of the Bankruptcy Act 1861. 8. That on the application of the said Wm. Ballard, the trial of the said indictment was postponed by order of the Central Criminal Court from the July to the last August session of the said court. 9. That on the 19th Aug. last the said Wm. Ballard was tried upon the said indictment before the Hon. Mr. Justice Keating, and after a trial of nearly three hours in duration the jury retired to consider their verdict, and having been absent an hour or thereabouts returned a verdict of not guilty. 10. That the Hon. Mr. Justice Keating directed the payment by the treasurer of the county of Middlesex of such costs in the said prosecution as are usually paid by him.

(Signed) "JOHN WARD."

The costs of the prosecution which had been paid out of the county funds were quite inadequate to pay all the costs which had been incurred.

Counsel further contended that it was most important that a case which had so much merit in it should be provided for as to costs, otherwise the penal clauses of the Act of 1861 would, if costs in a case like this were not to be granted, afford no security for the trading community, and these salutary provisions would become obsolete.

In reply to the Commissioner, it was stated by counsel that the bankrupt had been charged with the concealment or removal of 500*l.* or 600*l.* worth of goods. And a case had been laid before counsel, who had advised that there was ample evidence to commence a prosecution under the 221st section of the Act.

Mr. Commissioner GOULBURN doubted his power to make this order, for he feared this case could not be brought within the 223rd section. He should like

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some instance cited in which a similar order had been made. He thought the Act only contemplated two ways of paying costs—by the county and the chief registrar's fund—and as the county had made its allowance, could the court order payment *ultra* that allowance?

Griffiths referred the commissioner to the 12th section of the Act of 1849, and contended that the court, in the exercise of its primary jurisdiction, possessed very ample powers. The Act provided "that the court, in the exercise of its primary jurisdiction by virtue of this Act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy and claimed by the assignees for the benefit of the creditors, or relating to any acts done, or sought to be done, by the assignees in their character of assignees by virtue or under colour of the bankruptcy."

Mr. Commissioner GOULBURN said that, as the prosecution was instituted under the advice of counsel and with the sanction of the court, and having reference to the special circumstances of the case, he thought an order might be made under the section giving the court primary jurisdiction in all matters of bankruptcy. [The order made by the Court, from its importance as a precedent, is given *verbatim*]:—"Upon hearing R. G. of counsel on behalf of the creditors' assignee of the estate and effects of the above-named bankrupt, and it appearing to the court, upon reading the order of the 1st day of July last, that the court did thereby sanction the carrying on, by the creditors' assignee, of a prosecution against the said bankrupt, preferred at the Southwark Police-court, upon certain charges of misdemeanor; and it also appearing by the affidavit of John Ward, now read, that there were exceptional circumstances in this case, which in the said affidavit are fully set forth; and it also appearing to the court that the sum allowed for expenses, as already directed to be paid by the Central Criminal Court towards carrying forward the said prosecution, was wholly inadequate for the purpose: this court doth order that all costs, charges and expenses of and incidental to the said prosecution as aforesaid, the same being first duly taxed by the proper officer in that behalf, be paid out of the bankrupt's estate to William Udall, the creditors' assignee, who conducted the said prosecution under the sanction of the court. The amount already allowed by the Central Criminal Court in that behalf to be first deducted from such last-mentioned costs.

"EDWARD GOULBURN, Commissioner."

Thursday, Nov. 19.

(Before Mr. Commissioner HOLROYD.)

Re — MCBRIDE.

Pauper petition—Application for release—Sect. 112 B. L. C. A. 1849.

Where a petitioner appears to have means, he is not entitled to apply to the court in *formâ pauperis*.

This was an application for the release of the bankrupt from custody by *Denney*, and opposed by *Doria*.

The bankrupt had been in custody for three weeks on a bill of 20*l.* given to a man of the name of Sherwell, who, he alleged, deducted 3*l.* for interest. The money was payable by instalments, and default having been made he was taken in execution. It appeared that he was in receipt of 22*s.* a-week, independent of 10*s.* a-week, and 15*s.* a-week, which his wife earned as a laundress. Under these circumstances *Doria* submitted, that he ought not to have presented his petition in *formâ pauperis*.

Denney contended that those sums were liable to deductions, inasmuch as others were employed to perform a portion of the duties, and therefore he was to all intents and purposes what he professed to be, namely, a pauper.

The COMMISSIONER, however, thought otherwise, and directed the dismissal of the petition.

Petition dismissed.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Nov. 5 and 6.

(Before the LORD CHANCELLOR (Westbury.)

SCHOLEFIELD v. LOCKWOOD.

Husband and wife—Joint power of appointment—Wife's estate not indemnified in respect of husband's debts—Set-off between excess and arrears of interest on different mortgages—Judgment-creditor.

By a post-nuptial settlement in 1832, three estates, the property of the husband, were limited to the husband for life, remainder to such uses as husband and wife should jointly appoint "for the purpose of raising money by way of mortgage or otherwise," and in default of such appointment to a trustee for a term of years upon trust to raise sums not exceeding 600*l.* to pay debts of the husband, remainder to the wife for life, remainder as to one moiety to the husband in fee, and as the other moiety to such uses as the wife should appoint, and subject thereto to herself in fee.

In 1835 the joint power of appointment was exercised to raise two sums of 600*l.* and 400*l.* to pay debts of the husband:

Held, that the wife's moiety was not entitled to be indemnified to the extent of these sums out of the husband's moiety; the property being absolutely in the hands of a mortgagee in priority to these limitations, and not having been conveyed by the wife, but having been appointed merely in exercise of a joint power; and the wife's estate having been expressly limited to her in default of execution of the power.

Three estates, when put into settlement, were subject, two of them to two mortgages amounting to 2400*l.*, and the third to a third for 3000*l.* The husband being tenant for life, became insolvent in 1841. In 1840 a judgment was recovered against him and duly registered. From 1841 the interest on the 3000*l.* fell into arrear, whilst the mortgagees of the 2400*l.* entered and received rents in excess of interest:

Held, that the tenant for life was not entitled to have the benefit of the excess on the one estate until he had kept down the interest on the other.

But, inasmuch as, when the judgment was recovered, no sum had been paid by the tenant for life in discharge of principal, and he had become insolvent before any part of the profits received by the mortgagees could be applied in part payment of the principal, the judgment-creditor was held to be subject to the same equities as affected the tenant for life; and the appointee of the wife's moiety was held entitled to have the arrears during the life of the tenant for life set off against the accumulations before the judgment-creditor was entitled to stand as an encumbrancer against the wife's moiety.

It being alleged by the judgment-creditor that no loss to the wife's estate was sustained by letting the interest fall into arrear, the principal and arrears

of interest being more than the value of the estate;

Inquiry directed.

This was an appeal from a decree of the M. R., reported *ante*, 8 L. T. Rep. N. S. 409.

From that report and the narrative contained in his Lordship's judgment, a full statement of the facts may be obtained.

Hobhouse, Q. C. and Wickens for the deft. Mr. Durant, the assignee of Mrs. Dutton, supported the appeal. They cited

Lancaster v. Evans, 10 Beav. 154;

Waring v. Coventry, 2 M. & K. 406.

Baggallay, Q. C. and Fooks appeared for Charles Turner Lockwood.

Selegny, Q. C. and E. T. Smith were for the plt.—They cited *Jenkinson v. Harcourt*, Kay, 688; s. c. 23 L. T. Rep. 321; and referred to

2 Jarm. Wills, 3 edit. 609; and the cases there cited.

Hobhouse, Q. C. was heard in reply.—He referred to *Hopkinson v. Rolt*, 5 L. T. Rep. N. S. 90; 7 Jur. N. S. 1209;

Asley v. Tankerville, 3 Bro. C. C. 545;

Willes v. Greenhill, 29 Beav. 376;

Jackson v. Innes, 1 Bl. 104;

1 & 2 Vict. c. 110, s. 13.

The LORD CHANCELLOR.—At the time of the settlement, which was made in the year 1832, Mr. Thomas Dutton, the husband, was entitled to three estates. Two of them were subject to mortgages amounting to 2400*l.*, mortgages affecting the fee-simple; the other was subject to a mortgage, also affecting the fee-simple, for a sum of 3000*l.* By a post-nuptial settlement dated in the year 1832, and proceeding upon a contract for value between the husband and wife, those estates were limited, subject to the mortgage, to Mr. Dutton for life, remainder to such uses as Mr. and Mrs. Dutton should jointly appoint "for the purpose of raising money by way of mortgage or otherwise" (which are the words contained in the power); and in default of the exercise of any such power, and subject thereto, to a trustee for a term of years upon trust to raise such sum not exceeding 600*l.* as should be owing by Thomas Dutton in respect of two sums of 300*l.* each, with remainder to the use of Hannah Dutton, the wife, for her life; and from and after her death, then as to one moiety to Thomas Dutton in fee, and as to the other moiety of the estate to such uses as Hannah the wife should appoint by deed or will, and subject thereto to herself in fee-simple. It appears that, subsequent to the settlement, this joint power of appointment was exercised in the year 1835, for the purpose of creating two mortgages, one of 600*l.* and the other of 400*l.* There can be little doubt that the 600*l.* and the 400*l.* were debts of the husband, and in the first part of this judgment I will assume that to have been the case. The first point that arises is this: The husband became insolvent in the year 1841, he died in 1858. His wife survived him and died in 1859. Now the mortgages that were created of 600*l.* and 400*l.* affect the inheritance of the estate by virtue of the exercise of the joint power. The wife being entitled, under the subsequent limitations, to one moiety of the inheritance of those estates, insists that the mortgage is to be regarded as a transaction for the husband's benefit alone, and that inasmuch as by the exercise of the joint power her estate was made subject to those mortgages, she is entitled, to the extent to which her estate is damaged by the charge so created, to have it exonerated out of the other moiety limited to her husband. It has been long settled in this court, that if the wife's estate be charged or pledged for the debts of the husband, she is entitled to have that estate exonerated. Originally, perhaps, it

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arose in the course of the court's administration of the husband's estate, the court giving the wife the benefit of the husband's contract or covenant to pay the money; and, by virtue of that transfer of the legal right of the creditor, giving the wife a claim against the husband's estate. But, after some time, the form of the doctrine assumed a different shape, and then we find the language introduced, that the wife is to be regarded as a surety for the husband, and that in respect of such contract of suretyship she is entitled to the ordinary rights of a surety, namely, to have the debt of the principal thrown upon the property of the principal. It is an extraordinary instance of the power assumed by this court (which is exemplified in many other instances) of completely superseding and setting aside the common law by the exercise of what was little less than legislative authority, because the common law says that there can be no contract between the husband and wife except through the medium of a third person; but this court, upon the transaction alone, without any evidence of any agreement, creates a contract of suretyship between the husband and wife, and proceeds upon that basis to give the wife, as against the husband, the benefit of that contract. It was an extraordinary thing to do originally, but it has been done and settled, and therefore we must abide by it. Now, this contract of suretyship is derived only from the fact that the estate of the wife, as such, is charged and made amenable for the debt of the husband; and I must inquire, therefore, whether that is the case in the present instance now before me, because, if it be not, the fact that, strictly and properly speaking, the estate of the wife is, as such, made subject to and charged with these mortgages, then, I shall have neither authority, nor, certainly, inclination to extend the doctrine so as to include property which, in the hands of the mortgagee, cannot be properly said to be the estate of the wife, or to have been conveyed as such by the wife to the mortgagee. But it is plain that these two mortgages of 600*l.* and 400*l.* were created by the joint power of appointment alone. The wife levied no fine. The wife executed no deed under the statute. The mortgage emanated solely and exclusively from the power, and the estate conveyed is that entire estate which, as an undivided whole, is subjected to the power, and not the moieties which are created by the subsequent limitations. The ordinary language is found also in this deed after the power preceding the subsequent limitations, namely, "and in default of such direction, limitation or appointment, in case any such shall be made, then, when and as the estates and interests thereby directed, limited and appointed, shall respectively end and determine," then the estates are limited to the trustee for the term of years with remainder subject thereto, to the wife for life, with remainder in moieties to the husband and wife. The only estate of the wife, therefore, that I here find is, that estate limited to the wife in default of and subject to the exercise of the joint power. It is not given, nor does it arise otherwise than, subject to the power, and so far as the exercise of the power does not extend. The joint power of appointment was a thing that entered into the original contract between the husband and the wife, upon which this settlement proceeded, and it was created and given for the express purpose of doing that which it has been the instrument of effecting, namely, of raising money by way of mortgage or otherwise, as Thomas Dutton and Hannah Dutton from time to time should appoint. The mortgage, therefore, cannot with propriety of language be described as a mortgage of the wife's estate. From the act of the wife alone the mortgagee takes nothing. The interest of the mortgagee is no part of that estate or interest which the wife singly had. I am told by counsel

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at the bar, that this is a technical distinction. It is just this distinction between the entire and undivided estate which is made subject to the power and is held by the mortgagee under the exercise of that power prior to the subsequent limitations, and the moiety of that estate which is given to the wife by the subsequent limitations, but subject to and in default of the exercise of the power. The mortgagee takes no interest that was limited to the wife alone. I have therefore here a mortgage in which the wife's estate is not included, and as there is no charge there can be no claim for exoneration. I cannot hold that this is a case in which the wife's estate has been pledged or charged for the husband's debts. The husband incurs no liability from the wife having joined him in the exercise of the joint power, for that was in conformity with the intent and purpose of the settlement. The second point that has been argued before me arises in this way: I have said that the estates were settled subject to three mortgages. Two of the estates were both subject to two of the mortgages, amounting to 2400*l*. The third estate was subject to a mortgage for 3000*l*. All the estates were comprehended in the settlement; the husband was tenant for life of them all in possession. He became insolvent in the year 1841. About a twelvemonth before, namely, in the month of Jan. 1840, a judgment was recovered against him by Mr. Strother. That judgment was registered in May 1841, and the judgment-creditor therefore became entitled to all the remedies that are given by the statute of 1 Vict. c. 110. From and after the year 1841 the interest on the mortgage for 3000*l*. was permitted by the husband and the assignees of the husband to fall greatly in arrear. On the other hand, the mortgages on the estates charged with the 2400*l*. were permitted to enter into the perception of the rents; and as the rents exceeded the interest of the mortgagees, those mortgagees had a surplus of the rents in their possession, and to the extent of that surplus, belonging as it would do to the tenant for life, he may be considered as having paid off part of the principal of the mortgage, and in an ordinary case he would be entitled to stand in the place of the mortgagee as against the inheritance. But, inasmuch as there was a third estate, of which he was equally tenant for life, and as to the mortgage upon which he suffered the interest to fall into arrear, the remainderman says to the representative of the tenant for life, "you shall not be entitled in equity to claim the benefit of a charge upon the inheritance, so far as I am interested in it, in respect of the surplus rents that you have applied in part payment of the mortgage, unless you will give effect to the obligation incumbent upon you of discharging and keeping down the interest of the other mortgage for 3000*l*." Now, having regard to the duty imposed upon the tenant for life, resulting from the relation between the tenant for life and the remainderman, I should be of opinion that as between the tenant for life and the remainderman, the contention upon the part of the remainderman would be well founded, and that I could not permit the representative of the tenant for life to claim a title to stand in the place of the incumbrancer to the extent to which he had paid off the principal of that incumbrance, unless he also submitted to do equity according to the rule of this court, namely, to relieve the inheritance from the arrears of interest which, in breach of his ordinary duty, he had permitted to accumulate. Yesterday it was presented to me in such a manner that I derived this conclusion from the statement, namely, that at the time when the judgment was registered, surplus rents to a considerable amount were in the hands of the two mortgagees, and accordingly I intimated an opinion yesterday that the judgment-creditor was entitled to be regarded as the specific assignee by way of mortgage of that

surplus and the principal paid off by it, and that, as such assignee for value, he would not be subject to a claim upon the part of the remainderman to set off interest which the tenant for life had afterwards permitted to fall into arrear. A tenant for life has all his lifetime to pay off the arrears of the interest, and he cannot be charged with neglect of duty; neither does any right arise to the remainderman until the death or the insolvency of the tenant for life, and consequently at the time of the judgment there would be no equity upon the part of the remainderman; but in consequence of questions that I have put to the counsel to day I find that I was under a misapprehension, and it turns out thus, that at the time when the judgment was recovered no sum of money whatever had been paid by the tenant for life in discharge of the principal of the mortgage, and further that the tenant for life became insolvent before any portion of the rents received by the two mortgagees could be applied in part payment of the principal. I have therefore no difficulty, in that state of things, in holding that the judgment-creditor is to be regarded, not as the specific assignee of an existing interest, but as the general assignee by way of mortgage of the life-estate of the tenant for life; and if he is entitled only to be so regarded—which in truth is the manner in which his counsel has put his case at the bar—then undoubtedly the judgment-creditor claiming to have the benefits incidental to such an assignment of the life estate, is subject to the same equity that would affect the tenant for life himself, and therefore he would be liable, claiming in right of the tenant for life by virtue of that general transfer, to a set-off and equity on the part of the remainderman, namely, the obligation to keep down the arrears of the interest, which it was his duty to do, before he could claim, under the same deed which created that duty, the benefit of standing in the place of the mortgagee in respect of the principal moneys paid off out of the rents and profits of the life-estate. Therefore I think it clear that the debt. Mr. Durant, in respect of his being the appointee of the wife's moiety of the real estate, is entitled to have the arrears of interest that were permitted to accumulate on the three mortgages during the life of Mr. Dutton set-off and satisfied in the first place before the judgment-creditor, Mr. Strother, is entitled to stand as an incumbrancer against the wife's moiety of the inheritance in respect of that part of the principal of the two mortgages which has been paid off. But this very peculiar case then arises. It is alleged on the part of Mr. Strother that no injury or damage has been done to the wife by reason of allowing the interest on the third mortgage to fall into arrear, because it is said that the wife has not paid those arrears and never will pay those arrears by reason that the estate comprehended in the mortgage for 3000*l*. is less in value than the principal sum, and that therefore allowing the arrears of the interest to accumulate was no injury whatever to Mrs. Dutton, interested in one moiety of the equity of redemption, which was worth nothing, even if there had been no arrears, seeing that the 3000*l*. was more than the value of the entirety of the fee-simple of the estate. That representation is not admitted to be true on the part of Mr. Durant. At the same time, thus much is admitted, that Mr. Durant does not mean to claim any right to redeem the estate charged with the 3000*l*., because, he says, "The interest in arrear is 900*l*.; I cannot redeem it without paying 3900*l*., which is more than its value; but if those arrears had not exceeded 500*l*. I should have been willing to have paid 3500*l*., and therefore to the extent of the 500*l*. I am damaged." Well, I think that must be the subject of inquiry, because if there has been no loss sustained by the remainderman, undoubtedly there can be no claim to set-off. The loss

must be actually incurred before it can be the subject of set-off. I must therefore reverse that part of the decree to which this portion of the appeal relates, and declare that in case it shall appear upon the inquiry hereinafter directed that loss has been sustained by the appointees of the wife by reason of the interest on the 3000*l.* having been allowed to fall into arrear, then to the extent of the loss so sustained by Mr. Durant, Mr. Durant has a right to a claim of set-off against the claim made by the judgment-creditor in respect of the money applied out of the life-estate in part payment of the principal moneys due on the mortgages for 2400*l.*; and then direct an inquiry for the purpose of ascertaining what was the value of the estate comprised in the 3000*l.* mortgage at the time of the death of Mr. Dutton, and whether any and what loss has been sustained by Durant as one of the persons claiming under the wife by reason of the arrears of interest that accrued due during the life of Mr. Dutton.

Upon the question of costs his Lordship at first refused costs to C. T. Lockwood, but finally ordered the app. to pay them.

Solicitors for the apps., *Hawkins, Blozam and Hawkins.*

Solicitors for other parties, *Lewin and Attres; Ridsdale and Craddock.*

Wednesday, Nov. 11.

• the LORD CHANCELLOR (Westbury.)

Ex parte COCKBURN, re SMITH.

Bankruptcy—Act of 1861, sects. 192 and 197—Assent of joint and separate creditors—Burden of proof.

Two partners dissolved. Each partner afterwards executed a composition-deed in similar terms. There was then a joint adjudication, which was annulled by the commissioner on the ground of the composition. One of the joint creditors, who was dissentient, disputed the commissioner's decision, on the ground that it was not shown that the deeds were assented to by a majority of the joint, as distinguished from the general, creditors:

Held, that it was incumbent on the app. first to prove that there was any joint estate, and that as he had failed to do so, the appeal must be dismissed.

This was an appeal by a creditor against an order of Mr. Commissioner Fane, whereby he annulled an adjudication in bankruptcy which had been made against Messrs. Smith and Laxton, on the 14th July last.

On the 10th Nov. 1862 Smith and Laxton, then in partnership as wine merchants, in Great Tower-street, bought some wine of Messrs. Cockburn, of the value of 195*l.* 3*s.*, for which they gave their acceptance dated on the same day and payable at six months' date. On the 12th Nov. Smith and Laxton dissolved partnership. The acceptance falling due on the 13th May last, and Smith offering first to give security, and then to pay 10*s.* in the pound, both of which offers were refused, Messrs. Cockburn caused a writ to be issued against Messrs. Smith and Laxton on the 16th May, and served a notice of bankruptcy on them on the 19th. Negotiations ensued, which failed, and finally, on the 16th June, Smith and Laxton jointly signed an admission of the debt, which, on the 23rd, became a complete act of bankruptcy.

On the same, or the previous day, Smith executed a deed of composition, and on the 23rd a similar deed was executed by Laxton. The deeds were left for registration on the 30th June, and on the 1st July the certificate issued.

On the same 1st July Messrs. Cockburn presented a joint petition in bankruptcy against Smith and Laxton, under which they were adjudged bankrupt. The adjudication was disputed, and on the 31st Aug. the

learned Commissioner made the order, which was now appealed from, on the ground that the further administration of the affairs of Smith and Laxton must be effected by those who were entitled to act under the deeds of composition.

The deeds were framed alike. The amount of debts scheduled to Smith's deed was 35,764*l.* 18*s.* 9*d.*, upon which a composition of 3*d.* in the pound would give 447*l.* 1*s.* for distribution amongst his creditors. Amongst the creditors' names were those of Overend, Gurney and Co., for an amount of 20,000*l.*, and they were represented as having signed "subject to all necessary consents."

Laxton's liabilities, as shown by his deed, amounted to 27,196*l.* 8*s.* 4*d.*, upon which a composition of 3*d.* in the pound would yield 338*l.* 14*s.* The same firm of Overend and Co. were amongst the scheduled creditors to Laxton's deed, for the same amount, and with the same words attached to the signature.

Druce, for Messrs. Cockburn, in support of the appeal, argued that the adjudication against the debtors having been joint, the deeds could afford then no protection unless it were shown that a majority of three-fourths in value of the joint creditors had given their assent. No doubt the partners had dissolved partnership, but there were joint debts, and this was one of them.

The LORD CHANCELLOR observed that a single partner might enter into a deed of composition which should embrace his joint debts.

Druce argued that it was not competent to a separate debtor to make a composition-deed which should be binding on the joint as well as on the separate creditors, unless he showed that he had obtained the assent of three-fourths in value of the joint creditors. If it were so, a majority of one class of the separate creditors might combine to accept a small composition, and thus defeat the rights of the joint creditors, for whom there might be assets sufficient to pay 19*s.* 6*d.* in the pound. In this instance there was nothing to show that a single joint creditor had assented. It was contended, therefore, that the word "creditors" in the 192nd section must be read, in cases like the present, as meaning "joint creditors."

The LORD CHANCELLOR asked how it appeared that the joint creditors had not concurred?

Druce said there was no evidence on the subject, one way or the other.

The LORD CHANCELLOR observed that the creditor would be guilty of perjury if he omitted to include the joint creditors in his estimate of the majority. Of the fact of there being a majority the registration was *prima facie* evidence.

Druce submitted that the terms of the affidavit to be left with the registrar ought to be moulded to meet this case.

On the point of there being a possible combination of one class of creditors to defeat the rights of another class, the case of *Re Shettle*, 7 L. T. Rep. 610, was referred to, where the same possible difficulty was suggested as between secured and unsecured creditors.

An objection was also taken to the form of the deed, but this became the subject of a subsequent argument: (see below.)

It was also objected that the assents of Messrs. Overend were conditional only, and it was argued that the assents of all creditors must be absolute, in order that they might be estimated in the alleged majority (*Ex parte Rawlings*, 7 L. T. Rep. N. S. 582); but this was waived.

The LORD CHANCELLOR asked if there was any evidence as to the amount of the joint estate? The whole value of the contention depended upon this.

Druce observed that, if there was no joint estate, there would have been no purpose in a joint adjudication.

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The LORD CHANCELLOR said that, before he went any further, he must be satisfied that there was any joint estate at all.

Druce said it was impossible to adduce evidence on the subject on the appeal, without leave of the court.

The LORD CHANCELLOR said it was not only the duty but the interest of the petitioning creditor to have adduced evidence on the subject.

Bacon, Q. C. and *Sargood*, for the resps., were not called upon.

The LORD CHANCELLOR.—This appeal is made to me under these circumstances. The two bankrupts *Smith* and *Laxton* were wine merchants in partnership. That partnership continued down to some time in the month of November. The evidence does not fix the day, but I am told by counsel, and I have no doubt correctly, that the dissolution took place some days after the bill was accepted on which the petitioning creditor's debt is founded; and hence it may be fixed with tolerable precision as having taken place at some time subsequently to the 10th Nov. [*Bacon*.—It was on the 12th.] From and after that time, of course, the joint property, if there was any, of these two persons might have been divided and distributed between them, and there might have been a total annihilation of the whole joint property of the partnership. The argument has proceeded on the great inconvenience which would arise if the provisions of the statute were to be held to apply to all creditors, joint and separate, without distinction. It has been very ingeniously put, that the word "creditors" ought to be taken as indicating the several classes of creditors; and that the words of the statute ought to be taken distributively as to the majority in number and value of each class, the object of course being to show that if there be not a majority of each class assenting, the parliamentary conditions have not been fulfilled; and the result being represented to be, that if the separate creditors were to unite, the joint estate might be distributed amongst the separate creditors. But if there be no joint estate, the assets will be distributed equally, *pari passu*, amongst all the creditors, joint and separate. In this case I am obliged to assume that there is no joint estate, because it lies at the very foundation of this objection that there should be a joint estate. If there had been any, there might have been some weight in the argument; but I must assume to the contrary, and there being no joint estate, the joint and separate creditors are not distinguishable. Then I have *prima facie* evidence that the majority which the statute requires, of three-fourths in value of the creditors have concurred in assenting to this deed of composition, and I must hold therefore that in this respect the deed fulfils the parliamentary requisition. If there had been a joint estate it might have been otherwise; but in a case where there is no joint estate, I have not the least doubt that the course which has been taken is the correct course under the statute, and that in this respect each of these deeds is valid, inasmuch as it possesses the parliamentary requisites. It was competent to the dissentient creditor to have shown that it was not, and as he has failed to do so, I think that the commissioner has arrived at a correct conclusion, and the appeal must be dismissed with costs.

On the following day

The LORD CHANCELLOR, addressing *Druce*, inquired whether the dissentient creditors were named in the deed; and on receiving an answer in the negative as to some, further suggested whether, under a deed so framed, the creditors not named were precluded from taking legal remedies, and finally decided that he would hear further argument on the terms of the instrument on a subsequent day. This was arranged, and his Lordship reserved judgment. (See subsequent report.)

Solicitors for the apps., *Crowder* and *Maynard*; for the resps., *Batt* and *Son*.

Tuesday, Nov. 24.

(Before the LORDS JUSTICES.)

FOSTER v. HARVEY.

Practice—Swearing affidavit—Mortgagor and mortgagess—Foreclosure or immediate sale—15 & 16 Vict. c. 86, s. 48.

The *plt.* was a solicitor, but not the solicitor on the record, and it was

Held (dissentiente *Knight Bruce*, L. J.), that an affidavit sworn by him before one of his clerks duly qualified to take oaths was admissible as evidence.

The *plt.* was first mortgagor, and in possession as such of a distillery held upon a lease of which about twenty-five years were unexpired, but which was wholly unproductive. He filed his bill for a foreclosure:

Held, that he was entitled to an immediate sale before deciding upon the questions between the subsequent mortgagors.

This case came before their Lordships upon an appeal by Mr. Chidley, one of the debtors, against the whole of the decree of Wood, V. C., reported 8 L. T. Rep. N. S. 656, where the facts are sufficiently stated. The suit was one for the foreclosure of a mortgage granted by Mr. Chidley of a distillery held upon a lease of which about twenty-five years were still unexpired, and the *plt.* was Sir William Foster, of the firm of Foster, Burroughes and Co., solicitors at Norwich. Of the property in question he was not disputed to be the first mortgagor, but other incumbrances upon the property were in existence, and between these incumbrances questions of priority arose, in which the *plt.* of course was not interested. Sir William Foster was, however, in possession, but it appeared that it was found impossible to procure a tenant for the property, which was consequently wholly unproductive.

When the cause came on to be heard, it was asked on behalf of the *plt.*, that instead of a decree for foreclosure, one for an immediate sale might be made before determining the priorities of the subsequent mortgagors, and his Honour in accordance with that request, made the decree now appealed from.

As at the original hearing, so upon the appeal, an objection was taken, that an affidavit made by Sir William Foster, and sworn before a Mr. Benyon, one of the clerks of his firm, who was a person duly qualified to administer oaths in Chancery, could not be received at all. Without this affidavit there would have been no evidence in the cause; but the reply urged to the objection was, that although Mr. Benyon was in the employment of Sir W. Foster, the firm of Foster, Burroughes and Co. were not the solicitors on the record in the present suit, but that the *plt.* had instructed the town agents of his firm to conduct the suit on his behalf.

This objection was overruled by Wood, V. C. (See the report, *ubi suprad.*)

Roll, Q. C. and C. *Swanston* supported Mr. Chidley's appeal, and as to the admissibility of the affidavit relied on

Re Hogan, 3 Atk. 813;

Wood v. Harpur, 3 Beav. 290;

Hopkin v. Hopkin, 10 Hare, app. ii.

Upon the immediate sale they contended, that the circumstances disclosed no reason for depriving the mortgagor of the usual indulgence as to time.

Giffard, Q. C. and *Kay* for the *plt.*—Upon the question of the affidavit they relied upon the fact that Mr. Benyon was not the clerk of the solicitors on the record, and on the analogy of common law, and referred to

Read v. Cooper, 5 Taunt. 89 :

Williams v. Hoskin, 8 Taunt. 435;

Goodtitle v. Badtittle, 8 T. R. 638.

Upon the second question they referred to sect. 48 of the 15 & 16 Vict. c. 86, enabling the court in its discretion to order an immediate sale instead of decreeing a foreclosure, and contended that the discretion had been properly exercised in this instance, referring to *Phillips v. Gutteridge*, 4 De G. & J. 531.

Lindley, for one of the subsequent mortgagees, supported the decree.

Roll, Q. C. replied.

Lord Justice TURNER said that the first question for them to decide was, whether an affidavit made by the plt. in the cause, and sworn before a person in his service, could be received as evidence. It was not disputed that an affidavit could not be sworn before the solicitor upon the record, or before any one of his clerks; but the principle upon which that rule was established was, that the solicitor and the clerk must be presumed to have an intimate knowledge as to the evidence which would prove material or immaterial to the success of the cause. That principle did not appear to him to apply to the case of a person who happened merely to be in the employment of one of the parties in the suit; for there was no ground for assuming that such a person was acquainted with the circumstances connected with the suit in consequence of that relationship. If such a position were now maintained, it would be impossible to say to what it might not be extended. He therefore considered that the rule ought to be confined to the case of solicitors on the record and their clerks. The second question was as to the propriety of directing an immediate sale instead of the ordinary decree of foreclosure, and under the circumstances he could see no reason for overruling the discretion which the learned V. C., under the statute mentioned, had thought fit to exercise.

Lord Justice KNIGHT BRUCE said that, upon the admissibility of an affidavit so sworn as was that of the plt. in this cause, he had the misfortune to differ from the V. C. and his learned brother, for in his opinion the objection to the affidavit ought to be sustained, but the objection would, of course, fail, as Turner, L. J. agreed with him. Upon the second question which had been argued, he agreed with the view which they had taken.

Solicitors for the plt., *Sharpe, Parker and Co.*

Solicitors for the deft. who appealed, *Chidley and Co.*

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Saturday, Nov. 14.

Re RICKETTS.

Arbitration—Attendance of witnesses.

Where a submission to arbitration has been made a rule of this court, an order for the attendance of witnesses before the arbitrator is an order of course.

By the 17th section of the C. L. P. A. 1854 it is provided that every agreement or submission to arbitration by consent may be made a rule of any one of the Superior Courts of law or equity, unless a contrary intention should appear in such agreement or submission.

By the 3 & 4 Will. 4, c. 42, s. 40, the court which might have made any such agreement or submission to arbitration, a rule of court was empowered to compel the attendance of witnesses thereon, if necessary.

In this case a submission to arbitration had been duly made a rule of this court.

W. Morris applied for an order directing a witness to attend before the arbitrator.

The MASTER of the ROLLS.—You may take the order. The practice of the common law courts in these matters had better be followed. I am inclined to think that in future such an order should be an order of course.

Monday, Nov. 16.

FREEMAN v. BUTLER.

Re TRIGG'S ESTATE.

Production of documents—Mortgages—Privilege.

Where an executor and trustee of a testator was also a mortgagee of part of his estate, he was allowed to withhold from production the mortgage and other title-deeds of the security, but not certain accounts and writings relating thereto, which, it was said, might also affect the testator's general estate.

This was a suit to administer the estate of a testator of the name of Trigg. One of the defts. was the trustee and executor of Mr. Trigg's will, and also a mortgagee of part of his real estate. In the course of the suit the deft. had made an affidavit as to documents relating to the estate in his possession, but had claimed the right to withhold from production certain accounts and writings relating to his mortgage security. The plt., however, applied in chambers for an order directing the deft. to produce all the documents in his possession which related to the testator's estate. He refused to produce either the mortgage and other title-deeds of his security, or the accounts and writings relating to them. The matter was accordingly adjourned into court, when

Hardy appeared for the plt. in the suit, and admitted that until the mortgage-debt was discharged the mortgage and other title-deeds could not be called for; but that reasoning did not apply to the other documents which might relate to the testator's general estate as well as the mortgage:

Gibson v. Hewitt, 9 Beav. 293.

W. H. Terrell, for the deft., insisted that, as he was not a party to the suit as mortgagee, he was not bound to produce in it any document relating to the mortgage.

The MASTER of the ROLLS.—I am of opinion that all the documents in the possession of the deft. which relate to the testator's estate, must be produced; except, of course, the mortgage and other title-deeds of the deft.'s security as mortgagee. If that were not the course to be adopted, a trustee or executor might pay off a mortgage on his testator's estate, and then claim the right to keep back any documents in his possession which related thereto.

Thursday, Nov. 19.

WILLIAMS v. ALLEN.

Person of unsound mind—Fund in court—Payment out—Maintenance.

Where a person, aged fifty, of unsound mind, though not so found by inquisition, was possessed of a fund in court, that was her whole fortune, it was ordered to be paid out to her mother, she undertaking to maintain her.

This was a petition presented by a person of unsound mind, but not found so by inquisition, by her mother, as her next friend. The petition stated that the daughter was in her fiftieth year; that her mother had spent 800*l.* in her maintenance; that there was now standing in court to the separate account of the daughter, a sum of 390*l.*; and that she had no other property; and it prayed payment of the 390*l.* to the mother, on her undertaking to maintain the daughter.

Whitehorse appeared for the petitioner, and cited

Re Law, 30 L. J. N. S., 512 Ch.; 5 L. T. Rep. N. S. 646.

THE MASTER of the ROLLS.—I think that in this case the order asked for should be made. It does not, indeed, appear to me to be strictly correct, because the undertaking is necessarily confined to the life of the mother, who will in all human probability die before the daughter. However, I will make the order.

Solicitors, Green and Allen.

Saturday, Nov. 21.

Re THE GREAT EASTERN SHIP COMPANY
(LIMITED).

Petition for winding-up—Judgment-creditor—Injunction—Winding-up order.

A petition was presented *bonâ fide* for an order for the winding-up of a company. Before it came on to be heard, an *ex parte* injunction was obtained to restrain a judgment-creditor from enforcing execution against the company. When the petition came on to be heard, the judgment-creditor moved to dissolve the injunction, on the ground that no special circumstances existed for its having been granted:

Held, that the motion must be refused, but without costs, and the usual winding-up order was made on the petition.

This was a petition presented for an order to wind-up the Great Eastern Ship Company (Limited), under the provisions of the Companies Act 1862 (25 & 26 Vict. c. 89).

It appeared that on the 29th Sept. 1863, a Mr. Parry, a judgment-creditor, had obtained a judgment against the company, and execution having issued thereon, had seized the furniture and other effects on board the ship.

The petition was presented on the 6th Oct. 1863. On the 9th the petitioners obtained an *ex parte* injunction to restrain Mr. Parry from further proceedings under his judgment.

The petition now coming on to be heard, Mr. Parry moved to dissolve the injunction against him.

Selwyn, Q.C. and Swanston appeared for the petitioner.

Fooks, for the company, did not oppose the petition. He admitted that the *Great Eastern* had got into difficulties, and had hoisted a flag of distress; but he characterised Mr. Parry's application as "a wrecker's motion."

Baggallay, Q.C. and Thompson appeared for Mr. Parry, and contended that the *ex parte* injunction had been improperly granted, as there were no special circumstances to justify this court in its interference with his legal rights; and without such special circumstances he could not be restrained. They cited 25 & 26 Vict. c. 89, ss. 85, 87, 201, 202.

THE MASTER of the ROLLS, after observing that a winding-up order operated as an injunction, but that, before the winding-up order was made, the court had jurisdiction to grant an injunction to keep matters as they were for the general benefit of all the creditors and parties interested in the winding-up, said, he saw no reason for dissolving the injunction granted to restrain Mr. Parry. He should therefore refuse the motion, but without costs; and the usual winding-up order must be made on the petition. That appeared to him to have been presented with perfect *bonâ fides*; and the funds of the company would, therefore, be distributed, under the direction of this court, rateably between all parties.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs.,
Barristers-at-Law.

Monday, Nov. 16.

DREVON v. DREVON.

Practice—Order for commissioner to take evidence abroad—15 & 16 Vict. c. 86, ss. 21 and 22.

Where a party to a suit, who wished to put in accounts, resided at Lyons, and the nearest British consulate was 100 miles distant, the Court appointed a solicitor resident at Lyons to be special examiner to take the evidence, on the ground that the consul, before whom an affidavit might be sworn, resided at too great a distance for that purpose.

An application had been made in chambers in this case that a special commissioner might be appointed to take an affidavit for the purpose of verifying certain accounts which the deft. in the suit, who resided at Lyons, wished to put in. The nearest British consulate to Lyons was at Geneva, distant 100 miles. By sect. 22 of 15 & 16 Vict. c. 86, pleas, answers, affidavits, &c. may be sworn before any of Her Majesty's consuls or vice-consuls in foreign parts out of Her Majesty's dominions; by the preceding section, the practice of issuing commissions to take pleas, answers, &c. is abolished with respect only to pleas, &c. taken within the jurisdiction of the court. The great distance from Geneva rendered it difficult, in this case, to go to the consul, and an order had been made in chambers appointing a special commissioner. When the order came to be drawn up, the registrar was of opinion that the court had no jurisdiction to make it, and the question was therefore mentioned to the V.C. in court.

Renshaw in support of the order.

The VICE-CHANCELLOR suggested that the deft. might go before a notary public for the purpose of verifying accounts.

Renshaw said that the accounts were long, and would in that case have to be translated into French, and then re-translated, which would make the matter intricate and tedious. He suggested that a solicitor residing at Lyons should be appointed to take the account, instead of a special commissioner, and that the solicitor should be appointed a special examiner for the purpose of taking the evidence.

The VICE-CHANCELLOR made the order in compliance with that suggestion.

Wednesday, Nov. 25.

EDWARDES v. BURKE.

Practice—Security for costs—Plt. going abroad pending the suit.

Where a plt. sailed for Africa after notice of motion for decree had been given, the Court refused to stay proceedings in the cause until the plt. gave security for costs, as it did not appear from the facts that there was any intention of permanent absence on his part.

In this case a bill had been filed to take partnership accounts; notice of motion for a decree having been given, the plt. made his affidavit in support of the motion on the 23rd Oct. 1863, and on the same day left England for Cape Coast Castle, in Africa.

Glasse, Q. C. (Crackwall with him) now moved that all proceedings in the cause be stayed until the plt. gave security for the costs of the suit, as he had gone beyond the jurisdiction of the court. He read an affidavit of the deft., which stated that he had ascertained that the plt. had sailed with his wife from Liverpool by the ship *Armenian*.

Baily, Q. C. and Furniss, in opposing the motion, read an affidavit made by the clerk of the plt.'s

solicitor, which stated that the plt. had only temporarily left England, and that his residence was at Kensington. He had gone to the Gold Coast to transact important business for Messrs. Foster, who were extensive African merchants. They cited

Blakeney v. Dufaur, 2 De G. M. & G. 771.

Glasse, in reply, cited

Stewart v. Stewart, 20 Beav. 322.

The VICE-CHANCELLOR thought that there were not sufficient grounds for the order. The deft. founded his application on an affidavit made by himself. There did not appear to be the slightest suggestion that the plt. had gone abroad for the purpose of avoiding payment of costs. There was an affidavit of the clerk to the plt.'s solicitor, that his visit to the Gold Coast was only temporary, and that he resided at Auckland-villa, Kensington. The absence of any affidavit by Messrs. Foster was not sufficient to throw any suspicion on the plt.'s statements. His having taken his wife with him was a natural thing, and could not show an intention of permanent absence. The motion must be dismissed.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-inn, Barristers-at-Law.

Saturday, Nov. 14.

CURLLEWIS v. CARTER.

Injunction—Action of trover—Jurisdiction of the court—25 & 26 Vict. c. 42, ss. 1 and 2.

In a suit by a plt., alleging that the deft. had been employed by him as his agent for the sale of horses, and that, being unable to obtain from the deft. particulars of the transactions as to the sales and purchases, he (the plt.) had served the deft. with notice to determine the agency, and had subsequently removed several horses from the deft.'s premises, upon which the deft. had commenced an action of trover:

Injunction to restrain the action, on the ground that the Court of Ch. ought to ascertain the questions of fact or direct an issue, refused with costs.

Malins, Q. C. and Chisholm Batten moved, in this suit, for an injunction on behalf of the plt. Henry Charles Curlewis, to restrain an action of trover which had been commenced by the deft. Philip Allworthy Carter, under the following circumstances:—

The bill alleged that the deft. was some time ago employed in the plt.'s service as foreman to buy and sell horses and as a trainer of horses; that the deft. left the plt.'s service in the year 1859, and was afterwards employed by Messrs. Anderson, of Piccadilly; that in 1862 the deft. proposed to the plt. that if he would supply money to the deft. to be employed by him in the purchase of horses in his (def't.'s) own name, but on account of the plt., he (def't.) would leave Messrs. Anderson and act as agent for the plt. in the purchase and sale of horses upon the terms, that one-half of the clear profits to be gained should be allowed to the deft.; that the plt. agreed to these terms, but the plt. particularly stipulated that there was to be no partnership between them.

The bill further alleged that it was arranged between plt. and deft. that the stables, Nos. 4, and 5, Park-mews east, Portland-road, which the deft. held as yearly tenant should be used for the above purpose. Also that during the months of March and April 1863, the plt. advanced to deft. several sums of money for the purposes of the speculation. The plt., at the end of April, and subsequently, required the deft. to give him particulars of the transactions as regarded the horses bought and sold by him, and as the deft. did not produce any account, the plt. on the 21st July 1863 served the deft. with the following notice:

"Take notice that I do hereby determine and put an end to all and every authority which you may claim to have to act as my agent in the purchase or sale of horses, and that I claim the right to take, and intend forthwith to take, into my own possession, the whole of my property now in or about the premises Nos. 4 and 5, Park-crescent-mews, and such other place or places as I may find the same (*sic*); and further take notice that if, after the receipt hereof, you sell or attempt to deal or part with any of my horses or property, I shall adopt such proceedings against you in relation thereto as I may be advised. I further require you forthwith to render to me a detailed account in writing of all purchases and sales of horses which you may have made on my behalf, and of whom bought and to whom sold, with the several prices; and I also claim the immediate payment of all moneys which you may have received on my account."

The plt., with the knowledge and acquiescence, as the bill alleged, of the deft., removed from the stables seven horses, which were all that were remaining at the stables in the possession of the deft. as the plt.'s agent. The deft. on the 21st July claimed the horses so removed by the plt., and on the 31st a declaration in an action of trover by Carter was delivered to the attorney of Curlewis for converting to his own use or wrongfully depriving Carter of the use and possession of certain horses and other articles therein mentioned.

The plt. by his bill alleged that he had been compelled to plead to such declaration, and that notice of trial had been given; further, that the plt. had supplied the deft. with sums amounting altogether to 900*l.* or thereabouts, for the purpose of the agreement; that the deft. had not applied the whole of such money towards making the purchases agreed upon, and that he ought to account for the moneys not so applied.

The bill also alleged that the accounts of the dealings and transactions between the plt. and the deft. in relation to this speculation could not be properly taken except in this court; that the plt. could not obtain the relief to which he was entitled against the deft. except in this court; that the title of the plt. to such relief depended upon the determination of the questions of law and fact which were cognisable in the action commenced by the deft.; and that the plt. was willing, if the court should so direct, to consent to such amendment in the record in such action as might be required to convert the same into an issue directed by the Court of Ch.

The bill further stated that the deft. alleged that no such speculation was entered into by the plt., but that the moneys paid by him were loans made to the deft. at various rates of interest; and that the moneys paid by the deft. were payments on account of such loans and interest.

The bill prayed for an account of all dealings and transactions between the plt. and the deft. from the month of Feb. 1863, he offering to allow in such account all moneys paid by the deft., and also a moiety of the profits made by himself out of such transactions; for a declaration that the horses taken by the plt. from the stables as aforesaid were bought by the deft. with the money and as the agent of the plt.; that all further proceedings in the action might be stayed; that, if necessary, such issue might be directed for trying the question raised in the action as the court should direct; that the deft. might be ordered to pay the plt.'s costs at law, and the costs of this suit as related thereto; and that the deft. might be ordered to deliver over to the plt. such horses as were bought by the deft. for the plt., but were still in the possession or power of the deft.; or that they might be sold, and the produce of such sale brought into court, the plt. offering, if the court should so direct, to sell the horses

removed by him, and to bring the produce of the sale, after deducting the sums expended by him in keeping the same since the 21st July last, into court; and that what should be found due from the deft. to the plt. might be ordered to be paid.

In support of the motion it was contended, that in the above state of things it was incumbent on the court to stay the proceedings at law, and to exercise its jurisdiction under the 25 & 26 Vict. c. 42, ss. 1, 2, by either determining the question of fact, or directing an issue. They cited

Baylis v. Watkins, 7 L. T. Rep. N. S. 843.

Osborne Morgan (amicus curiae) observed, that in the case referred to the Lords Justices said that the result would have been different had there been an action pending at the time

Bacon, Q.C. and W. W. Cooper, for the defts., were not called upon.

The VICE-CHANCELLOR.—I have no doubt that Mr. Morgan's recollection of the decision in *Baylis v. Watkins* is quite accurate. The Lords Justices must have decided what I am now myself about to decide. Indeed, I cannot otherwise understand the result in that case. In the present instance, I think the construction of the Act of 1862 does not warrant this application, and therefore it must be dismissed with costs.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Thursday, Nov. 5.

SINGLETON v. SELWYN.

*Practice—Demurrer—Trust—Deed of inspection—
Multifariousness.*

To a bill filed by the surviving trustee under a deed of inspectorship to wind-up the affairs of a large mercantile concern, against the several creditors who had executed the deed, and who, by a covenant therein, had agreed to indemnify the inspectors, a demurrer was filed, on the ground of want of equity and multifariousness:

Held, that such a bill was maintainable, the plt. having a right to have all the accounts taken thereunder against all parties thereto, and was not demurrable for multifariousness.

This was a bill filed by an inspector under a deed of inspectorship after mentioned, against forty persons, creditors of the partnership who had executed the deed, praying that the accounts of contributions of the several defts. in respect of the deficiency of the available assets for payment of the liabilities of the plt. and one Mr. Pollard as such inspectors, might be ascertained, and for payment of the amounts of such contributions.

Edward Brown Wilson, in the year 1849, carried on the business of a manufacturer of locomotive engines, and of an ironfounder, at Hunslet, near Leeds, under the firm of Edward B. Wilson and Co., and in May of that year became much embarrassed in his circumstances. He entered into an arrangement with his creditors, which was carried out by the indenture next stated.

By an indenture of inspectorship, dated the 21st June 1849, one Pollard and the plt. Singleton were appointed inspectors, and Wilson was authorised to carry on his business for three years under their inspection. The inspectors had power to raise 10,000*l.* on mortgage of certain property conveyed to them by a deed of even date, or on other security by overdrawing their account, or by borrowing from their bankers or other persons. The proceeds of the business were to be applied in the first place in paying costs, the debts of non-executing creditors, the excess of the

debts of executing creditors beyond the amount entered in the schedule, debts contracted in carrying on the business, including an allowance to Mr. Wilson and interest on mortgages, and then in paying rateably the scheduled debts. Power was given to the creditors to execute for such part only of their debts as they pleased. Lastly, after provisions for the indemnity of the inspectors out of the estate of Wilson, each of the executing creditors covenanted with Pollard and Singleton that if they or either of them should incur any loss, &c., as inspectors or inspector, or in consequence of that arrangement, the creditors, their heirs, executors, administrators, partners or partner, would, "upon demand pay to the person or persons having incurred or borne such loss, &c., a sum or sums of money bearing such proportion to the whole amount of such loss, &c., as the debt or debts of such covenanting creditors set forth in the said schedule at the foot of the now-stating indenture written, and in respect of which dividends were made payable under the now-stating indenture bore to the aggregate amount of the debts in the said schedule in respect of which dividends should be payable as aforesaid, and would and should in the same proportion as aforesaid, save harmless and keep indemnified Pollard and Singleton and each of them, and the heirs, executors and administrators, estate and effects of each of them, and every other inspector for the time being, and his heirs, executors and administrators, estate and effects, from and against all actions, &c., in any way occasioned by, arising out of, or incidental to, the trusts, duties, powers, or discretion reposed in them by the now-stating indenture or the said deed of conveyance."

The term of three years provided for by the inspectorship deed was extended from time to time. In Jan. 1852 the management by Wilson was discontinued, and the business was thenceforth carried on by the inspectors under the firm of "Trustees of E. B. Wilson and Co.," with assistance for a few months by Sir T. H. Roberts; and other fresh arrangements were from time to time made. A deed dated 18th Oct. 1852 and other deeds (stated in the bill) had been prepared with a view of binding the covenanting creditors by these changes, but had been executed by a few only of them. The bill alleged, however, that they had all acquiesced in and acceded to these deeds and fresh arrangements.

In 1856, Roberts, claimed under an alleged partnership agreement with Wilson to have the inspector's accounts taken. In the same year the Bowling Iron Company, one of the principal of the covenanting creditors, by Pollard, their manager, instituted a suit of *Pollard v. Wilson*, on behalf of themselves and all others the creditors of Wilson entitled to the benefit of the inspectorship deed, to have the trust of the inspectorship deed carried into execution under the direction of the court, and praying that directions might be given for carrying on and winding-up the business, and for the protection and indemnity of the inspectors.

By a decree made in both causes in July 1857, inquiries were directed—first, whether the debts provided for by the inspectorship deed had been or could be satisfied; secondly, whether it was proper that the business should continue to be carried on by the plt. and Pollard as trustees, or by Wilson, under their inspection, and for the purposes of these inquiries it was ordered (according to the allegation in the bill) that all necessary and proper accounts should be taken on the footing of the said deed of inspectorship and the said indenture of 18th Oct. 1852.

Actions had been brought against the inspectors by their bankers and the Bowling Iron Company. The bill alleged that the assets of the business were insufficient to discharge the liabilities, and that Wilson had no property.

The debts. to the present bill were the covenanting creditors, or the representatives of such as were dead, and Pollard; and the bill prayed for necessary accounts and inquiries for that purpose, and also to restrain the Bowling Iron Company's action.

Five demurrers for want of equity and multifariousness were put in. That of the debts. Hardy and others (Low Moor Company) now came on for argument.

Rolt, Q.C. and Speed, in support of the demurrer, contended that, it having been decided on this very covenant, in *Selwyn v. Harrison*, 2 H. & M. 334, that there was no privity between, or joint liability, of the covenanting creditors under their covenant of indemnity, the inspectors had only a separate right of action at law against each creditor:

Brough v. Oddy, 1 Russ. & Myl. 55;

Pendlebury v. Walker, 4 Yo. & Coll. 424.

Even if the plt. had any right to come into equity, it appeared on the face of the bill that he might obtain, in *Pollard v. Wilson*, all the relief he asked for in the present bill. The bill was clearly multifarious, as each creditor might raise a separate defence; and, there being no privity between them, no creditor had any interest in any other creditor's case.

Sir H. Cairns, Q.C., Giffard, Q.C. and Charles Hall, for the bill, contended that, this being a trustee's bill, the relation between the inspectors and creditors was that of trustees and *cestuis que trust*, and the trustee had a perfect right to file a bill to have his accounts taken by the court, and to be discharged of his trust in such a manner as to bind all his *cestuis que trust*. It was doubtful if they could obtain, in *Pollard v. Wilson*, the relief prayed for by the present bill; but even if they could, they were not obliged to avail themselves of it. At most, it would be a ground for staying proceedings, not for a demurrer. The account was a common one to all the creditors, and the plt. had therefore a right to have all the parties to be bound by it present when it was taken once for all. The point was decided in

Cheeseborough v. Wright, 28 Beav. 283.

Willcock, Q.C. and Wickens, Osborne, Q.C. and Hardy, and Everitt, for other demurring parties.

The VICE-CHANCELLOR said that, putting aside for the present the consideration of the former suit, it was perfectly competent for the plt. to file the present bill. The inspectors had undertaken an arduous trust, involving considerable liability. He would assume, to avoid all question whether the debts. had or had not acceded to the deed, that the covenant created in each covenanting creditor a separate liability to pay a definite sum, say 50*l*. Nevertheless, there could be no doubt that trustees who had executed their duty must have a right to file a bill to ascertain whether any moneys were due from them to their *cestuis que trust*, or *vice versa*, from the *cestuis que trust* to them. Preliminary to any money being paid, they were entitled to have the account taken so as to bind all parties. But it was a different question whether the accounts could not be taken in the cause of *Pollard v. Wilson* so as to be binding on all the covenanting creditors. If that were so, the amount due to the inspectors, once ascertained, would become a liquidated sum, and they would have only a right against each creditor separately for his aliquot portion of it. He could not help thinking that, if no obstruction were raised and all parties proceed fairly, all the accounts of the trust might be brought out in that suit, and he could not doubt that all the creditors would be bound by the proceedings in a suit instituted by one on behalf of them all. At the same time it must be remembered that peculiar circumstances had arisen. The inspectors were being sued, and a question whether they were justified in defending the action, and other questions, might arise. Again, a creditor had the conduct of the former suit; he might, if satisfied

of the insolvency of the trust-estate, refuse to go on with the suit, or even consent to his bill being dismissed. The trustees had a right to say that they preferred to have their accounts taken in a suit of their own, of which they had themselves the carriage, and to have their accounts taken once for all, instead of each separate action against the covenanting creditors. But if the plt. was entitled to institute a suit against all the present debts. for that purpose, it was impossible to tell him that he must stop at the administration of the trust, and could not in the same suit have the payment from the debts. which would be consequential on the winding-up of the trust. He must therefore hold that the bill was maintainable; at the same time, there could be no doubt of the expediency of all parties combining to go on with the other suit. As to multifariousness, if the plt. was entitled, on the grounds already stated, to bring all the debts. before the court, it could make no difference that they might raise separate defences. They had a common interest in the accounts, although it might be open to some of the debts. to say they were not *cestuis que trust*. The demurrers, therefore, would be overruled, but, under the circumstances, the costs would be reserved till the hearing or further order.

Order accordingly.

Solicitors: T. W. Nelson; Evans and Co.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqs., Barristers-at-Law.

Wednesday, Nov. 18.

ASHBY (app.) v. WOODTHORP (resp.)

Metropolitan Building Act — Alterations in old buildings — Uniting buildings — Evidence — 18 & 19 Vict. c. 122, ss. 9, 28.

Before the passing of the *Metropolitan Building Act* a communication had been made between two old houses, Nos. 66 and 67, in the same occupation, by openings in the party-wall. After the Act came into operation it was sought to make a communication between No. 66 and the house adjoining on the other side by openings in the wall separating the two. These two houses taken together contained less than 216,000 cubic feet, but if Nos. 66 and 67 were to be considered as one building within sect. 28, then such building and the third house taken together contained more than 216,000 cubic feet:

Held, that Nos. 66 and 67 were to be considered as one building for the purpose, and that the making the communication was an alteration of an old building within sect. 9:

Secondly, that evidence was admissible to show whether the wall separating No. 66 and the house with which the communication was to be made was a party-wall or a cross-wall:

Thirdly, that in making such communication the rules in sect. 28 were obligatory.

Case stated by Alderman Sidney, one of the justices for the city of London, on the conviction of the apps. under the *Metropolitan Building Act* 1855.

The apps. are builders and the resp. is the district surveyor of the northern division of the City of London. The apps. were employed by Messrs. Baggallay to make two openings in the wall dividing the premises No. 66, Aldermanbury and No. 6, Love-lane, No. 66, Aldermanbury being at the corner of Love-lane. The work was completed in Aug. 1862.

On the 17th Dec. 1862 notice was served by the resp. on the apps. that the work done was not conformable to the *Building Act* in certain particulars

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and requiring them within forty-eight hours to render the same conformable thereto. The particulars of non-conformity stated were: by openings having been made in a party-wall dividing buildings which taken together exceed 216,000 feet in their entire contents, to wit, containing 320,000 cubic feet, without having the floor jambs and head formed of brick, stone, or iron, and the openings closed by two wrought-iron doors, each one-fourth of an inch thick in the panel, at a distance from each other of the full thickness of the wall fitted to rebated frames without woodwork of any kind as required by sect. 28, rule 3 of the said Act.

The notice not having been complied with, the apps. were summoned by the resp., and at the hearing it appeared that some years before the Building Act came into operation, a communication had been made between 66 and 67, Aldermanbury, by an opening on the first floors in the party-wall separating them, and the openings were closed when required by double iron doors; and Messrs. Baggallay came into the occupation thereof under those circumstances. In 1862 they became the occupiers of 6, Love-lane, and, for business purposes, made two openings on the first floor, in the wall separating 6, Love-lane, and 66, Aldermanbury, together

No. 6, Love-lane, and 66, Aldermanbury, together contain less than 216,000 cubic feet.

It was urged that, as the buildings were not new buildings upon which the work was being done, the Building Act did not apply; that the opening between 6, Love-lane, and 66, Aldermanbury, was not an alteration within sect. 9; and that the wall between 6, Love-lane, and 66, Aldermanbury, was not a party-wall, but a cross-wall. The evidence of the district surveyor was admitted, after objection thereto, to prove that in his opinion the wall was a party one. The justice found that the wall was a party-wall, and convicted the apps. and ordered them to comply with the requisitions in the said notice.

Gray for the resp.—First, evidence was admissible as to the nature of the wall between 66, Aldermanbury, and 6, Love-lane. Secondly, the premises, 66 and 67, Aldermanbury, formed one building within sect. 28 of 18 & 19 Vict. c. 122, which enacts (*inter alia*) that "no opening shall be made in any party-wall dividing buildings which if taken together would contain more than 216,000 cubic feet, except under the following conditions: such opening shall not exceed in width seven feet or in height eight feet. Such opening shall have the floor jambs and head formed of brick, stone, or iron, and be closed by two wrought-iron doors, each one-fourth of an inch thick in the panel, at a distance from each other of the full thickness of the wall, fitted to rebated frames without woodwork of any kind." No doubt, before the time the communication between 66 and 67 was made, they were two buildings, but the openings were made not for ventilation, but for doors for the purpose of using them as one building. Then the making the opening to 6, Love-lane, was an alteration within sect. 9, so as to subject the work to the regulations of the Act. If that be so, then taking 66 and 67 as one building, that, with No. 6, Love-lane, contained more than 216,000 feet, and the conviction of the app. was right, for not observing the rules in sect. 28.

Raymond for the app.—First, this is not an alteration within sect. 9. A mere opening like this in the wall cannot be said to have been contemplated by the Act, so as to require the interference of the district surveyor. Then this was a cross-wall within sect. 3, the interpretation clause, as the occupier was the same. Evidence was not admissible to show what a party-wall is within the meaning of the Act, as sect. 3 itself defines the meaning. [COCKBURN, C. J.—The wall was built to separate the two houses, and does not cease to be a party-wall because they have come into one

occupation.] Lastly, the only two buildings it is proposed to unite are Nos. 66 and 6, Love-lane, and they together contain less than 216,000 cubic feet. It is not correct to treat 66 and 67 as one building. The communication between them was made years ago, and by a different person; and in considering whether the app. is liable to a penalty for what he has done, the court ought not to regard what was done at another time by other persons.

COCKBURN, C. J.—I entertain no doubt that the conviction was right. Looking at the premises, it is impossible to come to any other conclusion than that Nos. 66 and 67 had been united into one building for the purposes of sect. 28. That being so, the area of that building, taken together with No. 6, Love-lane, gives the requisite number of cubic feet within sect. 28, which subjects the uniting of the two buildings to the rules therein. The apps. not having united these two buildings in conformity with rule 3 of sect. 28, after the district surveyor gave them notice so to do, the conviction was right. With regard to the reception of the evidence as to the wall being a party-wall and not a cross-wall, the magistrate decided rightly.

The rest of the Court concurring,

Conviction affirmed.

Tuesday, Nov. 24.

Ex parte LAMERT.

Medical Practitioners Act—Erasing name from register—Infamous conduct.

By the 21 & 22 Vict. c. 90, s. 29, the General Medical Council are the sole judges of whether a registered medical practitioner has been guilty of infamous conduct in a professional respect, and this court has no power to interfere.

M. Chambers (Barnard with him) moved for a *mandamus* to the General Council of Medical Education and Registration in England, commanding them to restore the name of the applicant to the register. Mr. Lamert, the applicant, is a duly qualified practitioner, and his name was entered on the register of practitioners under the 21 & 22 Vict. c. 90. The Medical Council, however, have since directed the registrar to erase his name from the register, on the ground that he had been guilty of infamous conduct in a professional respect in the publication by him of an indecent work on venereal disorders. Before doing so the council communicated the nature of the charges to him, and received his explanations; but they refused to hear him by counsel. Sect. 29 of 21 & 22 Vict. c. 90, enacts, that "if any medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall, after due inquiry, be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." It was now contended upon the affidavits that the applicant had not been guilty of any infamous conduct, and that his name had been therefore improperly removed from the register. [BLACKBURN, J.—Has this court any power to inquire into the propriety of the council's decision under this part of the section any more than we should have to inquire into the propriety of a conviction under the first part of the section?] The grounds on which the council acted was the publication of this work, and that was not "infamous conduct." [BLACKBURN, J.—If the offence were an impossible one, that might be so. But it is quite possible to publish a book purporting to be a medical work, which should yet be of an indecent character. WRIGHTMAN, J.—Suppose a *mandamus* to issue, and the council to return (in the words of the section) that the applicant had, "after due inquiry, been judged by the general

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council to have been guilty of infamous conduct," would not that be an answer?]

COCKBURN, C. J.—We are all agreed that the 29th section of the Act makes the Medical Council sole judges of whether a party on the register has been guilty of infamous conduct. The council here have declared that he has been guilty of infamous conduct in respect of the publication of this book, which may or may not have warranted the sentence; but inasmuch as those whom the Legislature considered the best judges of such a matter have given their decision, we cannot interfere.

The rest of the Court concurring, *Rule refused.*
Attorney for the applicant, *H. Philipps.*

Nov. 11 and 25.

REG. v. THE INHABITANTS OF ST. GILES,
CRIPPLEGATE.

Poor-law—Settlement by renting a tenement—General hiring—Tenancy for a year.

A renting of a tenement for an indefinite period, and an occupation for a year, constitute a tenancy for a year.

A. B. occupied for upwards of a year a house under a written agreement, whereby it was let to him from a certain day "at the monthly rental of 1l. 16s. 8d.," the said agreement containing this provision: "It is lastly agreed that one month's notice, to expire at either on the 25th day of March, the 25th day of June, the 25th day of September, or the 25th day of December, shall be a good and sufficient notice on either side for A. B. to quit and deliver up possession of the house."

Held, that this was a hiring of a tenement indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarter days; and the house having been actually occupied under that hiring for upwards of a year, it must be considered to have been an occupation under a hiring for a year.

This was a case stated upon an appeal to the City of London sessions by the parish officers of St. Olave, Silver-street, London, against an order of removal obtained by the parish officers of St. Giles, Cripplegate, of Thomas Wilsheer, his wife and five children. The sessions quashed the order.

The only ground of removal alleging any settlement was the following:—"That in March 1858 the said Thomas Wilsheer hired for the term of one year a separate and distinct dwelling-house, situate No. 6, Windsor-court, Monkwell-street, in the said parish of St. Olave, Silver-street, at a yearly rent of 22l., and he immediately entered into the occupation thereof, and continued to rent and occupy the same therefrom and for one whole year and upwards, and he actually paid upwards of 10l. rent for the same in respect of one whole year; he was assessed and duly paid the poor rates in respect of the said dwelling-house for one whole year and upwards, and he resided and slept therein for forty nights and upwards after payment of the said poor rates." The question in dispute on the said appeal, and which was duly raised by the grounds of appeal, was whether the following agreement under which the pauper occupied the house in question constituted a yearly hiring or renting for the term of one whole year as required by the statute 6 Geo. 4, c. 57.

"Memorandum of agreement, entered into the 20th day of March, 1858, between Henry Piper, as agent for the trustees of Mrs. Henley, and Thomas Wilsheer of Dobie-court:—Henry Piper agrees to let, and Thomas Wilsheer agrees to take, the house No. 6, Windsor-court, from the 25th day of March 1858, at the monthly rent of 1l. 16s. 8d. Henry Piper agrees to pay all landlord's rates and taxes, and Thomas

Wilsheer agrees to pay all tenant's rates and taxes, to keep the house in quiet and tenantable order, and to mend all squares of glass broken during his occupation. It is lastly agreed that one month's notice, to expire at either on the 25th day of March, the 25th day of June, the 25th day of Sept., or the 25th day of Dec., shall be a good and sufficient notice on either side for Thomas Wilsheer to quit and deliver up possession of the house to Henry Piper or other agent for the time being of Mrs. Henley's trustees.

"As witness our hands the day and year above written,

"HENRY PIPER,

"THOMAS WILSHEER."

The said Thomas Wilsheer occupied the said dwelling-house under such written agreement up to Midsummer 1860, a period of two and a quarter years, and during the whole of such period was assessed to and paid the poor rates of the said parish of St. Olave, Silver-street, in respect of the said dwelling-house. The said Thomas Wilsheer paid the rent of the said dwelling-house monthly during the whole period, but it was conceded by the apps. that all other conditions of obtaining a settlement had been fulfilled by the said Thomas Wilsheer, and that he had gained a settlement in the said apps. parish if the said written agreement constituted a yearly hiring or renting for the term of one whole year of the said dwelling-house, within the statute 6 Geo. 4, c. 57. The question for the opinion of the court is, whether such written agreement constituted such yearly hiring or renting for the term of one whole year of the said dwelling-house? If such question be answered in the affirmative, then the said order of sessions is to be quashed, and the said order of removal is to stand confirmed, otherwise the said order of sessions quashing the said order of removal is to stand confirmed, and the costs of the said appeal are to follow the decision of this court.

By the 6 Geo. 4, c. 57, s. 2, it is enacted, that "no person shall acquire a settlement . . . by or by reason of settling, upon renting or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land *bonâ fide* rented by such person in such parish or township, at and for the sum of 10l. a-year at the least, for the term of one whole year, nor unless such house, or building, or land shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10l., actually paid for the term of one whole year at the least," &c.

Gifford and Tayler appeared in support of the order of sessions, and contended that the agreement under which the pauper occupied the premises was not for a yearly renting as required by the 6 Geo. 4, c. 57, s. 1, but was a quarterly hiring at a monthly rent. [COCKBURN, C. J.—As the parties contemplated notices being given up to the end of the year, may it not be said that the hiring is for a year, unless they determine it before?] The payment of the monthly rent would tend to show that it is not a yearly hiring; and the provision for the month's notice to quit being to expire at the end of three months, does not alter it. It is a hiring for a month, with a condition as to its determination at certain days:

Reg. v. Charlton, 1 Q. B. 247;

Puddington v. Willemsen, 32 L. J. 109, Mag.;

Reg. v. Herstonmoucaux, 7 B. & C. 551;

Reg. v. Bathwick, 4 Dow. & Ry. 335;

Reg. v. Pontefract, 2 Q. B. 548;

Kemp v. Derrett, 3 Camp. 510.

W. J. Payne, contra, contended that the hiring, as shown by the agreement, was a general one, and therefore in law was a year. It was a hiring for a year, determinable upon certain conditions, and that the cases decided upon the settlement of hiring and service are applicable.

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R. v. Byker, 2 B. & C. 114;*R. v. St. Andrew-in-Pershore*, 8 B. & C. 679;
Wandsworth v. Putney, 2 Bott. 188.*Cur. adv. vult.*

Nov. 25.—MELLOR, J.—This case was argued before the Lord Chief Justice, my brother Wightman, and myself. If we had been required for the first time to put a construction upon the 6 Geo. 4, c. 57, s. 2, and the previous statute of 59 Geo. 3, c. 50, we might have hesitated to decide that in the present case a settlement had been gained. In other words, we should have doubted whether the pauper had *bonâ fide* rented a tenement for one whole year or occupied under such yearly hiring. The case of *Rex v. Herstmontceaux*, 7 B. & C. 551, however, is a decisive authority that those statutes did not require any other hiring or renting than would in ordinary cases constitute a tenancy for a year. Now the rule of law is, that a renting of a tenement for an indefinite period and an occupation for a year constitutes a tenancy for a year. In the present case it was conceded that the tenancy could not be considered a monthly tenancy by reason of the restriction upon quitting or determining the tenancy. The monthly rent being excluded in determining the character of the tenancy, to what other conclusion can we come than that it was a hiring of the tenement, indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarterly days, and the house having been actually occupied under that hiring for upwards of two years it appears to us that it must be considered to have been an occupation under a hiring for a year. Many cases have been decided with reference to settlements by hiring and service, which established that a hiring at weekly wages, determinable on a month's notice, and service under such hiring for more than a year gives a settlement: (*Reg. v. Hampreston*, 5 T. R. 205; and *Rex v. Great Yarmouth*, 5 M. & S. 114.) These cases are analogous to the present so soon as the effect of the statute Geo. 4, c. 57, s. 2, is determined. We are therefore of opinion that the rule for quashing the order of sessions must be absolute.

Rule absolute.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUXLEY SMITH, Esqrs.,
Barristers-at-Law.

Nov. 9, 11 and 16. *

BAIRD AND OTHERS v. WILLIAMSON AND OTHERS.

Adjoining mine-owners—Obligation of owner of the lower mine to receive the water from the upper mine.

The plts. and defts. were adjoining mine-owners; the defts. having the upper and the plts. the lower mine. In each mine there were two seams of iron-stone distant a few fathoms from each other; each seam cropped out on the surface of the defts.' land, and extended in a parallel dip down through the defts.' land into the plts.' land. Each party had worked out the upper seam, and the plts. had left no barrier to stop back the water flowing down from the defts.' works in that seam, but of this water the plts. did not complain. In order to get the minerals in the lower seam, the defts. made a crut or passage from the upper to the lower seam, so constructed as to be on an incline from a part of the lower seam to a part of the upper seam, having the head of the crut in the lower seam at a higher level than the mouth of the crut in the upper seam. This crut was made, in the usual course of skilful mining, for the purpose of getting the minerals from the lower seam to the upper seam and so to the shaft, so as to be raised to the surface. The water, however, from the works in the lower seam flowed down

this crut into the upper seam, and so on into the plts.' mine, of which they complained, contending that they were not obliged to receive through the upper seam more water than that which flowed from the works therein, and had a right to maintain their action for the water so flowing from the lower seam. The plts. further complained of water which flowed into their mine, which water it was alleged in the pleadings was raised by pumping to a level high enough for such water to flow away; on behalf of the defts. it was said that the pumping was for the purpose of getting other minerals which were lying deeper than the two seams, and that the pump was so placed that a crut led therefrom to the head of the crut before mentioned at such a level as that the water from the pumping flowed down the two cruts into the upper seam, and so on into the plts.' mine:

Held, as to the first point, upon the authority of Smith v. Kenrick, that the plts. could not maintain their action, as the owner of a higher mine had a right to work the higher mine in the usual and proper manner for the purpose of getting these minerals from any part of the mine, and that they were not liable for any water which flowed by gravitation from the works so constructed:

As to the second point, that the action would lie, on the ground that the occupier of the upper mine had no right to be an active agent in sending water to a lower one, the lower one not being subject to any servitude of receiving water conducted by means of the upper mine; and also that the owner of such upper mine had no right to interfere with the gravitation of water so as to make it more injurious to the occupier of the lower mine.

The declaration alleged the contiguity of the mines, the passage of the water from the mine of the defts. to that of the plts. in the manner above described, and that defts. threw upon the plts. the expense of lifting it, whereby, &c. The second and third counts varied the form of the complaint.

To this the defts. pleaded not guilty, in that the strata were not such as to allow water to percolate through them. That the cruts were made for the purpose of reaching the lower strata of minerals, and for no other purpose, according to the usual manner of mining.

Demurrer to last count.

Replication.—Demurrers to second, third, and fifth pleas.

Joinder in demurrer.

Pleas to new assignment.

Demurrers to second plea to new assignment.

Joinder in demurrer.

The pits. points were:—That the first and second counts each showed a cause of action by showing that the defts. introduced into the veins water not naturally arising in the veins, but coming from other sources, knowing that such water would find its way into the plts.' mine. That the manner in which the water finds its way into the plts.' mine is immaterial, whether by percolation through a barrier, or from the absence of any barrier if the water be foreign water not naturally arising or finding its way into the vein; and therefore the second plea is bad. That the third and fifth pleas and the second plea to the new assignment were bad on the ground that, although the mode adopted by the defts. might be a proper and recognised mode of mining, it will not justify the introduction of foreign water into a vein of mineral where it damaged an adjoining mine belonging to another owner in the same vein of mineral.

The defts.' points were:—1. That the first, second and third counts of declaration were respectively bad in substance, and that none of them showed any invasion by the defts. of a legal right existing in

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the plts., or any good cause of action against the defts. 2. That at any rate the second, third and fifth pleas were respectively good and valid answers to the counts to which they were respectively pleaded, and were respectively good in substance. 3. That the new assignment of the plts. to the third and fifth pleas respectively was bad in substance, and that the additional facts therein stated make out no cause of action by the plts. against the defts. 4. That the second plea to the new assignment was good in substance, and was a good and valid answer to the new assignment. 5. That the defts. were at liberty to drain, draw, pump, or otherwise remove water from one part of their own mines to another part, in whatever way they may think fit, and were not liable if by reason thereof such water should percolate through strata pervious to water into the mines of the plts. and cause damage there. 6. That at any rate the defts. were not liable for such consequences if such draining, drawing, pumping, or otherwise removing of the water within their own mines be done solely for the purpose of mining, and in the usual proper and recognised manner and course of mining. 7. That at any rate the defts. were not liable for such consequences if they did not draw or pump such water from one part of their mines to another part, but the water must flow within their mines from one part to the other by gravitation and other natural forces along passages and openings made solely for the purpose of mining, and in usual proper and recognised manner and course of mining.

Henry James (*Hor. Lloyd* with him) appeared for the plts.

Gray for the defts.

The referred to

Smith v. Kenrick, 18 L. J. 172, C. P.;

Chasemore v. Richards, 29 L. J. 81, Ex.;

Duke of Beaufort v. Morris, 6 Har. and

Youle on Waste, 177. *Cur. adv. vult.*

Nov. 16.—ERLE, C. J. now delivered the judgment of the court.—In this case the plts. complain of the flow of water into their mine from the defts.' mine. The defence was, that the flow arose from mining work carried on with due skill and in a customary and proper manner. As the complaint related to three kinds of foreign water, the question raised may be better understood by a short description of the local relation of the two properties agreed to be the effect of the pleadings. The two mines adjoin; the defts.' being the upper, and the plts.' the lower mine. In such mine there were two seams of ironstone, distant a few fathoms from each other. Each seam cropped out on the surface of the defts.' land, and extended in a parallel dip down through the defts.' land into and through the plts.' land. Each party had worked out that portion of the seam of ironstone which we may call No. 1, and the plts. had left no barrier to stop back the water flowing down from the defts.' works in that seam, and of this water the plts.' did not complain, it being clear, from the case of *Smith v. Kenrick*, that no such complaint could be sustained. In order to get the minerals in the seam which we may call No. 2, the defts.' made a crut, or passage, from the first seam to the second seam, so constructed as to be on an incline from a part of the seam No. 2 to a part of the seam No. 1, and although No. 2 lay under No. 1, yet the head of the crut in No. 2 was at a higher level than the mouth of the crut in No. 1. This crut was made, in the usual course of skilful mining, for the purpose of getting the minerals. The defts.' counsel explained it to be for the purpose of carrying the minerals from the seam No. 2 down the crut to the seam No. 1, and down that seam to the shaft, so as to be raised to the surface. While the crut effected this service, at the same time the water from the works in No. 2 flowed down through it into No. 1, and so on

into the plts.' mine. The complaint of the plts. was of this water. They contended that they were not obliged to receive through No. 1 more water than that which flowed from the works therein, and might maintain their action in respect of the water so flowing from seam No. 2. But on this point we think the plts. fail. The owner of the higher mine has a right to work the higher mine in the usual and proper manner for the purpose of getting out any quantity of minerals from any part of the mine, and he is not liable for any water which flows by gravitation from the works so constructed. We think the law was correctly laid down to that effect in *Smith v. Kenrick*. If this crut had been made for the purpose of draining water into the plts.' mine which would not otherwise have arrived there, and not for the purpose above described, we consider the action would lie. It appears in *Smith v. Kenrick*, where the barrier of the lower mine had been wrongfully pierced for air-holes at the lower boundary by the former occupier of the upper mine, that the subsequent owner of the upper mine had no right to make a construction for the purpose of turning some of the water through those openings. By paying money into court in an action for that wrong, he admitted that his exemption from the liability was confined to the water which flowed by the laws of nature into the plts.' mine for the purpose of getting the minerals. The plts. further complained of foreign water which flowed into their mine. This water is alleged in the pleadings to be raised by pumping to a level high enough for such water flowing away. The learned counsel described the pumping to be for the purpose of getting other minerals which were lying deeper than the two seams above mentioned, and the pump was so placed that a crut led therefrom to the head of the crut above mentioned, at such a level as that the water from the pumping flowed down the two cruts into the seam No. 1, and so on into the plts.' mine. In respect of this water we think that the action lies. The defts., as the occupiers of the mine, have no right to be active agents in sending water to the lower mine. The plts., as occupiers of the lower mine, are subject to no servitude of receiving water conducted by means of the upper mine. Each mine-owner has all the rights of property in his own mine; amongst them, the right to get all the minerals, provided that he works with skill in the usual manner, and if, while the occupier of the higher mine exercises that right, nature causes the water to flow into the lower mine, he is not responsible. If the occupier of the lower mine intends to guard against this operation, he must leave a barrier in the upper part of the mine to pen back the water of his higher neighbour. The law imposing the regulations for the enjoyment of conflicting interests does not authorise the occupier of the higher mine to interfere with the gravitation of water so as to make it more injurious to the occupier of the lower mine. This appears to be the law. For authority we refer to the case of *Smith v. Kenrick*, also to the questions which were left to the jury in the case of *Acton v. Blundell*, and judgment is to be entered accordingly. There will be judgment entered for the plts. on the demurrer to the plea to the new assignment, and judgment for the defts. on the demurrer to the other pleas.

REGISTRATION APPEAL.

Tuesday, Nov. 17.

SMITH (app.) v. HALL (resp.)

Election law—Borough vote—Charity—2 Will. 4, c. 45, s. 36.

The claimants were freemen of the borough of S., and "brothers" of the hospitals of St. B. and St. J., and as such brothers were entitled to houses to

live in, and equal shares in the revenues of the hospitals, which are derived from landed estates. The hospitals are under the government of the Charity Trustees, and are reputed to be corporations by prescription. A person to be qualified to be elected a brother must be more than fifty years old, or a lame, blind, or impotent person unfit for husbandry. Each brother keeps his house in repair, and no brother when once elected was ever known to be turned out. It was objected that the claimants, though entitled to vote as freemen, were disqualified as the recipients of "parochial relief or other alms:"

Held, that these persons having a legal right to the revenues of the hospitals, and not being in a state of indigence and abject poverty, and having been qualified to vote at the time of the passing of the 2 Will. 4, c. 45, were not the recipients of "parochial relief or other alms" within the meaning of sect. 36 of that statute, and therefore were not disqualified from voting.

This was a consolidated appeal from the court of the revising barrister for the borough of Sandwich. The following case was stated for the opinion of the court.

CASE.

Thos. Bowers, James Wyburn, Francis Crocier, James Dennis, Daniel Deverson, Henry Ewell, sen., Valentine Heill, sen., Edward Longley, John Gray Manning, Wm. Neale, John Spicer and John Valder, on the list of freemen entitled to vote for members of Parliament for the borough of Sandwich, were duly objected to by Charles Powell on the ground that all the several persons before named were disqualified from being registered by the 36th section of the 2 Will. 4, c. 45, which enacts, "that no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future Parliament for any city or borough, who shall within twelve calendar months next previous to the last day in July in such year have received parochial relief or other alms, which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." It was proved to me that all the before-named were brethren either of the Hospital of St. Bartholomew, or of the Hospital of St. John, in the town of Sandwich, and had been recipients of the gratuities and other benefits by law belonging to such brethren for more than twelve calendar months next previous to the last day of July 1863.

It was also proved that the said two hospitals of St. Bartholomew and St. John are identical in their constitution and management, and are both under the government of the Charity Trustees appointed by the Lord Chancellor.

It was further proved to me that each of the said hospitals is by repute a corporation by prescription, and that the property of the same consists in landed estates and houses, the income arising from the former being divisible annually among the brethren in equal proportions, and a house being assigned to each of the brethren wherein to live. These houses are an aggregation of separate buildings; and each is kept in repair by the brother who lives in it. The right of appointment of brethren to the said hospital is vested in the above-mentioned Charity Trustees.

No instance was cited to me of any brother once appointed having been turned out of either of the said hospitals.

There is no deed or document accurately defining the qualifications of the persons who are to be appointed brethren, but it was proved to me that in 1612 the mayor and jurats of Sandwich had the management of the hospitals, and that at that time an ordinance was made by them that "every person placed in the hospital should be of the age of forty years, or thereabouts, except always decayed jurats, or any lame,

blind, or impotent person;" and by an inquisition of charitable uses taken Sept. 7 (6 Car. 1.), it was found that the brethren ought to be above the age of fifty, except lame, blind, or impotent persons, and unfit for husbandry, and should be inhabitants of the said town, or a child of some then or late inhabitant, having no competent means to live.

It was proved to me that this latter regulation as to the qualifications for brethren is that which is now, and has been for some time past in force, and that in addition thereto, by a resolution of the Charity Trustees lately passed, no person is eligible to be a brother under the age of fifty-six years.

The brethren of the said hospitals have always heretofore voted for members of Parliament for the said borough without objection.

I directed that the before-mentioned persons were not disqualified from being registered by the said 36th section of the 2 Will. 4, c. 45, and I retained their names on the list of freemen entitled to vote. If the court shall be of a contrary opinion, their names ought to be expunged from the same list.

The said Charles Powell duly appealed from this decision.

(Signed) J. D. C.,

Revising Barrister.

Hayes, Serjt. (Bourke with him) for the app.—These voters are freemen of the borough, and set up an interest in the hospital, but the only question is, are they disqualified from voting by the receipt of alms? There has been no case on the disqualification clause since the Reform Act, 2 Will. 4, c. 45. *Faulkner v. Overseers of Upper Boddington*, 3 C. B., N. S., 412, was a case of certain persons called "beadsmen," and the court decided that as they had no duties to perform, except to receive their money, they had not an estate which came to them by promotion to an office, but were recipients of alms:

Heath v. Haynes, 3 C. B., N. S., 389;

Heartley v. Banks, 5 C. B., N. S., 40,

was the case of the poor knights of Windsor whose occupation was held to be a charity.

Simpson v. Wilkinson, 7 M. & G. 50;

Freeman v. Gainsford, 11 C. B., N. S., 68; 5

L. T. Rep. N. S. 611;

Elliott on Qualifications and Registrations, 2nd edit. p. 257, and the cases collected there.

These persons being recipients of alms, are not free agents. There are cases the other way which I may as well mention:

The *Bedford* case, 2 Doug. 114, 123; *Elliott* 259;

Taunton's case, 1 Doug. 371.

The latter case is the case of the Chelsea pensioners; but that is not in the nature of a charity, though so called, but a reward for service.

Welsby for the resp.—It is conceded that these people are qualified to vote as freemen, and it is a question whether they are disqualified by the 36th section of the Reform Act (2 Will. 4, c. 45) as being the recipients of alms. The hospitals are reputed to be corporations by prescription, and the houses occupied by these persons are independent, and each kept in repair by the brother who occupies it, and there is no instance of any brother being turned out; besides which, they have always voted heretofore. [WILLIAMS, J.—In Haywood on Elections, there is the case of this very borough (Haywood on Borough Elections, p. 214), where the House of Commons decided by a majority of one, that a member who had been elected by these votes was rightly seated.] I do not see that they would be precluded from voting as freeholders if they were not a corporation. I think the cases decide that "other alms" refers only to such alms as are contributory to the poor-rate: (Rogers on Elections and Registration, 7 ed., p. 105, and the cases collected there.)

several of the cases cited there usage was taken into consideration. This is property vested in these people: they repair their houses and live in them for life. I don't dispute that it is charity, but I submit that it is not alms; there are charities which are not alms, and which at the passing of the Reform Act did not disqualify.

HAYES, Serjt., in reply.—The recipients of the charity are to be people who have no competent means of living, and therefore must be supported by this charity or parish relief. The reason why a charity should not give a person a vote is also a reason why it should disqualify him as a freeman.

ERLE, C. J.—I am of opinion that the revising barrister was right, and that the votes in question are good. The claimants are freemen, and therefore have a right to vote unless they are disqualified by sect. 36, which disqualifies the recipients of parochial relief and other alms which by the law of Parliament disqualified at the time when the Reform Bill (2 Will. 4, c. 45) passed. The recipients of the proceeds of these lands were not disqualified at the time when the Reform Bill passed. In the case that has been referred to (Haywood on Borough Elections, 214) the committee seems to have held that these votes were good. Parliament seems to have doubted whether the committee was right; but ultimately decided that the member who came in with these votes was rightly seated. This leaves it doubtful; but we should incline in favour of the franchise against disqualification, unless the law compelled us to take the latter course. The meaning of the enactment is, that persons who are so situated as to be presumably subservient, without any independence of mind, should be disqualified, and I take it that these freemen, by reason of having a house and a share in the profits of the lands for life, would stand with a greater probability of independence, as far as their pecuniary interest was concerned, than would be the case of very many freemen and persons who have merely the proceeds of their own labour to rely on to support them. These men may be at that time of life when they may have many years of active labour before them, and yet may be qualified to have a house for life and a share in the profits of these hospitals, and I do not think that is a disqualification.

WILLIAMS, J.—I am entirely of the same opinion. I think that it is not made out that the circumstances under which the revenue of these hospitals was shared by the persons who were in the receipt of it showed a disqualification within the meaning of the statute. There certainly seem to be a great many conflicting decisions on the subject, as far as the committees of the House of Commons go; but I find the rule laid down in Haywood on County Elections, 2nd edit. p. 278, a book of very high authority, that "a distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn." It seems to me that here it is out of the question that these recipients of alms are in that plight, and I think they are not disqualified.

BYLES, J.—I am of the same opinion. I collect from the statement of the case that both of these bodies are corporations by prescription, and the persons elected to receive alms are members of these corporations. Mr. Welsby has pointed out that all the proceeds of the charity are by law belonging to the brethren, and distributable in equal proportions amongst them. In the *Bedford* case, 2 Doug. 114, 123, and the case of the *Greenwich Pensioners*, 1 Doug. 371, the parties had a right to take their share, whatever it was; but in no case cited by my brother Hayes had the parties who were to receive alms a legal right to them.

Under these circumstances, I cannot help thinking that these are not parochial alms within the meaning of the statute.

KEATING, J.—I am of the same opinion. The voters here *prima facie* are entitled to vote, but it is contended that they are disqualified by the receipt of alms. It is to be observed that there is nothing in the distribution of these alms, and the advantages which they possess under their distribution, which is interfered with by the parochial officers or any one else. And they have further the advantage of the houses which confer upon them the right to vote. Under these circumstances it appears to me that the objector was bound to show a disqualification, which he has not made out.

Judgment for the resp.

Attorney for app., *Henry Smith.*

Attorney for resps., *Dines and Harvey.*

Nov. 13 and 24.

FRYER v. KINNERSLEY.

Libel—Privileged communication.

The plt. being a member of the Royal Horticultural Society, applied to E. the manager of the society's gardens to recommend him a gardener. E. was in the habit of recommending gardeners to members of the society, and he recommended the plt. to the deft. The plt. entered the deft.'s service, and, after some time, was discharged by the deft., who then wrote to E. a letter, of which the following is the material part: "On Saturday I had another scene with Fryer in my garden. He was extremely violent, came towards me several times with an open clasp-knife in his hand, and eyes starting from the sockets with rage—a perfect raving madman. I was fortunately accompanied by my upper servant. He accused me of having opened a letter of his, and said he had written to the General Post-office about it, and would take proceedings, as it was an indictable offence. . . . Mr. B. told me that, some time ago, Fryer obtained a post-office order for some one in London, and not having given the correct name and address, the money was not paid, and came to the post-office and abused Mr. B. in very rude language. I think it right that you should be informed of Fryer's violent conduct, as you might unwittingly recommend him without being aware of his temper and faults."

Held, that even if the communication were privileged, the expressions in the letter were excessive, and beyond what would be justified by a privileged communication.

Libel.—The declaration contained two counts for libel, and a count for slander, which last was abandoned at the trial. The deft. pleaded the general issue.

At the trial, before Keating, J., at the Middlesex sittings after Trinity Term, the following facts were proved:—The plt. entered the service of the deft. as gardener at the beginning of the year 1862. The plt. had previously been employed at the gardens of the Royal Horticultural Society, of which the deft. was a member, and the deft. engaged him in consequence of the recommendation of Mr. Eyles, the superintendent of the society's gardens. In Jan. 1863 the deft. gave the plt. notice to leave his service on the 30th April following, and on the 20th April he wrote the following letter to Mr. Eyles:—

"Binfield-manoor, Berks, 20th April 1863.

"Dear Sir,—On Saturday I had another scene with Fryer in my garden. He was extremely violent, came towards me several times with an open clasp-knife in his hand, and eyes starting from the sockets with rage, a perfect raving madman. I was, fortunately, accompanied by my upper servant. He accused me of having opened a letter of his, and said he had written

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to; the General Post-office about it, and would take proceedings, at it was an indictable offence. I have found in my post-bag, since my notice to him to leave, a letter, and a daily newspaper. The letter was delivered to him unopened, and certainly no letter for him was ever opened by me. I went to-day to inquire at the Bracknell post-office if he had made any complaint there about me, but found that no complaint had been made there. Mr. Bartlett told me that some time ago Fryer obtained a post-office order for some one in London, and not having given the correct name and address, the money was not paid, and came to the post-office and abused Mr. Bartlett in very rude language. I think it right that you should be informed of Fryer's violent conduct, as you might, unwittingly, recommend him without being aware of his temper and faults. I have engaged the gardener of whom I spoke to you; he has been here, and likes the place.—I remain, dear Sir, yours truly,

"Mr. Eyles." "EDWARD KINNERSLEY.

On the 22nd April Eyles wrote to the deft. the following letter:—"I am surprised and very much annoyed to hear that Fryer has behaved so shamefully to you. I had intended to have him taken on here again on leaving you, but I cannot think of doing so after such behaviour. I certainly shall have nothing more to do with him, and I am only extremely sorry that I should have been the means of his coming to you, but I evidently did not know his temper and disposition." The plt. having inquired of Eyles the reason of his not being employed at the gardens of the society, Eyles read to him the deft.'s letter. Thereupon he brought this action against the deft. Eyles refused to furnish the plt. with a copy of the deft.'s letter, and the first two counts in the declaration alleged libels in terms not agreeing *verbatim* with the letter of the deft. produced at the trial, being derived apparently from the plt.'s recollection of the expressions used in the letter which had been read to him. The third count alleged a verbal slander to the same effect.

At the conclusion of the plt.'s case the deft.'s counsel applied for a nonsuit on the ground of a variance between the libels alleged in the declaration and the words of the letter, and also on the ground that the communication was privileged.

Keating, J. reserved these points for the consideration of the court, who were to have power to amend the declaration, and the case was left to the jury, who found that the letter was a libel, but that the publication of it was not malicious, but *bona fide*. They assessed the damages at 10*l*.

Shee, Serjt. having obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved,

Laxton showed cause.—The letter written by the deft. was not privileged. It was no part of his duty to recommend servants, though he may have done so occasionally, and did so in the present instance. The letter was written officiously to a person having no common interest with the deft., and under circumstances of excitement and irritation. It was a volunteered communication. The law is settled in the cases of

Rogers v. Clifton, 3 B. & P. 587;

Pattison v. Jones, 8 B. & C. 578;

Brooks v. Blanchard, 1 C. & M. 779;

Toogood v. Spyring, 1 C. M. & R. 181;

Martin v. Strong, 5 A. & E. 535.

Shee, Serjt. and *Kingdon* supported the rule.—As to the variance, if the declaration is amended, the deft. ought to have an opportunity of pleading a justification: (*Saunders v. Bate*, 1 H. & N. 402.) With respect to the other question, the rule laid down in *Wood v. Spyring* is followed in *Harrison v. Bush*, 5 E. & B. 344, that a communication made *bona fide* upon any subject-matter in which the party com-

municating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable. Eyles, as superintendent of the society's gardens, was in the habit of recommending servants. The plt. had applied to him again for a servant, and there had been a communication from Eyles to the deft. about the plt.'s character. The deft. had a common interest both with Eyles and with the other members of the society, who were accustomed to take servants on his recommendation. The fact that the communication was volunteered by the deft., and not elicited by an inquiry from Eyles, will not, by itself, take away the privilege. In *Coxhead v. Richards*, 2 C. B. 569, the parties were strangers. [ERLE, C. J.—There was a balance of opinion in that case among the judges.] But the judges all agreed upon this point, that the privilege was not taken away in consequence of the communications being voluntary, if there was a moral duty on the part of the writer to make the communication. *Wright v. Woodgate*, 2 C. M. & R. 573, is an authority to the same effect. [WILLIAMS, J.—A person may be a good gardener, though he may be of a violent temper.] That may be so; but then it must be remembered that the letter complained of only mentions the fault of temper, and makes no other charge.

At the conclusion of the argument, the Court suggested that the case could not be satisfactorily disposed of without an amendment of the declaration; and with the consent of the counsel for the deft., the record was amended by inserting in the declaration the exact words of the letter from the deft. to Eyles which gave rise to the action. With respect to the general question of privilege, *Cur. adv. vult.*

Nov. 24.—ERLE, C. J.—This was a rule to set aside the verdict for the plt., and to enter a nonsuit or a verdict for the deft. in an action of libel, on the ground that the defamatory letter complained of was privileged. Whatever our opinion might have been about the communication being privileged, on the ground that the letter was written to Eyles, who had found a place for the plt. as servant to the deft., and who, as head gardener to the Horticultural Society, was in the habit of finding gardeners for masters, and masters for gardeners, if the letters had been confined to a simple statement of the servant's conduct, the letter clearly goes, in our judgment, beyond what was justified by such a communication. There are some expressions about the plt.'s being a raving madman, and other expressions, in our judgment, excessive, and beyond what would be justified by any such privilege as was contended for, assuming it to exist. We are therefore of opinion that the rule must be discharged, and the verdict for the plt. will stand.

Rule discharged.

COURT OF EXCHEQUER.

Reported by F. BAILEY AND H. LEIGH, Esqrs., Barristers-at-Law.

Tuesday, Nov. 24.

SOWERBY v. WADSWORTH.

Outlawry not reversed—Slaying proceedings become plt. an outlaw.

The plt., who, about thirty years since, was made an outlaw when out of England, and the outlawry not reversed, sued deft. in trespass. Deft. did not plead the outlawry, but at the trial applied for leave to plead it in abatement, which was refused. Plt. obtained a verdict, and afterwards signed judgment, &c. Deft., on the fourth day of the following term, applied to set aside the judgment and sub-

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[Ex.]

sequent proceedings, on the ground that the plt. was an outlaw :

Filed too late; that the deflt. should have pleaded the outlawry in abatement at the proper time, and that the rule should not have been to set aside the proceedings, but to stay further proceeding.

This was an action of trespass to a common. Deflt. pleaded a right of way. The cause was tried at Hertford, before Bramwell, B., and a verdict found for the plt., 40s. damages. The learned Baron certified for a special jury, and that the action was brought to try a right, so that the plt. would be entitled to costs. At the trial, an application was made by the deflt. to the judge that he might be then allowed to plead in abatement that the plt. had been outlawed, then was an outlaw, and such outlawry had never been reversed. The learned judge thought such pleas were not to be favoured, and, under the circumstances of this case, refused to allow it. Judgment was afterwards signed, &c. The deflt. then obtained a rule to show cause why the judgment and all subsequent proceedings should not be set aside, and the proceedings stayed in the meantime, on the ground that the plt. was an outlaw, and that such outlawry had never been reversed.

Hawkins, Q. C., Sir G. Honyman and Archibald showed cause, and after referring to the facts of the case and that the defence set up by the deflt. claiming this supposed right without any pretence for it was most frivolous and vexatious, contended that the application was too late; the outlawry should have been pleaded in abatement at the proper time for pleading in the regular way, and the court would not in its discretion—and this was an application to its discretion—favour such a plea of the deflt. at this stage of the proceedings. There was no allegation in the affidavits upon the part of the deflt. that Beavan, at whose suit the plt. was said to have been outlawed thirty years ago, is now alive, or that this plt. is the same person that was then outlawed; there is no evidence of identity at all that the plt. is the person who was outlawed. The plt. states in his affidavit that between the years 1831 and 1838 he was out of England; if therefore he is the same person that outlawry may be easily reversed, and rather than this rule should be made absolute the court will if necessary adjourn this motion until the first day of next term, that the outlawry in the meantime may be reversed. The plt. also says he was not aware of any such outlawry, or that he owes anything; it is only an outlawry in a personal action on civil process, and therefore would not operate as a forfeiture of land; it is only a personal disability, and can only be taken advantage of by plea in abatement :

Viner's Abr. J. A. "Outlawry;"

Bacon's Abr. "Outlawry," D. 1, 2, 3;

Com. Dig. "Outlawry," E. 2, and Co. Litt. 128 b;

2 Lord Raymond 1056;

Bendloe, p. 17.

It would be consequently too late but to plead it in abatement and at the proper time; and if too late to plead it in bar, it is now too late for this motion.

Shee, Serjt. and Wollett in support of the rule.—There can be no doubt that the right course for the deflt. to have taken advantage of the plt. being an outlaw, would have been to have pleaded it in abatement at the proper time, if the deflt. had been then aware of it; but it does not appear that he was then aware of it. From the plt.'s affidavit it sufficiently appears that he it was who was outlawed; and if he has paid the debt and there is no affidavit that he has paid it, why did he not reverse the outlawry, and say at once he had paid the debt? The outlawry is in truth still in force, and not reversed; that being so, it has been laid down by numerous authorities that an outlaw cannot appear in court for any purpose but to

reverse his outlawry. He cannot enforce any proceeding for his own benefit:

Aldridge v. Buller, 2 M. & W. 412;

Re Mander, 2 Q. B. 867;

Reg. v. Lowe, 8 Ex. 697; and

Chitty's Prac.

POLLOCK, C. B.—This is an application by motion to the court to set aside a judgment and all subsequent proceedings in the cause, on the ground that the plt. was made an outlaw some thirty years ago, and that the outlawry is now in force. It is an application made to the discretion of the court after the cause has been tried, a verdict found by the jury for the plt. and judgment entered up. It is the judgment of the court, regularly signed, and the deflt. now comes and says, "Set all that and the other proceedings aside, because the plt. was thirty years ago outlawed." The answer is: Why did you the deflt. lie by, allow all these proceedings to go on, take the chance of winning the cause, and then when you found you had lost and the verdict was against you, come to the court with this objection? It should have been pleaded in abatement within the time allowed by the practice of the court. The courts do not favour pleas in abatement; and I must say I think my brother Bramwell did quite right at the trial in refusing to allow it to be pleaded there at the last moment. The deflt. then comes and seeks this indulgence from the court. I do not think he is entitled to it. The outlawry is thirty years old (perhaps not the worse for that), and the plt. was abroad at the time, and it would rather appear that he has paid the debt since for which he was outlawed. This being an application to the discretion of the court, the court can inquire into the facts and circumstances of the case to see whether it ought to interfere now by setting aside these proceedings upon motion in the manner asked. I am of opinion that we should not, and that this rule must be discharged.

BRAMWELL, B.—I am entirely of the same opinion. The defence he set up was a most vexatious proceeding on the part of the deflt. This outlawry might have been pleaded in abatement, and it ought, in order to be available, to have been pleaded in the proper time allowed for it. The deflt. says he did not know it in time to do so; it is not stated when he did first know it, and certainly the objection should be taken at the earliest possible opportunity. The case referred to in Bendloe does not touch this point. As to *Aldridge v. Buller*, Parke, B., when it was urged that an outlaw could not be heard in court except for the purpose of reversing his outlawry, said: "That is not quite true: an outlaw may show cause against an attachment. It is more correct to say that he cannot enforce any proceeding for his own benefit." If he is dragged into court by the other side, surely he is entitled to defend, or to protect himself, though he is an outlaw, from perhaps a wrongful action. *Aldridge v. Buller* is distinguishable from this case. Suppose here the deflt. had moved to set aside the notice of trial, which, according to the argument on the part of the deflt., he might have done, would he have been allowed to do it? The proceedings here are all perfectly regular in themselves. This application should have been, not to set them aside, but to stay the proceedings. In *Aldridge v. Buller* deflt. sued out a *habeas corpus* to charge plt. in execution for costs which it was sought to set aside. This objection was not there taken, but the court intimated that such a proceeding may be too late. There are therefore two answers to this motion. The first, a substantial one, is, that the deflt. should have raised this objection by plea in abatement at the regular time; and the second is, that the deflt. did not apply at the earliest opportunity to stay the proceedings, but at this late period to set aside the judgment and subsequent proceedings.

CHANNELL, B.—I am also of opinion this rule

[Ex.]

PRYCE v. GRIFFITHS—KEYNSHAM COMPANY (LIMITED) v. BAKER.

[Ex.]

ought to be discharged, and with costs. The deft. had a right to plead this in abatement; he did not plead it at the proper time, but allowed that time to pass by, wait the result of the trial, allow judgment to be signed, and then applies to set it aside. I do not see why the judgment should be set aside; there was nothing wrong in signing the judgment. The case that has been referred to, of *Aldridge v. Buller*, is distinguishable, as already pointed out by my brother Bramwell. If an outlaw is summoned into court, it may be without just ground for it; it would be monstrous to say that he is not to be allowed in any way to defend himself. The deft. here had an opportunity of applying earlier to stay the proceedings, but did not so apply. I do not therefore think he is entitled now to what he asks by this rule.

PIGOTT, B.—I am of the same opinion. This is an application not to be favoured by the court.

Rule discharged.

Wednesday, Nov. 25.

PRYCE v. GRIFFITHS.

County Court—Practice—Costs—Concurrent jurisdiction.

If a plt. applies to a judge at chambers for costs under the County Courts Act 1852 (15 & 16 Vict. c. 54), s. 4, and is refused, he cannot afterwards make an independent application to the court for costs, but should come by way of appeal from the judge's decision at chambers, and the rule must be drawn up upon reading the affidavits used before the judge, and his decision thereon.

This was a rule obtained by the plt. calling upon deft. to show cause why he should not pay to the plt. the costs of the action and also the costs of this rule.

The action was by a landlord against his tenant for breach of a farming agreement in carrying off and selling straw and manure away from the land. The action was tried by special jury at the last spring assizes for the county of Montgomery, when the plt. obtained a verdict for 15*l*.

In August last the plt. applied by summons to Byles, J., at chambers, for the costs of the action, on the ground that the Superior Courts had a concurrent jurisdiction, as the plt. and deft. lived within twenty miles of each other, and the cause of action did not arise wholly or in any material part within the County Court district where the deft. dwelt and carried on his business at the time of action brought; but that learned judge refused the application, and indorsed the summons "No order." This rule was afterwards obtained by way of appeal from that decision.

Morgan Lloyd, for deft., now appeared to show cause, but said there was a preliminary objection to the form of the rule. The rule was drawn up on reading an affidavit made in September last, containing additional statements to it, without any allusion to that used in August, and it did not in any way refer to the proceedings at chambers, before Byles, J., or the affidavits there used. By the 15 & 16 Vict. c. 54, s. 4, application might be made either to the court or to a judge at chambers, and as the jurisdiction is in the alternative it was not competent to the plt. to make an original application to this court after having failed at chambers; the learned judge there having indorsed the summons "No order," had, in fact, dismissed the application. The plt. might then have come by way of appeal from the judge's decision, but this rule should have shown the previous proceedings, and been drawn up on reading the affidavits used at chambers, with the judge's decision thereon:

Warman v. Bulahan, 3 L. T. Rep. N. S. 379; 30 L. J. 48, Q. B.

McIntyre, contra, in support of the rule, was then called upon to answer this objection.—Although this

was not shown upon the face of the rule, yet he had mentioned to the court when moving for it there had been such an application to Byles, J., at chambers, and the result of it. [POLLOCK, C.B.—That is nothing, you should have brought the affidavits before us.] The judge did not make an order, and we were not therefore bound to take any notice of it. The summons is indorsed "No order," but it would have been otherwise if it had been "dismissed." [POLLOCK, C.B.—"No order" means that the judge had adjudicated and refused costs.] Additional affidavits may be used in this court on an appeal against a judge's order, and the original affidavits are now in court. [PIGOTT, B.—It makes no difference whether they are now in court or not. The question is, as to what took place when the rule was moved for.] It was decided in *Pike v. Davies*, 6 M. & W. 546, that additional affidavits may be used. [PIGOTT, B.—"Additional" assumes that you have the original affidavits as well as the fresh one.] The judge was bound to grant the order, and he had no discretion to refuse. [PIGOTT, B.—That is not the question now before us; you now come upon different materials and by way of appeal. CHANNELL, B.—You have not here now the materials that were before the judge at chambers.]

POLLOCK, C. B.—This rule must be discharged. The plt. should have brought before us the previous proceedings at chambers, the affidavits used there, and the judge's decision, and the rule should have been drawn up on reading them. The motion should have been by way of appeal, instead of which the plt. chooses to make an independent application to this court, without alluding to what occurred at chambers. The case is within the principle of that which was cited, *Warman v. Bulahan*, and is decisive of this. The rule must be discharged, and with costs.

The rest of the Court concurred.

Rule discharged.

Plt.'s attorneys, *Howell and Jones*, Welchpool.
Deft.'s attorney, *Yearsley*, Welchpool.

Wednesday, Nov. 25.

THE KEYNSHAM BLUE LIAS LIME AND CEMENT COMPANY (LIMITED) v. BAKER.

County Court—Costs—Concurrent jurisdiction—Word "dwell"—Place where business carried on—9 & 10 Vict. c. 95, s. 60—15 & 16 Vict. c. 54, s. 4.

*Plts.' only place of business was at Keynsham; deft. lived within seven miles of it, both being within the district County Court of Gloucester. The company had an office in London where the directors' meetings were held. The company was being wound-up, and, under the Winding-up Acts, an official liquidator was appointed, who attended at the office of the company in London, and lived in London. He sued deft. in the Superior Court for a debt of 2*l*. 14*s*. due to the company:*

Held, there was not concurrent jurisdiction with the County Court, and that he was not entitled to his costs for suing in the Superior Court.

The above-named company was being wound-up, and the liquidator sued the deft. in this court for 2*l*. 14*s*. 3*d*., a debt due from him to the company. The deft. suffered judgment to go by default.

Oppenheim moved for a rule calling on the deft. to show cause why he should not pay the plts.' costs on the ground that the Superior Courts had concurrent jurisdiction with the County Court. The deft. resided in or near Eristol. The only works of the company are at Keynsham, about six or seven miles from where the deft. lived, both places being within the jurisdiction of the County Court of Gloucester. All the goods are made and sold at Keynsham, but the registered office of the company is in Great Winchester-

street, London; there it is the board of management meet, and where the liquidator attends. That office must therefore be taken as the place of business, not Keynsham, where the works are. [BRAMWELL, B.—This is a corporation. In *Taylor v. The Crowland Gas Company*, 24 L. J. 233, Ex., it was said that a trading corporation “dwells” at the place where its business is carried on. This business was never carried on it seems elsewhere than at Keynsham, within seven miles of the debt.] In *Adams v. The Great Western Railway Company*, 3 L. T. Rep. N. S. 621; 30 L. J. 124, Ex., it was decided that a railway company is to be deemed to dwell at the principal office, and not at every station on the line, and where the plt. dwelt more than twenty miles from the principal office of the company, the plt. was held to be entitled to costs under the 15 & 16 Vict. c. 54, s. 4. In *Shields v. The Great Northern Railway*, 4 L. T. Rep. N. S. 479; 30 L. J. 331, Q. B., it was held that a railway company does not carry on its business within the meaning of the 9 & 10 Vict. c. 95, s. 60, at every place where it has a station, but only at the principal office where the directors meet and the general business of the company is transacted. Here the principal office where the directors meet is in Great Winchester-street, in London, and the general business of the company is there transacted.

POLLOCK, C. B.—There should be no rule here. The railway cases that have been cited are not applicable to this. Railway companies may be said in some respects to be *sui generis* as to the mode in which their business is carried on. They have one principal station, where almost everything of much importance to the company is arranged; the board of directors meet there, and the business of the company may be said to be there transacted. The smaller offices along the line of railway are for the accommodation of the particular places where they may be placed, but all controlled and governed from the principal station. There is no ground whatever for saying there is anything of that kind here. This company had one, and only one, place of business, which was at Keynsham; there they got the material, did what was necessary to it, and there they sold it, and there only. It was said, because the directors meet in London, there should be concurrent jurisdiction to sue in the Superior Courts for about 40s. a debt. who lives at Bristol, being about seven miles from where the plt.’s works were carried on. I certainly think that plt. should have summoned the debt. to the County Court, and that he is not entitled to the costs of bringing his action in this court.

BRAMWELL, B.—I am of the same opinion. The company was a corporation, and the question is, whether they dwell more than twenty miles apart from the debt; the company were carrying on their business entirely at Keynsham, and the debt. living only six or seven miles away from it, both places being within the district County Court of Gloucester. It is preposterous to say the company dwell in London because the directors meet there sometimes, or the official liquidator appointed lives in London. The plt. is clearly not entitled to costs.

CHANNELL, B.—I also think there should be no rule in this case. The authorities cited in reference to railway companies are not applicable to the facts here. The company must be understood to be where they carry on their business; and it makes no difference that there may have been an official liquidator appointed who happens to be living in London, or to meet the directors of the company there.

PROCTOR, B. concurred.

Rule refused.

Plts.’ attorney, *Lindo*.

Debt.’s attorneys, *Bridges and Son*.

EXCHEQUER CHAMBER.

Reported by F. BAILEY, Esq., Barrister-at-Law.

May 20 and June 25.

ERROR FROM THE EXCHEQUER.

(Before ERLE, C. J., CROMPTON, WILLES, KEATINGE and MELLOR, JJ.)

BAGNALL AND ANOTHER v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Mines—Railway company—Compensation—Surface owners.

A railway company, to whose rights and obligations debts. succeeded, purchased from a former owner the surface of land lying over a mine belonging to the plt., and thereon constructed their railway. In order to obtain the level of their line, the company cut through and removed upwards of 20 feet in depth of the surface clay lying over the plt.’s mine, which was impervious to water, leaving exposed a surface of porous rock. The soil was similarly cut away by the railway company along the line to the place where a brook flowed, over which the line was carried by a flat bridge at about the natural level of the ground. Between this brook and the surface of plt.’s mine there was originally a bank, or rising ground, through which the company made a cutting for their line of rails, sloping downwards from the bridge to the part over the mine. The mine at this part was unworked when the railway was being constructed. The plt., in their subsequent working their mine, came to within forty yards of the railway, and gave debts. notice under the Act, but they did not purchase the mine. Plts., therefore, worked on in a proper manner, and, as a consequence, the railway began to sink. The company raised it up from time to time by placing materials of a porous nature over the surface. The railway was made with drains at the side, which the company were bound to keep up; after the line began to sink they did not do so, but filled up the openings with the porous materials. In Aug. 1860 a flood happened, and the brook overflowing the girders of the flat bridge, the water was carried down the cutting to the part of the line overlying the plt.’s mine, and there percolating through the porous rock, the mine was drowned and the work stopped:

Held (affirming the judgment of the Court of Ex.), that the debts. were liable in an action for the damage sustained by the plt. caused by the flooding of the mine, and that the claim was not one which could have been enforced under the compensation clauses of the Railway Clauses Consolidation Act 1845.

Error from the judgment of the Court of Ex. in favour of the plt., on a special case stated for the opinion of that court. The pleadings, the facts of the case and arguments of counsel are set out at length in the report of the case in the court below, 5 L. T. Rep. N. S. 621.

Phipson, Q.C. argued for the plt. in error (the debts. below).

Gray, contra, for the debts. in error.

The arguments being in substance to the same effect as in the court below, it will be unnecessary to repeat them. The following additional cases were cited:—

Reg. v. The Eastern Counties Railway Company, 10 A. & E. 531;

Glover v. The North Staffordshire Railway Company, 16 Q. B. 912;

Caledonian Railway Company v. Lockhart, 3 Macq. 808; 3 L. T. Rep. N. S. 65;

Re Penny and The South-Eastern Railway Company, 7 E. & B. 660;

EX. CH.]

HALDANE AND OTHERS v. NEWCOMB—ROUCH v. ALBERTI.

[BAIL.]

Re Ware and The Regent's Canal Company,
9 Ex. 395;

Smith v. Kenrick, 7 C. B. 515:

Brine v. The Great Western Railway Company,
2 Best & Smith, 402;

Reg. v. The Commissioners of Sewers for Pag-
ham, 8 B. & C. 355. *Cur. adv. vult.*

The judgment of the court was on the 25th June 1862 delivered by

WILLES, J.—In this case the conjoint effect of making the defts.' cutting and their neglect to keep their drains in proper order has been that a large proportion of water which, but for the cutting, would not have come near the plts.' mine, and but for the defective state of the drain would have passed away and been carried off without injury to the mines, poured down into and damaged the mines, for which the present action is brought. The company had, upon receiving the statutory notice, declined to purchase the mines, and the jury found (and it is upon this finding the question arises) the principal cause of the mischief to be that the drains had not been kept in proper order. It was hardly contended, and could not be successfully disputed, that the company was liable to make compensation; and the main stress of the argument bore upon the question whether such compensation can be recovered as damages in this action, or whether the plt. ought to have proceeded under the compensation clauses of the Railway Act. Now the obvious intention of the Legislature in giving the company the option of purchasing the mines was, that in case they should decline to buy, the mine-owner should possess his property intact. If it were otherwise, the railway company would have it in their power to do indirectly what they were not permitted to do directly, namely, to take away the benefit of the mines, either in the whole or in part, without paying for them, and after they had elected not to buy. Moreover, there are practical obstacles of an insuperable character against saying that there arises upon the making of a railway an immediate right to compensation in respect of the possible future injury to an unopened mine. At that time it does not appear that the mine will ever be worked, nor that the drains will not always be kept in proper order, so that the company might contend that peradventure no damage would ever arise; and an assessment of damages in advance would be sheer speculation. This consideration distinguishes the present case from that of *The Caledonian Railway Company v. Lockhart*, 3 Macq. 808, where the embankment could not have been made without exposing the land to damage by periodical floods which were certain to occur, and the deterioration in value by liability thereto might at once be calculated with reasonable certainty, which brings it within the authority of that class of cases in which it is held that damages caused by negligence of an improper exercise of the powers of the Act form a proper subject of an action; *a fortiori* that is so where the negligence is in the care and management of the line, and not in the construction of the works. That was the course of reasoning by which the Court of Ex. arrived at the conclusion that the defts. were liable in an action; and, upon consideration, we are satisfied that their judgment was correct. It must, therefore, be affirmed.

Judgment affirmed.

Plt.'s attorneys, *Mackeson and Goldring*, 59, Lincoln's-inn-fields.

Defts.' attorney, *S. Carter*, St. George-street.

[This case has been by some accident mislaid.]

BAIL COURT.

Reported by A. GALLWEY and J. H. JAMES, Esqs.
Barristers-at-Law.

Monday, Nov. 23.

(Before CROMPTON, J.)

HALDANE AND OTHERS v. NEWCOMB.

Demise—Repairing lease—Evidence—Misdirection.

In an action against a tenant for not leaving premises in repair, evidence as to a prior promise on the part of the lessor to put them in repair is not admissible, and it would be a misdirection to tell the jury to have regard to such promises; but they may measure the extent of the repairs to be done by the age and class of the premises.

Declaration on an agreement by the deft. to keep and leave certain premises demised to him in good repair. Breach, that he did not leave them in good repair. Judgment by default, and writ of inquiry to the sheriff of Essex to assess the damages: verdict, one farthing.

Philbrick, on behalf of the plts., had obtained a rule to show cause why the inquisition should not be set aside, and a fresh inquisition brought, on the ground of misreception of evidence and of misdirection.

Murphy showed cause.—The misreception complained of was, that the deft. was allowed to give evidence of an alleged promise by the plts., or their agent, at the time of the contract in the declaration admitted, and also of the particular state of repair of the premises at the time of the demise. The under-sheriff had made no note of such objection, and the gentleman who appeared for deft. said that none such was made.

Philbrick—I took the objection myself.

CROMPTON, J.—You should have got the judge to make a note of it.

Murphy.—As to the misdirection, the jury first returned a verdict that, considering the state of repair of the premises when the deft. took them, and the promise made that they should be repaired by the plt., they found for the plt. with one farthing damages. The under-sheriff told them he could not take such a verdict, that he should ask them if they found for the plt. or for the deft. simply, and if for the plt. with what damages. The jury then found for the plt. with one farthing damages.

Philbrick in support of the rule.—The judge laid down the law rightly at first, but in the end he entirely wavered from that ruling. The condition and class of the premises were proper to be inquired into, but not their state of repair at the time of the demise:

Payne v. Haine, 16 M. & W. 541.

CROMPTON, J.—If the under-sheriff told the jury to have regard to the prior promise, it was a misdirection. But so far from doing so he sent them back to reconsider their verdict. He clearly had the case of *Payne v. Haine* before his mind, and told them they might look at the age and class of the premises.

Rule discharged with costs, if the plt. should be entitled to the costs of the action.

ROUCH v. ALBERTI, *ex parte* HOCKLEY F. WOOD
(One, &c.)

Practice—Judges' Chambers—Costs—Notice in summons—Certiorari.

An order upon an attorney of one of the parties to pay the costs incurred in proceedings in a cause, he not being a party applying to the court, is bad, if the attorney had no notice in the summons that he would be called upon to pay such costs.

Laxton had obtained a rule to show cause why an order of Keating, J. in this cause should not be

[BAIL.]

HALDANE AND OTHERS v. NEWCOMB.

[BAIL.]

rescinded or varied as to so much thereof as related to the payment of costs by Mr. Hockley F. Wood, the plt.'s attorney, personally.

The summons upon which Keating, J. made the order was as follows:—"Let the plt.'s attorney or agent attend to show cause why the writ of *ca. sa.* issued herein should not be set aside, and the deft. discharged out of the custody of the sheriff of Middlesex, the action not having been duly removed from the County Court, and that being no judgment or proceeding in the Court of Q. B. upon which such *ca. sa.* could lawfully issue, and the facts not having been disclosed to the judge granting the order for the *certiorari*, and the affidavit for such order being wrongly entitled."

The order was: "That the writ of *ca. sa.* issued herein be set aside, and the deft. discharged out of the custody of the sheriff of Middlesex, as to this action, the action not having been duly removed from the County Court, and there being no judgment or proceeding in this court upon which such *ca. sa.* could lawfully issue. And I further order that no action be brought against the plt. or the sheriff in respect of the arrest herein. And I further order that the costs of and incident to the proceedings herein be paid by the plt.'s attorney, Hockley F. Wood."

It appeared that on the 30th July the petitioner recovered judgment against the deft. in the Westminster County Court for 20*l.* 4*s.*, with 5*l.* 5*s.* costs. On the 4th Aug. the County Court judge made an order for the payment of the debt and costs. Thereupon Wood the plt.'s attorney, took out a judgment-summons on the ground that the deft. was about to leave the country. This summons was dismissed with costs. On the 7th Aug. Wood obtained a certificate from the officer of the County Court, and then applied, on affidavit, to Keating, J., for an order for a *certiorari* to remove the judgment into the Q. B. under 19 & 20 Vict. c. 108, s. 49. Wood did not disclose to the judge at chambers the fact of the judgment-summons having been applied for and refused by the judge of the County Court. Thereupon Keating, J. made an order, which was dated Aug. 8. Wood then went to the writ-office of the Q. B., and there lodged the order and præcipe and paid the fees, when the writ was duly sealed.

Being ignorant as to the nature of the return to be made to the writ, Wood was recommended by the officials at the writ-office to apply to the Treasury-office of the Q. B. to search for precedents. However, he next proceeded to the County Court, but it being Saturday he found the office closed against him, and was unable to obtain an interview with the registrar. Thereupon he applied to a clerk connected with the office, who informed him that, as both the judge and the registrar of the court would be out of town until the middle of September, their signatures being necessary, the return could not be obtained until then. At the same time the clerk stated that they were ignorant in the office of the present practice respecting the return to writs of *certiorari*. Wood then took the writ with the certificate of judgment signed by the registrar to the Treasury-office of the Q. B., and one Boddy, acting for the senior officer there, took in the *certiorari* with the certificate appended to it, according to the affidavit of the deft., but entirely detached from it, according to the applicant's affidavit, and gave out a certificate that the judgment in the cause of *Rouch v. Alberti* had been filed in the treasury of the Court of Q. B. by *certiorari*. Thereupon Wood issued a *ca. sa.*, and arrested the deft. This was on a Saturday; and on Monday, Aug. 10, the summons above set out was heard before Keating, J., Wood and the deft.'s attorney both attending. The summons was adjourned to the Tuesday, and then adjourned to a later

hour the same day; but on neither of these latter occasions did Wood attend. Keating, J. having meanwhile made inquiries of the master, made the order set out above.

Temple, Q. C. now showed cause.—It will be said on the other side that the judge at chambers had no power to make the order, or that if he had it was not properly exercised. But the full court would have had power to make the attorney pay costs, and whatever a judge at chambers orders cannot be enforced without making it a rule of court; and the party thinking himself aggrieved has then an opportunity of being heard. Then as to the proper exercise of the power, it is conceded that the summons did not call on the attorney to show cause why he should not pay the costs; but the order ought to be supported on the facts as a matter of discretion. The affidavit put into Wood's hands at chambers sufficiently apprised him of the nature of the imputation thrown upon him. In *Reg. v. Borron*, 3 B. & A. 432, the court refused an application for a criminal information against a justice; and at the end of his judgment Abbott, C. J. says: "It is only necessary to add further, that as the application to this court appears to be the act of Mr. Charles Pearson, the costs of the rule must be paid by him." [CROMPTON, J.—But here it was an application upon a collateral matter, and no warning was given to the attorney. He had no opportunity of saying "I did this under a mistake," and there was nothing to put him on his personal defence.] Whether Wood willingly or unwillingly misled the officials at the Treasury-office of the Q. B., it is unnecessary to contend, as the professional ignorance which he acknowledged was so great that he was most righteously visited with the costs of the proceedings.

Laxton in support of the rule.—The summons did not call upon Wood to pay the costs. The ignorance which he displayed was quite excusable, for he was deceived by the intimations of the treasury official. The person really responsible was Boddy, who gave the certificate without examining the documents handed in by Wood. Moreover, the certificate of the registrar was evidence of the proceedings in the County Court: (9 & 10 Vict. c. 95, s. 111.)

CROMPTON, J.—Upon the question of merits he did not entertain any doubt that the discretion of the judge at chambers had been rightly exercised; but as he was exceedingly doubtful whether such an order could be made without notice, he would avail himself of the opportunity to consult his brother judges before finally deciding the case.

Nov. 24.—CROMPTON, J. now delivered judgment.—I am confirmed in the conclusion that the order made by Keating, J., is on the merits perfectly right, whether the attorney was guilty of gross ignorance or something worse. But, as it occurred to me yesterday, there is a principle of very considerable importance involved in the case, viz., whether on this summons such an order could properly be made, and therefore I desired to consult some of the other judges on the point. Having done so, I have now to state that I am still more strongly of opinion that the order cannot be supported. A principle is involved of extreme importance, and one which the courts have always been strong in maintaining in the case of decisions by justices, namely, that no man shall be injured by a decision without an opportunity of hearing and meeting the charges brought against him. But there is another principle involved which concerns the practice at chambers. The universal practice is, that where it is intended to charge an attorney with misconduct, and to throw the cost of proceedings upon him, the application for costs shall be embodied in the summons. In the present case the summons was to set aside an execution, and not one word was said in it about calling upon the attorney to pay the costs. And although the main

question was very fully discussed at chambers, it does not appear that the subject of the present motion came at all under discussion. The learned judge entertaining, as I do, a very strong opinion upon the merits, postponed giving judgment until the following day. Next morning, neither of the parties being before him, he said he should like, before deciding on the case, to consult the master with respect to the practice as to certificates and writs of *certiorari*. Having done so, the judge said he thought it right that the attorney should pay the costs. But the attorney did not appear, and there was no discussion before the judge upon the matter, and no question raised as to whether he ought to be visited with such consequences of his misconduct. I must take it, upon the affidavits now in court, that he was never called upon to make such an affidavit as he now makes, namely, that the matter had its entire inception in his ignorance. Consequently, the case falls within the rules I have mentioned. I have not the slightest doubt that, under certain circumstances, a judge has the right to order an attorney to pay the costs of a proceeding. There is a class of cases in which an application emanates from the attorney personally, proceedings both of a civil and criminal nature, wherein an attorney assumes the character of a relator. In such cases, if an attorney has improperly put himself forward, the court has jurisdiction over him, and can make him pay the costs. But except in that class of cases I can find none bearing upon the question now before me. There are two modes of proceeding at chambers—either by summons in the principal matter, with notice that the attorney is to pay the costs, or by substantive application that the attorney shall pay the costs of the proceedings; and further, there may be an application to the court to answer matters on affidavit. All these courses are open to the party here. But upon the whole I think I am bound to rescind so much of the order as directs the attorney to pay the costs. I cannot alter it so as to make the costs fall upon the petitioner, as I should be thereby falling into the very error I am now correcting. The rule must be absolute, but without costs.

Rule absolute.

Temple subsequently obtained a rule calling upon the attorney to show cause why he should not pay the costs, and in the event of his not being ordered to pay them, why the petitioner should not.

Tuesday, Nov. 24.

(Before CROMPTON, J.)

SLATER v. MAYOR OF SUNDERLAND.

Attorney's lien for costs—Claim of creditor on security of sum recovered—Compromise.

An attorney has a lien for his costs on the judgment recovered by his client, and the court will lay hold of the fund where it exists, and when it does not thereby set aside any arrangement of the parties.

This was a rule calling upon the plt. to show cause why the bill of costs of an attorney named Young should not be taxed by the master, and why the deft. should not be restrained from paying the sum of 100*l.* to the plt.

It appeared that Mr. Young acted as attorney for the plt. in the action brought against the deft., which resulted in a verdict being taken by consent for 100*l.* This settlement was effected, according to Mr. Young's statement, contrary to his advice and behind his back, but the plt. distinctly contradicted this. The latter gave the deft.'s attorney notice that he was not to pay the 100*l.* to any one but himself, while Mr. Young gave a counter-notice that the money was to be paid to him. Prior to the action the plt. had borrowed 800*l.* from one Bramwell, and wishing to obtain a further advance of 100*l.*, he offered him as

security whatever he might recover in this action, upon which he procured the additional loan. This arrangement was effected through the agency of Mr. Young, so that he was perfectly cognisant of it. The costs of the action greatly exceeded 100*l.*

Holl showed cause, and argued that the plt. was bound to give notice to the deft.'s attorney not to pay the money to any one but himself, in order to protect Bramwell, his creditor. The plt.'s affidavit stated that the settlement was effected under the advice of Mr. Young, and he was cognisant of the circumstances under which the loan was increased. [CROMPTON, J.—But the security would be subject to the attorney's lien for his costs. I do not find that the plt. intended to pledge the costs as well as the damages.] In *Hough v. Edwards*, 26 L. J. 54, Ex., it was held that the attachment of a judgment-debt under the garnishee clauses of the C. L. P. A. 1854 overrides an attorney's lien on, or control over, the judgment in respect of general costs due to him from the garnishee. In *Barker v. St. Quintin*, 12 M. & W. 441, the court decided that an attorney's lien on a judgment being merely a claim to the equitable interference of the court to have the judgment held as security for his costs, he has no authority over the execution of a writ of *ca. sa.*, so as to carry it into effect against the order of the plt., even though the plt. and the deft. should collude to deprive him of his lien. [CROMPTON, J. referred to *Bramden v. Allard*, 2 E. & E. pt. 1, 19.] There the right of setting off one judgment against another was held to be not a legal right, but given by the equitable jurisdiction of the court with reference to all the circumstances of the transaction, and will not be allowed so as to defeat either the attorney's lien for his costs, or the right acquired by an assignee. All the cases show that the attorney's lien gives him merely a right to the equitable interference of the court. [CROMPTON, J.—Was there any assignment of the judgment to Bramwell?] It appears from the affidavits that there was none. 100*l.* was received as damages and costs; the costs may swallow up the whole, and it would be unfair for the creditor to lose his security.

T. Jones, contra, contended that Mr. Young never agreed to pledge his costs, and that the compromise was effected behind his back. He knew that the net sum recovered in the action was pledged, but not the costs. It was not a case for the interference of the court. [CROMPTON, J.—If the money were unpaid, could not Mr. Young proceed in the action?] The usual practice is to call on both parties to show cause, and to call on the deft. to pay the money into court. [CROMPTON, J.—According to your argument the deft.'s solicitor would be safe in paying you upon receiving an indemnity.] This is not a case where the deft. would be prejudiced by paying twice. In *Bramden v. Allard* the application was to prejudice the deft.; yet Lord Campbell, C.J. says, "An attorney has a lien for his costs, an equitable lien, which equity will enforce, and when he has recovered judgment in an action, he may apply the fruits of it in payment of the sum which is due to him." [CROMPTON, J.—If the deft.'s solicitor were to pay the money to the other side, what power have we to prevent his doing so?] The fund is here existing: (*Davies v. Lowndes*, 3 C. B. 853; *Gould v. Davis*, 1 C. & J. 415.) Where money can be laid hold of, the court will order it to be paid into court: (*Ormerod v. Tail*, 1 East, 464.)

CROMPTON, J.—There is no sufficient proof of an assignment here, and the plt. could not have meant to assign the whole sum recovered. The principle established by the cases is, that the court will not interfere under its equitable jurisdiction so as to set aside the arrangement of the parties, except in case of fraud and collusion. The fruits of a judgment may

be laid hold of where there is no attempt to set aside such arrangement. The attorney's lien attaches to the fund which is still existing, and though the court cannot interfere to set aside a compromise, it can lay hold of the fund in order to satisfy that lien. The rule will therefore be made absolute.

Rule absolute.

(Before BLACKBURN, J.)

REG. v. HAMMOND AND OTHERS.

Interest—Disqualification of justices—Conviction.

The defts., who are justices and shareholders in a railway company, convicted a man of travelling on that railway with an improper ticket:

Held, that the fact of their being shareholders, however slight their interest might have been, disqualified them from so acting.

This was a rule calling on Hammond and others, justices of the county of Durham, to show cause why a *certiorari* should not issue to bring up the conviction of one Jabez Alexander, on the ground of interest in the justices. The prisoner was convicted on the 28th Sept. last, by these justices, of travelling on the North-Eastern Railway by a train other than that for which he had obtained a ticket, and some of these justices were shareholders in the railway.

Mellish, Q. C. (Davidson with him) showed cause.

—There are two questions: first, is there any interest at all? The conviction is for travelling on the railway without a ticket, but the penalty does not go into the funds of the company, but to the county-rate—the alleged interest can be only as regards the costs. [BLACKBURN, J.—Suppose the conviction were for trespassing in pursuit of game, could it be said that the magistrate who convicted, and on whose land the offence was committed, had no interest?] The shareholders are a corporation, and have a personal interest. [BLACKBURN, J.—Surely the shareholders have an interest in preventing people travelling without tickets. Suppose it was a charge of stealing, would the shareholders be incapable of adjudication?] The question of costs is incidental only to the main inquiry. [BLACKBURN, J.—The interest to each shareholder may be less than a farthing, but still it is an interest.] Secondly, has there not been a waiver of the objection? The prisoner appealed to the quarter sessions, and though he learnt the fact that some of the justices were shareholders after he gave notice of appeal, he went to the quarter sessions and took his chance of being acquitted on the merits. [BLACKBURN, J.—That was a waiver as to one of the justices, but he learnt that another was similarly interested, after the appeal was heard.] If he waived the objection against one, he waived it against the other.

Macnamara contra.—The conviction is bad, because the justices were interested. The court will not inquire into the amount of interest. The prisoner was convicted under the 8 Vict. c. 20, the 3rd section of which enacts that "justice" shall mean "a justice who shall not be interested in the matter:" (*Reg. v. Justices of Hertfordshire*, 6 Q. B. 753.) As to the second question, notice of appeal was given, and then it was learnt that one of the justices was interested. If the appeal had been abandoned, costs would have been incurred. But after the appeal was heard it became known that another of the justices were interested.

His LORDSHIP made the rule absolute.

Rule absolute.

REG. v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Inquisition—Lands Clauses Act—Sheriff interested as shareholder.

By the 39th section of the Lands Clauses Act, the coroner should summon a jury to take an inquisition, if the sheriff be interested in the transaction (as being a shareholder in the company requiring the land), and a certiorari will issue to bring up the inquisition although by the 145th section "no proceeding, &c., shall be quashed for want of form, nor shall the same be removed by certiorari."

This was a rule calling upon the defts. to show cause why a *certiorari* should not issue to bring up an inquisition taken before the sheriff of the county of Lancashire, on the part of a Mr. Mercer, who owned lands adjoining the defts.' railway, on the ground that the sheriff was interested in the transaction as a shareholder in the company.

Little (Welsby with him) showed cause.—The objection is merely formal. The affidavits state that if the warrant had been delivered to the coroner, as required in this case, the same proceedings would have been taken and the same assessor would have presided. By the 39th section of 8 & 9 Vict. c. 18, it is provided, that "if such sheriff be interested in the matter of dispute, such application shall be made to the coroner of the county in which the lands in question, or some part thereof, shall be situate." The Act takes no cognisance of trusts, and, for all that is stated, the sheriff may be interested as a trustee only. [BLACKBURN, J. The *onus probandi* lies on you.] Mr. Mercer challenged every shareholder who was on the jury, the consequence or which was that ten only remained, and the case was by consent tried by ten jurors. This takes the case out of the operation of the Lands Clauses Act. *Reg. v. Manchester and Leeds Railway Company*, 8 A. & E. 413. In this case it was held that a *certiorari* would not issue where no injury had been sustained. Sect. 145 of the Act in question enacts that, "no proceeding in pursuance of this Act shall be quashed or vacated for want of form, nor shall the same be removed by *certiorari* or otherwise into any of the Superior Courts."

Corrigal v. London and Blackwall Railway Company, 5 M. & G. 219.

T. Jones, who appeared on the other side, was then called upon. [BLACKBURN, J.—The granting of the *certiorari* is discretionary. You have suffered no damage. How do you show yourself to be entitled to it?] He cited

Reg. v. Cheltenham Paving Commissioners, 1 Q. B. 467;

Hodges on Railways, 420, 3rd edit.;

Reg. v. Sheffield and Manchester Railway Company, 11 A. & E. 194;

Davies v. Grand Junction Canal Company, 9 Q. B. 469;

Reg. v. South Holland Drainage Company, 8 A. & E. 429;

Rez v. Aberdare Canal Company, 19 L. J. 251, Q. B.

[BLACKBURN, J.—Can you show that a *certiorari* is a matter of right where the sheriff is interested? Unless you show this it is discretionary, and no damage has been suffered.] Yes, the jurisdiction is given by the Act, and the 39th section expressly provides for this case. The sheriff being interested had no jurisdiction, the proceedings should have been taken before the coroner; the inquisition was altogether extra-judicial.

BLACKBURN, J.—The language of the section is very plain, and I have no doubt now that the rule should be made absolute.

Rule absolute.

[EAIL.]

REG. v. THE CORONER OF YORKSHIRE—EWENS v. TYTHERLEIGH.

[Div.]

Tuesday, Nov. 25.

(Before CROMPTON, J.)

REG. v. THE CORONER OF YORKSHIRE.

*Inquisition—Coroners' Act—Juror hearing part only of the viva voce evidence.**After a coroner's juror had viewed the body and heard part of the evidence, another person was sworn, viewed the body, and took part in the proceedings on hearing that portion of the evidence which had been previously taken read over to him: Held, that this was a sufficient ground for bringing up the inquisition.*

This was a rule calling upon the coroner of Yorkshire to show cause why a *certiorari* should not issue to bring up an inquisition taken before him. The application had been made on the part of a Mr. Ingham, on whose mill a boiler had burst, causing the death of one of his workpeople, and the jury found him guilty of manslaughter.

Cleasby, Q. C. now showed cause.—The first two grounds on which the rule was obtained were, that the cause of death, and the time of committing the offence, did not sufficiently appear on the face of the inquisition; the inquisition stating merely that the deft. "did feloniously kill and slay." This defect is cured by the 4th section of 14 & 15 Vict. c. 100, which enacts that, "in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient in every indictment for murder to charge that the deft. did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the deft. did feloniously kill and slay the deceased." By the interpretation clause, "the word 'indictment' shall be understood to include information, inquisition," &c. The 24th section provides that "no indictment for any offence shall be held insufficient for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence." The Coroners' Act (6 & 7 Vict. c. 83), by the 2nd section, enacts that inquisitions shall not be quashed on account of technical defects; one of which is enumerated as "the omission to state the time, when time is not of the essence of the offence." [CROMPTON, J.—What do the words "where time is not of the essence of the offence" mean?] They exclude cases of burglary, and offences against some of the game laws. [*Temple, Q.C.*, who appeared in support of the rule, here stated that the court had granted the rule on these grounds, because, on referring to the 14 & 15 Vict. c. 100, it did not appear to apply to inquisitions. On this part of the case he should contend that the time must be stated, and where it must be stated, the manner and means of death must also be stated.] The court, however, has, if necessary, a power of amendment. The third ground was, that the jury did not view the body before the proceedings had commenced, nor at the proper time, nor in the proper manner. It appeared from the affidavits that fourteen or fifteen jurors assembled, and after they were sworn, went and viewed the body. Another person then came into the room where they were, and told the coroner that he also had viewed the body (wishing to form one of the jury). The coroner ordered him to be sworn, and taken back by a policeman to view the body again, which was accordingly done. Upon his return, that portion of the evidence which had been previously taken was read over to him. One objection was, that all the jurors did not view the body at the same time; but the 2nd section of the Coroners' Act cured this defect also: it provided that "no inquisition shall be quashed, &c. because the

coroner and the jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the inquest." There had been no adjournment, and this was the first and only sitting; the mere fact of another juror coming in would not constitute a second sitting. [CROMPTON, J.—The next objection, I suppose, is, that the juror who came in last did not hear all the evidence?] Yes; that he did not hear it all given *viva voce*. [CROMPTON, J.—It seems to me to be one of the strongest objections.] The impression of the court above was, that the inquisition should not be quashed by reason of a mere irregularity. There are no authorities on the subject, except as to cases of misconduct. [CROMPTON, J.—The objection that the jury did not view the body at the same time goes to the jurisdiction.] This is nothing more than an irregularity. An inquisition is traversable, and merely puts a man on his trial. [CROMPTON, J.—But here is a man put on his trial by a juror who has not had an opportunity of observing the demeanor of all the witnesses. This may be done by consent in civil, but not in criminal cases.] The jury might proceed without any evidence at all—upon their own knowledge. The irregularity cannot go to the root of the proceedings.

CROMPTON, J.—I have a strong opinion that the alleged defects on the face of the inquisition are cured by the acts which have been referred to; but I am against you upon the other point. I never allow a grand juror to be sworn after the charge is begun: much more ought every grand juror to be present when a bill is brought before them. I think this case should be put into the Crown paper; then fresh affidavits may be filed, if necessary, and the matter be more fully discussed. *Rule absolute.*

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by DR. SWABET, of Doctors'-COMMONS.

Wednesday, Nov. 18.

(Before WILDE, J. O.)

EWENS v. TYTHERLEIGH, falsely called EWENS.

*Suit for nullity—Malformation—Delay.**Where a delay of some years occurs in bringing a suit of this nature, the court will require an explanation of such delay.*

This was a petition for a decree of nullity of marriage, by reason of the incurable malformation of the woman, which fact, on the medical evidence, was clearly established, but the court, advertising to the delay of more than ten years from the date of the marriage to the commencement of the suit, required some explanation of it.

The parties had lived in Devonshire, and one of the medical men who had reported to the court and gave evidence in court, had been her regular medical attendant before and after marriage. It appeared that some time after the marriage she had undergone an operation at Bristol.

Dr. Spinks, who conducted the petitioner's case, then called the petitioner, Charles Henry Ewens, who deposed in substance as follows:—I was married in 1851: the morning after the marriage took the resp. to Mr. Griffiths, a surgeon, in Gower-street; he examined her, said it was a curious case, and should advise a further opinion; he named Dr. Reed; I went with her and Mr. Griffiths to Dr. Reed; he examined her and told me he thought an operation might be successful; she appeared so nervous and excited that he advised her going home for the present; he prescribed some medicines, and said I had better bring her up again in the course of a few months; on return home she became exceedingly ill and so remained for the most part

BANK.]

Ex parte BOOTH, re A TRUST-DEED—REG. v. GEORGE THALLMAN.

[C. CAS. R.]

till we separated; her state of weakness was so extreme that she was hardly able to dress herself; after the operation at Bristol she came back home, and relapsed into the same weak nervous state; it was impossible for me then to bring her to London; when the rail opened she came to London, and was operated upon by Mr. Baker Brown, in Aug. 1860; she was in London two or three months, and was very much upset by the operation; soon after her return I told her mother that, as nothing could be hoped from surgical operation, I thought it my duty to separate; she agreed, but said that, as her daughter's health was so bad, if I would let it remain for a time she would acquaint her daughter that I wished for a separation; I expected every week she would have done so, but she did not; in Sept. 1862 the resp. was stopping with a friend, and my sister told her she thought she ought to separate; she never came back after that.

WILDE, J. O.—In this case I think the main fact is proved, but a delay of eleven years before the court was applied to required to be explained. The principle which guides this court is, that persons seeking such relief ought to come without marked delay; that is, the court interferes to relieve the petitioner from a real grievance, and the presumption is, that if the alleged grievance is borne with for a long time the application is not *bona fide*, but is made for some side purpose. Had it not been for the evidence of the petitioner, the length of time would, in my mind, have been a bar, but his evidence satisfactorily explained the delay. There is no doubt that the woman was in a very feeble state of health. He behaved in a most manly and considerate way, and was not without a hope, on which he acted, that surgical remedies would alter her state. In this he was disappointed. Her ill-health continued, and in 1860 he ascertained that nothing was to be obtained from surgical aid or the operations of nature. I see no ground to draw, from the lapse of time, the conclusion that the petitioner is seeking relief on other than the true ground, and the only one on which this court could give it.

Solicitor, T. J. Vining.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Saturday, Nov. 21.

(Before Mr. Commissioner HOLROYD.)

Ex parte BOOTH, re A TRUST-DEED.

24 & 25 Vict. c. 134, s. 194.—Trust-deed—Registration of—Enlargement of time for.

The court will, upon sufficient cause shown, enlarge the time for registering a deed under the 194th section of the Bankruptcy Act 1861, notwithstanding that the twenty-eight days limited by the Act for that purpose have expired.

The illness of the country solicitor and the absconding of the managing clerk of the town agent to whom the matter was intrusted is a sufficient reason.

Trust-deed. This was an application to enlarge the time for registering a trust-deed under the 194th section of the Bankruptcy Act 1861, the time limited by the Act for such registration having expired.

Dubois (solicitor) applied *ex parte* on behalf of the debtor, upon the authority of *Ex parte Adamson*, cited in *Ex parte Jennings*, 8 L. T. Rep. N. S. 521. It appeared, from the affidavits filed in support of the application, that the deed was executed by the debtor on the 1st Oct. last, and that the country solicitor who had charge of the deed fell ill previously to the 28th Oct., and having no one in his office competent to attend to the matter, the deed was not sent to his London agent for registration until the first week in

November. On the 7th Nov. it was intrusted to the managing clerk of the London agent to do what was necessary, but he, without any notice to his employer, absented himself from the office, and had not since been heard of, in consequence of which it had just been discovered that no step had been taken towards registering the deed. Several creditors had signed the deed, and the only object of registering it was to make it receivable in evidence.

Mr. Commissioner HOLROYD granted the application under the circumstances, but by his order strictly limited the leave given for registration of the deed to the purpose that it might be given in evidence under the 194th section of the Act, but so as not to interfere with the fourth condition of the 192nd section.

Ordered accordingly.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 14.

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ., MARTIN and BRAMWELL, BB.)

REG. v. GEORGE THALLMAN.

Nuisance—Exposure of person—Public place.

It is sufficient to support an indictment for indecent exposure of the person, if the act is done in a place where a great many people can see it, although that place is not a highway; as where the exposure took place on the roof at the back of a house where it could be seen from the back windows of many neighbouring houses, and was seen by several persons therefrom.

Case reserved by the Deputy Assistant Judge at the Middlesex Sessions.

The prisoner was tried before me in the second court, at the Middlesex Sessions on the 25th Aug. last, on an indictment which charged that he in a certain open and public place, that is to say, on the roof of the dwelling-house of one G. H. Cook, situate in a certain open and public street called Albemarle-street, in the parish of St. George, Hanover-square, and near the dwelling-houses of divers of the liege subjects of the Queen situate in that parish, and also in and near the said open and public street and common highway called Albemarle-street, and within the sight and view of Elizabeth Anselbrook and Mary Day and of many other of the liege subjects of the Queen there residing and dwelling, and along and through the open and public street and common highway there going, returning, passing and repassing, did unlawfully, wilfully, publicly and indecently expose his person and private parts naked, and did continue on the roof of the said dwelling-house, and near the dwelling-houses aforesaid, &c., with his person exposed, &c., for the space of twenty minutes, to the great damage and common nuisance of the said E. A. and M. D., and of all other the liege subjects of the Queen, then and there being, and then and there residing and dwelling, and along and through the open and public street and common highway aforesaid going, returning, passing and repassing, against the peace, &c.

The prisoner lived as a servant at a house, No. 4 in Albemarle-street, Piccadilly, and on the 31st July, while several female servants belonging to a club-house were going to bed, about eleven at night, in a room at the back of the house, No. 11 in Stafford-street, the prisoner passed along the roofs of the houses and exposed himself on that of No. 6, Albemarle-street, which was exactly opposite the window of the room where the females were. He was almost entirely naked, and exposed his person.

They mentioned the circumstance to the other servants, but were scarcely credited.

On the following night the prisoner again appeared, and exposed himself in a most indecent manner, remaining on the roof for about ten minutes.

The head waiter of the club was sent for, and also a policeman, both of whom saw the exposure, making, with five females who were present, seven persons before whom, on this occasion, the exposure took place.

The house out of which the prisoner came, as well as that from which the witnesses saw him, were situate in public streets; but that part of the roofs of the different houses along which the prisoner walked did not face the public street, and his acts could not be seen by persons passing along those streets, but they could be seen from the back windows, not only of houses in Albemarle-street and Stafford-street, but also from those of several houses in Bond-street.

The prisoner's counsel submitted that the roofs of the houses did not constitute a public place, and that the exposure, in the presence of the different persons as described, did not amount to a public exposure so as to make the prisoner guilty of the common law misdemeanor.

The case was not argued before me; but it was suggested by the counsel on both sides that it should be reserved for the opinion of the Court of Criminal Appeal, and argued there. I consented to that course, being desirous that the point should be settled by competent authority, and I told the jury that, in my opinion, the place and the exposure were sufficiently public to bring the acts of the prisoner within the law, if they should be of opinion that he exposed himself in fact indecently, wilfully and intentionally.

The jury found him guilty, and the question for the determination of your Lordships is, whether I was right in so ruling. If I was, the verdict is to stand; otherwise not.

The prisoner not being able to find bail, is in prison awaiting the decision of your Lordships.

JOSEPH PAYNE,

Deputy Assistant Judge.

Best (*Beasley* with him) for the prisoner.—It is submitted that the conviction ought to be quashed. The evidence did not support the averment in the indictment that the exposure occurred "in a certain open and public place." This is an indictment at common law, and the place where the exposure is made must be such as the public have access to. Here the place was not visible to any one passing along the streets. In *Sedley's* case, 1 Sid. 168, the exposure was in a balcony in Covent-garden, in sight and view of persons passing along the street. In *Reg. v. Webb*, 3 Cox C. C. 183, 1 Den. 338, an exposure to one person in a passage of a public-house leading to the public parlour was held insufficient. And so an urinal in a public market has been held not to be a public place: (*Reg. v. Orchard*, 3 Cox C. C. 248.) The exposure must be a public nuisance to render it indictable.

ERLE, C. J.—We are all clearly of opinion that in order to be liable to an indictment for indecently exposing the person, it is not necessary that the man should stand and expose his person in a public highway. If it is in a place where a great number of the Queen's subjects can and do see the exposure, that is sufficient.

The rest of the Court concurring,

Conviction affirmed.

April 25 and Nov. 24.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., and KEATING, J.)

REG. v. F. BURRELL AND H. R. BURRELL.

Abduction—24 & 25 Vict. c. 100, s. 53 (a)—Taking out of the possession of the father or mother—Stepfather.

Case reserved for the opinion of this Court by Williams, J.

This was an indictment under the statute 24 & 25 Vict. c. 100, s. 53, tried before me at the last Norfolk Assizes.

It charged that Frederick Burrell fraudulently allured, took away, and detained one Jane Burrell out of the possession of her mother, and one William S. Hyder, he then having the lawful care and charge of her, she being then under the age of twenty-one years, and having then a present legal interest in real estates, with intent to marry and carnally know her.

And Henry Richard Burrell was charged with feloniously aiding, &c. to commit the said felony.

The two defendants were the paternal uncles of Jane Burrell, who was sixteen years old in Feb. 1863, and was entitled by inheritance to real estates of the value of about 50*l.* a-year.

Her mother Mary Ann Hyder had married first James William Burrell, the father of Jane, and brother of the two defendants. He died in 1846, and the mother afterwards, in the year 1848, married W. S. Hyder.

Her daughter Jane lived with her and her stepfather at Fakenham till she was sent to school by her mother, first to a school in Suffolk, in Jan. 1862, where she remained till Aug. 1862, when she came back to her mother's, and then in Oct. 1862, to a school in Norwich, where she remained till Dec. 20, when she came back to Fakenham for the Christmas holidays.

She arrived at her mother's house in the afternoon, and staid about half-an-hour, and then she left the house alone. About nine o'clock that evening she came back, and staid till ten, when she again left the house without her mother's knowledge or consent. She came back the next morning, and staid with her mother for about two hours, and then again went away without her mother knowing whither. In fact, she had gone to the house of her uncle, the defendant Henry Richard Burrell, who also lived in Fakenham, and she continued there until the 19th Jan. 1863, when she left Fakenham as hereafter mentioned.

(a) The 24 & 25 Vict. c. 100, s. 53, enacts, "Where any woman of any age shall have any interest, whether legal or equitable, present, or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress, or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest whoever shall, from motives of lucre, take away or detain such woman against her will with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person and whoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession, and against the will of her father or mother, or any other person, having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour, and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, co-heiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, any such property shall upon such conviction be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the Attorney-General appoint."

She continued to pay visits to her mother for an hour or two nearly every day till the 19th Jan.

It further appeared that in the interval between her coming home from school in Suffolk and her going to that at Norwich, it had been arranged at her own desire, in consequence of her not living happily with her stepfather and mother, that she should live with her mother's mother and brother who dwelt together in Fakenham.

When she came back for the Christmas holidays she wished to remain with her mother; but the latter insisted on her daughter's abiding by her choice to go to her grandmother's for the holidays, and would not consent to her staying with her at her stepfather's house.

On this she went to the house of her uncle Henry Richard Burrell. Her mother, as soon as she discovered that her daughter was there, desired her to come to her house, and refused to let her have her clothes unless she did so.

On the 19th Jan. Frederick Burrell and the wife of Henry Richard Burrell left Fakenham together with Jane Burrell by the railway, and on the next day Frederick Burrell and Jane Burrell were married at the church of Plumstead near Woolwich.

These occurrences took place under such circumstances as fully warranted the jury in finding that Jane Burrell was allured and taken away by Frederick Burrell with intent to marry her, and that Henry Richard Burrell aided, &c., in the committing of this act. And the jury accordingly convicted them.

But several points of law were raised by the counsel for the defendants, which I reserved for the consideration of this court.

First, it was contended that there was no evidence that Henry Burrell had fraudulently allured and taken away the young woman within the meaning of the statute.

Secondly, that there was no evidence that she was taken out of the possession of her mother within the meaning of the statute.

Thirdly, that the indictment charged that she was taken out of the possession of her mother and of William S. Hyder, he having then the lawful care and charge of her, and that it was necessary to prove that she was in the possession of him, as thus alleged, as well as of her mother, when she was taken away.

But the only proof of that was, that the guardianship of her person and copyhold estate had been granted to him at a special court for the manor of Fakenham, when she was admitted as tenant of her copyhold estate in that manor. And it was contended on the parts of the defendants that this did not show that he had the lawful care and charge of her within the meaning of the statute.

On the part of the Crown it was argued that at all events there was evidence that she was taken out of the possession of her mother, and that this was sufficient to sustain the indictment.

EDWARD VAUGHAN WILLIAMS.

April 25.—*Drake* for the prisoner.—The conviction cannot be sustained. First, there was no evidence that the prisoner Frederick fraudulently allured, took away and detained Jane Burrell out of the possession of her mother. Some meaning must be given to the word "fraudulently" in this part of the section. If it be said that the motive was a pecuniary one, and that that would satisfy the word "fraudulently," the answer is, that the preceding part of the section provides for that case expressly. There was no evidence of any false pretences or mis-statements to satisfy the word "fraudulently" [MARTIN, B.—How can this court know that the prisoner fraudulently allured the young woman away except from the evidence? WILLIAMS, J.—All the evidence is set out in the case on the point. POLLOCK, C. B.—This may have been a

very honest love match; but was it not a fraud against the child to pretend to marry her when he could not legally do so?] Secondly, there was no evidence that he took the girl out of the possession of her mother, within the meaning of the statute. This case differs from *Reg. v. Mantelou*, 6 Cox C. C. 143; *Dears*, C. C. 159, inasmuch as here the girl was in the possession of her mother at the time. [WIGHTMAN, J.—The mother would not let her stop with her.] It does not appear that either of the defendants knew that the mother had required her daughter to come back. [WIGHTMAN, J.—Sect. 55 would apply to the case of taking away a girl from school.] In *Hicks v. Gore*, 3 Mod. 84, where a mother had placed her daughter, an heiress, under the care of a lady, to prevent her being run away with, the lady collusively married the girl to her own son while she was under sixteen. The marriage being without enticement and openly, it was held that the case was not within the penalties of 4 & 5 P. & M. c. 8. Thirdly, the indictment avers that W. S. Hyder had the lawful care and charge of the girl. Hyder, the second husband of the girl's mother, had nothing to do with the care and charge of her: (*Ratcliffe's case*, 3 Co. R. 38.) Although he had been admitted as her guardian on the court-rolls of the manor, that does not constitute him guardian of her person. The prosecutrix was bound to prove that averment in this indictment, and not having done so, it is submitted that the prosecution cannot be sustained.

Bulwer for the prosecution.—First, as to the word "fraudulently." If any evidence of fraud is requisite, there was sufficient. The construction of the statute is obvious. Sect. 53 creates two classes of offences: the first is, "to take away or detain" any woman, &c. against her will, without reference to her age, contemplating the case of an heiress capable of giving consent to her marriage; but when the Legislature comes to deal with the case of an heiress under the age of twenty-one, and incapable of giving such consent, then the will to be violated is not the will of the woman, but of the person having the lawful care of her; and it is made an offence not only to "take away or detain" such woman out of the possession of such person, but also to "fraudulently allure" the woman out of the possession, &c. Where the offence is "taking away" or "detaining," it is not necessary to allege or prove fraud; but where the offence is "alluring," it must be alleged and proved to have been a fraudulent alluring, whatever that may mean. It is quite sufficient to support this prosecution, that here the uncle took away and married his niece, who was under age, without the knowledge of the person who had the lawful custody of her. The concealment of the fact from her lawful guardians is quite sufficient evidence of fraud. The fraud is against the persons having the lawful custody of the girl, and who by law have the power of giving her consent. [POLLOCK, C. B.—The consent is immaterial, as the marriage is wholly illegal. WIGHTMAN, J.—Do you contend for the conviction of both? WILLIAMS, J.—There was evidence of aiding and abetting which is not stated in the case.] The language of this part of the section is not, as in the first part, against the will of the woman, but against the will of her father or mother or other person having the lawful care of her. In *Ratcliffe's case* it was held, that the mother of a child who marries again is entitled to the legal care and custody of her child. [WIGHTMAN, J.—The girl is not in the actual possession of her mother.] Assuming that the girl was living at her uncle's with the consent of her mother, why is she not then in her mother's custody and possession? The other side must contend, that if she was at her grandmother's, she was not in her mother's possession. The mother did not abandon her control. It was arranged that she should live with her mother's mother and brother. It

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is sufficient to sustain this prosecution that the mother had a right to the possession and charge of her daughter. In 1 East P. C. 457, it is said that *Hicks v. Gore* wants more consideration. In *Reg. v. Kipps*, 4 Cox C. C. 167, Maule, J. said: "The law throws a protection about young persons of the sex and within the age specified by the statute 9 Geo. 4, c. 31, s. 20. It has been determined by the Legislature that at that age young females are not able to protect themselves, or give any binding consent to a matter of this description. It is therefore quite immaterial whether the girl abducted consent or not; if her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed." So again *Reg. v. Manktelow* supports this view of the case. As to the third objection, it is not necessary to prove the averment about the second husband having the lawful charge of the girl. That is surplusage, and may be struck out of the indictment.

Metcalf, in reply, referred to

Reg. v. Handley, 1 Foa. & Fin. 648.

Curr. adv. vult.

Nov. 24.—*POLLOCK, C. B.*—The prisoner, Frederick Burrell, was indicted for fraudulently alluring, taking away and detaining a young female out of the possession of her mother and one W. S. Hyder, he having the lawful care and charge of her, and the other prisoner was indicted for aiding and abetting him. The court is divided in opinion on the facts, not on any question of law. If there had been a difference in our opinion on the law, the case in the ordinary course would have been directed to be argued before all the judges. But as it is, we think the court may well act according to the opinion of the majority of the judges who heard the argument, and hold that the facts do not sustain the prosecution, and that in point of fact the crime was not proved. As I said before, there is no difference among the judges as to the law. — *Conviction quashed.*

Nov. 22, 1862, and Nov. 24, 1863.

(Before *POLLOCK, C. B., WIGHTMAN, WILLIAMS, JJ., CHANNELL, B. and MELLOR, J.*)

REG. v. SAMUEL STANNARD.

Brothel-keeping—Landlord—Weekly tenants.

The landlord was indicted for keeping and maintaining in the first count a common bawdy-house, and in the second a disorderly house. It was proved that the house was let out in apartments to young women by distinct takings as weekly tenants, but the landlord did not occupy any part, nor keep the key, or reserve to himself any right of entry. The tenants so occupied the house as to cause it to be a scandal to the neighbourhood. The only profit the landlord derived was the increased rent. Complaints were made to the landlord and he well knew the use to which the apartments were applied by his tenants, but he took no steps to remove the lodgers: Held, upon these facts, that the landlord did not keep or maintain a bawdy-house or a disorderly house.

Case reserved by Cockburn, C. J. for the opinion of this Court:

Samuel Stannard was tried before me at the last Assizes for the county of Suffolk, upon the following indictments:—

Suffolk.—The jurors for our Lady the Queen, upon their oath present, that Samuel Stannard, on the 1st day of January, in the year of our Lord 1859, and on divers other days and times between that day and the day of taking this inquisition, at the parish of St. Mary Key, in the borough of Ipswich, in the county aforesaid, unlawfully did keep and maintain a certain common bawdy-house, and in the said house, for the lucre and gain of him the said Samuel Stannard, cer-

tain persons, as well men as women, of evil name and fame, then and there, and on the said other days and times, there unlawfully and wilfully did cause and procure to frequent and come together the said men and women and whores in the said house of the said Samuel Stannard, at unlawful times, as well in the night as in the day, then and there and on the said other days and times there to be and remain drinking, tippling, whoring and otherwise misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting, being, residing and passing, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Stannard, to wit, on the said 1st day of January, in the year aforesaid, and on the said other days and times aforesaid, at the said parish of St. Mary Key, in the borough aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common ill-governed and disorderly house, and in the said last-mentioned house, for the lucre and gain of him the said Samuel Stannard, certain persons, as well men and women, of evil name and fame, and of dishonest conversation, then and there and on the said other days and times, there unlawfully and wilfully did cause and procure to frequent and come together, and the said men and women, in the said house of him the said Samuel Stannard, at unlawful times, as well in the night as in the day, then and there and on the said other days and times, there to be and remain drinking, tippling, whoring and otherwise misbehaving themselves, unlawfully and wilfully did permit, to the great damage and common nuisance of all the liege subjects of our Lady the Queen there inhabiting, being, residing and passing, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her Crown and dignity.

The facts proved were as follows:—

The house in question was inhabited entirely by women, who lived by prostitution openly carried on, and whose conduct was often riotous and grossly indecent, so as to be a scandal and offence to the neighbourhood.

The deft. was the owner of the house, but he occupied no part of it, neither did he keep the key or reserve to himself any right of entry. The apartments throughout the house were let to weekly tenants, who occupied separately under distinct takings, each lodger having her own room, her own key, and a door opening either into the street or into a passage communicating with the street.

The deft. had nothing whatever to do with the management of the house (if indeed a house thus divided into distinct and separate holdings could be said to be managed as a house) or of any part of it.

He received no share of the earnings of the women, nor did he derive any benefit therefrom, except so far as he may be said to have done so incidentally from their ability to pay their rent being thereby increased.

He had no control over the tenants, except such as might arise indirectly from his power as landlord to determine the tenancy from one week to another. He only went to the house to collect the weekly rent from the different lodgers, or when being pressed by the complaints of the neighbours he went (as sometimes happened) to endeavour to prevail on the inmates to be more orderly in their behaviour.

On the other hand, it was abundantly clear that he perfectly well knew the use to which the apartments were applied by the several lodgers, and that he let the apartments with a full knowledge that they would

be applied to the purposes of prostitution and with a perfect assent on his part to their being so applied.

A question presented itself whether, under these circumstances, the deft. could be considered as having "kept" the house in the legal sense of that term.

Entertaining serious doubt how far the indictment could, on the state of facts I have stated, be supported, I thought it best, on the whole, to direct a verdict of guilty, reserving the case for the consideration of this Court. COCKBURN.

No counsel appeared for the prisoner.

Nov. 22, 1862.—*Metcalfe (Orridge with him)* for the prosecution.—It is submitted that the conviction was right. The 25 Geo. 3, c. 36, s. 8, defines who shall be deemed to be the keeper of a bawdy-house, "And whereas by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, and other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment, be it enacted that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such notwithstanding he or she shall not in fact be the real owner or keeper thereof." [POLLOCK, C. B.—What did the landlord do here as master or mistress?] He let it out to young women and so made himself responsible for the nuisance. The depositing of naphtha in large quantities in a warehouse has been held to be indictable as a nuisance: (*Reg. v. Lister*, 7 Cox C. C. 342; 1 Dea. & B. 209.) So in *Reg. v. Moore*, 3 B. & Ad. 184, the deft. was held indictable for keeping a pigeon shooting-ground, and thereby causing persons to come upon the highway adjoining with guns to shoot the stray pigeons. So here the landlord may be said to bring these young women together, knowing their way of life and to what uses in all probability the apartments will be applied. [POLLOCK, C. B.—No doubt the lodgers were each liable for keeping a bawdy-house: *Pierson's case*, 2 Ld. Raym. 1197; but in what sense does the landlord keep the house so as to make him liable?] He knew the uses to which the house was to be applied, and so was an accessory before the fact; and under 24 & 25 Vict. c. 94, s. 8, was liable to be indicted as a principal offender. He had the power of determining the tenancies, and neglecting to do so was aiding and abetting the lodgers in so using the house. In *Res v. Pedley*, 1 A. & E. 822, it was held that the landlord of premises let out on short tenancies was liable for a nuisance arising during the tenancy, that being the consequence of the nature of the erection. So here the nuisance arises from letting the rooms to these young women with full knowledge of their way of life. In *Thompson v. Gibson*, 7 M. & W. 456, the defts. were held liable for continuing a nuisance from a building erected under their superintendence, although they had no right to enter upon the land to remove it. The cases of *Res v. Medley*, 6 C. & P. 292; and *Rick v. Basterfield*, 4 C. B. 783,

were also referred to.

Cur. adv. vult.

Nov. 24, 1863.—POLLOCK, C. B.—In this case the facts were, that the prisoner being owner of a house, had let out the whole of it in different apartments to young women whose habits were not of the most moral kind. The prisoner retained no part of the house, and had no control over any part of it whatever. No doubt the persons to whom it was let, and who used it for immoral purposes, were themselves indictable. The prisoner, however, was indicted for keeping a disorderly house, and we are of opinion that, whatever other

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offence he may have been guilty of, he was not guilty of the crime of keeping a disorderly house. He did not keep the house, nor was any part of it kept by him. He had no right to let any one in or refuse admission to any one during the tenancy. We are therefore of opinion that the house was not kept by him, and that the conviction ought to be quashed.

Conviction quashed.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Friday, Nov. 13.

(Before the LORD CHANCELLOR (Westbury).)

BURDETT v. HAY.

Practice—Injunction.

Where, upon a motion to dissolve an injunction which had been granted ex parte in the terms of the prayer of the bill, the court discharged its former order, and awarded a new and totally different injunction, which had not been prayed by the bill, of which no notice had been given and which was not within the scope of the relief originally prayed, the order was, on appeal, discharged, on the ground of irregularity, apart from the merits, and the deft. allowed his costs in the court below as well as upon appeal.

This bill was filed by Robert Burdett, who in July 1863 agreed to purchase from the deft. William Hay the business of a rectifier and wine merchant, which the deft. represented himself as carrying on at the Distillery, Albany-street, under the name or firm of Grimbale and Co.

By the agreement, which was dated the 27th July 1863, it was agreed that, amongst other particulars, the following should be assigned to the plt.:—"Books of account and all and every other the implements and articles and things then used in carrying on the said business."

The book-debts were not assigned, but it was agreed that the deft. Hay should allow them to remain on the books, to be collected by the plt. in the usual course of business, the deft. Hay allowing a commission of 1 per cent. for such collection.

The agreement also contained a proviso that the deft. Hay should not at any time thereafter carry on or be concerned, directly or indirectly, in any distillery or business of the same kind as was then carried on by him.

The plt. paid a deposit on the 1st Sept. 1863, and attended at the distillery on the 3rd Sept. to complete the purchase, when upon inquiry it was found that the books of account and other books belonging to the business had been taken away by the deft. Hay, or by his orders. An arrangement, however, was made, and the plt. proceeded to complete the purchase; and on the same day an agreement was entered into in writing and signed by the plt. and deft., whereby it was provided that the books, &c. should be deposited at the counting-house of the distillery in Albany-street, for the joint benefit of both parties.

The bill alleged that, notwithstanding this agreement, the deft. Hay declined to return the books, and retained the same in order to enable him, in violation of the agreement, to collect the debts of the business; and on the 8th Sept. 1863 there appeared an advertisement in a morning paper, announcing that the partnership between Hay and the other deft. Thomas Herbert Edmonds had been dissolved, and that neither of them would be in any way responsible for any business that might in future be carried on there; also that Mr. Edmonds at an early date

would wait on the customers, when he hoped to be favoured with their further orders.

A circular letter dated the 3rd Sept. was also sent to the customers of the late business, stating that the current book-debts due to the late firm would be collected under the sole direction and for the separate account of William Hay.

The plt. accordingly filed a bill praying—1. That the debts. Hay and Edmands might be ordered forthwith to deliver up to the plt. all the books of accounts, &c. 2. For an injunction to restrain the debts. from collecting or receiving any of the book-debts. 3. For any injunction to restrain the debts. from then or at any time thereafter carrying on or being concerned, either directly or indirectly, in any distillery or business of the same kind as that at the date of the agreement carried on by Hay and Edmands; and 4. That the debts. might pay the costs of the suit.

On the 11th Sept. 1863, on motion *ex parte*, an injunction was granted by the M. R. restraining the debts. in the terms of paragraphs 2 and 3 of the prayer above mentioned, until the debts. should have answered the bill, or until further order.

The debt. Edmands, in the following month, moved to dissolve the injunction; and on the 22nd Oct. the M. R. ordered that the above order of the 11th Sept. 1863 be discharged, and in lieu thereof directed an injunction to be awarded, restraining the debt. Edmands, in any business as a distiller and wine merchant in which he might be engaged either separately or jointly, from advertising or holding out to the public that he was a partner in the late firm of "Grimble and Co.," or in any respect interested therein, or connected therewith, and also from soliciting the business or custom of any one of the customers of the late firm of Grimble and Co. until the hearing of the cause, or further order; the costs of the motion to be costs in the cause.

From this order the debt. Edmands appealed.

Hobhouse, Q. C. and W. W. Cooper supported the appeal. They were stopped by the court.

Selwyn, Q. C. and Beales supported the order. They argued that the second injunction was within the terms of the relief prayed by the bill.

The LORD CHANCELLOR.—I have seldom seen any thing more irregular. An *ex parte* injunction is granted originally in the terms of the prayer of the bill. Then an application is made on motion by the debt. to discharge that injunction. Now, undoubtedly it is a rule of the court that an injunction is to be granted in the terms of the prayer of the bill; and it must be dissolved in the usual way. What has been done in this case is, that, upon the application of the debt. to dissolve the injunction, which application, it is confessed, was perfectly right and regular, the court, at the instance of the plt., without any new motion, and without anything in support of any such new motion, has taken upon itself to grant a different injunction, a new injunction, against the debt. So that the debt., who came before the court for the purpose of dissolving an injunction that had been improperly granted, finds himself at once placed in this predicament, that, without any new application by his adversary, upon notice of motion, which motion had become *functus officio*, the court, without any further application, grants a different injunction, an injunction entirely different from that which is prayed in the bill, and not warranted on the ground of its being comprehended in that which is prayed, even if such a principle were admissible. In olden times, the injunction that was prayed in the bill was also prayed in terms in the process annexed. Since the introduction of printing an alteration has taken place, which I regret. The process is taken away, and the prayer of the process is no longer a part of the bill. But the rule of the court must continue, that the injunction must be such an injunction as is prayed by the bill and process. Here

I have an injunction prayed by the bill to restrain the debt. from collecting the debts due to the dissolved firm, and a further injunction to restrain him from interfering in the business of the former firm. Now, the order produced to me, and which I have before me, is an injunction of quite a different character. It is an injunction to restrain the debt. from advertising and giving out to the public that he was a partner in the old firm, or in any manner interested therein. The former injunction was on the footing that he was connected with the firm; the latter injunction is on the footing that he was not so connected. I think therefore, upon the merits, even if I were disposed to pass over the irregularity of the injunction being granted in favour of the plt. upon the debt.'s notice to dissolve, which was a correct and proper notice, the debt. must succeed. The injunction must be dissolved, and the debt. will have the costs of the motion before the M. R.

Solicitors: for the plt. *Walter and Moojen*; for the debts., *Edmands, and Garrard and James*.

Wednesday, Nov. 25.

(Before the LORDS JUSTICES.)

SYKES v. SHEARD.

Vendor and purchaser—Trust for sale—Consent of a class—Death of one before consent.

The testator gave real estate to trustees upon trust to sell and hold the proceeds in trust for his "sons and daughters," but directed that no sale should be made without the written consent of his "sons and daughters." The will then settled the shares upon the sons and daughters respectively and upon their issue, and in default of issue, as he or she should appoint. One of the daughters died without issue, and duly appointed her share to her husband absolutely. The trustees afterwards contracted to sell part of the property to the debt., and the six surviving children of the testator and the husband of the deceased daughter consented in writing to the sale. The debt. rejected the title, on the ground that by the daughter's death no proper consent could be given:

Held (affirming the decision of Romilly, M. R.), that the title was open to too serious a doubt to be forced upon a purchaser.

This was an appeal by the plts. against a decision of the M. R. dismissing with costs a bill filed for the specific performance by the debt. of a contract to purchase lands under the circumstances stated in the former report, 8 L. T. Rep. N. S. 820, where the facts so fully appear that it is not necessary here to recapitulate them. It is, however, desirable to give the very words of the clause of the will upon which the question turned, which, after directing a sale of real and personal estate, were as follows:—

"And as to the money to arise as aforesaid (that is by a sale), and the stocks, funds and securities whereon the same shall be invested, in trust for my sons and daughters, subject to the trusts hereinafter contained; nevertheless I declare that no sale of my real or personal estate, or any part thereof, shall be made without the consent in writing of my sons and daughters, whether covert or sole." The suggestion being that by the use of the same words in close juxtaposition, first in declaring the objects of the trust, and then in declaring the persons whose consents were required to authorise a sale, the testator must have intended all of his children in the latter case.

Southgate, Q. C. and Dickinson for the appeal.—The two authorities on which the debt. relied in support of his contention that by the death of one of the daughters no valid consent to a sale was now possible, were

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Danno v. Annas, Dyer, 219; and *Atwaters v. Birt*, Cro. Eliz. 856; but in the former of these cases the consent required was that of a single person who was named, and in the latter the consent of T. W. and three other persons, all by name. Here it is to be with the consent of a class only, and the survivors represent that class:

Vincent v. Lee, Cro. Eliz. 26; Co. Litt. 113 a; and Dyer, 177;

Mansell v. Mansell, cited in Lord St. L. on Powers, 252;

Green v. Green, 2 Jon. & Lat. 589;

Lord St. Leonards on Powers (8th edit.), 126-128.

Selwyn, Q. C. and T. C. Wright for the purchaser, the defts., were not called upon.

Lord Justice KNIGHT BRUCE said, that in his judgment the doubt that was raised upon this title was much too serious for the title to be forced upon a purchaser. The objection might not prevail, it might not be one that ought legitimately to be entertained when contested upon the will in a suit properly constituted; but it was impossible to force the title with this objection upon a purchaser who would not consent to accept it, and the question could not be contested in the present suit between vendor and purchaser upon a bill for specific performance. The appeal therefore failed.

Lord Justice TURNER said, that the question depended upon the meaning of the words "sons and daughters" in the will of the testator, and the M. R. had already arrived at a construction of those words. Even if they were of a contrary opinion, it would be impossible for them to say what the opinion of future judges might be upon the construction of this will. It was, therefore, impossible to make a decree for specific performance by the purchaser.

Upon the application of *Selwyn*, Q. C., the dismissal of the appeal was ordered to be with costs.

Solicitors for the plts., *Shum and Crossman*.
Solicitors for the defts., *Edwards, Layton and Jaques*, agents for *M. S. Scholefield*, of Batley, Yorkshire.

(Before the LORDS JUSTICES.)

Re CARTWRIGHT.

CARTWRIGHT v. THOMPSON.

Annuity Act—53 Geo. 3, c. 141, s. 10—Who is to be taken as grantor—Notice to solicitor—Constructive notice.

In 1826 T. mortgaged his interest in land to M., who was his solicitor. By a deed executed in 1828, while the mortgage was still subsisting, F. granted an annuity to D., and T. joined in the deed granting the same lands, in order further to secure the annuity, and covenanted that his interest was free from incumbrances. M. acted as solicitor for all parties in this transaction, but he and T. concealed from D. all knowledge of the mortgage. The annuity deed was never enrolled:

Held, by Knight Bruce, L. J. (agreeing with the M. R.), that the deed was within the exception of the 10th section of the *Annuity Act*, and did not require enrolment;

That T. was one of the grantors of the annuity within the statute;

That the notice which M., as the mortgagee, had of the mortgage, did not affect his client the grantee.

Turner, L. J., though convinced that the justice of the case was entirely with the grantee, declined to express any opinion upon the legal questions raised.

This was an appeal by the plt. from a decision of the M. R. allowing a claim in respect of an annuity granted by the testator in the cause to one Arthur Downes,

whom the claimant represented. The hearing before his Honour is reported *ante*, p. 138, and it is unnecessary to repeat the statements found in that report.

Cole, Q. C. and *Hetherington* supported the appeal, contending that Thomas Cartwright was not one of the grantors, for he only conveyed his lands as a security for the annuity, and did not join in the grant of an annuity, as was the case in *Darwin v. Lincoln*, 5 B. & Ald. 444, upon which the claimant relied. Secondly, Mr. Montrieu having been the grantee's solicitor, the latter had notice of the existing mortgage:

Kennedy v. Green, 3 Myl. & K. 699;

Espin v. Pemberton, 3 De G. & J. 547; a.c. 32 L. T. Rep. 345;

The *Annuity Act*, 53 Geo. 3, c. 141, s. 10.

John Pearson for the resp.—[In the course of his argument, Knight Bruce, L. J. said that the court was with him on the question of value.] Thomas Cartwright was one of the grantors, and not merely a surety: (*Darwin v. Lincoln*, *ubi sup.*) And upon the question of notice, actual and constructive, he cited

Ex parte Michell, 2 East, 137;

Hewitt v. Loosemore, 9 Hare, 449;

Jones v. Smith, 1 Phil. 244.

Cole, Q. C., in replying, referred to *Le Neve v. Le Neve*, Ambler 436; a.c. W. & Tnd.

Lead. Cas. 23;

Fuller v. Benett, 2 Hare, 394.

Lord Justice KNIGHT BRUCE said, that in this case the first question was whether, on the assumption that the point of value was with the resp., the lands subjected to the annuity were lands within the meaning of the words, lands "of equal or greater annual value than the said annuity over and above any other annuity, and the interest of any principal sum charged or secured thereon of which the grantee had notice at the time of the grant." Assuming, then, the question of value to be with the resp., it was plain that if Thomas Cartwright had been clearly the grantor of the annuity in every proper sense of the expression, the case would have been brought within the exception. But it was said that he was not the grantor of the annuity; that his brother Francis Cartwright, the principal in the transaction, was the grantor, and that Thomas Cartwright, the owner, only joined as a surety, and did not join in the grant of the annuity, nor make himself personally or directly liable for the same. But he was a party to the deed; he subjected his lands to the payment of the annuity, as part of the same transaction by which the annuity was granted, and therefore, according to his judgment, it would be not only an illiberal and narrow, but an improper, construction of the language of the Legislature to say that these lands, if of sufficient value, were not lands within the exception, notwithstanding the use of the word "grantor," and notwithstanding that Thomas Cartwright was not personally liable. The question, then, was the question of value, and in considering that question he agreed with the app. that the greater amount of the annuity was the only amount to be considered, without regard to the lesser amount to be payable for a time. But he was satisfied upon the evidence that, subject only to the question of the mortgage for 1000*l.*, the value was sufficient. The controversy was by this reduced to the question whether of the mortgage for 1000*l.*, the annuitant, Mr. Downes, had notice within the meaning of the term as used in the 10th section of the Act of Parliament. The matter stood thus, that Mr. Downes was for all ordinary purposes an absolute stranger to this transaction; the mortgage had been made to Montrieu and two other persons, Montrieu being a solicitor. He was engaged as the solicitor in the matter of the annuity transaction; he was engaged on behalf of the grantee of the annuity, and he acted also for the

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grantor, or if there were two grantors, then for both of the grantors; he was in fact engaged for both of the Messrs. Cartwright as well as for Mr. Downes. It was said that because the mortgagee himself knew, as he must of course have known, of this mortgage, and yet suppressed it, and did not in any manner bring it to the notice of Downes the grantee, but kept it to himself, the knowledge of Montrieu was within the meaning of the section the knowledge of Mr. Downes. He dissented entirely from any such reading of the statute; to him it appeared that it would be utterly unjust and unreasonable so to construe it. He was, therefore, of opinion that the grantee had no notice of the mortgage; that, consequently, even on the assumption (which he agreed was a right one) that the greater amount was the only one to be regarded, the lands were of sufficient value—of value more than equal to the value of the annuity, independently of any incumbrance, and he repeated, that within the meaning of this statute the grantee had not notice of any incumbrance whatever. The appeal was against reason and justice, and it must be dismissed with costs.

Lord Justice TURNER said that, as his learned brother agreed with the M. R., it was unnecessary for him to give any opinion upon the case; and without meaning to express any dissent from his learned brother or from the M. R., he would refrain from expressing any opinion. The appeal must be dismissed with costs, for the app. had failed, and must pay the costs under any circumstances, because it was clear that the honour and justice of the case were with the resp.

Solicitors for the app., *Roy and Cartwright*.

Solicitors for the resp. Mr. Downes, *Bridges and Son*.

Thursday, Dec. 3.

(Before the LORDS JUSTICES.)

Re THE GREAT SHIP COMPANY (LIMITED), *ex parte* PARRY.

Winding-up — Judgment creditor — Execution — Injunction — The Companies Act 1862 — Sect. 201 — Costs of appearance.

A creditor of an unregistered company sued to recover a debt, obtained judgment and execution, and put the sheriff in possession of the property. Some days after, a petition for winding-up the company was presented, under which an injunction to restrain the sale was applied for ex parte and granted:

Held (differing from the M. R.), that under these circumstances the creditor ought not to be restrained from taking advantage of the proceedings which he had bonâ fide instituted. The court must look at the legal rights of all the parties, and its discretion must be guided by considering what it would have done if, after the winding-up order had been actually made, a creditor who had previously obtained judgment had applied for leave to issue execution.

Quære, whether a case in which judgment and execution have been obtained before the presentation of the petition for winding-up is within the 201st section of the Act mentioned:

And whether under that section an ex parte injunction can be granted at all.

Per Turner, L.J.: The section applies only to cases in which there have been unfair proceedings on the part of a creditor.

The sheriff was served with notice of the original, but not of the appeal, motion:

Held, that he was entitled to the costs of his appearance at the Rolls, but, not to any costs upon the appeal.

This was a motion on behalf of Mr. Robert Sortin Parry, that an order dated the 21st Nov. last, made by the M. R., and so much of an order made by his Honour on the 9th Oct. as restrained the said R. S. Parry from further prosecuting certain proceedings at law, and so much of the same as restrained the sheriff of Lancashire from proceeding to sell the stores and appurtenances belonging to the ship in the said order mentioned (the *Great Eastern* steamship), and the furniture in the offices at Liverpool, under a writ of *feri facias* at the suit of the said R. S. Parry, might be discharged with costs.

The Great Ship Company (Limited) was incorporated under the Joint-Stock Companies Acts 1856 and 1857 on the 21st Oct. 1858, and its object was, as appeared from the memorandum of association, to purchase, fit out and equip the *Great Eastern* steamship and other steam or sailing vessels, and the despatching thereof on voyages with passengers and cargoes, and its capital was 330,000*l.*, in shares of 1*l.* each. Business was soon afterwards commenced. In 1860 the company increased its capital by the issue of 100,000 preferential shares of 1*l.* each, and the whole capital had been called up and paid.

The company was never registered under the Companies Act 1862.

On the 15th Dec. 1862 the company mortgaged the ship to James Thomas Jones and others, to secure 100,000*l.*, and on the 31st July 1863 they executed another mortgage of the ship, her stores and appurtenances, for the sum of 5350*l.*, to the present applicant. The whole assets of the company consisted of the ship and her outfitings, and a small cash balance, and the company had incurred other debts to a very considerable amount.

Mr. Parry, in an action instituted by him against the company, obtained judgment in the Q. B. for a debt of 5439*l.*, including his mortgage-debt, on the 28th Sept., and immediately thereafter issued the writ of *fi. fa.* mentioned, and under that writ the sheriff of Lancashire, on the following day, seized the ship (which was then lying in the Mersey), her stores and appurtenances, and the furniture in the office at Liverpool, and he continued in possession, and meditated selling the whole.

On the 6th Oct. a petition was presented by Messrs. Jones and Co., and Messrs. Glyn and Co., the bankers of the company, and others, stating the foregoing facts, and that a forced sale would be detrimental to the shareholders, creditors, and all concerned, whereas, if the ship were to be sold with care and deliberation, a very considerable portion of the debts might be paid; and it prayed for a winding-up order against the company. On the 9th of the same month his Honour, upon the petitioners undertaking to abide by any order that the court might make as to damages, and to accept short notice of motion to dissolve the injunction thereby granted, issued an injunction restraining the present applicant and other creditors who had begun legal proceedings from further prosecuting the same, and also restraining the sheriff of Lancashire from selling the ship, her stores and appurtenances, and the furniture in the office. This order was obtained *ex parte*.

On the 21st Nov. Mr. Parry applied to the M. R. to dissolve this injunction, which was opposed on behalf of the petitioners for the winding-up order, and his Honour refused the application without costs, and without prejudice to the question of Mr. Parry's priority in respect of his judgment. On the same day, his Honour made the usual winding-up order on Messrs. Jones and Glyn's petition.

His Honour's judgment was to the following effect:—
"I think I must continue the injunction. I do not go into any question at all respecting the judgment. There may be peculiarities and circumstances affecting

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the judgments which might entitle the judgment-creditor to enforce execution in one case, and induce the court not to restrain the judgment-creditor from obtaining the fruits of his judgment; and in another case there might be strong reasons why the court should interfere. I think the object of the Legislature in passing this Act, in the section where it directs that after the presentation of a petition for winding-up the affairs of a company under this Act, and before making an order for winding-up the affairs of a company under this Act, it shall be lawful for the court to restrain any further proceedings in any action, was to secure equality of division amongst the creditors, in all cases where it saw that the company itself was hopelessly insolvent, and that a winding-up must take place. If no doubt a judgment-creditor had obtained execution, and thereupon the company, for the mere purpose of defeating his judgment, and defeating his execution, had put forward a friendly creditor to present a petition to wind-up the company, and the court was not satisfied that the company would be wound-up at all, but thought it possible that the petition would be afterwards withdrawn, or that there were no grounds for winding-up the company, then the court would say, "This is not a case for defeating the judgment-creditor, and he ought to be allowed to have the full benefit of his judgment." But if the winding-up order is made, and is *bond fide* proceeded with, then the intention of the court is that all the creditors shall be paid *pari passu* in equal shares and proportions. For that purpose it is that the Legislature makes these two distinct alterations with respect to this Act. The winding-up order itself operates as an injunction to prevent any further proceedings. But before the winding-up order takes place the court has a discretion, and has a power to do it upon such terms as it shall think fit—that is to say, to keep things *in medio*—to keep the rights of the parties exactly as they were at the time when the petition was presented, in order that the court, at the time when the petition is heard, may say what is fit and proper to be done. If it has reason to suspect that the application for the winding-up order is collusive, and is not intended to be proceeded with, it may allow the injunction to be dissolved. If no winding-up order is made, of course the injunction would go as a matter of course, that is to say, the court would at once dissolve it; but in all the cases where it is nothing more than this, that the creditor comes with great rapidity, not delayed by any fraud—without using the word "fraud" in its literal sense—or excuses on the part of the company to prevent him from obtaining any of the fruits of his judgment at an earlier period, when he merely obtains an order to get priority over the creditors, and where the company must necessarily be wound-up, and when a petition is actually presented for that purpose, my opinion is that the construction of the Act is, that in these cases the judgment-creditor ought to be restrained, and that the whole of the funds of the company ought to be distributed rateably and equally amongst all the creditors of the company. That being so, and no special case being made on the present occasion, I am of opinion that this injunction ought to be continued—that is to say, I do not dissolve it on the present occasion. You will observe what takes place in a great number of these cases. The moment when a petition is presented to wind-up the company—I do not remember exactly how many days it takes, fourteen I believe—it might well be that several persons, the moment they heard that a petition was about to be presented, might obtain judgment against the company, which the company would not go to the expense or trouble of resisting; they might obtain judgment at once and issue execution before the petition for winding-up could be heard. It is for that reason that the

Legislature has given the judge discretion to stay them all, in order that at the time when the court makes the winding-up order it may distribute the assets fairly and equally amongst all the creditors. I think this is one of those cases where I ought to make the winding-up order, and not dissolve the injunction."

Against so much of this order as has been already mentioned Mr. Parry now appealed.

Baggallay, Q. C. and *Andrew Thomson* supported the appeal.—They contended that, under the Act of 1862, sect. 201, the discretion rested entirely with the court as to the staying of proceedings previously commenced against the company, and it was by no means the intention of the Legislature that where *bond fide* proceedings had been commenced, and had (as might be said of this action by reason of the *pl. in it* having proceeded to judgment and execution before the winding-up petition was even presented) actually terminated, the creditor should be deprived of the fruits of his diligence for the benefit of others who had only come in later. They submitted that the injunction had been improperly granted originally, and that it ought now to be dissolved.

Selwyn, Q. C. and *Swanston* supported the order, and urged that the 84th section of the Companies Act 1862 shows that the time when the winding-up is to be taken as having commenced is the date of the presentation of the petition, and from that time all other litigation, and all proceedings arising from former litigation, are stopped.

Freeman for the Sheriff of Lancashire.

Baggallay, Q. C. replied, that the execution was actually levied before the winding-up petition was presented. The sale and further proceedings were merely consequential upon the judgment and execution.

The sections of the Companies Act 1862 referred to were the 84th, 87th, 94th, 133rd, 163rd (which was compared with sect. 80 of the Joint-Stock Companies Act 1856), 193rd and 201st.

Lord Justice KNIGHT BRUCE said:—A creditor, a just creditor, of an unregistered company, called, I think, the Great Ship Company (Limited), sued that company for the recovery of his debt, and was strongly opposed. The progress of the action was, in consequence slow. Judgment was ultimately recovered in the action against the company, fairly and rightfully recovered, notwithstanding all the opposition to the demand, on or before the 28th Sept. last, and on the 29th Sept. execution by writ of *feri facias* was placed in the hands of the sheriff, who on that day, under the writ, well and lawfully seized certain goods belonging to the company. There had been then no petition for winding-up, but some days afterwards, namely, upon and not before the 6th Oct. following, a petition for winding-up the company was presented—presented only, not heard—and three days afterwards an injunction was obtained *ex parte* for the purpose of preventing the sheriff from selling under the execution. I repeat, that at that time there was no order for winding-up the company, inasmuch as an order for that purpose was not obtained until I think the 21st Nov. Now it is said that the order ought not to have been made; that if there was a discretionary power to make the order under the circumstances, the discretion was not exercised in such a manner as should be sustained. It is said, however, that the order to restrain the sale was well made under the 201st section of the last Companies Act, which enacts, "that the court may at any time after the presentation of a petition for winding-up an unregistered company, and before making an order for winding-up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as hereinbefore provided, upon such terms as

the court thinks fit." Now as to this section two doubts have presented themselves to my mind; first, whether the action having been concluded by judgment and execution, and there being nothing more to be done in it but to raise the money by sale of the goods, such a case was within the language of this section according to its true construction, the words being, "to restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company." It has been ably argued on the part of the app., that the execution in this case was not within the provisions of this section, and I am not sure that the argument is not well founded. Another point on which I entertain doubt is, whether an *ex parte* injunction could be granted under the terms of this section. I wish, however, not to say more at present than that as to each of these points I doubt. But assuming that in neither case is the doubt well founded, assuming that such a case as the present was within the language of the Act, and assuming that an *ex parte* injunction could be granted, I think that the circumstances of the case were not such as to call for the exercise of the judicial discretion of the court, and that there was no sufficient ground in point of equal justice, as the matter appears to me—speaking with the greatest deference, I need not say, to the eminent judge before whom this case has been—no state of circumstances sufficient to induce the court to act against a just creditor in lawful possession of a judgment followed by execution, there having been no petition for winding-up the company until some days after the sheriff had been in possession. I therefore respectfully dissent from the order made in this instance, without giving any opinion upon either of the other two points I have mentioned, except intimating a doubt upon each. The order is one that had better be discharged, and I think it should be discharged accordingly.

Lord Justice TURNER said:—I am of the same opinion. The question, as it seems to me, depends entirely upon the 201st section of the Act. The 87th section has no application except when an order for winding-up the company has been made. The 163rd section does not affect the present case, because the 163rd section applies only to cases where an execution is put in force after the commencement of the winding-up which (as Mr. Swanston correctly pointed out) is after the petition has been presented. But here the execution was put in force before the petition was presented. The question, therefore, is one upon the 201st section of the Act. Now, in considering the 201st section of the Act, I lay out of consideration the point to which my learned brother has adverted, whether this sale under the execution put in force, would or would not be a "proceeding" within the meaning of that section. I give no opinion whatever upon that point. But at all events the 201st section gives power to the court, and puts it entirely in the discretion of the court, to say whether the proceedings should or should not be restrained by the order of the court. The true question therefore is, what circumstances ought to influence or guide the court in the exercise of that discretion. In my opinion the court, in dealing with a question thus dependent on its discretion, is bound to look to the legal rights of the parties, and to the interests not of one class of creditors only, but of each particular class of creditors who may be affected by the decision at which it shall arrive. I think, with all deference to the M.R., that there is nothing in this Act of Parliament which gives to the general creditors of this company any right to have their interests consulted in preference to the interests of the particular creditor whose case may come before the court. I think it is the duty of the court to look and hold an even hand between the interests of all the parties, and I take this section to have been introduced into the Act of Parliament very much with a

view to meet cases in which there might have been unfair proceedings on the part of the creditor who is seeking to enforce those proceedings against the assets of the company. Above all, I think it would be the bounden duty of the court, in considering the question as to the exercise of its discretion in granting an injunction in cases of this description, to see what would be the duty, or might probably be the duty of the court, if the order to wind-up had been actually made and an application had been made to the court by the creditor for leave to issue execution; and I cannot, in the circumstances of this case, see upon what ground this court could, after the order had been made, have refused to this creditor a right to proceed under the execution which had been issued by him. Here, however, is a case of *bonâ fide* judgment, perfectly obtained without any suspicion of fraud—obtained, as my learned brother has said, after great opposition; execution issued upon that judgment, property seized under the execution, and nothing to stop it except the power which is given to this court under the 201st section of the Act. With all due deference to the M.R., I think that that power has not been judiciously exercised under the circumstances of this case, and I think, therefore, that the injunction ought to be dissolved."

Freeman, on behalf of the sheriff, asked for the costs of his appearance. In answer to questions of their Lordships, it appeared that he had been served with notice of the original motion, but not of the appeal motion, though he appeared at both hearings.

Their LORDSHIPS therefore thought that he should be allowed his costs at the Rolls, but not in this court, as he had not been served.

Order: discharge the order refusing the motion, and dissolve the injunction, the app. to have his costs here and at the Rolls. Liberty to the resps. to apply to the M. R. as to their costs.

Solicitor for the judgment-creditor, *Hindley*.

Solicitors for the petitioners who had obtained the winding-up order, *Murray, Son and Hutchins*.

Solicitors for the Sheriff of Lancashire, *Mackinson and Carpenter*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Nov. 19 and 25.

WILKINSON v. ROGERS AND ANDREWS.

Covenant—Breach of—Injunction.

A covenant to use a house as a dwelling-house only, is a covenant running with the land.

A sub-lessee who was bound by a covenant in a lease to use a particular house as a dwelling-house only, put up a notice in the window of it as follows:—"Alphons Andrews, Coal-office; and at the Coal Exchange." Orders were taken by him for coal at the house, but no coal was actually supplied there to customers, and the house was, in other respects, used as a dwelling-house. Upon a motion by the plt. (the reversioner) for an injunction to restrain the defts. (the lessee and the sub-lessee) from putting up the notice, or using the house otherwise than as a dwelling-house only, it was

Held, that the injunction must be granted.

This cause came on upon a motion, on behalf of the plt., for an injunction to restrain the defts., their tenants, servants and agents, from using a house and premises, No. 39, Westbourne-grove, for a coal office, or allowing the same to be used, and from carrying on, or allowing to be carried on, the business of a coal merchant therein, and from exhibiting a certain placard or notice, or from using, or allowing the said house and premises to be used other than as a private dwelling-house, and from in any manner violating the covenant

and stipulations contained in a certain indenture dated the 25th Jan. 1859, and for damages, costs and further relief.

The facts of the case, as they appeared from the bill, were shortly these:—

By an indenture, dated the 28th Aug. 1844, and made between Christopher Rawlinson and Frederick Bedwell of the first part, William Lent of the second part, William Kinnard Jenkins of the third part, Catherine Elvira Jenkins of the fourth part, and Charles Hammond of the fifth part: the parties thereto of the first, second, third, and fourth parts duly demised, leased, and confirmed unto Charles Hammond, his executors, administrators and assigns, the piece of land, and the house then built thereon (being No. 39, Westbourne-grove aforesaid), for the term of seventy-six years and one quarter of another year, at the yearly rent of 6*l.* 6*s.*: and the indenture contained covenants by the lessee, his executors, administrators and assigns, with the parties thereto of the first part, their executors, administrators and assigns, and also by way of separate covenant with the said William Lent, his heirs and assigns, and as another and separate covenant with the said William Kinnard Jenkins and his assigns, and the said Catherine Elvira Jenkins, her heirs and assigns, among other things, "to keep and use the said messuage and premises as and for a private dwelling-house only, and that he should not suffer to be done upon the said premises any act or thing which might be, or grow to be, an annoyance, damage, or disturbance to the lessors, or of the other tenants for the time being of the estate of the said William Kinnard Jenkins, at Westbourne-grove aforesaid."

By an indenture dated the 12th April 1851, Charles Hammond, in consideration of 3300*l.* duly assigned the residue of the above-stated term to John Sperling, his executors, administrators and assigns, but subject to the payment of the rents and performance of the lessees' covenants respectively reserved and contained in the indenture of the 28th Aug. 1844.

By an indenture dated the 25th Jan. 1859, and executed by John Sperling of the one part and the Rev. William Garrett Lewis of the other part, John Sperling demised to William Garrett Lewis, his executors, administrators and assigns, the said messuage, No. 39, Westbourne-grove, aforesaid, for twenty-one years from the 25th Dec. 1858, determinable as therein mentioned, at a clear yearly rent of 52*l.* 10*s.* "And the said William Garrett Lewis did thereby covenant and agree with the said John Sperling that he the said William Garrett Lewis, would pay the said rent of 52*l.* 10*s.*, upon the days thereinbefore appointed, and further that he the said William Garrett Lewis, his executors, administrators and assigns, should and would keep and use the said messuage as and for a private dwelling-house only, and should not do or suffer to be done upon the said premises, or any part thereof, any act or thing which might be or grow to be an annoyance, damage, or disturbance to the John Sperling, the superior landlord or landlords for the time being of the said premises, or the tenants for the time being of the said John Sperling, or the superior landlord or landlords of adjoining or adjacent premises."

By an indenture dated the 22nd Dec. 1860, and executed by John Sperling of the one part, and the plt. of the other part, John Sperling, in consideration of 2900*l.*, assigned the residue of the above-stated term to the plt., his executors, administrators and assigns; but subject to the rent and covenants in the said indenture of the 28th Aug. 1844, and on the part of the lessee to be paid, observed and performed.

In the month of July 1862 the Rev. William Garrett Lewis assigned all his interest in the messuage No. 39, Westbourne-grove, and the said indenture of the 25th

Jan. 1859, to the deft. William Rogers; but subject to all the covenants and provisions in the said indenture contained. William Rogers sub-let the premises to the deft. Alpheus Andrews. Both the defts. had, when they obtained their respective interests on the premises full notice of all the conditions and covenants contained in the indenture of the 25th Jan. 1859. In violation of those covenants and conditions the defts. recently ceased to keep and use the said premises as a private dwelling-house, and opened the same, or allowed them to be opened as a coal-office, and exhibited, or allowed to be exhibited on the window of the said premises a placard or blind, inserted, with the following words on it:—

"ALPHEUS ANDREWS.

"Coal-office.

"And at the Coal Exchange."

The bill then stated that the defts. carried on or allowed to be carried on the business of a coal merchant on the said premises, and did not keep and use them for a private dwelling-house only, but by using or allowing the same to be used for the purpose of such coal business, the character of the neighbourhood was lowered, and a nuisance was created to the plt., who was the superior landlord of the adjoining or adjacent premises, and great damage was done to the plt. The plt. required the defts. to discontinue such breach of their covenant, and to observe the same, but they refused to do so, and the motion was now therefore made, and to the effect already stated.

It appeared from an affidavit filed by the deft. Alpheus Andrews in opposition to the motion, that, he said, it was not true that he had recently ceased to keep and use the premises No. 39, Westbourne-grove aforesaid as a private dwelling-house; that, on the contrary, ever since he entered on the possession of the said premises the whole of such premises had been and still were, used as a private dwelling-house, except that he had set apart one of the rooms on the ground-floor as an office for the purpose of receiving orders for the supply of coals. He never had kept, nor did he now keep on the said premises or any part thereof, coals for sale. The houses in Westbourne-grove aforesaid opposite the said premises No. 39 and throughout the greater part of the grove were used as shops, and the houses on the same side as the said premises No. 39, with few exceptions, were also used as shops; that, save in so far as the mere circumstance of his receiving orders at the said dwelling-house for the supply of coals, he denied that he had at any time carried on or allowed to be carried on upon the said premises, No. 39, Westbourne-grove, or any part thereof the business of a coal merchant, or that he had used or allowed the same to be used in any manner to lower the character of the neighbourhood, or to create a nuisance to the plt., or that any damage had been done, or was now being done, to the plt. by reason of his receiving orders at the said dwelling-house for the supply of coals, or his having placed in the window of such room his name, as alleged in the said bill.

Selwyn, Q.C. and *Swanston* appeared in support of the motion, and cited

Kemp v. Sober, 1 Sim. N.S. 517;

Johnston v. Hale, 2 K. & J. 414.

Locock Webb appeared for the deft. Alpheus Andrews.

J. H. Palmer, Q.C. and *Boyle* for the deft. Rogers.

Nov. 25.—The MASTER of the ROLLS.—In this case an application was made to the court by the plt. for an injunction to restrain the defts. (or rather one of the defts.) from putting up an inscription on a blind in a window of his house, stating that it is a "coal office." Now, the decision of the questions involved depends, in the first place, upon the construction of the covenants which form part of the lease subject to which the deft. Andrews holds; and, secondly, on the acts

done by him. It appears that by an indenture dated the 25th Jan. 1859, the Rev. William Garrett Lewis became the lessee of No. 39, Westbourne-grove, the house in question, for a term of twenty-one years, from the 25th Dec. 1858, at the rent and under the covenants therein contained. Among those covenants was the following: [The M. R. read it, as above stated, and continued.] In 1862 Mr. Lewis assigned all his interest in the premises to the deft. Mr. Rogers, under whom, as a sub-lessee, the deft. Andrews claims. The first question is, whether Andrews is bound by the covenant which I have read? A somewhat bold argument was addressed to me on that part of the case. It was said that the covenant did not run with the land; or, if it did that, nevertheless, Andrews was not bound by it, as he was nowhere named in the indentures in which it was contained. I suggested, at the time when that argument was advanced, that I thought it was not good law. In the time of Queen Elizabeth, perhaps, the question might have been—as in fact it was—doubtful. But *Spencer's* case settled the doubt. The 6th resolution in that case, and which I will read from Mr. Smith's able work, the *Leading Cases at Law*, is to this effect—(1st vol. p. 92, 3rd edit.)—"If lessor for years covenants to repair the houses during the term it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come; as well those who come to it by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they, who shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side, be bound by the like covenants when the lessee makes it with the lessor." There are a number of cases collected in the notes to *Spencer's* case—all establishing the law as it is there stated—viz., that a covenant of this nature runs with the land. I am of opinion, therefore, that on this part of the case the deft. Andrews is bound by the covenant. But that being so, the next question is, whether there has been a breach of it by him? Now what Mr. Andrews has done is this: there is a bay window, on the ground floor of the house, with two sides to it, which I may call lateral windows. On one of those he has put up his name, with the words "Coal-office" added. He tells us, in his evidence, that he has set apart one room for the purpose of taking in orders there for coals, and that orders are there taken; but he adds, that no coals are actually sold on the premises. The real question is, whether that is using the house as a dwelling-house only? I must own I am of opinion that it is not. It is true, coals are not supplied to customers on the premises, but they are supplied elsewhere, by the party at the house, to customers who come and give their orders there. I have myself been to examine the *locus in quo*, and I found considerable difficulty in doing so. The street was taken up; but I saw this—which was, in fact, alleged by the deft.—that, with the exception of this house, and three others near it, belonging to the same landlord, the street is one almost entirely composed of shops. That may or may not be an advantage to the plt.; but, at all events, here are four houses close together, and certainly not in themselves suited to shops. I find on one of them a plate with the word "Surgeon;" on another, the word "Dentist." Now, I must say, that I think, if a person wanted a private dwelling-house, he would feel that, to have a coal-office next door would be a most undesirable thing. That being so, I am of opinion, upon the second question, that as the lessee has entered into, or, which is the same thing, is bound by the covenant, it must be enforced, unless the plt. has done anything to forfeit his right to have it performed. As to

that, it was said that a photographer, in one of the adjoining houses, had been allowed to put up his name on the window of his house, without objection. But that was not true; or if it was, the name has been removed for upwards of two years. I think the plt. has not done anything to forfeit his right to the injunction he now seeks; and I have, under the circumstances, no option to exercise. I must grant the injunction to restrain the defts. in the terms of the prayer of the bill, from putting up the notice complained of.

Solicitor for plt. *H. J. Riches.*

Solicitor for deft. *D. Alston.*

Thursday, Dec. 3.

BIRDSALL v. BRADLEY.

Practice—Award—Order to perform.

Where a plt. had been ordered to comply with the terms of an award thereafter to be made, but when the award was made he refused so to do: it was Held, that the proper course was not to attach him for contempt of the order made, but to make another order directing him to comply with the terms of the award within a certain time; otherwise that he should be attached.

This was a motion on behalf of the deft. in the suit for an order directing the plt. to obey an award.

It appeared that an order had been made in the suit on the 23rd Dec. 1862, by which the plt. had been directed to do all such acts as might be necessary for the purpose of carrying out an award thereafter to be made. The award was duly pronounced by the arbitrator, but it had not been made a rule of court. The plt., notwithstanding the order of the 23rd Dec. 1862, refused to do anything to effectuate the award.

Francis Webb now moved for an order to the effect above stated. He said that the old practice was to serve the party who refused to comply with an award with notice to appear and show cause why he so refused; and then, upon an order being made compelling him to perform the award, and his disobedience to that order, to issue an attachment against him. Here the order of the 23rd Dec. had been disobeyed, but it was not at present sought to do more than to compel the plt. to perform the award.

The MASTER of the ROLLS.—Are you sure, Mr. Webb, that the order you ask is correct? Ought he not to be attached at once for disobedience?

Webb submitted that such an order as he now moved for was in accordance with the existing practice.

The MASTER of the ROLLS, after some consideration, said:—I will make the order according to the terms of the notice of motion. If the plt. does not obey it within, say ten days, let an attachment issue against him for contempt.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs.
Barristers-at-Law.

Friday, Nov. 20.

WORDSWORTH v. PARKINS.

Practice—Revivor.

Where an administration suit has abated by reason of the sole plt. dying without any transmission of his interest, the 32nd Consolidated Order is not applicable, but the court, upon a bill of revivor being filed, will make an order to revive in the usual form.

The original bill in this suit had been filed in 1830, being a suit for the administration of a testator's real and personal estate. The plt. was tenant for life in possession, and the defts. were some of them tenants for life in remainder, and others had absolute interests, contingent on their surviving the plt. The plt., the

first tenant for life, however, had outlived the other parties, and she was now dead.

Charles Browne now moved for an order of revivor.—It had been held in *Watts v. Watts*, Johns. 631, that a common order of revivor was not sufficient where the interest of the party had wholly determined; in other words, that the 15 & 16 Vict. c. 80, s. 52, did not apply to such a case. It was necessary then to proceed under the old practice, which made it incumbent on him to exhibit a bill of revivor or supplemental bill in order to obtain the usual order to revive the suit. This had been done in the present case. The old practice was regulated by the orders of 1845, which had been abrogated by the Consolidated Orders, but no new orders had been substituted for them. In consequence therefore of there being no orders by which the practice in such a case was regulated, he asked that the supplemental bill which had been filed should be treated as a supplemental statement under the 32nd Consolidated Order. The order would be served on the defts., who would then be entitled to object.

The VICE-CHANCELLOR said it was a case where the usual order might be made, viz., that the suit which had been abated might stand revived, and be in the same plight and condition as the same was in at the time of the abatement.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSTON, Esqrs., of Lincoln's-inn, Barristers-at-Law.

Thursday, Nov. 19.

SMITH v. JOHNSON.

Copyright—Copyright Amendment Act, 5 & 6 Vict. c. 45—Publishing a part or portion of a work "separately or singly," an infringement of the 18th section of the Act.

In 1849 the plt. wrote a series of tales for a weekly periodical, in which they were published. In 1863 the deft., the proprietor, in a supplementary number of the same periodical, commenced a republication of one of the tales, and that republication had been continued in supplementary numbers ever since (such numbers, however, containing other tales besides the plt.'s):

Held, that this was a publishing "separately," within the meaning of the 18th section of the Copyright Act; and having been made without the consent of the plt. or his assigns, it was restrained by the court.

Bacon, Q. C. and Westlake moved for an injunction on behalf of the plt. John Frederick Smith, to restrain the defts. William Spencer Johnson and Thomas Wilson, their printers, publishers and agents, from "publishing, or suffering to be published, or aiding, or being concerned in the publishing of certain tales comprised under the title of 'The Chronicles of Stanfield Hall,' or any of them, or any part thereof respectively, in any supplementary number of the *London Journal*, or otherwise, without the consent previously obtained of the plt., the author, or his assigns."

The plt. stated that the *London Journal* is a weekly periodical consisting of tales, a part of one or more tales appearing in each number. In or about the year 1849 the plt., the then proprietor of the *London Journal*, composed for it three tales, called "Ulrich the Saxon," "The Heiress" and "Cromwell, or the Protector's Oath," which were comprised under the common title of "The Chronicles of Stanfield Hall," and were published in the said periodical in or about the same year. On that occasion the plt. did not assign or relinquish to the said proprietors of the

London Journal any of the rights which are granted or reserved to authors by law.

The defts., the present proprietors of the *London Journal*, were now publishing weekly what was called a supplementary number of the *London Journal*, bearing on its face that it was to be had with or without the current number of the *London Journal*, and containing each week parts of several tales. In the supplementary number for Saturday, 27th June 1863, there was commenced a republication of the tale called "Ulrich the Saxon," under the title of "Stanfield Hall," by John Frederick Smith, Esq., and that republication had been continued by the appearance of a further part of the same tale in each succeeding supplementary number. In the headings of the supplementary number there was printed in capital letters, "A Re-issue of John Frederick Smith's best Tales, 'Stanfield Hall,' and 'Amy Lawrence, the Freemason's Daughter.'"

The plt. had never given his consent to this republication, and by his bill in this suit he alleged that he held all his rights in respect of the tales comprised under the title of "Stanfield Hall," in trust for Messrs. Petter and Galpin, of La Belle Sauvage-yard, who, on the 6th Nov. inst., wrote to the defts. requesting them at once to discontinue the republication of the said tales, which, however, they ultimately refused to do. It was also alleged that the deft. threatened, and intended, to continue the republication of these tales in the supplementary numbers of the *London Journal*.

For the plt. it was contended that the real question was, whether the republication was a separate publication within the meaning of the Copyright Amendment Act. The 18th section of 5 & 6 Vict. c. 45, was as follows:—"And be it enacted, that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted and carried on, or shall hereafter project, conduct and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such works, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act. Except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor, shall not publish any such essay, article, or portion separately or singly, without the consent previously obtained of the author thereof, or his assigns." They referred to the cases of

Mayhew v. Maxwell, 1 J. & H. 312; and

The Bishop of Hereford v. Griffin, 15 Sim. 190.

Malins, Q.C. and Speed, for the defts., contended,

first, that the act complained of was not a violation of the statute. The author, under the Act, had no copyright; his only right was to prohibit any publication in a separate or single form—that was, any publication of his complete story without others. In this case all that the defts. did was to publish in a supplementary form parts of the tales, just as if they were published for the first time, though not always conjoined as they were in the first instance. The cases of the *Bishop of Hereford v. Griffin*, and *Mayhew v. Maxwell*, were to be distinguished from the present. But secondly, the plt. had lost any right he had by his acquiescence. The publication had been going on for a year, twenty-three parts of the tale of “Stanfield Hall” had been published, and it would now be most oppressive to interfere with the publication. Under these circumstances it was submitted that the motion must be refused.

The VICE-CHANCELLOR.—The proviso in the Act of Parliament which prohibits a publication “separately and singly” is a proviso intended for the benefit and protection of authors. This court in previous cases has, and I think wisely, construed the language of the Act so as to afford that protection which was clearly intended by the Legislature; and that protection being intended, it is the duty of this court to give the relief now asked. In the case cited before the Vice-Chancellor of England (*The Bishop of Hereford v. Griffin*), it was said in argument that the meaning of the proviso, taken with the whole clause, is not to vest a copyright in the proprietors or publishers of a periodical work, but simply to give them a licence to use the matter for a particular purpose. That was the view adopted by the Vice-Chancellor of England, that was the view subsequently adopted by Wood, V. C., and that is the view which, upon the construction of the language of the Act, fortified by these authorities, I feel myself bound to take. The first part of the clause contemplates a publication of works, called periodical works, in parts, and it contemplates the labour which authors bestow in composing literary works which are to be published as portions of those parts. The words “parts and portions” occurring in this clause are extremely significant, and fully justify the view which this court has taken in previous cases. Keeping in view this principle of construction—that the Act of Parliament was intended to give a licence only to the proprietors of periodical works purchasing and paying for a literary composition to be published as a part or portion of a periodical work—the construction of the words in the proviso which prohibit them from publishing these parts or portions which “alone” are the property of the author, from publishing these portions “separately and singly,” seems reasonably plain. “Publishing separately” must mean publishing separately from something. What is that “publishing” which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published. That that is the view which has been previously taken the cases show, and the language in the case of *Mayhew v. Maxwell* was to the effect that the deft. should be prohibited from publishing the literary work then in question otherwise than as part of the Christmas number of the *Welcome Guest*. Now, that Christmas number was a thing called a “part” in the Act of Parliament which describes these periodical works as being published in a series of parts and numbers. The Christmas number is part or portion of the other composition. The order of this court peremptorily prohibited the deft. Maxwell from publishing it separately from the other part or number. What has the deft. in this case done? He has acquired, under the first clause of the Act of Parliament, an actual property in this literary composition, which is

called “The Stanfield Hall Tales,” published in portions or parts of a certain periodical work. The Act of Parliament says the publishers shall not publish these portions separately from those parts for the publication of which they have obtained a licence already. What they have done is to print the portions already published of those antecedent parts in what is called a supplementary number, and which may be purchased with or without the number in which the “portions” were originally published. That is a separate publication—separate from the “part” in which it was originally published. To reprint in numbers which may be had with or without the concurrent number of the work, is an act not permitted by the Legislature. I must therefore restrain the defts. by an injunction in the terms prayed for. The case comes within the decision of *Mayhew v. Maxwell*, which followed the decision in the *Bishop of Hereford v. Griffin*, where the late V. C. of England considered that an author was entitled to the protection of this court; and I am very glad the Legislature has given to authors a right to such a protection. As to the argument that the plt. has forfeited that right, there is scarcely any pretence for it; but it is said that it will be more convenient to allow the publication to go on, and keep an account of the profits. That, however, is a matter for the parties themselves to decide upon. The plt. being right in his contention, a similar injunction to that which the law has sanctioned in other cases ought to be granted to him. As to the other argument, that this is a publication conjoined with other works, it is not sound.

The order was in the following terms:—“That those portions of the *London Journal* called ‘The Stanfield Hall Tales,’ must not be published otherwise than as portions or parts of the numbers in which they have been previously published, or in any other way separately or singly, without the consent or licence of the plt.”

Solicitors: for the plt., *Ashurst and Morris*; for the defts., *Benham and Tindell*.

Tuesday, Nov. 24.

TAYLOR v. SPARROW.

Custody of title-deeds—Devisees in trust—Tenant for life and remainderman.

Testator devised the residue of his real estate to the plts. and their heirs, upon trust to permit and suffer his sisters-in-law S. and M. to receive and take the rents and profits for life, without power of anticipation, and in case either should die or marry, then the one surviving and remaining unmarried to receive the whole income; but in case both should marry, then upon trust to sell and distribute the proceeds in manner hereinafter mentioned, as if they had both died; and from and after the decease of them the said S. and M., or both of them marrying, then testator directed the plts. to stand possessed of the trust-funds, upon trust to divide the same amongst his nephews and nieces (naming them) equally. The tenants for life were empowered to renew leases for terms of years in the names of the trustees. S. died in the lifetime of the testator: Held, that M., the legal tenant for life, having possession of the title-deeds, was entitled to retain them as against the plts. the trustees.

This was an administration suit.

George Taylor, of Edgbaston-street, Birmingham, by his will, dated the 16th March 1857, devised and bequeathed unto his two nephews, the plts. Jesse Taylor and George Taylor, their heirs, executors, &c., all the residue of his real and personal estate upon trust to permit and suffer his sisters-in-law Sophia Sparrow and the deft. Matilda Sparrow, to

receive and take the rents, interest, dividends and annual proceeds thereof for and during the term of their natural lives, to and for their own use and benefit, and their respective receipts alone should be the only good and effectual discharge for the same; and the same should be received by the said Sophia Sparrow and Matilda Sparrow notwithstanding any assignment or disposition by either of them made; and in case either of them, the said Sophia and Matilda Sparrow, should depart this life, or marry, then the one surviving and remaining unmarried should be entitled to receive the whole of the income arising from testator's said estate and effects, as the same should become due and payable; but in case both of them should marry, then testator directed his trustees to stand possessed of his estate and effects, upon trust to sell the same, and to pay and distribute the money to arise from the sale in the manner therein mentioned, as if they had both departed this life. And from and after the decease of them, or both of them marrying, then testator directed his trustees to stand possessed of the trust-funds upon trust to pay and divide the same amongst the testator's nephews and nieces (naming them) equally. And the testator empowered his trustees to stand possessed of the share of any nephew or niece dying before the distribution of his estate, upon trust to invest the same and apply the proceeds for the benefit of the children by the first marriage of such nephew or niece. He also empowered his trustees, or his said sisters-in-law Sophia Sparrow and Matilda Sparrow alone, to pay to any ground landlord any sum of money which should be awarded, or which should be payable from his estate by reason of the expiration of any lease during the life or lives of his sisters-in-law, or which might be recoverable by any breach or default in the fulfilment of any of the covenants in any lease under which he held any of his properties. The testator also empowered his said sisters-in-law to renew any lease of any part of his estate for a term of years, with power to take down such buildings as might be erected thereon, and erect others more suitable and convenient, as they should be advised. The testator also charged his estate with a sum of money not exceeding 4000*l.* for the above purposes; and he authorised his trustees to take such leases in their names and to hold them upon the trusts of his will. The testator also appointed his said sisters-in-law the executrices and the plts. trustees of his will, and devised to the plts. all estates vested in him on mortgage or upon trust.

Subsequently to the date of the will Sophia Sparrow died; and by a codicil, dated 7th Feb. 1861, the testator appointed the deft. Matilda Sparrow sole executrix of his will and codicil.

The testator, at his death in Oct. 1861, was seised of or entitled to certain freehold property at Birmingham, consisting of several houses, and also to leaseholds, and the deft. Matilda Sparrow, upon the decease of the testator, possessed herself of the several title-deeds relating to the testator's freehold and leasehold properties. The plts., as devisees in trust, and devisees of mortgage and trust estates, applied to the deft. to hand over these deeds to them. This she refused to do. After some correspondence, on the 23rd Jan. 1863 the plts.' solicitor made a formal demand of the deeds; and on the following 5th March this bill was filed against the tenant for life Matilda Sparrow and Jacob Townshend Taylor, as one of the residuary legatees in remainder, praying, amongst other things, for the proper administration of the trusts of the will, and "that all proper directions might be given respecting the custody of the title-deeds and securities relating to or forming part of the testator's estate."

Bacon, Q. C. and Renshaw, for the plts., argued that they, as remaindermen of the testator's legal estate under the will, were entitled to the custody of

the title-deeds, which were unsafe in the keeping of the tenant for life. They, as trustees, had certain onerous and important duties to perform, and they submitted that, if the court should be of opinion that they were not entitled to the deeds, at least it would impose such terms on the tenant for life as would ensure the safety of the deeds and exonerate the trustees from liability. They cited

Lady Langdale v. Briggs, 8 De G. M. & G. 416, 439;

Warren v. Rudall, 1 John. & H. 1.

Malins and C. Hall, for the deft. Matilda Sparrow, contended that she, as legal owner of the property, was entitled to the custody of the deeds.

O. Morgan, for the deft. Jacob T. Taylor, referred to

Lee v. Prieaux, 3 Bro. C. C. 383;

Lewin on Trusts, 488.

THE VICE-CHANCELLOR.—I see no reason for changing the custody of these title-deeds. It is not the rule of the court to do so in such a case; and as to the deft. giving security, that would be a strange thing to require in a case where no danger has been suggested. The circumstances in the case of *Lady Langdale v. Briggs* were very different. No rule was there laid down which is applicable to this case. But I observe that, according to Mr. Lewin (*Trustees*, p. 592, n.), the Court of C. P. seems to have recently laid down a rule, or rather approved of a rule previously laid down and in early times acted on, to the effect that, "where the estates are legal, the person in possession of the deeds, whether tenant for life or remainderman, may hold them. The rule is, who first takes, he keeps: (*Foster v. Crabb*, 12 C. B. 136)." That is quite intelligible at law, because it could not be said that the possession was wrongful if the person had any interest in the property, and in such a case a court of law would not change the possession of the deeds, and this court very rarely interferes with the possession of deeds when found in the hands of a tenant for life, particularly when there is no suggestion that there is any danger. As to the peculiar rule in reference to the case of a father and son, noticed in the case of *Warren v. Rudall*, I never heard of any such rule. But, no doubt, Wood, V. C. found good reason for stating what he did in that case. It is, however, only an *obiter dictum*. I cannot make any order for changing the custody of the deeds in this case.

Solicitors for the plts., *Elsdale and Byrne*, agents for *Homfray and Holberton*, Brierley-hill, Staffordshire; for the defts., *Chester and Urquhart*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Monday, Nov. 16.

WHITE v. CARMARTHEN AND CARDIGAN RAILWAY COMPANY.

Public company—Practice—Suit by shareholders—Demurrer.

The directors of a railway company issued bonds for the purpose of paying a contractor the price of works performed by him in the prosecution of the objects of the company. These were in excess of their authorised capital and the borrowing powers granted to them by Parliament:

Held, on demurrer, that this was not illegal.

A suit by a shareholder must be on behalf of himself and all other the shareholders of the company.

Demurrer.

This was a bill filed by one of the shareholders of the Carmarthen and Cardigan Railway Company

against the company, their directors, and a contractor of the name of Holden, praying for a declaration of the illegality of certain bonds issued by the company, and for an injunction to restrain the company from issuing any bonds, &c. not authorised by their Acts.

The company had been authorised to raise 200,000*l.* and 174,000*l.* capital, of which 137,284*l.* 13*s.* 6*d.* had been raised, and to borrow 60,000*l.* and 58,000*l.* The whole of the former sum had been borrowed, but none of the latter. The amount of the bonds exceeded the 58,000*l.*

The allegations of the bill upon which the question turned were the following paragraphs:—

"7. The sum so received on account of capital and for loans was wholly insufficient for carrying into effect the objects of the said company, and having spent the whole of the paid-up capital and the amount so raised by loans, and being unable to obtain any more money on account of the subscribed capital, the directors of the company, the defts. other than the said H. A. Holden, devised a scheme for evading the restriction contained in the said Act as to the amount of money the company was empowered to borrow, and in pursuance of such scheme they proposed to the contractors for the construction of the railway to pay them the amount of their contracts for the work to be done by bonds or obligations of the said company, payable at certain specified deferred periods, with interest half-yearly; in the meantime such bonds to be issued in such manner and for such amounts as the contractors might desire.

"8. The contractors, before agreeing to accept payment in this manner, ascertained, as the fact was, that these bonds could only be negotiated at a discount of from 20 to 25 per cent., and made their contracts accordingly.

"9. The effect of this arrangement was, that the company paid for the execution of its works a much larger sum than would have been paid had the payment been made instead of these bonds; and the property of the company and of the shareholders on which the whole of the paid-up capital of the company and the 60,000*l.* so borrowed, became charged with a debt of many thousands of pounds wholly unauthorised to be created."

11. The form of these bonds was then set out, which did not vary from the usual form of bonds of joint-stock companies.

The bill then alleged that in 1862 the company had obtained a fresh Act, enabling them to raise fresh capital, and conferring upon them extended borrowing powers, and proceeded as follows:—

"15. Notwithstanding the powers conferred by the last-mentioned Act upon the company for the raising of additional capital to the amount of 174,000*l.*, no steps whatever had been taken for that purpose, but in lieu thereof the defts., other than the deft. H. A. Holden, are proceeding to carry out the works authorised by their several Acts of Parliament by means of bonds as before mentioned.

"16. The bonds so issued would appear to be securities within the meaning of the borrowing powers contained in the said Acts of Parliament, and there is nothing apparent thereon by which the public can know whether such bonds form part of the money authorised by the said Acts to be borrowed, or under what authority the said bonds are created."

"19. The plt. has also lately discovered, as the fact is, that in the month of Jan. 1862 the defts., other than the deft. H. A. Holden, not having sufficient funds to make the deposit required by the standing Orders of Parliament on making their application for the said Act 'of 1862,' applied to an agent to raise money for them, and they did accordingly raise, through the said agent, between 11,000*l.* and 12,000*l.*, for which they issued bonds of the company similar in

form to those before mentioned; and the money so raised, to the amount of 5960*l.*, was handed to the deft. John Probert, and by him paid to the Accountant-General as part of such deposit, and the sum of 5568*l.* was paid to the secretary or solicitor of the company, and by him or them also paid to the Accountant-General for the like purpose."

The bill further alleged a threat and intention by the directors to continue the issue of the bonds.

To this a demurrer was filed for want of equity.

Roll, Q.C., Giffard, Q.C. and Locock Webb, for the demurrer, contended, first, that the usual form of bills by a shareholder of a company had been departed from: (*Mozley v. Alston*, 1 Ph. 790.) That the conduct of the directors was not illegal; on which point they referred to

Royal British Bank v. Turquand, 5 E. & B. 248;

6 E. & B. 227;

Troup's case, 29 Beav. 353;

Baker's case, 1 Dr. & S. 55.

Sir H. Cairns, Q.C. and Rosburgh, for the bill, suggested that the other shareholders might be brought before the court according to the present practice. This objection, however, was one as to parties only, and therefore *ore tenus*. The conduct which the plt. had pursued was to raise money in an unauthorised manner and saving themselves the necessity of going to Parliament for further powers. They cited

Emperor of Austria v. Day, 2 Giff. 628, 4 L. T.

Rep. N. S. 274, 294;

The VICE-CHANCELLOR said that the demurrer must be allowed, but he would give leave to amend. The plt.' case was not very clearly stated, and of course the allegations of the bill must be taken most strongly against the pleader. The transactions complained of were, first, those stated in the 7th paragraph; and secondly, that the company when about to apply for a new Act of Parliament, which they afterwards obtained, raised the amount of the deposit by means of one of these bonds. Were these transactions consistent with the company's powers? If the company expecting to obtain extended parliamentary powers could find a contractor willing to take these bonds in payment or part payment for work done, the court could not hold that it was either a fraud upon the company's Act or an unauthorised mode of raising money. The form of the bonds was that given in the schedule to the Lands Clauses Act, and it could not be said that it was a device for issuing bonds assignable in the market, as if they were bonds or debentures issued under the company's parliamentary powers. As to the later transaction, the case was even less strong. That transaction might or might not have been a proper one originally; but the Act of Parliament, which the court must hold to be beneficial to the shareholders, had been actually obtained by means of those bonds. If the court had been asked to restrain the company from issuing the bonds for the purpose of paying the deposit, it might have done so; but now the money had been actually received and applied, as he must hold, for the benefit of the shareholders. The threat alleged by the bill must of course be restricted to paying the contractor by similar bonds. As to the form of the bill, the plt. could not sue by himself under any notion that his *co-cestui que trust* might afterwards be brought before the court. The forms of the court furnished a distinct course in suits of this description, and the plt. must sue on behalf of himself and the other shareholders.

Demurrer allowed with costs; liberty to amend.

Solicitors: *G. E. Gustard; Gole and Co.*

Common Law Courts.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Tuesday, Nov. 19.

ROSEWARNE v. BILLING.

Pleading—Gaming and wagering—Rules of the share-market—Money paid by broker at the request of the loser of a wager as to the price of shares—8 & 9 Vict. c. 109, s. 18.

If the loser of a wager request a third person to pay the amount of the loss for him to the winner, and that person does in consequence pay it to the winner, an action will lie at his suit against the loser to recover the amount.

Seemingly, if a person is requested by another to make a wagering contract for him, and in case of loss to pay the amount thereof to the winner for him, and he does accordingly make the payment, he may sue the loser for the amount.

Quære, whether, if a person employs a broker to make for him a wagering contract respecting the price of shares, knowing that by the usage of the share-market the broker will have to make the contract in his own name, and to pay the amount of the loss, if any, to the persons with whom he may have contracted, he can, after the contract has been made, by giving notice to the broker not to pay the amount of loss, free himself from all liability to repay the broker what the broker subsequently pays to the winning parties?

Declaration.—For money payable by the deft. to the plt., for money paid by the plt. for the deft. at his request, and for money found to be due from the deft. to the plt. on accounts stated between them.

Second plea.—That the plt. was and is a mining agent, and that the deft. retained and employed the plt. as such agent after the passing and coming into operation of a certain Act of Parliament passed in the session of Parliament held in the eighth and ninth years of her present Majesty, intituled "An Act to amend the law concerning games and wagers," to make and enter into on behalf of the deft., and the plt. then in pursuance thereof made and entered into for the deft. with certain persons whose names are to the deft. unknown, certain contracts by way of gaming and wagering, contrary to the form of the said statute, that is to say, certain wagering contracts under the semblance of pretended sales to the deft. by such persons respecting the market price and value of certain shares in a certain mine called Wheal Harriet on certain days then to come, whereby, under pretence of contracts, the said plt. agreed with such persons, being the persons with whom the plt. so contracted for the deft., that if the price and value of the said shares should be lower on the said future day than on the respective days when the said wagering contracts were respectively made as in this plea is mentioned, he the deft. should receive from the said persons the amount of the difference between the value of the said shares respectively on the several days when the same wagering contracts were respectively made and the market value on the said future days, and if the price and value thereof should be higher on the said future days than on the respective days when the said wagering contracts were respectively made as aforesaid, the deft. should pay to the said persons respectively the amount of the difference between the value thereof on the said days on which the said wagering contracts respectively were made as aforesaid and the market value thereof on the said future days, and the deft. says, that it never was intended that any shares should be actually bought by the deft. or sold or delivered by

such persons in pursuance of the said wagering contracts as aforesaid, or otherwise, as he the plt. always well knew, but that such differences alone should be received or paid by the deft. as aforesaid; and that the money so paid by the plt. was paid in settling and discharging differences which had become payable to the said persons upon the said wagers and contracts so made by the plt. as such agent as in the plea aforesaid, he, the plt., having as such mining share agent, and according to the custom among mining share agents, made the said wagers and contracts in his the plt.'s own name as a principal, without disclosing the name of the said deft.; and that the said accounts were stated by the deft. with the plt. of and concerning the said moneys so paid as aforesaid, and not otherwise.

Demurrer.

Hodgson in support of the plea.—The plea contains no traverse of the allegation in the declaration that the money was paid at the request of the deft., and this amounts to an admission on the record that there was a special request made by the plt. to the deft. to pay the money for him. There is a difference between contracts void and voidable: (*Gye v. Felton*, 4 Taunt. 877.) It is consistent with the plea, that after the deft. had lost the wager, he came to the plt. and said that he knew the contract to be void, but that he wished the plt. to pay the sum lost for him, which would constitute a valid contract to repay the plt. if the plt. paid what was due from the deft. to the third persons. It is not even essential that the request should be made after it was ascertained that the deft. had lost the wager:

Jessop v. Lutwyche, 10 Ex. 614;

Fitch v. Jones, 5 E. & B. 238;

Knight v. Chambers, 15 C. B. 562;

Knight v. Fitch, 15 C. B. 566.

Lopes in support of the demurrer.—The plea expressly avers that the money was won upon a gambling contract to the knowledge of the plt., and it brings the contract within 8 & 9 Vict. c. 109, s. 18, which enacts, "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." The statute would be nugatory if wagering contracts could be enforced wherever a third person intervened.

ERLE, C. J.—I am of opinion that judgment should be for the plt. The law is, that contracts made by way of gaming or wagering shall be null and void, but not that they shall be illegal. No one can sue upon a gaming contract, and the plt. would not have been liable in an action brought against him by the parties with whom he had made the contract, and to whom he had lost. But when he paid them he was acting as the deft.'s agent and at his request, and where a person who has lost a wager requests another person to pay it for him, and that person does pay it, an action lies at the suit of the person so paying to recover the amount from the person for whom he pays. I should be of opinion, if the question came to be tried, that if the deft., knowing the usage of the share-market, requested the plt. as a broker to make such a contract for him as the present, and at the same time requested him in case of loss to pay the amount for him to the persons entitled to it, that would be a continuing request, and the plt. would be entitled to recover money so paid from the deft. If after the loss had been sustained the deft. countermanded his authority, and gave the broker notice not to pay the amount, a question might arise, whether or not he was at liberty to rescind his request, and whether he would not be liable to repay the broker if, according

C. B.]

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[C. B.]

to the rules of the market, the broker did pay it for him; but that question does not arise here.

WILLIAMS, J.—A similar plea was held bad in *Jessop v. Lutwyche* and *Knight v. Chambers*. This plea certainly avers that the plt. as agent paid the amount in his own name, but that makes no difference. It is consistent with the plea that the plt. having made the contract in his own name, but having a good defence under the statute to any action at the suit of the winning parties, would have refused to pay them but for a request from the defts. which induced him to do so. Then the defts. are liable to repay him.

KEATING, J. concurred.

Judgment for the plt.

Attorney for the plt., *Stacpoole*.

Attorneys for the defts., *Clowes and Hickley*.

Nov. 18, 19 and 24.

PEARSON V. THE COMMERCIAL UNION ASSURANCE COMPANY.

Policy of insurance against fire—Construction—Vessel lying in docks with liberty to go into dry dock.

The plt.'s vessel was insured against fire by the defts. under a policy of insurance, expressed to be "on the hull of the steamship Indian Empire, with her tackle, furniture, and stores on board belonging, lying in the Victoria-docks, London, with liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy." There was no dry dock attached to the Victoria-docks, but there was a pontoon dock, called the Thames Graving-dock, attached to the Victoria-docks, in which repairs ordinarily executed in a dry dock could be done, but the vessel was too large to go into it. Preventive precautions against fire and appliances for extinguishing it existed both in the Victoria docks and the Thames Graving-docks. The vessel was towed from the Victoria-docks to the nearest convenient dry dock, her paddle-wheels having been taken off in the Victoria-docks in order to enable her to go into the dry dock. After completing her repairs in the dry dock and coming out of it, she remained moored in the Thames in order that her paddle-wheels might be replaced. This was according to the ordinary course pursued by shipbuilders, but the vessel might have been towed at once to the Victoria-docks and have had her paddle-wheels replaced there, though at a far greater expense. The vessel was burnt at her moorings during the currency of the policy, and the defts. disputed their liability under the policy:

Held, that the vessel was entitled under the policy to go from the Victoria-docks to a dry dock, and that she was covered by the policy while proceeding to and returning from the dry dock, but that she was not covered by the policy while moored in the river for a purpose not connected with the transit from dock to dock.

Action upon a policy of assurance against fire, tried before Erle, C. J., at the sittings in London after Trinity Term. The verdict was for the plt., with 10,000*l.* damages, the defts. having leave to move to enter a nonsuit.

The policy was expressed to be "on the hull of the steamship *Indian Empire*, with her tackle, furniture and stores on board belonging, lying in the Victoria-docks, London, with liberty to go into dry dock and light the boiler fires once or twice during the currency of this policy," and the currency of the policy was from the 14th May 1862 to the 14th Aug. 1862. There was no dry dock attached to the Victoria-dock, but there was a pontoon dock called the Thames Graving-dock, communicating with the Victoria-

docks, in which the same repairs could be done to vessels as were ordinarily done in dry docks. The vessel did not go into this dock, but went out of the Victoria-docks, and was towed up the river to a dry dock called Lungley's dock, and having been there repaired, she was moored to a Government buoy in the river for some days, in order that her paddle-wheels, which had been taken off to allow her to go into the dry dock, might be replaced. While so moored the vessel was burnt. The defts. denied their liability under the policy to make good damage sustained by the vessel while in the river.

The evidence adduced at the trial is carefully summed up in the judgment of the court.

A rule having been obtained by the defts. to enter a nonsuit,

Bovill, Q. C. showed cause.—The defts. must show that the vessel was not in the Victoria-docks at the time of the fire, nor in a dry dock, nor going to and coming from a dry dock. The jury have found that she was burnt while on her way back to the Victoria-dock. The vessel was in fact too large to go into the Thames Graving-dock, and that dock is not a dry dock, but a dock in which vessels are placed on pontoons, and raised up out of the water.

Lush, Q. C., Karlake, Q. C. and Sir G. Honyman supported the rule.—The defts.' contention is, first, that the policy only covered the ship while lying in the Victoria-dock or in the adjacent Thames Graving-dock; secondly, that if this was not so, it covered the ship only while in the Victoria-dock or in some dry dock; and thirdly, that assuming the vessel to be protected while passing between the Victoria-dock and a dry dock, she was not protected while moored in the Thames. There was a great difference between dock risk and river risk, and the defts. only intended to insure against the former. The clause giving liberty to go into dry dock was inserted because there is a considerable difference between the risk in wet dock and dry dock. In the Victoria and Thames Graving-docks there were peculiar safeguards against fire, and appliances for extinguishing fire, which did not exist elsewhere. The position of the vessel and the nature of the risk to which she was likely to be exposed must be regarded in construing the policy:

Burgess v. Wickham, 8 L. T. Rep. N. S. 47.

Nov. 24.—ERLE, C. J. read the judgment of the court (Erle, C. J., Williams and Keating, JJ.):—This was an action on a policy by which the ship was insured against loss by fire during three months. The ship was described to be lying in the Victoria-docks, with liberty to go into dry dock and light her boiler fires once or twice. She was burnt within the three months, and the question before us has been, whether, at the time she was burnt, she was covered by that policy. The circumstances that existed at the time the policy was made, relative to its construction, and the circumstances attending the loss, relative to the application of the construction of the loss, appeared to be as follows:—The ship was lying in the Victoria-docks, and was to be repaired in a dry dock. The Thames Graving-dock, in which ships were lifted by pontoons, so as to be dry, was adjoining to the Victoria-docks, but the width of the ship prevented her from going into the pontoon dock. Mr. Lungley's dry dock, which was distant about two miles up the Thames from the Victoria-docks, was the nearest that could receive the ship conveniently, and, for the purpose of entering there, it was necessary to remove the lower half of the paddle-wheels. This was done in the Victoria-dock, and the parts of the wheels were deposited in a barge there, and the ship was towed up to Lungley's dock, and the necessary repairs were nearly completed there in the course of two months. Then the ship was towed down to the Government buoys off Deptford, between 600 and 700 yards from

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the Victoria-docks, and moored there for the purpose of having the parts of the paddle-wheels replaced there. The utmost dispatch was used in pressing this work, and it was nearly completed in ten days. While this was being done, other work was in progress in order to make the ship fit for sea; but there was no delay on this account, and nothing turned on this work. Then the ship was burnt at her moorings. The evidence showed that it was usual with the great shipbuilders in the Thames for ships of great width, which had taken off the half of the paddle-wheels for the purpose of going into their dry docks, to lie in the Thames after coming out while the parts of the paddle-wheels were being replaced, and that the moorings of the plt.'s ship in the river while this process was performed was according to the course usually followed by them in respect of ships whose paddle-wheels had been in like manner and for the same purpose removed. The evidence further showed that the plt.'s ship might have been taken back into the Victoria-docks without being moored in the Thames, and that the paddle-wheels might have been replaced in that dock, but that the expense of the work in the dock would have been four times as great as it was in the river. It was said that the work could be more conveniently performed in the Thames than in the dock, but this was not explained to have any meaning beyond the expense. The evidence further showed, that in the Victoria-docks there were very careful precautions to prevent damage by fire, watchmen at all hours, a numerous fire brigade always ready, policemen and other servants of the company trained to the use of the fire-engines, and carpenters ready to scuttle a ship on fire, together with an ample water supply from stand-pipes in many places; while in the river, it was said, there were only three floating engines placed at considerable distances from each other, and that nearly an hour elapsed between the breaking out of the fire and the arrival of the first of these engines. There was evidence that in offices of great importance, such as the Sun and the Phoenix, the premium was the same whether the ship lay in the river or a dock; but in these offices the same rate had been continued from a far distant time, and the defts. objected, with good reason as we think, that their rights under their contract were not to be affected by the rights of other parties under their contracts with other companies. These being the facts, the defts. contended that the ship was not covered by the policy at the time of the loss, on three grounds—first, because the ship was not lying in the Victoria-docks, or in the dry dock adjoining thereto; secondly, because the ship was not in any dock; and thirdly, because the ship was not in a dock, nor in transit from a dock to a dock, within the meaning of the policy. As to the first and second grounds the defts. contended that the words "lying in the Victoria-docks, with liberty to go into dry dock," confined the risk to the Victoria-docks and the dry dock adjoining thereto, or to the Victoria-docks and some other dry dock adjoining thereto, and excluded the risk of transit from one dock to another. But in respect of those grounds we think the defts. failed. As to the first ground, the words of the policy do not express that the liberty is confined to any particular dry dock; and although it is probable that both parties expected that the pontoon dock would be used, and neither party knew that the relative measurements of the ship and that dock would prevent the adoption of that course, still effect is to be given to the words in their ordinary meaning, and the liberty to go into dry dock is unrestricted in its expression. If the defts. intended to confine the liberty to the pontoon dock only, they should have expressed their intention more clearly. As to the second ground, if the plt. had liberty to revert to any convenient dry dock, we think the policy covered the ship while the plt. used

the liberty so given to him thereby. The description is in the nature of a condition. The defts. insured for three months, provided the ship is in the situation mentioned in that policy—that is, in either dock, or in the necessary passage from the one to the other. We are aware that, under this construction, the plt. would be uncovered as to all risk from collision, or the like, in the river, during the transit, and that the defts. would take an undefined liability in the river if the plt. might choose a dry dock at an undefined distance from the Victoria-docks. But, notwithstanding these considerations, we are brought to the construction above stated, and decide against the defts. on the two first grounds on which they relied. As to the third ground, above stated, we think the defts. are entitled to succeed. We think that the ship was not in a dock, nor in transit from a dock to a dry dock, within the meaning of the policy. We consider that the risk contemplated by both parties was substantially the risk of fire in a dock; and although the defts. are held, by implication, to have undertaken so much risk in the river as was essential for the exercise of the liberty of transit from dock to dock, yet this risk in the river is limited to that transit, and does not, in our judgment, extend to any time during which the ship stopped in the river, not for the purpose of that transit. A few hours were all that would have been required for that purpose. The delay of ten days was for the purpose of replacing the paddle-wheels, and there was no proof that they could not have been replaced as well for the ship, although with more expense, in the dock where they were taken off, and where they were left till the ship returned. The risk in the river appears much greater than in the dock, by reason of the absence of many appliances for security against fire which were available in the dock. The plt. placed much reliance upon the fact above stated, that it was usual with the great shipbuilders, after repairing such ships as the plt.'s, to replace the paddle-wheels in the river; but the question here does not depend on the course of business usual with shipbuilders, but on the contract between these parties. If a ship is prepared for sea in the dock of a shipbuilder in all respects, except as to the paddle-wheels, which are of necessity postponed in order that the ship may pass out of the dock, it might well be the best and cheapest course for the ship to lie at a convenient place in the river to receive those wheels, and then proceed on her voyage. Time and money would probably be wasted by sending her into another dock; but, under this contract, the insurance is confined, by its express terms, to the dock; and although it is extended by implication to the necessary passage from one dock to the other, there is no implication that it should be made to extend to lying in the river for any purpose of repair. The paddle-wheels were not essential for the purpose of moving the ship into the dock; the same power that brought her to her moorings would have taken her on to dock. According to our construction, the ship was not covered unless she passed directly from the one dock to the other. She did not so pass, but was delayed ten days, and this delay was not owing to any cause connected with the passage. It follows, that during those ten days the defts. were not liable. Therefore the rule for entering a verdict for the defts., or a nonsuit, must be made absolute.

Rule absolute.

Attorney for the plt., *Cotterill and Sons.*

Attorneys for the defts., *Thomas and Hollams.*

Tuesday, Nov. 24.

CROWTHER (app.) v. BRADNEY (resp.)

Election law—Notice of objection.

Where there is more than one list of voters for a parish or borough, a person objecting to the vote of another must, in his notice of objection, state in which list his (the objector's) name is to be found.

This was a consolidated appeal from the court of the revising barrister for the borough of Kidderminster.

The following case was stated for the opinion of the court:—

At a court held before me for the revision of the lists of voters for the borough of Kidderminster, Geo. Bradney objected to the name of Alfred William Crowther being retained in the list of persons entitled to vote in the election of a member for the borough of Kidderminster. The notice both to the overseers and to the said A. W. Crowther was signed thus: "George Bradney, of Wharf-hill, on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied in the parish of Kidderminster."

The ancient parish of Kidderminster consists of the "Borough of Kidderminster," the Foreign of Kidderminster," and the "Hamlet of Lower Mitton," for each of which separate and distinct overseers, churchwardens, highway surveyors and other officers are appointed and separate and distinct rates are levied. The hamlet of Lower Mitton is within the parliamentary borough of Bewdley.

The said George Bradney in his notices of objection to the respective overseers of the said parishes or districts of "Kidderminster Borough," and "Kidderminster Foreign," addressed his notices respectively as follows:—"To the overseers of the parish of the Borough of Kidderminster," and "To the overseers of the Foreign of the parish of Kidderminster."

Two lists of persons entitled to vote for the parliamentary borough of Kidderminster were made out and published in the present year, one headed "List of persons entitled to vote in the election of a member for the borough of Kidderminster, county of Worcester, in respect of property occupied within the Borough of Kidderminster," purporting to be signed by three persons describing themselves as "Overseers of the Borough of Kidderminster;" and the other headed "List of persons entitled to vote in the election of a member for the borough of Kidderminster in the county of Worcester, in respect of property occupied within the Foreign of the parish of Kidderminster," purporting to be signed by two persons describing themselves as "Overseers of the Foreign of Kidderminster." The name of George Bradney was on the first-mentioned list.

It was objected on behalf of the said A. W. Crowther, that the notices of objection (which were in all other respects good) were insufficient, inasmuch as the said George Bradney stated himself to be on the "list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster." Whereas it should have stated on which of the said two lists of voters his name appeared.

I held, that the notice of objection was sufficient, and the said A. W. Crowther having failed to prove a qualification, I expunged his name from the list of voters.

Twelve other persons, whose names and qualifications are set out in a schedule hereunder written, were also objected to by the said George Bradney, and, failing to prove their respective qualifications, I expunged their names; but the like objection to the notice of objection in each of their cases existed and was taken before me, and I gave the same decision

thereon. The parties objected to having given notice that they were desirous to appeal from my decision, I allowed their appeals, and declare that such appeals ought to be consolidated.

If the court shall be of opinion that such notices of objection were insufficient, then the name of the said A. W. Crowther, and also the names of the several other persons mentioned in the said schedule hereto, are to be restored to the respective lists of voters from which the same have been expunged, and the register of voters is to be altered accordingly. But if the court shall be of opinion that such notices of objection were sufficient, the register of voters is to remain unaltered.

(Signed) G. S., Revising Barrister.

Karslake, Q. C. (Bourke with him) for the app.—The notice of objection was objected to on the ground that there was more than one list of voters for the borough of Kidderminster, and the objector did not state on what list his name was to be found. He describes himself as "on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied in the parish of Kidderminster," and does not state in which parish within the borough he has property. Property in the parish of Kidderminster does not necessarily give a right to vote for a member for the borough, as some of the ancient parish is without the borough. There are two lists of voters, one for the parish of the borough, and the other for the parish of the foreign. [WILLIAMS, J. cited *Samuel v. Hitchmough*, 7 L. T. Rep. N. S. 360; 13 C. B., N. S., 1.] In that case the notice described the objector as a voter of the parish of St. Paul's, and there were two lists of voters for that parish, but they were made out by the same overseers, and were both placed on the same church door, and were in fact only two schedules of one list: (*Edisford v. Farrar*, 4 C. B. 9.) He describes himself as on the list of persons entitled to vote for the borough when there is no such list, and then he goes on to say "in respect of property occupied in the parish of Kidderminster," and that may not be in the borough at all. It is not a question of whether he is entitled to vote, but whether he is on the list of persons entitled to vote:

Tudball v. Town Clerk of Bristol, 7 Scott N. R. 486; 5 M. & G. 5.

Welby for the resp.—There is but one parish, which comprises three divisions, which I may call townships. [BYLES, J.—But they appoint their own overseers and churchwardens?] Yes; but it does not appear that there is more than one parish church. The case of *Samuel v. Hitchmough*, 13 C. B., N. S., 1; 7 L. T. Rep. N. S. 360, is directly in point. Everybody knows that there is but one parish church in Kidderminster, and my contention is, that the two lists, though prepared by different persons, would, when fixed on the same church door, become one list, as in the case of *Samuel v. Hitchmough*. [BYLES, J.—But by the statute (6 & 7 Vict. c. 18, s. 23) the lists are to be published on other places of worship which do not belong to the Established Church, and we must take judicial notice that the presumption is that, in such a place as Kidderminster, there is more than one place of worship.]

Karslake, Q. C. was not called on to reply.

ERLE, C. J.—I am of opinion that the objector must show which of the lists his name is on. This description is not sufficient.

The other learned Judges concurred.

Judgment for the app.

COURT OF EXCHEQUER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law.

Nov. 12 and 16.

SMITH v. EDGE.

Arbitration—Award—Reference after verdict—Costs abiding event—County Court Acts—Compulsory reference.

A verdict was taken for plt. for 13*l.*, and costs 40*s.*, subject to a reference by an order of Nisi Prius. The costs of the cause to abide the event; the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, who was to possess the same powers as a judge at Nisi Prius as to certifying, found upon the whole a balance in favour of the plt. for 2*l.* 16*s.*, and directed the deft.'s costs of the reference and award to be paid by the plt. He did not give any certificate as to costs. Plt. and deft. lived within twenty miles of each other:

Held, that the plt. was not entitled to the costs of the cause, as the County Court Act (13 & 14 Vict. c. 61), s. 11, deprived him of them.

Per Bramwell, B.: There is no difference in that respect between a reference by consent and a reference by compulsion.

This was an action brought to recover 21*l.* for goods sold and delivered, money lent, &c. The declaration contained the usual money counts.

Pleas:—1. As to 5*l.* parcel, &c., never indebted. 2. As to 5*l.* 5*s.* 6*d.*, other parcel, &c., set-off. 3. As to the residue of the money claimed, payment into court of 11*l.* 5*s.*

The plt. joined issue on the first and second pleas, and accepted the 11*l.* 5*s.* paid into court in discharge of the causes of action in respect whereof it had been paid in. The cause came on for trial at the last Spring assizes, before Pollock, C.B., at Derby, when it appearing to him to be a matter of account only, he ordered it to be referred to arbitration upon the usual terms; it was also by consent of the parties; and a verdict was accordingly taken for the plt. for 13*l.*, costs 40*s.*, subject to a reference. The order of reference was to the arbitrator to settle all matters in difference between the parties, and to order what he should think fit to be done by either party respecting the matter in dispute. The arbitrator was to possess the same powers as a judge at Nisi Prius as to certifying; and it was also ordered that the costs of the cause do abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator, who might direct and award to and by whom and in what manner the same should be paid. The arbitrator, by his award, ordered that the verdict entered for the plt. be vacated, and adjudged, as to the first issue, that deft. was indebted to plt. 5*l.* 5*s.* 6*d.* over and above the 11*l.* 5*s.* paid into court. As to the second issue, that plt. was indebted to deft. 2*l.* 9*s.* 4*d.*, and that that sum be allowed out of and deducted from the 5*l.* 5*s.* 6*d.* found to be due to the plt. from deft., and that deft. pay, plt. 2*l.* 16*s.* 1*d.*, the balance. He also ordered the plt. to pay deft. his costs of the reference and award, and that the plt. do bear his own costs of the same. The arbitrator had power to certify as to costs, but he gave no certificate. The order of reference was made a rule of court. The question was, who was entitled to the costs of the cause? and the master not having taxed them for the plt., a rule nisi had been obtained calling on the deft. to show cause why the plt. should not recover his costs in the action, and why the master should not tax the same, and why deft. should not pay plt. the costs of this application.

Fitzjames Stephen now showed cause, and contended

that the plt. was not entitled to costs, as the case came within the provisions of the County Court Act (13 & 14 Vict. c. 61), s. 11, which provided that, where a plt. recovered, in any action in the Superior Courts, a sum not exceeding 20*l.* on contract, or 5*l.* in tort, over which the County Court had jurisdiction, the plt. should have no costs. The plt. and deft. lived in the same village, and the County Court had jurisdiction. *Cooper v. Pegg*, 16 C. B. 264, is directly in point. The arbitrator here had given no certificate. *Wigens v. Cook*, 6 C. B., N. S., 784, is distinguishable from this. In that case the record was withdrawn, and no verdict taken: here there was a verdict. *Jones v. Jones*, 7 C. B., N. S., 832, was a case of a reference by judge's order before verdict: (*Kelcey v. Stupples*, 1 H. & C. 576; 7 L. T. Rep. N. S. 389.) Where an arbitrator is put in the place of a jury, the County Court Acts apply.

Streeten, contra, for plt., in support of the rule.—The plt. is entitled to his costs of the cause. Such costs were, by the order of reference, to abide the event, and the arbitrator has awarded a balance in favour of the plt. of 2*l.* 16*s.* 1*d.* The County Court Acts do not apply in a case like this. It was a reference by consent, and of all matters in difference between the parties. [POLLOCK, C. B.—Were any other matters in difference gone into before the arbitrator except this cause?] No. The arbitrator has given the deft. the costs of the reference, which he could not do if this had been a compulsory reference. The plt. would clearly be entitled to his costs, but for the County Courts Act; so he would if the reference was before verdict:

Wigens v. Cook, 6 C. B., N. S., 784; 33 L. T. Rep. 224;

Jones v. Jones, 7 C. B., N. S., 832; 1 L. T. Rep. N. S. 373;

Kelcey v. Stupples, 1 H. & C. 576; 7 L. T. Rep. N. S. 389.

It was a reference by consent, and it was also agreed by the parties, as part of the terms of such a reference, that the costs of the cause should abide the event of the award, and the award being in favour of the plt., he is entitled to the costs of the cause.

Cur. adv. vult.

Nov. 16.—POLLOCK, C.B.—This was an action brought in the Superior Court for less than 20*l.*, the parties living within twenty miles of each other. The case was therefore properly within the County Court Act if there were nothing to remove it from the effect of that statute. The facts were, that upon the case being opened before me upon the Midland Circuit I perceived immediately what was the state of the matter in respect to the plt.'s right to costs, and pointed out that the question in dispute was really one of account, and I directed, thereupon, that the point should be looked at by somebody at the bar; the parties agreed to that, and an arbitrator was appointed by the parties, instead of altogether by the direction of this court. The arbitrator disposed by his award of all the questions in the cause which were in dispute, and there was a set-off claimed I think to the amount of 5*l.* odd, which the arbitrator gave effect to merely to the extent of 2*l.* or 3*l.*, and the arbitrator substantially might have done that by saying, if such an issue should be found for the plt., so and so; if such an issue for the deft., so and so, &c. But he did not take that course, he merely found the fact, but he did not give it legal effect by disposing of it as a matter of law, by saying that the issue should be entered for the plt. or deft., and then so and so, but, substantially, he decided "the issue." Properly speaking, he had no power to do anything else. As to all matters in difference being referred to him so as to make any distinction between the case where the whole was referred, it appears to me it was a mere mistake

[Ex.]

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[Ex.]

on the part of the officer in not striking out so much of the common printed order of reference as referred to all matters in difference, and Mr. Streeten vainly endeavoured to make out that there was any other matter in the cause than what was there disposed of. There was supposed to be an error in the postea, and it came before me as the judge at chambers, and I thought the arbitrator substantially had done what by the order of reference he was ordered to do, namely, to deal with the verdict. I directed the postea to be amended by entering the verdict in the way in which it was done; and that left ultimately the case disposed of by the verdict of the jury, modified by the award; but ultimately, the plt. had recovered, by the verdict of the jury, assisted by the arbitrator, altogether less than 20*l*. I think, therefore, that the plt. is not entitled to recover his costs. Four cases were referred to in the course of the argument: *Cooper v. Pegg*, *Wigens v. Cook*, *Jones v. Jones*, and *Kelcey v. Stupples*. There is no one of these cases like the present. All those statutory arrangements, the effect of which is to make people pause before they bring an action merely because they have a right to bring one (a practice extremely mischievous, and which ought to be discouraged as far as possible), by which persons are made to pause and consider, "Shall I go to law because I have a right of action?" without any reference to what may be the fate of it and the consequences to the party himself should be carried out and the fullest effect given to all the statutory provisions made by the Legislature to repress mere litigation and fruitless discussion. Therefore I am exceedingly glad to find that there is no difficulty whatever in giving the fullest effect to the clause in the County Court Act which deprives the plt. of his costs where he recovers less than 20*l*., and where the County Court and the Superior Courts at Westminster are not in conflict with each other. These are the reasons why, in my judgment, the rule ought to be discharged; and by so holding we comply with what must be considered the spirit of the Legislature and the law as now administered, and do substantial justice between the parties and some good to the community.

BRAMWELL, B.—I am of opinion that this rule should be discharged; and I think it may be discharged on the form of the rule without technicality. The plt. has recovered in an action by verdict, modified by an award, a sum under 20*l*., and if the jury had been the actual persons pronouncing the verdict to that amount, it is conceded the plt. would be entitled to costs, and there would have been error upon the record. The costs would have been given without showing that the arbitrator had found what should be due. Mr. Streeten comes here and asks for an order to pay the costs. I have inquired of the master, and my own notion is, in accordance with his, that there never was a case known where a person having got a verdict, and being entitled to judgment upon it, could get the costs of his action otherwise than as part of his judgment. Therefore the rule is wrong. If the plt. is entitled to the costs of the action, having got a verdict and judgment, he must be entitled by virtue of the judgment. But then I do not find any fault with Mr. Streeten for having put the rule in that form. I do not see how he could have put it in any form to entitle him to what he asks, because if he had come and asked for a certificate that the parties lived within twenty miles, he would have been beaten upon that ground; or, that the cause of action did not arise in the jurisdiction, he would have been beaten on that ground; or, that it was a fit cause to be tried, he would have been beaten on that ground. I do not see how he could have applied for a certificate, or that he could make any other motion than he has done. I should prefer dealing with it in another point of view, which is this: the parties have, by consent, referred the amount of the verdict to arbitra-

tion, and they have agreed that the costs should abide the event. My brother Willes, in delivering the judgment of the Court of C. P. in *Robertson v. Sterne*, 7 L. T. Rep. N. S. 462, which has been referred to before, in speaking of a case where the costs are to abide the event, said, I think with uncommon good sense and logic: "Here is a statute which enacts that if in an action on contract within the jurisdiction, the plt. shall recover a sum not exceeding 20*l*., the plt. 'shall have judgment to recover such sum only, and no costs,' except in certain cases within which this does not fall. This section, in terms, deprives the plt. of his costs in the event which has happened, unless the order in its terms can or does dispense with the statute. It appears to us, however, that the statute and the order are not necessarily in conflict, for that this section adds to the ordinary events of a cause a third and modified one for the plt., but without costs, unless he obtains an order; and that the order of reference, which is the same in all cases, and speaks the language of the court when it says that the costs of the cause 'shall abide the event,' refers to the event *quoad* costs, equally as to the mere event." Well then, what he said was this: where there is a submission to reference and the costs are to abide the event, you may have an absolute event in favour of the deft.; that is to say, if he gets judgment, you may have an event in favour of the plt., and if he gets a judgment for more than 20*l*., then he gets the costs; or you may have an event in favour of the plt., and if he gets less than 20*l*. then the event is, he does not get his costs unless he gets it under circumstances that take the case out of the statute. But my brother Willes, is dealing with a case where the submission was by compulsion, and he proceeds to speak as though there would be a difference between a submission by compulsion and a submission by consent, because, he says, "It cannot justly be imputed to the judges who framed it that they intended to exclude from the operation of the statute all cases in which there was a compulsory reference. The decisions referred to as to reference by consent before trial, *Wigens v. Cook* and *Jones v. Jones*, are obviously inapplicable, because to the right of such a reference the law attaches no special consequences as to costs, whereas in the event which has here taken place there is a statute which says expressly that a plt. shall have no costs." Having entirely agreed with my brother Willes so far as is necessary to decide the particular case, I dissent, with great submission, from his opinion so far as it intimates a difference between submission by consent and submission by compulsion; because, what is the difference? a binding result upon the parties at the time, but it is arrived at by different means. In the one case the costs abide the event by the agreement of parties; in the other the costs are to abide the event by the order of the court. In each case they are to abide the event, and what is the meaning of the expression in one case, is to my mind the same meaning in the other; it would be the same costs abiding the event, one thing in one case and another in another, according to the circumstances of each particular case. But my brother Willes, in giving the judgment of the Court of C. P., was doing that which a prudent person delivering an opinion would do; that is, stating enough to show his present opinion was right, and stating enough to show distinguishing circumstances between it and what may be taken to be opposite to it. I abide by the opinion I am reported to have expressed, and no doubt did, in the case of *Frazar v. Sargent*, 8 L. T. Rep. N. S. 467, that I could not see any difference between a reference by compulsion and a reference by consent; nor do I. And now I wish, again, to refer to a matter to which I adverted before, namely, that though this reference is by consent, the plt. must get his damages

in the action; in order to recover the damages that have been awarded to him he must have a judgment. Then I say, as was said in the case referred to, that the plt. there was entitled to his costs because there was no statute to deprive him of them. So I say here, the plt. is not entitled to his costs because there is a statute that deprives him of them; when he has a verdict in his own favour for less than 20*l.* he shall not have his costs unless he has a particular certificate. It does not seem to me to matter what that result is provided it be by his consent. It is sufficient that that is the result arrived at; and that is sufficient to bring it within the statute. I confess it is a salutary rule that we are not to make a distinction between consent and compulsion; but the good sense is in those cases where the result is, if the plt. is within the statute he gets his costs. A word or two about the authorities. It is a somewhat remarkable thing that there is not any decision or any case that is to be taken to have decided that which is the point in this case. Those referred to, with the exception of *Wigens v. Cook* and one other, were cases under Lord Denman's Act, where the parties recovered less than 20*l.*, and the costs were said to be given by Lord Denman's Act. The answer was, "No, it was not so, because it applies to a case only where there has been a verdict." The only case differing from that is the case of *Jones v. Jones*: that was not a case within Lord Denman's Act, it was a case where the plt. had obtained judgment by default, with a submission, but no verdict taken. I believe that if it had been an action originally commenced in the Superior Courts, the statute would have applied, and have deprived the plt. of his costs; then to apply the case, as I have done here, he would have been entitled to sign judgment in the action for the sum awarded as upon a judgment in default and getting an order of reference, and a reference thereunder, and then it seems the statute would not have applied, he would have recovered less than 20*l.*, and there would have been no certificate. If I am wrong in supposing he could have signed judgment in the action, the case is entirely out of the question, and there would be no statute to deprive the plt. of costs. But, supposing he could sign judgment in the action, nevertheless that case was rightly decided, for this reason, that it was not an action originally brought in the Superior Court; it was moved by *certiorari* from the inferior into the Superior Court. Then the statute does not apply. It was said that was not adverted to in giving judgment in that case; no more it was. To my mind, it was an informal rule, unless it means it is taken out of the provisions of the County Courts Act, namely, to order that he shall have his costs, because he lived more than twenty miles apart from the deft., or because the cause of action would not arise, or something of that sort. If that was the form of the rule, the court ordered that the plt. should have his costs because the action was originally brought there. But then I should think there was no fault to be found with the decision in that case; for certainly, to my mind, the case was rightly decided, for the reason I have given. In the result, I think that this rule ought to be discharged. I think that wherever the plt. is entitled to judgment in the action, and gets his damages in the action, and the case is such that by virtue of the provision in the County Courts Act, the plt. would, if it had been simply a hostile proceeding without any reference voluntary or compulsory, have lost the costs in the cause, so equally does he lose them when there is a reference which fixes the amount, unless where there has been such a reference, which it would have been necessary for him to get. I think that is the general rule that ought to govern all these cases.

CHANNELL, B.—I am also of opinion that the rule

should be discharged. In consequence of the observations of the Lord Chief Baron and my brother Bramwell, I should not have thought it necessary to say anything upon the subject. But in the course of the argument I rather entertained a different opinion to that which I now have arrived at. I desire it to be entirely understood that I entirely concur in the opinions of the Lord Chief Baron and my brother Bramwell. I agree with my brother Bramwell in thinking that this rule must be disposed of on the matter of form, because it asks "why the plt. should not recover the costs of the action, and why the master should not tax the costs." If the plt. could be entitled to costs at all it must be by virtue of the order of reference made a rule of court. If the costs be taxed at all they must be taxed on the rule. Now it appears to me that, inasmuch as this was a reference of the cause to arbitration, with power to the arbitrator to direct a verdict to be entered, we must consider that the plt. has recovered in the action that sum of money for which the arbitrator has directed the verdict to stand. It is true that beyond the matters in difference on which the verdict was entered there was no matter in difference. All that he has decided by the award is the matter in dispute, and ordering the verdict to stand for a certain sum, it appears to me that the plt. must be taken to have recovered that sum, and the case is brought within the 11th section of the County Courts Act which has been referred to. I think that Act expressly deprives the plt. of costs. I have considered the cases with reference to the statute and the authorities that have been cited, and it appears to me that when they are examined they do not interfere with the view I am submitting. In those cases in which the plt. succeeded in getting his costs there was a reference before verdict; in this case there was not. I think the award of the arbitrator in this case stands in a different light to that in those cases; and though there are some general observations in the case of *Robertson v. Sterne*, in 7 L. T. Rep. N. S., which would at first seem to interfere with the view now taken, I think my brother Bramwell has entirely explained those observations. I therefore think our judgment should be that the rule should be discharged.

FIGOTT, B.—I am of the same opinion. I do not think the circumstance that there were other matters in dispute not referred makes the least difference in the case; and for that there is the authority of the case of *Cooper v. Pegg*. I am also of opinion that the authorities when examined are subject exactly to the observation my brother Bramwell has made upon them, and they do not interfere with our deciding this case upon the principle upon which we ought to decide it. If you read the 11th section of the County Courts Act, it is clear, if you bring an action in a Superior Court which you ought to bring in an inferior court, you ought to be deprived of costs, unless you get judgment by default, or recover more than the sum named. The parties lived within twenty miles of each other; the plt. has recovered less than 3*l.*, and he has not recovered by default. I do not think it matters whether he recovered by a verdict or recovered by the award of an arbitrator.

Rule discharged.

Plt.'s attorney, *H. M. Burt*, 10, South-square, Gray's-inn.

Def't.'s attorney, *J. W. Hicken*, 11 Serjeants'-inn, for *Flecker*, Derby.

Monday, Nov. 16.

ROBERTS AND YARDLEY v. ROSE.

Nuisance—Action for obstructing—Abatement of nuisance—Excessive damage in—Pleading—Demurrer.

To a declaration that *deflt.* wrongfully obstructed a watercourse made by *plts.* in certain land by the licence of the owners and occupiers of such land, and enjoyed by them by such licence, *deflt.* pleaded in effect that he was the occupier and lawfully possessed of the said land in which, &c., and *plts.*, with his leave and licence, made the said watercourse and used the same until *deflt.* revoked the licence, and because *plts.* continued to use such watercourse after such revocation and notice, &c., *deflt.* obstructed, &c.

New assignment, that *plts.* sued for an obstruction, on "other" land than that mentioned in the plea, and being the land in the declaration mentioned, and not the land of *deflt.* mentioned in the plea, of a watercourse made in such other land.

Plea to new assignment, in effect, that *deflt.* was possessed of land adjoining the land in the new assignment called "other" land, and the water passing in and along the said watercourse was wrongfully discharged therefrom on to the said adjoining land of *deflt.*, and without entering on such "other" land in the new assignment mentioned, and obstructing the said watercourse on such "other" land, *deflt.* could not prevent such wrongful discharge, wherefore in order to prevent, &c., *deflt.* obstructed, &c.

Replication, that the obstruction where made was not necessary for preventing the discharge of water over *deflt.*'s said land, and was made much higher up the watercourse than *deflt.*'s land, and the water might have been by *deflt.* lawfully obstructed on the said "other" land lower down the said watercourse, and nearer to *deflt.*'s said land, and that if it had been so obstructed lower down, &c., such obstruction would have prevented the water from being discharged on *deflt.*'s land, and would not have caused the damage to *plts.* in the declaration mentioned; and such obstruction so made as aforesaid was an unnecessary and unreasonable mode of preventing, &c., and by reason thereof did *plts.* unnecessary damage:

Held, on demurrer, that the replication was good, and afforded an answer to the plea to the new assignment, as it showed that *deflt.* had done more than was necessary to abate the nuisance.

Per Channell, B.—The replication was either a good traverse of the second plea as regarded the necessity of the act of abatement, or it was a good, though informal, new assignment of excessive damage.

Second count.—That before the committing of the grievance hereafter mentioned, *plts.* being possessed of a certain colliery, did, at their own cost, and by the licence and with the consent of the owners and occupiers of certain land near the said colliery, make a watercourse in the said land for carrying away the water by them from time to time pumped from the said colliery, and from thence until and at the time, &c., during all which period they were possessed of the said colliery, *plts.* by the licence and with the consent of the said owners and occupiers of the said land enjoyed the advantage of having the water so by them pumped as aforesaid flow away from the said colliery along the said watercourse. Averment, that the said licence and consent to enjoy the said advantage, and their said possession of the said colliery continued till the commencement of this suit, and still did continue; and the said licence and consent and advantage were of great value to the *plts.*, and that *deflt.* knowing that

plts. were enjoying the advantage aforesaid, wrongfully and wilfully obstructed the said watercourse, and thereby prevented the water from flowing along the same way from the said colliery; by means whereof *plts.* sustain and will sustain damage, &c.

Plea 4 to second count.—That before and at the time when *plts.* made the said watercourse as in the said second count mentioned, and from thence until and after the committing by *deflt.* of the alleged grievance in the same count mentioned, *deflt.* was the occupier and was lawfully possessed of the land near to the said colliery in which *plts.* made the said watercourse as in second count mentioned; and *plts.* made the said watercourse in *deflt.*'s said land with the leave and licence of *deflt.*, and with such leave and licence used the same until *deflt.* afterwards revoked such leave and licence, and gave notice to *plts.* of such revocation, and because *plts.* continued to use such watercourse, and to send the water down the same after such revocation and notice thereof against the will of *deflt.*, *deflt.* obstructed as in the second count mentioned.

New assignment to plea 4.—That *plts.* sue not for the obstruction on the *deflt.*'s said land of a watercourse on the *deflt.*'s land, but for an obstruction upon other land than that mentioned in the said fourth plea, and being the land in the second count mentioned, and not being the land of which *deflt.* was the occupier and possessor, as in the fourth plea mentioned, of a watercourse made on such other land with the licence and consent of William Lowe, the occupier of such other land.

Plea 2 to new assignment.—That at the time of the committing by him of the alleged grievances in the new assignment mentioned, *deflt.* was possessed of certain land adjoining to the land in the new assignment called other land, and the said watercourse in and over such other land was so constructed that the water passing in and along the same was wrongfully discharged from the same on the adjoining land of *deflt.*, and without entering on the said other land in the new assignment mentioned, and obstructing the said watercourse on such land, the *deflt.* could not prevent the water from the watercourse from being discharged therefrom and coming on the land of the *deflt.* in this plea mentioned, wherefore, in order to prevent the said water from the said watercourse from being so discharged, and coming on the land of the *deflt.*, *deflt.* obstructed on such other land the said watercourse made on such other land, as he lawfully might for the cause aforesaid.

Second replication to second plea to new assignment.—That the obstruction so made by *deflt.* at the place where it was made was not necessary for preventing the water from being so discharged from the said watercourse, and coming on *deflt.*'s said land, as *deflt.* knew at the time when he made it. Averment, that the said obstruction was an obstruction made much higher up the said watercourse than the *deflt.*'s said land, so as to prevent the water from flowing down a large part of the said watercourse on the said other land where *plts.* had such licence and consent, as in the second count mentioned, for the flowing thereof. Averment, that the water might have flowed along the said last-mentioned part of the said watercourse without being discharged from the said watercourse and coming on the *deflt.*'s said land, or injuring the *deflt.*, and might have been by *deflt.* lawfully obstructed on the said other land lower down the said watercourse, after it had flowed over the last-mentioned part thereof and nearer to *deflt.*'s said land than the place where he did obstruct it, as *deflt.*, at the time when he made the said obstruction, well knew. Averment, that, if the same had been obstructed lower down the said watercourse, on the said other land and nearer to *deflt.*'s said land as aforesaid, such obstruction would have prevented the water from being discharged from the said water-

[Ex.]

ROBERTS AND YARDLEY V. ROSE.

[Ex.]

course and coming on deft.'s land, and would not have caused the damage to the p'ts. in second count mentioned, and such obstruction which deft. so made as aforesaid was an unnecessary and unreasonable mode of preventing the water from being discharged from the said watercourse, and coming on deft.'s said land, and by reason thereof did the p'ts. unnecessary damage.

Demurrer to second replication to second plea to new assignment, and joinder in demurrer.

A point marked for argument in the margin was, that the replication was bad, because deft. was not bound to consider the convenience of, nor the damage done to, the p'ts. exclusively.

Deft.'s points:—1. The replication alleged in effect that deft. might have diverted the water at another point in Lowe's land, and that if he had done so he would not have caused the particular damage complained of, but deft. contends that the replication is bad, because it is quite consistent with it that deft. acted as he did in order to avoid doing damage to Lowe; and it would be no answer to Lowe's action that unnecessary damage was done to him in order to avoid doing some injury to p'ts. 2. That under the circumstances disclosed on the present record the act of deft. was lawful, and for anything that appears, done to the best of his judgment, and therefore not actionable unless he acted maliciously.

P'ts. points:—1. Plea is bad, for that it does not show that the obstruction was necessary in the place where it was made, or that it was reasonable to make it there. 2. That it does not show, even against the occupier of the land, a right to make the said obstruction where it was made. 3. That for the purpose of abating such a nuisance the party may not at his pleasure walk any distance over his neighbour's land and stop the stream at any part thereof, but must act reasonably. 4. That if he could stop it one yard from his own premises and unnecessarily goes a mile to do it, he exceeds his right, and is a trespasser. 5. That it does not show that the flowing of the water at the place where it was obstructed was a nuisance to him. 6. P't. will also contend that the replication is good, as alleging that the mode of obstruction was both unnecessary and unreasonable.

Gray, Q. C., for deft., in support of the demurrer.—The "other" land on which the alleged trespass was committed was the land of Lowe, and Lowe, and not p'ts., should have brought the action. The declaration is for obstructing a watercourse enjoyed by licence. The plea assumes that it was by deft.'s licence, and pleads a revocation. Then the new assignment changes the question to Lowe's land. In order to prevent the water flowing over his own land, deft. had a clear right to go upon Lowe's land. The traverse in the replication is, "You have obstructed it at a wrong place; you might have obstructed it nearer your own land, which would have been less injurious to me, and therefore your justification is not a good one." That is a bad replication. It is not p't.'s land, and not therefore necessary to aver as little damage as possible. Lowe, as owner of the land, is the party to be attended to, and if he were to sue deft., the latter would have to show as little damage as possible done. [CHANNELL, B.—Is it clear that the second plea to the new assignment is good? You do not allege that you could not have obstructed the water at some other place, or that you could only have obstructed it at one particular place.] Why is deft. bound to allege that he could only have done it at that one spot? He is not bound to make the barrier on his own land. Having Lowe's licence he may select some spot on Lowe's land and must be guided by the question where he does least damage to the latter. [BRAMWELL, B.—A. makes a watercourse over his own land to B.'s, so that, from the natural position, the water will flow from A. to B. The latter complains, and A.

says, "Bring your action;" to which B. replies, "No, I will go on your land and stop it." Has he any right to do that?] It is submitted that he has. Deft. here has a right to defend himself from the water, which he cannot do without going on Lowe's land. It may be, the way which did more than necessary damage to p'ts. did Lowe the least damage. Deft. was not bound to obstruct the water in the way least injurious to p'ts., but to the owner of the land, and the replication ought to have alleged that Lowe would have been less damaged if the obstruction had been made elsewhere. Where an excess of damage is relied on the allegation of doing as little damage as possible is not traversable. There should be a new assignment.

H. Matthews (with whom was Huddleston, Q.C.) contra, for p'ts.—The replication is good. The law is clear, as thrown out by Bramwell, B. during the argument, that though a man may abate a nuisance on his own land where and how he pleases, yet when he goes upon another's land to abate, he must show that it was necessary for the purpose of abating the nuisance. That has been averred (I do not say well averred) in this plea. It is not a question of as little damage as possible, but it is a material averment, and if so, the replication is a traverse of it. [CHANNELL, B.—Is this replication anything more than an informal new assignment?] If it was necessary to obstruct, deft. had a right to do the act, doing as little damage as possible. To consider the question of balance of damage is to confuse the principle on which the right to abate rests; it turns wholly on necessity, which measures the existence of the right and the extent a man may go in abating.

Com. Dig. "Action on the Case for Nuisance," D. 4, 442, 3;

Dimes v. Felley, 15 Q. B. 276; 19 L. J., N. S., 449, Q. B.;

Bateman v. Bluck, 18 Q. B. 870; 21 L. J., N. S., 406, Q. B.;

are *a fortiori* authorities in favour of p't. The second plea to the new assignment is bad, for not showing p't. to be a wrong-doer (*Jones v. Williams*, 11 M. & W. 176; 12 L. J., N. S., 249, Ex.); and secondly, for not showing that the obstruction and abatement were necessary to the enjoyment of deft.'s right.

Gray, Q. C., replied.—The replication is not a good new assignment. In a new assignment, where a p't. is himself the owner of the land, it may be made material that as little damage as possible was done, but here Lowe ought to be the party bringing the action. P'ts. seek to make deft. liable by showing he did unnecessary damage, but both the parties having interests must be looked at. It is not necessary the plea should allege it might have been done with less damage, and it is consistent with the plea that the obstruction was made with the least possible injury to the owner of the land.

POLLOCK, C. B.—We are all of opinion that the p'ts. are entitled to judgment. A fuller insight into the facts might have been desirable; but with the light thrown by the argument on the pleadings, I feel no difficulty in coming to that conclusion. I do not understand the sort of measure which Mr. Gray takes of the relative inconvenience to one party and the other, and he fails, I think, in establishing the proposition for which he has contended. As my brother Bramwell has correctly said, if a man constructs a watercourse on his own land, he may obstruct it at whatever point he pleases; but I do not think that he can enter upon his neighbour's land and wander up and down over a long line of watercourse there and select any place he likes in which to make the obstruction.

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[Ex.]

BRAMWELL, B.—I agree with my Lord in his opinion that the plts. are entitled to our judgment. I will not say, nor is it necessary to decide, whether the deft. must have had a right to enter upon Lowe's land in order to obstruct the watercourse; but, assuming that he had, I agree with Mr. Gray that he must exercise the right in such a manner as to do as little damage to Lowe as possible; but not only so, he was bound in doing the act to do as little damage as possible, not only to Lowe, the owner of the land, but also to the plts. The plts. by their replication say, "You made the obstruction where it was not necessary, and you might have lawfully made it elsewhere with less damage to the plts." I confess that seems to me to be an answer. But Mr. Gray says, "You do not say in your replication that that mode of doing it would be better for you without doing more injury to Lowe." It seems to me that practically the replication does say that; for it says, you might have done it elsewhere lawfully. On that ground I am of opinion that the replication is good.

CHANNELL, B.—I am of opinion that the plts. are entitled to the judgment of the court. The plts., it appears, have a watercourse which they occupy on Lowe's land, and by their declaration they complain of an obstruction of such watercourse by deft. [His Lordship states the declaration and fourth plea.] The plt. new assigns, and it is the second plea to such new assignment which we have to consider. It says that deft. was possessed of certain lands adjoining the land in the new assignment called "other" land, and the watercourse in and over such other land was so constructed that the water was wrongfully discharged therefrom over adjoining land of deft., and without entering on such "other" land and there obstructing the watercourse, deft. could not prevent such wrongful discharge, wherefore, in order, &c., he went on such other land and made the obstruction complained of, as he lawfully might. Assuming, for the sake of the present argument, that the deft. had a right to enter upon his neighbour's land to obstruct the water, and to obstruct it either on the plts.' or on Lowe's land, it was essential that the second plea to the new assignment should aver the necessity of the act to abate the nuisance; and it should also have averred that he did no more than necessary damage. The pleadings place the plts. in the alternative, and the replication is either a good traverse of the second plea as regards the necessity, or it is a good, though informal, new assignment of excessive damage.

PIGOTT, B.—I also am of the same opinion. I think the replication to the second plea to the new assignment affords a good answer, and shows that the deft. did more than was necessary to abate the nuisance. Mr. Gray says that if more injury was done to the plts. less was done to Lowe, but the proportionate amount of damage to one and the other is not the true criterion.

Judgment for the plts.

Attorneys for plts., *Cloves and Hickley*, 10, King's Bench-walk, Temple.

Attorneys for deft., *Mackeson and Goldring*, Lincoln's-inn-fields.

Wednesday, Nov. 25.

BYRNE v. BOADLE.

Negligence—Evidence for jury of master's negligence—Onus probandi.

Deft. used and occupied the entire warehouse and premises from which a barrel of flour was being lowered. The plt. was passing along a public road by the warehouse, when the barrel fell from deft.'s warehouse upon and injured the plt. :

Held, that this alone was sufficient prima facie evidence of negligence by deft. to go to the jury.

This was an action against the deft. for negligence

in the lowering of certain barrels of flour from his warehouse, one of which barrels fell upon and injured the plt. At the trial of the cause before the Assessor of the Court of Passage at Liverpool, the plt. was nonsuited, leave being reserved to him to move to set aside that nonsuit and enter the verdict for 50*l.*, at which sum the damages were contingently assessed by the jury. A rule nisi having been obtained for that purpose,

C. Russell now showed cause against it.—The plt. was in October last walking along Scotland-road, Liverpool, when there fell upon him from one of the stories of the deft.'s warehouse a barrel of flour. Dft. was a flour dealer, and the whole of the warehouse and premises were in his occupation. No other evidence having been given to connect either the deft. or his servants with the occurrence, or to prove actual negligence, it was contended for the deft., first, that it was not to be presumed, because the barrel came from the deft.'s premises, that he or his servants were then engaged in lowering the flour without any evidence upon the subject, and that affirmative evidence by the plt. of negligence by the deft. or his servants was necessary. It was not pretended that the deft. himself was there, for he was not, and it was perfectly consistent with the facts that the persons lowering the flour were using the utmost care, and with the best appliances, and that the occurrence was a pure accident. He referred to *Mitchell v. Crasweller*, 13 C. B. 234, where it was held that the defts.' carman in that case not being at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorised act. The plt. should have given some evidence that the deft. or his men were in this warehouse doing some act. [POLLOCK, C. B.—Was it not the duty of the deft. to show that neither he or any of his servants did this?] Even if it had been brought home to the deft. so that he might have been liable the nonsuit was correct, because there was no evidence given to show any negligence: (*Carpus v. The London and Brighton Railway Company*, 5 Q. B. 747.) [POLLOCK, C. B.—Lord Denman in that case at Nisi Prius held that the plt. proved a *prima facie* case of negligence against defts. by showing that when the accident occurred the train and railway were exclusively under their management.] In *Christie v. Griggs*, 2 Camp. 79, it was held that the proprietor of a stage-coach is not answerable for any damage that may happen to a passenger from the coach being overturned by a mere accident. [BRAMWELL, B. referred to *Skinning v. The London and Brighton Railway Company*, 5 Ex. 787.]

Bird v. The Great Northern Railway, 28 L. J. 3 Ex.;

Cotton v. Wood, 29 L. J. 33, C. P.; and

Hammack v. White, 11 C. B., N. S., 588, were also cited.

In the last case it was held that the mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plt. must give some affirmative evidence of negligence on the part of the deft. All the facts here are consistent with the absence of negligence on the part of the deft., and he is not called on to show the contrary unless a case is first made out against him.

Little, for the plt., in support of the rule, was not called upon.

POLLOCK, C. B.—I am of opinion this rule should be made absolute to enter the verdict for the plt. for the amount at which the jury assessed the damages. Suppose a man to be walking under a warehouse, as was the case here, and a barrel was to roll out and fall upon him, the barrel coming from a height above, how could he possibly tell by whose negligence it was done? It was proved in evidence, in this case, that

the entire warehouse and premises were in the deft.'s occupation, used by him for the carrying on his trade, and that the barrel which fell out, or was being lowered, came from the warehouse of the deft. and caused the injury to the plt. That would be of itself *prima facie* evidence of negligence by the deft., or those for whose acts he was responsible. The plt. is not to be obliged to go about and inquire the cause of such an accident—who were in the warehouse above him, and their business there; how it was done, and such like: it is similar to that of a man who has to go through a public passage where a building is being erected, and an injury is caused to him by some of the materials falling on him whilst passing. This would be *prima facie* evidence of negligence against the builder; here the evidence before the court was, that the plt. and his wife were passing along the Scotland-road, in Liverpool, and when they were close against the deft.'s warehouse, the whole of which was in his occupation, used by him as a flour dealer, there came down suddenly upon the man a barrel of flour, and thus the accident occurred to the plt. of which he complained. This is one of those cases in which, I think, a presumption of negligence by deft. is raised, and it was for him, who had all the means of evidence and knowledge within his reach, to meet it. It having been shown that the deft. had the entire possession and exclusive use of this warehouse, it would be presumed that the accident arose from his want of care, unless he gave some explanation of the cause by which it was produced, which explanation the plt. could not be expected to give, not having the same means of knowledge.

BRAMWELL, B.—I am of the same opinion.

CHANNELL, B.—I am also of the same opinion. It has been said by Mr. Russell there was nothing to connect the deft. with any negligence in the matter, and, for anything that appeared to the contrary, the injury might have happened by an inevitable accident, or otherwise, for which the deft. may not have been liable; but there was abundant evidence to go to the jury.

PIGOTT, B. concurred.

Rule absolute to enter verdict for plt. for 50l.

C. Russell applied for leave to appeal, which was refused.

Plt.'s attorneys, *Underhill and Field*, 3, New-inn.

Deft.'s attorneys, *Bridges and Collins*, for *Francis and Almond*, Liverpool.

EXCHEQUER CHAMBER.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

ERROR FROM THE QUEEN'S BENCH.

Thursday, Nov. 26.

(Before POLLOCK, C.B., WILLIAMS, J., BRAMWELL and CHANNELL, BB., BYLES and KEATING, JJ.)

WHITMORE AND ANOTHER (Assignees of J. E. Claridge) v. HENRY CLARIDGE AND OTHERS.

Trover—Bill of sale—Advance of money to pay other creditors—Act of bankruptcy.

Where a tradesman was indebted to B. and C., to the former of whom he had given a bill of sale, who had taken his goods in execution, and having applied to D. for a loan of money to pay off B. and C., obtained it upon the security of a bill of sale, which transferred all right in the property to D.; A., however, to be permitted to continue to carry on the business, with power to D. to enter and seize upon the goods, and B. and C. were paid off accordingly; but at the same time another creditor, E., had obtained judgment, but had abstained from issuing execution, and afterwards A. was adjudged to be a bankrupt, the goods having in the meantime been sold by D.

under his bill of sale, and an action having been brought by the assignees of A. to recover from D. the value of the goods:

Held, that the giving of the bill of sale to D. was not an act of bankruptcy, it not being an assignment to pay a past debt, but an assignment with a view to release a trader's property from a charge upon it.

This was an appeal against the decision of the Q. B., making absolute a rule to enter a verdict for the defts.

This was an action of trover for the conversions of the goods of the plts., who claimed as assignees of James Edward Claridge, a bankrupt, there being a count also for the conversion of the goods of the said J. E. Claridge before he was a bankrupt. By the particulars of demand the claim of the plts. was confined to such goods as were named in a bill of sale of the 5th Dec. 1859. The trial took place at the Worcester Summer Assizes 1861, when it appeared that the bankrupt had carried on the business of a farmer and horse dealer. The deft. Henry Claridge also was a farmer, and the two other defts. were auctioneers. In 1859 the bankrupt was indebted to two persons of the names of Brook and Woodward, and had given a bill of sale to the former for the debt which was due to him. He owed money also at the same time to Samuel Stephens, who was afterwards trade assignee, and one of the plts. Brooke and Woodward took possession of the goods of the bankrupt, who applied to the manager of the Tewkesbury Bank for a loan of money, believing that if he could get the money he might with the proceeds of the next crop be able to go on with his business and pay everybody. Having failed in this application he applied to the deft. Henry Claridge, who was his brother, and who knew that he was short of money and in difficulties, but who believed that he had sufficient property to pay all that was owing. Henry Claridge refused to make an advance without having the security of a bill of sale, and thereupon one was prepared, and it was executed on the 5th Dec. 1859. It recited that Henry Claridge had been asked by J. E. Claridge to advance 619l. 3s. 6d. to pay off the amount due to Brooke and 493l. 8s. 6d. to pay off the amount due to Woodward, and also to advance to the said J. E. Claridge 37l. 8s., making together the sum of 1150l., and that H. Claridge had agreed to do so upon the terms that the repayment thereof and of any further advances that might be made thereafter should be secured. It was then stated that the money had been paid to Brooke and Woodward, and the said J. E. Claridge then granted to H. Claridge the whole of the stocks, crops, goods, &c. in his occupation, upon trust to permit the said J. E. Claridge, so long as the said H. Claridge should think fit, to use and enjoy the premises and carry on the business, and with power to the said H. Claridge to enter at any time and seize all the goods, &c., and to dispose of all such goods, &c., or to carry on the business as he pleased. It was further agreed that H. Claridge should stand possessed of all the moneys arising from any sale of such goods, &c., in trust in the first place to discharge all expenses, &c., and to retain to himself the sum of 1150l., being the total of the sums above named with interest, and also any other sum which he may at any time thereafter advance or lend to the said J. E. Claridge, and to pay over the residue to the said J. E. Claridge. The bill of sale also contained an acknowledgment by the said J. E. Claridge of the receipt of the sum of 37l. 8s., which had been before mentioned, but it appeared that this had not really been paid. The sums of money which H. Claridge agreed to pay to Brooke and Woodward were paid to them. In Sept. 1859 the plt. Stephens had brought an action against the said J. E. Claridge, and had recovered judgment for 406l., upon which he had received on the 26th of the same month a sum of 30l., and on the 12th Dec. another sum of 50l. He

was induced to delay issuing execution, as both J. E. Claridge and H. Claridge assured him that he would be paid the whole. However, in April 1860, he did issue execution, and the said J. E. Claridge was thereupon arrested and sent to prison. Notice was then given to Stephens of the bill of sale. Afterwards, on the 25th of the same month of April, a petition was presented in the Bankruptcy Court by a creditor, and the said J. E. Claridge was adjudicated a bankrupt. H. Claridge ordered the other defts. to sell the whole of the property conveyed to him by the bill of sale, and the sale accordingly took place on the 24th April. The whole sum realised was 2098*l.* 6*s.* 2*d.*, the residue of which, after paying the rent, expenses, and the money advanced, was retained for the bankrupt, who stated that he thought the amount realised was a good deal under the value of the property. At the trial a verdict was entered for the plts. for 1873*l.*, leave being given to the defts. to move to enter a verdict for them, the court having power to draw inferences of fact.

Mellish, Q. C. and *Matthew* now appeared for the apps., and contended that the facts constituted an act of bankruptcy, the whole of the trader's property being assigned to pay off existing debts :

Butcher v. Easter, 1 Doug. 294 ;
Wasley v. De Mattos, 1 Burr. 467
Marshall v. Rogers, 1 De G. 273 ;
Newton v. Chandler, 7 East, 137 ;
Sibert v. Spooner, 1 M. & W. 714 ;
Ex parte Zwillingback, re Marshall, 13 L. J. 19, Bank ;
Graham v. Chapman, 12 C. B. 85 ;
Hutton v. Cruttwell, 1 Ell. & Bl. 15 ;
Smith v. Timms, 4 L. T. Rep. N. S. 827 ;
Ex parte Lewis, 31 L. J. 11, Bank ; 6 L. T. Rep. N. S. 143.

Powell, Q. C. and *Macnamara* appeared for the deft. H. Claridge, and

Huddleston, Q. C. and *Dowdsonell* for the other defts. They were, however, stopped by the Court.

POLLOCK, C. B.—I believe we are all agreed in opinion that the judgment of the court below must be affirmed. Our opinion is founded upon this—that this was not an assignment of property to pay a past debt, but an assignment with a view to relieve a trader's property from a charge upon it. In reality it was for the benefit of his estate. This it is which distinguishes the present from all the cases and the principles laid down in them. It is to release the trader's property, which was under a pledge.

WILLIAMS, J.—I am of the same opinion. To come to a contrary conclusion, we must hold that which is at variance with the facts, that the assignment was made fraudulently and with intent to delay creditors.

CHANNELL, B.—I concur with the rest of the court. This was not an assignment for a past debt only, but to relieve the trader's property from a charge upon it under the bill of sale and the execution, and it was made for a new consideration.

BYLES and *KEATING*, J.J. concurred.

Judgment affirmed.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 21.

REG. v. G. H. BREN.

Embezzlement—Clerk or servant—Friendly society—Committeeman.

Two friendly societies appointed a committee, of which the deft. was a member, to conduct an excursion ; the committee employed the deft. and several others to sell tickets. It was his duty to pay over the money so received, which was to belong to the two

societies, to a person appointed by the committee, but he received no remuneration for his services :

Held, that he was a joint owner of the money, and not a clerk or servant within the 24 & 25 Vic. c. 96, s. 68, liable to be indicted for embezzlement.

Case reserved for the opinion of this court, by the Deputy-Recorder of Reading, at the borough sessions.

George Holgate Bren was charged that he, being employed as servant to D. L. (naming the other members of the committee), did whilst he was so employed receive and take into his possession 24*s.* for, and in the name and on the account of the said D. L. &c., his masters, and the said money did fraudulently and feloniously embezzle.

The persons above named, with the said George Holgate Bren, were a committee formed from the members of two friendly societies, called the Excelsior and the Royal Berkshire Lodges, for the purpose of conducting an excursion by the South-Eastern Railway.

The said committee nominated certain persons to sell tickets, entitling the bearers to share in the excursion, and issued to them the tickets for sale. The tickets and the money produced by the sale of them belonged to the two friendly societies, each lodge being entitled in proportion to the numbers of its members. The duty of the persons appointed to sell tickets was to pay over the money received from the sale of them to a person appointed by the committee to receive it for the use of the societies. They received no remuneration for their services.

The said George Holgate Bren was a member of the Royal Berkshire Lodge, and one of the persons nominated by the committee to sell tickets. A certain number of tickets were issued to him for sale, which he sold, and instead of paying over the money to the persons appointed by the committee he fraudulently appropriated it.

The case was tried before me, acting as deputy to the Recorder for the borough of Reading, on Tuesday, the 27th Oct.

The jury found that the said George Holgate Bren was employed by the committee ; that while so employed he received the money mentioned in the indictment in the name and on the account of the committee, and fraudulently converted it to his use.

Whereupon I directed a verdict of guilty, subject to the opinion of this court, whether he was employed "for the purpose, or in the capacity of a clerk or servant," within the meaning of the 68th section of 24 & 25 Vic. c. 96, and whether, being a member of the committee and of one of the societies, and thus a joint owner of the tickets, and the money produced by the sale of them, he could be lawfully convicted."

Judgment has been postponed, and the prisoner discharged on recognisance of bail to appear and receive judgment. T. BROS.

Reading, Oct. 29, 1863.

Pater for the deft.—The conviction cannot be sustained. The deft. was a mere trustee, and was not employed as a clerk, or in the capacity of a clerk. He received no remuneration, and was not under the control of any one. In *Reg. v. May*, 1 L. & C. 13 ; 8 Cox C. C. 421, a person who was to be allowed commission on all business that he did for the prosecutors, and who was to account to them for any money he might receive immediately on the receipt of it, was held not to be a clerk or servant within the 7 & 8 Geo. 4, c. 29, s. 47. In that case, Cockburn, C. J. said, that the relation of clerk or servant implied control. Here the deft. was subject to none. [MARTIN, B.—The prisoner was more like a managing partner than anything else.]

Harington for the prosecution.—Although the deft. was a member of the committee, and jointly interested in the fund, yet, according to *Reg. v. Proud*, 9 Cox C. C. 22, and *Reg. v. Burgess*, 9 Cox

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C. C. 302, he was liable to be convicted for the embezzlement. [MARTIN, B.—In *Proud's* case the prisoner was a paid secretary, and, as such, under a contract to receive and pay over the money, and until he had paid it over he held it on behalf of his employers.] In *Burgess's* case the prisoner was a member of the society, and was held liable to be convicted of larceny for taking money belonging to the society. [MARTIN, B.—A shareholder in a joint-stock bank has no interest in the money in the bank, only in the net profits.]

ERLE, C. J.—We are all of opinion that the conviction cannot be sustained. The deft. was a member of the committee, and so a joint owner of the money. And we think that he was not chargeable as a clerk or servant, and so not liable upon this indictment.

MARTIN, B.—I also think that the deft. was neither a clerk or servant, nor employed in the capacity of a clerk or servant.

The rest of the Court concurring,

Conviction quashed.

REG. v. WILLIAM WHITE WATTS.

Depositions—Mode of taking—Admissibility—11 & 12 Vict. c. 42, s. 17.

A deposition of a witness taken in the following manner upon the committal of a prisoner for trial, was held irregular and inadmissible in evidence at the trial.

A note of the evidence before the committing magistrate, consisting of the witnesses' names and the heads of what each could prove, was taken in the open court. Then the prisoner and the witnesses were taken into a room, and another clerk examined the witnesses from the note in the absence of the magistrate, and there wrote down the answers, and the witnesses then signed the paper, and the prisoner was not asked if he would then cross-examine the witnesses, but he did cross-examine them by his attorney in court. The prisoner and witnesses were then again taken into the court before the magistrate and the depositions read over to them; the magistrate then asked the prisoner in the usual way what he had to say, and signed the depositions.

Case reserved for the opinion of this court at the Liverpool Borough Sessions:—

The prisoner was tried before me at a Court of Quarter Sessions of the peace holden in and for the borough of Liverpool on the 25th May 1863; he was indicted for larceny from his master.

It was proved that one of the witnesses examined before the committing magistrate was unable to attend the trial as a witness by reason of illness.

It was then proposed on behalf of the prosecution to put in evidence his deposition taken before the committing magistrate, and for this purpose a witness was called who proved that the deposition was taken in accordance with the invariable and long-established practice of the magistrates' court; that when the prisoner was before the magistrate, he was defended by an attorney, who had a full opportunity of cross-examining and did cross-examine the witnesses; that a note of the evidence given before the committing magistrate, consisting of the names of the witnesses and the heads of what each could prove, was taken by a clerk to the magistrates; that afterwards the prisoner and the witnesses were taken into a room, and that there another clerk who had not been present at the examination before the magistrates, examined the witnesses from the aforesaid note in the absence of the magistrate, and there wrote down the answers, and that the witnesses then signed the paper so written by the said last-mentioned clerk; that the prisoner's attorney was not there, though he might have been if he had liked, and that the prisoner was not asked if he

would then cross-examine the witnesses, and did not cross-examine them.

That afterwards the prisoner and the witnesses were again taken before the magistrate, and the evidence so taken and written down by the clerk in the room in the absence of the magistrate was read over to them; that the prisoner was not then asked if he would cross-examine the witnesses; that his attorney was not there, though he might have been if he had liked; that the magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate then signed the papers so written as last aforesaid; that one of the depositions contained in the said last-mentioned paper was the deposition tendered in evidence before me.

It was objected on behalf of the prisoner that such deposition was not taken in accordance with 11 & 12 Vict. c. 42, s. 17, and therefore inadmissible; and the following authorities were cited:

Reg. v. Arnold, 8 C. & P. 622;

Reg. v. Johnson, 2 C. & K. 394;

Reg. v. Christopher, 1 Den. C. C. 536;

Candle v. Seymour, 1 Q. B. 889.

I admitted the deposition and the prisoner was convicted; but having doubts as to its admissibility, I granted this case for the opinion of your Lordships, whether the said deposition so taken was properly admitted.

I respited judgment and the prisoner was admitted to bail.

LEOFRIC TEMPLE,

Assistant barrister to the Recorder of Liverpool, 27th May 1863.

Little for the prisoner.—The depositions were inadmissible. They were not taken in accordance with 11 & 12 Vict. c. 42, s. 17. The legislation in respect of the depositions of witnesses is narrated in 2 Russ. on Crimes, 889. In 1 Taylor on Evidence, referring to *Reg. v. Potter*, 7 C. & P. 650; and *Reg. v. Thomas*, 1b. 817, it is stated that it was the intention of the Act that the justice should be present when the depositions of the witnesses are taken. [MARTIN, B.—The question is whether this deposition was taken in compliance with the Act.] It is not stated in the case, but it is the practice at Liverpool for several clerks to be employed at the same time in taking the depositions of witnesses in different cases when the magistrate is not present. The clerk may add or omit questions. Virtually he exercises the power intended to be exercised by the magistrate. [MARTIN, B.—My brother Willes mentioned to me that the same objection as that taken here was made before him at Liverpool, and that he understood that it was the universal practice. I have always been surprised at the great difference in the length of the cross-examination of witnesses when before justices and before judges, but I can now understand how it is that in the former case the cross-examination extends only to a line or two.] In the schedule to 11 & 12 Vict. c. 42, the depositions are stated to be "taken and sworn before me," i. e. before the magistrate. That evidence which was taken before the magistrate is not returned, and that which was not taken before him is returned. In *Christopher's* case a magistrates' clerk at his office drew up depositions from minutes taken before a magistrate and questions asked by him, and it was held that a witness in cross-examination might be asked what he had then said to the magistrates' clerk without putting in the depositions which had been afterwards read over in the presence of the prisoner and witnessed before the magistrate. The reasoning also in *Candle v. Seymour*, 1 Q. B. 889, applies.

James, Q. C., for the prosecution, said that he appeared to hear the judgment of the court, and not to argue in support of the prevailing practice. The

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prosecutors were desirous that the court should lay down a rule for the guidance of the magistrates of Liverpool on future occasions. His own mind was opposed to the practice, and he would not argue in support of what he did not approve. If the court did not sanction the practice the corporation would put themselves in position to have further assistance for the discharge of the magisterial duties. The learned assistant-barrister was of opinion that the depositions were inadmissible, but reserved the case in order that the question might be raised and settled. No blame attached to the magistrates. [WIGHTMAN, J.—The officer of this court informs us that the practice in London and the metropolitan police-courts is to take the depositions in the presence of the magistrate. MARTIN, B.—I do not think it would be considered essential for the magistrate himself to write down the answers.]

ERLE, C.J.—I think that the depositions were inadmissible, not having been properly taken. The statute requires the depositions to be taken down in writing in presence of the magistrate and of the prisoner, and that the prisoner shall be at liberty to cross-examine the witnesses in the presence of the magistrates. In this case those requirements have not been complied with. It is not our province to lay down any regulations as to the particular way in which depositions should be taken, but to decide the question before us, and all that we now say is that these depositions were improperly taken. The conviction therefore will be quashed.

The rest of the Court concurring,

Conviction quashed.

COURT OF PROBATE.

Reported by Dr. SWABY, of Doctors'-commons.

Tuesday, Dec. 1.

In the Goods of GEO. JAMES HAY, deceased.

Scotch confirmation—21 & 22 Vict. c. 56—23 & 24 Vict. cc. 15 and 80.

The schedule (E) annexed to 21 & 22 Vict. c. 56, being the form of confirmation of an executor nominate, runs, "An inventory of the personal estate and effects of the said C. D. at the time of his death, situated, &c."

But the Court, looking to the provisions of 23 & 24 Vict. 80, s. 5,

Held, that the words "at the time of his death" are, since that Act, properly omitted in Scotch confirmations, and directed such a confirmation to be sealed.

The deceased in this case died on 21st Oct. 1862, domiciled in Scotland, having by a certain trust-deed, disposition and settlement, and two codicils, appointed Lieut.-Colonel Hay, the Rev. Augustus Handley and Alfred Atkinson Pollock, executors, who had given upon oath an inventory of the personal estate of the deceased in Scotland and England.

In the *testament testamentar* tendered to the registry of this court for sealing, it was recited that the executors "have given upon oath an inventory of the personal estate and effects of the said Geo. Jas. Hay, Esq., situated in Scotland and England, amounting in value to £ , which inventory has likewise been recorded, &c."

It was objected in the registry that this was not a sufficient compliance with schedule E. annexed to 21 & 22 Vict. c. 56, as omitting the words, "at the time of his death, situated, &c." which are contained in the schedule. By the 10th section of the Act, confirmations shall be in the form, or as nearly as may be in the form, of schedules D. and E. hereunto annexed.

Dr. Swabey now moved the court to direct the *testament testamentar* to be sealed in its present form. Admitting, for argument, that the words omitted did form a necessary part of the schedule when that Act passed, there are subsequent Acts to be considered, which it is submitted make the form adopted in the present *testament testamentar* the proper one. The 23 & 24 Vict. c. 15, sect. 6, enacts that money secured on heritable property and by heritable bonds in Scotland, is to be chargeable with probate and inventory duties. The 23 & 24 Vict. c. 30, reciting such enactment, and that it is expedient that the levying and collecting the said duty should be regulated as hereinafter mentioned, enacts by sect. 5 that the special inventory provided by this Act and the inventory of the personal estate of the deceased containing also the property on which duty is imposed by the recited Act and this Act, shall be stamped with duty according to the value of the property contained therein at the time they shall be respectively sworn to, including the proceeds accrued thereon down to that time. And it is hereby provided that the inventory and additional inventory of any person deceased, required to be exhibited and recorded in the proper Commissary Court in Scotland, shall be stamped with duty according to the value of the property contained therein at the time they shall be respectively sworn to, including the proceeds accrued thereon down to that time, &c. The last part of the section quoted seems general in its terms, and not limited to the particular duties imposed by the two Acts.

Sir J. P. WILDE—I think that is so, and the confirmation will be sealed in its present form.

Parke and Pollock, solicitors.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABY, of Doctors'-commons.

Nov. 6 and 12.

(Before WILDE, J. O., on motion for rule nisi for new trial.)

SCOTT v. SCOTT.

Verdict of jury on cruelty—Principles of court in granting or refusing new trial.

Where the issue of cruelty is submitted to a jury, the court will not grant a new trial unless it is satisfied that there was error or miscarriage on the part of the jury. That on the evidence the court might not with certainty have arrived at the same conclusion as the jury did, is not sufficient.

This was originally a suit for restitution of conjugal rights by the husband against the wife, who pleaded cruelty, and prayed for a judicial separation. The petitioner took issue on the cruelty.

The issue was tried by a special jury before the vacation, when the jury, by their verdict, negatived the wife's plea of cruelty.

The *Queen's Advocates* (Sir R. J. Phillimore), Dr. Spinks and H. T. Cole with him, now moved for a rule nisi for a new trial, on the ground, mainly, that the verdict was against the weight of evidence.

Cwr. adv. vult.

Nov. 12.—WILDE, J. O.—The court is asked in this case to grant a rule for a new trial. It is a suit by the husband against his wife for a restitution of conjugal rights. Her answer is, that he has been guilty of conduct amounting to legal cruelty. Whether he had or not was the single question of fact in the suit, and was accordingly tried before the late Sir C. Creswell and a special jury. The jury found that he had not. This finding I am now asked to set aside on the ground that the verdict was against the weight of evidence. This is a serious re-

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sponsibility. The Legislature has, in its wisdom, confided the determination of such cases to a jury, in place of the court upon whom it formerly devolved, and a very difficult task it is. In the great variety of questions which in this country are referred to a jury, there are few so difficult to handle as the contentions of an unhappy marriage. In the common run of other cases the inquiry is spread over a limited range of time, the conclusion depends upon the converging effect of independent facts and witnesses, often largely fortified by written documents, and illustrated by the daily practice of trade, or the ordinary events of life; and although the jury is often embarrassed by the collision of directly contrary testimony, they commonly receive much aid and support from those portions of the case that rest in writing, or are plainly and undeniably proved. They are seldom without some guide beyond the credibility of the parties themselves. But in cases of conjugal dispute, when cruelty is the issue, it is far otherwise. The domestic history of years is poured forth by husband and wife in alternate streams of opposite colours; the memory of each is ransacked for the most trivial details; the posture of each mind is antagonistic in the extreme, drawing memory and sometimes imagination after it in the attack or defence. Events are often misplaced in date, and always exaggerated in aspect. Unqualified accusations serve only to elicit absolute denials, and amidst a volume of evidence and at the end of a protracted investigation, the truth, obscured, disfigured and transformed by prejudice and passion, is hard indeed to find. Nor does the nature of the case admit of much aid. Corroboration is seldom forthcoming. Those portions of their time which married people spend in quarrelling are not their most public moments. If a third person becomes witness to their outbreaks it is generally a servant, and such persons generally enlist their feelings on one side or the other. Written evidence there is seldom any save letters which, though they strongly illustrate the general tone and feeling of the writers, seldom or never assist the proof of a disputed fact. So that in the result the credibility of the parties themselves, their demeanour before the court, and their general bearing in word and deed, come to be the sole materials out of which the decision must be constructed. There is probably no tribunal so fit to handle such materials as a body of men like a jury; though it is not to be expected but that they should sometimes fail. But if it is difficult for a tribunal under such disadvantages to do right, how much more difficult is it upon the same materials to pronounce that it has done wrong? Where so much is obscure, who shall pretend to see plainly? And yet that is what the court must be enabled to do before it can justify an interference with the verdict which a jury have found. I will take this early occasion for stating the principles which should guide the court in the use of this power. New trials are in themselves an enormous evil, though there are cases in which justice demands them. No element in the administration of justice is so destructive of its efficiency as uncertainty; and no grievance more sorely felt by suitors than that which snatches success away at the moment of its accomplishment, and sets all abroad and in doubt again after one complete hearing and decision. Nothing shakes so much that confidence in the law which it is the first duty of all tribunals to uphold. The court does not exercise the function of mere appeal from the jury. It is not its duty to go over the same ground with them, and reverse their decision merely because it arrives at an opposite conclusion; it must see its way very plainly and be satisfied with tolerable certainty that there has been error or miscarriage—failing that, it is bound to accept the verdict as correct. It remains to consider whether this case is of that class. I do not propose to examine the evidence

in detail; a short review will suffice. It appears that the parties lived together on tolerable, if not satisfactory, terms at first; that they afterwards had frequent quarrels, and that their condition at last was that of complete estrangement with violent altercations. The chief foundation of these altercations was discreditable to the husband in the extreme—a greed for money from his wife and her mother. But there were other causes: the wife, though she denies it, is proved by independent testimony to have dressed in a manner which the husband appears to have thought, with some reason, to be both extravagant and unbecoming. To this has to be added the frequent intervention of Mrs. Morris, the mother-in-law, who, while resisting the extravagant demand of the husband for money, was the constant refuge and resource of the wife. Ten years of the married life of persons thus inclined and situated, reproduced in evidence, has furnished the jury with a volume of evil words and ungracious, unmanly, if not violent deeds. It was not difficult for the learned Queen's Advocate in addressing this court with this evidence in his hands, to hold up a most repulsive picture of the petitioner. With lines and colours from the same source, I am not sure that a likeness of the lady drawn by an adverse hand would be much more attractive. But these are the prejudices which beset the case. The learned and able judge who presided at the trial warned the jury against them, and it is the duty of the court to forget them now, save so far as they throw light on the evidence of cruelty in its legal sense. Now, what is that evidence? It may be epitomised thus:—The wife swears to six distinct acts of violence; I will take them in order: First, the beating of the child in her presence an excessive and cruel manner; secondly, the threat to shoot both children and wife with a pistol; thirdly, an unprovoked blow on the leg with a heavy stick at Inverness; fourthly, three blows on the face, said to have been inflicted on the 28th Jan. 1858, at Strontian; fifthly, the twisting of a piece of velvet with violence round her neck about Oct. 7, 1858; sixthly, the blow on the face, said to have been inflicted in 1861, when she refused to come away from the window in London. These several acts are all, save the last, supported by the wife's oath alone; she called only one of the servants, who from time to time lived in the house with her. This one was Ann Morse, but she entered her service as late as May 1861, and is in her service still. This woman, speaking of May 1861, says, "she saw her mistress coming upstairs one evening, that her mouth was bleeding very much, and there was a mark on the month as of a blow, which continued some days." So stood the wife's case of violence—an amply sufficient one if the wife's oath could be relied upon; which was the real question the jury had to determine. Now, the husband met all these six charges with an absolute denial. Some he represented as inventions altogether, and some as exaggerations. He admitted beating the child, but said it was with a switch no bigger than a pen, and that not until the child had previously kicked him. He swore the child did not faint, and was not sick (as the wife had stated); he vouched the two servants, M'Ewan and Charlotte Palmer, who came into the room at the time, both of whom he said were outside the court, and the latter of whom he called as a witness. She said, "I found the child lying in Mrs. Scott's lap—not crying then; my duty was to wash and dress him. I saw no marks on him. I saw a stick in Capt. Scott's hand, a switch. I saw no brandy; did not see him sick; did not see the child faint. He was lying quietly in his mother's arms, not half a minute I heard him crying and sobbing." Then, as to the charge of threatening to shoot, the petitioner swore he did not possess a pistol at the time, and that he made no such threat. The wife, in cross-examination, admitted she

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did not see the pistol, and said he held it under his coat. And Dr. Wodehouse, speaking of a subsequent occasion, when the charge of threatening to shoot was brought up against the husband by Mrs. Scott, and her mother in his presence, says, Capt. Scott said he had no pistol in his possession at the time. Upon being pressed Mrs. Scott said it might be something else; did not say what. The third charge is of a blow on the leg, which Capt. Scott declares to be an invention, and he examines the maid who was with her at the time, who answered in cross-examination, that "she did not remember ever fomenting Mrs. Scott's leg." The fourth charge is met with a total denial, as also is the fifth; and as to the sixth, the petitioner declares he removed her from the window with no unnecessary force, and accounts for the condition of her mouth by saying that "she constantly had something the matter with her teeth and gums, gumboils, and swellings of the face." He also gave general evidence. He called two other servants besides Charlotte Palmer—Selina Morgan and Sarah Wheeler, one of whom was thirteen months in their service. They all three depose that they never heard swearing or bad language on Capt. Scott's part, and that they witnessed no violence. In addition to this, the petitioner called Col. Simmons, who saw a good deal of them in 1861; Mr. Harrison, who often saw them together between 1844 and 1858; Dr. Wodehouse, who saw them in 1853; and Mr. Boulbee, who was with them at the shooting quarters in Scotland. They all give a favourable account of his demeanour to his wife, and expressly deny a habit of using bad language. He examined another witness, Mrs. White (his own sister), who, though she says there were often words between them, says she never heard him swear at or use any violence to his wife. Surely this evidence presented a case on the husband's part well worthy of attention. Whatever may be said in condemnation of his general conduct, here was surely cogent evidence in denial of those instances of personal violence which were relied upon as sustaining a charge of cruelty. The jury believed the husband. Who can assert that they ought to have believed the wife? They were not without reasons for doubting her entire truth. Not to mention the contradictions she received from the witnesses already named, I have been much struck with the evidence as to her dress. A distinguished officer, Col. Simmons, C.B., says he saw them in 1860 and 1861 frequently, and in cross-examination he said, "Mrs. Scott was very fashionably dressed; that seemed to outrage Capt. Scott's feelings—he spoke to me about it." Now the husband had sworn that "her dress was not such as ladies walk in." Whereas the wife swore positively, "Petitioner did not object that I went too much dressed, but sometimes said he would not walk with me unless I was smarter." The subject was not a very material one, but such discrepancies tend much to break down confidence and invite distrust, and it may be that the jury so regarded them. I will dismiss in a few words the remaining ground for this application. Three affidavits are offered to the court. The substance of them is, that after the close of the resp.'s case, but before the trial was concluded, a witness presented himself in Westminster-hall who could have corroborated the resp. upon one or more of the instances of cruelty to which she had sworn. The resp. desires a new trial that she may have the benefit of this evidence. But this is quite inadmissible. The affidavits disclose no surprise, and the proposed additional testimony is not in denial of some point or matter introduced unexpectedly on the other side, but only additional to and in affirmation of the case made and all along intended to be made by the resp. herself. It has never been the habit in Westminster-hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though

newly discovered) if another trial were allowed. And if it were otherwise there are few cases that would not be tried a second time. But in this case there is the further fact that if application had been made to the judge at the trial he might have allowed the evidence to be given. The result is, that the court declines to interfere. I am sensible that in so deciding I may be affirming a decision which is erroneous, but the same might be said of an opposite decision had that been arrived at instead. And in the uncertainty which besets every step of such an investigation, I feel bound to accept the decision which a jury pronounced after a long and patient trial, and under the guidance of a most impartial judge.

Solicitors: Harrison, Beale and Harrison; and Clarke and Co.

Nov. 17 and 24.

(Before WILDE, J. O.)

OSBORNE v. OSBORNE.

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Same issues in cross-suits—Staying one suit—Commission to examine witnesses—Practice.

Where the same issues are raised in cross-suits (made necessary by the imperfect powers granted by the Legislature to the court), the court will, as a general rule, stay one, and that without reference to their relative positions in the cause-list. In such a case, if a commission to examine witnesses is granted, it will be drawn in such a form as that the evidence shall be available in the stayed suit should that come to a hearing.

These proceedings were in the nature of cross-suits. The husband's petition for dissolution of marriage by reason of the wife's adultery with Martelli was filed on 30th May 1862. The resp. appeared and answered charging the petitioner with adultery, cruelty and desertion, and praying a judicial separation. Both petition and answer were amended, and on the 27th May 1863 the issues were directed to be tried before the court by a common jury.

In the wife's suit the petition filed on the 28th March 1863 charged adultery, desertion and cruelty, and prayed a judicial separation. The husband's answer brought the same charges against the wife as contained in his petition. On the 27th May 1863 the issues raised in this petition were also directed to be tried before the court by a common jury. The wife's petition was set down first for hearing in the registry, and the causes stood as in the above order, Nos. 54 and 55 in the printed list for Michaelmas Term.

Nov. 17.—Dr. Spinks, on behalf the wife, was now instructed to ask for commissions to issue in both suits to examine certain necessary witnesses in Paris and that the husband should pay a sum of money to repay the wife's expenses in respect of both the commissions. He understood that the learned judge in chambers had made an order that the wife's petition should be stayed till the husband's petition was disposed of, and ventured to offer the following remarks to the court on the practice in such cases, and the necessity of the double petition. On a petition for dissolution of marriage it has been understood that the Divorce Act only enables the court to decree in accordance with the prayer of the petition or to dismiss it. It cannot make any substantive decree on the facts which may be alleged in and proved on the answer; hence the necessity of the two petitions. Again, on a petition for dissolution by the wife (though that is not the present case) her evidence, and that of the husband, is admissible on the issues of cruelty and desertion, but on the same issues raised by her answer their evidence is inadmissible: (22 & 23 Vict. c. 61, s. 6.) This double suit is common enough; an instance of it is *Burroughs*

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v. Burroughs, 2 Sw. & Tri. 544, and, however hardly this may bear on the husband in respect of costs, as in *Hepworth v. Hepworth*, 2 Sw. & Tri. 414, the court has not hitherto considered itself at liberty to interfere with the order in which the parties have entered the causes for trial or hearing.

WILDE, J. O.—The question raised, though not quite regularly, on the present motion, is one of great importance, and I am much obliged to Dr. Spinks for his remarks. I must take time to consider of the proper course.

Cur. adv. vult.

Nov. 24.—WILDE, J. O.—This was an application for two commissions to issue in two suits. The husband's suit was commenced first. The wife's suit was not begun till after a lapse of ten months, but was first set down for hearing. I ordered in chambers that the wife's suit should be stayed. The necessity of the double suit is undoubtedly caused by the defective power given to this court by the Legislature. The court has no power, on a petition for dissolution, to decree in favour of the resp.; and the same evidence is admissible or inadmissible according to whether it applies to issues raised on the petition or on the answer. In the previous cases, referred to by counsel, the wife's suit was the first started, so that they do not strictly apply; I do not, however, rely upon that distinction. I shall adhere to the order that the wife's suit shall be stayed, because I cannot help seeing that, if the husband's suit is decided one way, it would, if not legally, yet morally, put an end to the second. Wherever there are two suits in which the same issues are raised, and I can find a legitimate reason to stay one or the other, I will do so. The order for the commission in the husband's suit may be drawn up in such a form as that the evidence may be available in the wife's suit if that comes to a hearing.

Proctors for wife, Toller and Sons.

Attorney for husband, T. Wright.

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

Nov. 3 and 10.

(Before the Right Hon. Dr. LUSHINGTON.)

THE LAUREL.

Bottomry—Personal credit—Foreign law—Evidence—Commission—Pleading—Costs.

The fact that the lex loci sanctions arrest for advances made to a vessel will not convert into a bottomry transaction advances made on personal credit; but the lex loci in this respect may nevertheless be pleaded as supporting the presumption that the advances were made upon the credit of the ship.

Whether certain commissions forming items in a bottomry account are fair and reasonable, are questions for the consideration of the registrar and merchants, but their decision must not altogether depend upon whether or not such charges are customary in the place where the bond was given.

An article pleading that the charges were fair and reasonable admitted, and the deft. allowed to traverse the allegation; but

Held, that whatever be the result of the suit, the party failing in proof with respect to the charges, will be condemned in the costs of the evidence respecting such evidence.

The questions in this case came before the court in the form of objections to the plt.'s reply.

The material portions of the pleadings are as follows:—

The petition.

Art. 1. The above-named vessel, the *Laurel*, whilst

on a voyage from Shanghai to London, being in want of repairs necessary for the voyage, put into Batavia, in the island of Java.

Art. 2. The master was without funds or credit at Java. Execution of a bottomry bond on ship and freight for the sum of 4088*l.* 17*s.* 4*d.* payable to Messrs. Maclaine, Watson and Co., Java, thirty days after the vessel's arrival in London.

Art. 4. Arrival of the ship and nonpayment of the money secured upon bottomry.

The answer.

Art. 5. Consignment of the vessel to Messrs. Maclaine, Watson and Co., of Batavia, part of the firm of Maclaine, Fraser and Co., the agents of the vessel at Singapore. Agreement with Messrs. Maclaine, Watson and Co., to advance the necessary funds at 2½ per cent. for repairs, and 5 per cent. for disbursements.

Art. 6. Charge by Messrs. Maclaine, Watson and Co. (besides the above commission) of 2½ per cent. on the estimated or assumed value of the cargo. All the above commissions were included in the amount for which the bond was given. No stipulation for maritime premium.

Art. 9. The advances were made on the personal credit of the defts., the owners of the vessel. No condition of maritime risk.

Reply.

Art. 3. "By the law in force at Java at the time when the said bond was given the said Messrs. Maclaine and Co. were entitled to a lien on the *Laurel* and her freight for the several sums included in the said bond, and the said Messrs. Maclaine and Co. were by such law entitled to enforce payment of such items by arrest and sale of the *Laurel*, and arrest of her freight, and had not such bond been given they would have proceeded so to enforce payment of such items."

Art. 6. "The commissions included in the said bond are the usual lawful and customary commissions payable at Batavia in circumstances such as those of the present case."

V. Lushington appeared in objection to the above articles of the reply.

E. C. Clarkson contra.

Dr. LUSHINGTON, after stating the material portions of the pleadings objected to, said:—Assuming the law to be as pleaded in the third article of the reply, it is manifest that its importance in this case is dependent upon another proposition, viz., that such power of arrest and sale renders a bottomry bond valid, though there was no prior, or, indeed, any engagement for bottomry before the execution of the bond. It is only where a bottomry bond would otherwise be invalid that there could be any necessity to resort to such law: that law is invoked to make valid that which would otherwise be invalid. We all know that bottomry bonds can be granted only in cases of necessity, where the master has no personal credit; and that a bond not executed till long after the actual advance, if nevertheless in pursuance of an agreement for bottomry, is valid. Now the court, from the case of the *Augusta* to the cases up to the present day, has good reason to conclude that in almost if not in all foreign countries, merchants who supply money to defray the necessary expenses of the ship, tradesmen who do the necessary repairs, or furnish the necessary articles, have a right of arresting the ship to satisfy their demands, and that according to the *lex loci* such right of arrest, *per se*, renders valid any bottomry bond, though there was in the first instance no agreement or understanding that such bond would be required, and though the master had not contemplated the granting of a bottomry bond, and, if he had suspected a bond would have been required, might have hesitated before he received such assistance, might have sought for it in other quarters, or, in some cases, have waited

for instructions from owners or consignees. There are very serious considerations which would make the court pause before it gave its assent to such doctrine. Still it may be that such state of the *lex loci*, though not perhaps sufficient to bring about all these consequences attributed to it, may be an important ingredient in assisting to support the validity of the bond. [The Court then referred to the case of the *Alexander*, 1 Dod. 278, and said:] The result, according to the opinion of Lord Stowell, is, that the validity of the bond depended not only on a promise or understanding to give the bond, but upon the question whether the merchant making the advance did so on the credit of the ship, and not on personal credit; and I think it is to be inferred that his Lordship also intimated his opinion that the conclusion of fact was to be drawn from all the circumstances of the case, the liability of the ship to be arrested being one of such circumstances. Now, the *Augusta*, 1 Dod. 293, decided that, wherever advances had been made on personal credit, a bottomry bond for such advances would not be valid by reason of the law of the country where the bond was taken authorising the detention of the vessel for such advances. But all the observations must be taken with reference to the circumstances of the case under discussion, and the principal fact in this latter case was, that the money had already been advanced on personal security. There was no question as to whether it had been advanced upon the credit of the ship; beyond doubt it was not. The case of the *Alexander* had been decided only about a year before, and it was cited in the argument. The observations of Lord Stowell, therefore, in the *Augusta*, cannot, unless the contrary clearly appear, be construed as antagonistic to the judgment in the *Alexander*. I think the effect of Lord Stowell's concluding observations in the *Augusta* is, that a law sanctioning arrest for advances will not convert a transaction on personal credit into a bottomry transaction; but such observations do not contradict the doctrine in the *Alexander*, that the existence of such a law, in the absence of proof that the advances were made on personal credit, supports the presumption that the advances were made upon the credit of the ship. The leading consideration on Lord Stowell's mind therefore seems to have been, whether or not the advance was made on personal credit or on the security of the ship. I know of no case which contradicts or militates against the law so explained. I think my own judgment in the *Vibilia*, 1 W. Rob. 1, is in accordance with it. I therefore admit this article, because it is admissible evidence to show that the money was advanced on the security of the ship—the essence of a bottomry transaction. I do not admit it as converting a transaction on personal credit into bottomry. With regard to the charge of commission being the customary charge, this is properly for the registrar and merchants, but, for convenience sake, I will not exclude it. I admit that such charges being customary is a fact to be considered in ascertaining if the charges are fair, not as conclusive evidence, for I have ruled, and declare again, that with respect to commissions the court will not be bound by the custom of any place. I shall admit the article. If not contradicted by plea, I shall assume it to be true without requiring evidence. If contradicted by plea, both parties are at liberty to produce evidence. The party which fails on such an issue will have to pay the costs, whatever may be the ultimate result of this litigation.

DIGEST OF MARITIME LAW CASES (EXCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from p. 302.)

[N.B.—The LAW TIMES REPORTS, N.B., will give all the Maritime Law Cases decided from Michaelmas Term 1859. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1859. A Digest of the Maritime Cases during the same period is appearing in the LAW TIMES.]

SLAVE TRADE.

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2171. Cases relative to the slave trade: (*The Newport*, J. C. P. C., Feb. 17, 1857; *Hoquard v. The Queen*, J. C. P. C., Dec. 1 and 2, 1857, *Shipping Gazette*.)

2171 a. Construction of 5 Geo. 4, c. 113, ss. 2, 4, 7, 10, 11 and 51. In order to subject ship to forfeiture, guilty knowledge on the owners' part must be proved, and the burden of proving it, as regards both the owners of vessels and the skipper of the cargo, lies on the seisor. What subjects the cargo to forfeiture. Question as to costs and damages in case of restitution, where suspicion attaches to the owners of goods, and where goods are seized for penalties improperly imposed on innocent consignees. National honour "ought to be vindicated at national expense," and merchants engaging in lawful adventure and subjected to illegal sentence should be indemnified by Government. Injury sustained by consignees being condemned in penalties is not of a character for which damages can be awarded in a Court of Admiralty. Cases commented upon: *Barton v. The Queen*, 2 Moore P. C. C. 19; *Del Campo v. The Queen*, 2 Moore, 18; (*Reopend v. The Queen*, appeal from Vice-A.C., St. Helena, J. C. P. C., Feb. 5, 1858, *Shipping Gazette*.)

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2182. What is considered to be spoliation of a ship's papers, and its effect upon the judgment of the court in questions of capture: (*The Johanna Emilia*, or *The Emetia*, A. C., June 30, 1854. *Shipping Gazette*.)

SPONTANEOUS IGNITION.

2183. Spontaneous combustion of gas emitted by copper ore, owing to the ore not having been calcined and properly prepared previous to shipment: shipper liable for loss of freight by having to take on board sugar at an intermediate port at a loss freight in lieu of the copper ore. The jury not being able to agree, the verdict of the majority was taken of consent: (*The Thomas Bell; Richardson v. Sadder*, C. E., Dec. 21, 1852. *Shipping Gazette*.)

2184. Coals having been landed at intermediate port so greatly damaged by sea-water that it would cost an unreasonable sum to put them into safe condition to be reshipped without danger of spontaneous combustion, held a total loss on a time policy on freight: (*The Charles Kerr; Michael v. Gillespie*, C. P., May 23, 1857. *Harrison's Digest*, 102; 2 Jur. N. S. 1219; 26 L. J. 306, C.P.)

(To be continued.)

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs., Barristers-at-Law.

Monday, Nov. 30.

(Before Mr. Commissioner GOULBURN.)

Ex parte THE ASSIGNEE, re HUGHES.

12 & 13 Vict. c. 106, s. 269—Construction of—Granting reward under.

Semble, the court has no jurisdiction under the 269th section of the Consolidation Act 1849, to grant a reward to parties for their exertions in getting in and realising the bankrupt's estate.

This was an application under the 269th section of the Consolidation Act 1849, for remuneration to two persons who had assisted in discovering and realising the estate of the bankrupt. Hughes was a solicitor and money scrivener, who, having absconded, was made bankrupt before the Bankruptcy Act 1861 came into operation. There was great difficulty in realising, or even ascertaining the assets, which, to a considerable extent, consisted of outstanding bills of costs; and the assistance of Haynes, a former clerk of Hughes, had been most serviceable to the estate, and several hundred pounds had been realised for the creditors solely through his exertions. The assignees were now desirous of making him a present of ten guineas, and a similar amount to another person, through whose agency certain property in Yorkshire had been traced and made available.

Goodman (solicitor), for the assignees, submitted that the court had jurisdiction under the words of the 269th section:—"And any person who shall, after such time (forty-two days), voluntarily discover, to the court or the assignees, any part of such bankrupt's estate not before come to the knowledge of the assignees, shall be allowed 5 per cent. thereupon, and such further reward as the assignees, with the consent of the court, shall think fit to be paid out of the estate on such discovery." [Mr. Commissioner GOULBURN.—That relates to where a bankrupt has wilfully concealed his estate. I own I do not see what jurisdiction I have to make a present, and I am very loth to make such a precedent, although I have no doubt, from what is stated, that the proposed reward would be very well deserved. You seem to put your application in too ambiguous a shape.] The creditors assent to this application. The exertions for which the small remuneration was sought had been highly beneficial to the estate. He submitted that, under the general discretionary power which the court necessarily had, it could make just and reasonable remuneration for "services" rendered to the estate.

Mr. Commissioner GOULBURN.—Your better course will be, that the assignee should send it in his accounts at the audit, properly verified, and I will then sanction it.

Tuesday, Dec. 1.

(Before Mr. Commissioner HOLROYD.)

Ex parte MAPLE, re CORNER.

24 & 25 Vict. c. 134, s. 120—Delivery of documents—Right of assignees to.

The court is bound, under the 120th section of the B. A. 1861, to order all books and papers of the bankrupt, or in any way relating to his estate, and which were in his possession at the time of his decease, to be delivered up to the official assignee.

Delivery of documents. This was an application under the 120th and 121st sections of the Bankruptcy Act 1861 for the delivery to the assignees of all papers and documents, books and writings, of a deceased bankrupt, under the following circumstances:—

Corner, the bankrupt, who was a solicitor, was

BANK.] *Ex parte* BJORNEBORG TANDSTICKS MATCH FACTORY ASSOCIATION, vs KULLBERG. [BANK.]

adjudicated in Dec. 1862. Not having filed his accounts, he was adjourned *sine die*, and upon the 31st Oct. 1863 died suddenly. He left no will, and no one administered to his estate. The assets to a considerable extent consisted of bills of costs for business done by him as an attorney, and it having become necessary that those bills should be made out and delivered to the clients, a solicitor was appointed by the creditors' assignee for that purpose. The bankrupt was allowed to retain all his books and papers in his own possession to enable him to make out the bills of costs, but which he had neglected to do.

By the 120th section it is enacted that, "The court shall give such directions as it may deem expedient with regard to the custody and inspection of the books, papers, writings and documents relating to the estate, and may authorise the official assignee to have the custody thereof or of any part thereof."

By sect. 121, "No person shall be entitled as against the official assignee to withhold possession of the books of account of the bankrupt, or to claim any lien thereon."

Bagley, on behalf of Mr. Maple, the creditors' assignee, stated that upon the application of his client to the parties in possession of the books, he was referred to Mr. Butler, a solicitor, and a friend of the family, who declined to give them up without the order of the commissioner. He submitted that the assignee had an absolute right to the possession of all books and papers relating to the estate of the bankrupt.

Butler (solicitor) submitted that the assignee was not entitled to the possession of the private papers of clients, upon which neither the deceased bankrupt nor those who represented his estate had or could have any lien; nor to those deeds, documents and papers which came into the possession of Corner after his bankruptcy; nor to documents and papers relating to the private property of third persons, against whom no allegation of indebtedness could be made or had even been suggested. All books, papers and documents to which the assignee could reasonably lay claim would be at once given up.

Bagley in reply.—The trade assignee had an absolute right to insist upon the delivery up of all papers; he must be regarded not only as representing the creditors upon the estate of the deceased, but in the light of a trustee for those third parties who might have a claim upon any of the deeds or documents. If anything were due to the estate from the owners of such deeds, &c., it was the duty of the assignees to hold them until those debts were discharged.

Mr. Commissioner HOLROYD.—It appears to me, more especially in a case of this sort, where a solicitor having been made bankrupt, dies in possession of documents and papers, that the court is bound to act upon the 120th section of the Act of Parliament, and direct all such documents, books and papers to be given up to the official assignee. That officer will look through them, in conjunction with the trade assignee, and such as they have no claim upon will be delivered up to the parties having a right to them, taking a proper receipt from those parties.

The following was the form of the order made:—"Upon the application, &c., it is ordered that the said Mr. Butler, and all and every person and persons holding the same by his authority or direction, do deliver to Mr. Edwards, the official assignee in this matter, all and singular the deeds, books, papers, documents and writings belonging to the said bankrupt, or to his estate, or in his possession, custody or power at the time of his decease."

Monday, Dec. 7.

(Before Mr. Commissioner GOULBURN.)

Ex parte THE BJORNEBORG TANDSTICKS LUCIFER MATCH FACTORY ASSOCIATION, vs KULLBERG.

Reputed ownership—Goods in possession of factor.

Goods consigned for sale on commission are in the possession of the consignee as factor, and do not consequently pass to his assignees on his bankruptcy.

Reputed ownership. This matter was before the court on the 18th Nov. last, when the commissioner directed the facts to be stated in the form of a special case. The case now came on for argument.

SPECIAL CASE.

The Bjorneborg Tandsticks Lucifer Match Factory Association was incorporated according to the laws of Finland, by which no charter or permission from the Government is necessary to form a company, but only a resolution or agreement of the intending shareholders; and no formal record is preserved of such resolution, or of the formation of the company, except the books and archives of the company itself.

In or about the month of Nov. 1852 the company made a consignment of lucifer matches to the bankrupt for sale on its account as factor and commission agent. The consignment was originally from Finland to Germany, but the goods not being realised in Germany, were forwarded, with the approval of the association, to England for sale by the bankrupt on its behalf.

By the terms of the agreement entered into between the bankrupt and the company, the former was not required to accept bills an account of the consignments, nor to provide any money to defray the usual charges thereon, but in his books he debited the company with the fire insurance and other charges attaching to the goods. The company also drew upon him bills to the amount of 1580*l.*, for the value of the goods, which the bankrupt accepted. These bills were outstanding at the time of the bankruptcy. The goods were taken possession of by the assignees and sold. The proceeds of the sale, after payment of all expenses, amounted to 264*l.* 14*s.* 5*d.*, which sum the assignees paid into the Bank of England to the credit of the accountant in bankruptcy. The company, through their agent and executive public officer Ferdinand Eugene Wahlgren, claimed this sum, undertaking to cancel and give up to the assignees all bills drawn by the company upon and accepted by the bankrupt in respect of the goods. On the other hand the assignees laid claim to the money as being the produce of goods in the reputed ownership of the bankrupt at the time of his bankruptcy.

The question for the opinion of the court was, whether the above-mentioned sum of 264*l.* 14*s.* 5*d.* or any and what part thereof, was the property of the association or of the assignees.

From the affidavits filed in support of the company's claim, it appeared that Abraham Oldenburg, as the salaried manager, had consigned the goods in question to the bankrupt for sale on behalf and for the account of the company, and that he had drawn upon the bankrupt in respect of such consignments as agent for the company and not on his own account. That the bankrupt held the goods until his bankruptcy as factor and agent of the company and not as the owner or purchaser thereof.

Sargood, for the association, cited *Whitfield v. Brand*, 16 M. & W. 286; a.c. 16 L. J. 103, Ex.;

Ex parte Greenwood, 6 L. T. Rep. N. S. 558.

Reed appeared for the assignees.

Mr. Commissioner GOULBURN.—The question here is to whom the goods belong? *Parks, B.*, in *Whitfield v. Brand*, laid it down that a factor is not the "owner" of the goods; and *Pollock, C.B.* held that if

it were shown that a man sold the goods of others on commission he was a factor. Here it is shown that the bankrupt had the goods consigned to him as a factor, to sell on commission simply, and not upon a *del credere*. The order will be that the claimants, the company, are entitled to the proceeds of the goods, less the insurance and other charges. The company must cancel and give up the acceptances of the bankrupt held by them.

Order accordingly.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Nov. 11 and 13.

(Before the LORD CHANCELLOR (Westbury.)

Re THE JOINT-STOCK COMPANIES WINDING-UP ACTS, and *Re* THE BRITISH PROVIDENT LIFE AND FIRE ASSURANCE SOCIETY, *ex parte* GEORGE LANE.

Winding-up—Contributory—Purchase of shares by company—Inference of prescribed formality having been complied with—7 & 8 Vict. c. 110, s. 29.

*By the deed of settlement of a company, it was provided that it should not be lawful for the directors to sell or purchase any shares without the authority and sanction of a general meeting "previously in that behalf obtained." L., who was a registered shareholder for 300 shares, and who had been a director of the company, in the year 1855, being desirous of parting with his shares, applied to the directors, and was referred to S. as their agent. L. agreed with S. to give up the shares, to pay 100*l.* and 30*l.* bonus to himself, and take back two annuities for himself and his wife. This transaction was completed in Jan. 1856. Direct evidence that any meeting was held for the purpose of confirming this purchase was wanting; but it appeared that the shares were transferred in the company's books, and in the public register, and that the allottee paid calls upon them. The annuities were also regularly paid; and there was evidence to show that at a general meeting held in April 1856, a balance-sheet was produced and adopted, which showed entries for "annuity purchase-moneys," and a sum of 300*l.* for "deposits returned on shares:"*

Held, that the clause in the deed could not be held to mean that the directors were not to treat for the purchase of shares, provided such purchase was afterwards ratified, and that the word "previously" meant previously to the treaty becoming finally valid and binding:

Held, further, that, under the circumstances, the assent of the company must be held to have been given to the transaction; and that, on the whole, the transfer by L. to the company was a valid transfer; and that he was not liable to be placed on the list of contributories.

The 29th section of the Joint-Stock Companies Act relates to contracts with servants for the supply of goods, &c., and not to transactions respecting dealings with shares.

This was an appeal from a decision of Kindersley, V.C., whereby he held that Mr. Lane was liable as a contributory to the above company.

The facts are stated in the report, *ante*, p. 281, and the main question on the appeal turned upon the construction to be put upon a clause (157) of the company's deed of settlement, whereby it was provided that "it should not be lawful for the directors to sell or purchase any shares without the authority and

sanction of a general meeting of proprietors or members of the society previously in that behalf obtained."

Glasse, Q. C. and *Henry Shebbeare* supported the appeal on behalf of Mr. Lane. They cited

Ex parte Grady, 30 L. J. 326; 8 L.T. Rep. N. S. 98;

Bargate v. Shortridge, 5 H. of L. Cas. 297.

Baily, Q. C. and *E. K. Karstake*, for the official manager, supported the V.C.'s decision. They cited

Ex parte Lawes, 1 De G. M. & G. 421;

Ex parte Morgan, 1 M. & G. 225;

Ex parte Stanhope, 2 De G. & Sm. 198.

Shebbeare, for the creditors' representative, referred to the 29th section of the 7 & 8 Vict. c. 110, by which it was provided that if any contract or dealing should be entered into, in which any director should be interested, the terms of such contract or dealing should be submitted to the next general or special meeting of shareholders, and that no such contract should have any force until approved and confirmed by the majority of the votes of the shareholders present at such meeting.

Glasse, Q. C., in reply, referred to

Doe dem. Pennington v. Tanieri, 12 Q. B. 1013.

The LORD CHANCELLOR.—I quite agree with the V. C. in the position that Mr. Lane cannot be held to have legally denuded himself of these shares, unless he has done so in conformity with the provisions of the deed of settlement. In dealing with a joint-stock company, the provisions of that deed must be observed. The question is one of fact, whether there is evidence before me that the transaction has been carried on in conformity with the deed, whether the circumstances are such as enable me to presume, and render it my duty to presume, that the deed has been complied with, or whether the circumstances are such as to estop the company from denying that the provisions of their deed have been duly observed. Now it is material to have regard to the course of dealing and to the transactions that have taken place on the part of the company, after the shares were delivered up to them by Mr. Lane. It appears that Mr. Lane was originally a director of this company. I quite agree with the remark, that to him, therefore, complete knowledge of the provisions of the deed must be ascribed. Mr. Lane ceased to be a director of the company some time in 1855. He had originally subscribed or agreed to take 300 shares in the company. It does not appear that the final certificates of these shares were ever issued to him. All that appears to have been issued to him were what are called the scrip certificates. In the latter part of the year 1855 Mr. Lane was desirous of parting with these shares, either by sale of them to another person, or by a sale and surrender of them to the company. He made a proposition accordingly. That proposition was brought before the court of directors, and it was referred by them to Mr. Sheridan, the managing director, to consider and see in what manner the proposition could be carried into effect. Mr. Lane accordingly, on the 25th Jan., attended at the office, and was then informed by Mr. Sheridan, that he either had disposed, or could dispose of the shares, but he required Mr. Lane, and it was agreed, that he should surrender the shares, and should receive from the company two annuities, one on his wife's life, and one on his own, it being part of the business of the company to grant these annuities. Mr. Sheridan represented to Mr. Lane that the consideration for the annuities would be a sum of 400*l.*, and he, Sheridan, required a special gratuity from Mr. Lane of the sum of 30*l.* in respect of his own personal conduct in the transaction. Mr. Lane accordingly gave to Mr. Sheridan a cheque for 130*l.*; so that he gave the 300*l.* that had been paid on the shares, together with the 100*l.*, representing the purchase-money of the annuities, and the extra 30*l.*, being the gratuity to

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Mr. Sheridan. Now, I cannot at all imagine that the question of the validity of this transaction, as between Mr. Lane and the company, is to be affected at all by the circumstance that Mr. Sheridan received this gratuity of 30*l*. It was a very improper transaction as between Mr. Sheridan and the company. It might have entitled the company to demand from Mr. Sheridan that sum of 30*l*.; but it could not impair or affect the validity of the transaction as between Mr. Lane and the company, if in other respects it was not open to objection. Mr. Lane accordingly delivered to Mr. Sheridan the scrip certificates that he had in his possession, and accordingly Mr. Lane received from the company some memorandum, or was assured that some entries had been made by which the two annuities of 18*l*. each had been secured to him and his wife. Now, all this was completed, as I understand the evidence, in the month of Jan. 1856. There was a provision in the deed of settlement of this company that an annual general meeting should be held. The general meeting being annual, of course was held at some time in the year—at some time which does not appear to have been constantly fixed. The provision in the deed in this respect is contained in the 157th section, and the effect of that section is that the directors shall not be at liberty to purchase any share or shares, without the authority and sanction of a general meeting of the proprietors and members of the society previously in that behalf obtained. Now it is impossible to understand this section as necessarily having this meaning, that the directors shall obtain the approbation of a general meeting before they treat for the purchase of any shares. It is absolutely necessary that the treaty should have been matured as to its terms, before those terms could be submitted to a general meeting; because what is intended here to be done is this, that the general meeting shall have an opportunity of knowing the terms upon which the shares are proposed to be purchased on behalf of the company, and therefore it must necessarily follow that it would be quite competent to the directors to proceed by treaty and negotiation, and even to enter into a conditional contract, provided only that ultimately the sanction of a general meeting was obtained. It has been considered in the court of the V. C. as if this word “previously” meant previously to any proposal, previously to any treaty, previously to the contract being considered and matured. I am not of opinion that that is the correct meaning of the term. I hold the meaning of the term to be this, that the sanction of the general meeting shall be obtained to the contract, that is, to the contract when matured and finished, subject only to the condition that this assent and approbation shall be something previous to the contract taking effect and binding the company, and binding also the other contracting party. The word “previously,” then, consistently with its proper meaning, and consistently with the reasonable intent and object of the clause, must be considered to mean previously to the transaction becoming finally valid and binding. That being so, what I have now to consider is this, whether this contract, concluded as far as it could be concluded between Mr. Lane and the directors in the month of Jan. 1856, has or has not been subsequently sanctioned by the company at a general meeting, *modo et formâ*, as required by this section of the deed? And here I hold myself not only at liberty, but bound, to draw all the conclusions against the company which may be reasonably drawn from the conduct of an individual or from the conduct of a company, which, in this respect, is to be treated as an individual. Now, what are the acts which were subsequently done by the company? I pass over for the moment the scanty evidence which the company brings forward of the immediately subsequent meeting, and what occurred there, passing it

over with this observation for the present, that it was the duty of the company to have kept exact and accurate minutes of what took place at their general meetings; and if those minutes are not forthcoming, that it must be assumed, as against the company, that whatever the directors ought to have brought forward at that annual meeting, whatever then might, in conformity with the antecedent proceedings of the directors, have been submitted to the shareholders, must be taken to have been so submitted. Well, then, I find, subsequently to the general meeting, that 200 of these shares were actually transferred by the company to a gentleman of the name of Goosey, for a sum of 200*l*., and this dealing with the shares, it will be observed, could not be for one moment taken by the company, or even thought of, except on the basis of the company having duly acquired those shares, and which acquisition could not have been made except in conformity with the 157th section. This subsequent act of ownership by the company, which against them is pregnant with this fact, that they had duly become owners, is duly entered in the books of the company; and not only did they enter this transaction as a legitimate act of ownership over the shares, but they proceeded to make a call on that new allottee or assignee of those shares of a sum of 100*l*., being 10*s*. per share. Now I pause here for a moment to consider, am I or am I not to infer from this fact, that the company had become *bonâ fide* and legitimately the owners of the shares? It does not rest there. The company returned the transaction to the public registry office, and in the books of that public registry the transaction is entered, so far as Mr. Sheridan is concerned, by an entry that states that 200 of these shares had been transferred to the company. Now the dates appear to be these. The transfer made by the company to Mr. Goosey is dated in the company's books the 21st Feb. 1856; the return to the office is entered in the public book on the 22nd Feb. 1856. No doubt the return had been made to the office of the transfer or surrender by Sheridan some days previously to the time when the new assignment was made to Goosey. But probably the entry was not made in the public book at the registrar's office until the 22nd Feb., which is one day after the date of the assignment to Goosey. There was here, therefore, a public announcement to the whole world—a fact which must have been known to the shareholders, which I must take to have been known to the shareholders at the meeting—that 200 of these shares had been transferred to and accepted by the company. Then the next thing I find is this—that the 100 shares are not only dealt with by the company, but are assigned by them in different portions to five other individuals, who were returned to the public registry. [*Shebbeare*.—I think, my Lord, there is a little misunderstanding about that. I understand these shares were previously allotted.] We have gone through the whole of it, and I desired Mr. Karslake to show me the proof of the assertion that they were previously allotted. Upon an examination of the matter, there was no evidence produced of the hypothesis of Mr. Karslake, that there had been a double issue of shares under the same numbers. Neither was there any evidence of the fact that the allotment had been previously made, and upon the official manager being asked, on his appealing to the entry in the books, whether there was any date to the entry, he said there was none, and therefore I must in all reason assume that if shares are entered in a book, allotted to five persons, which bear the same numbers with the shares originally allotted to Mr. Lane, and the scrip certificates of which were delivered up by him, the allotment to the five persons was subsequently made. The 100 shares appear to have been allotted to five persons in the books, and those 100 shares previously

allotted to Mr. Sheridan appear in the public registry now as held by those five individuals. It is impossible, therefore, to take any case in which there have been acts or conduct, on the part of the company, more reconcilable with the hypothesis that the company had legitimately and rightfully become the possessors of those shares originally held by Mr. Lane. But it does not rest there. The company not only dealt with those shares in the manner I have described, but they paid the annuities regularly during 1857 and 1858, and having made default in payment in 1859, legal proceedings were taken and new directors investigated the whole subject, and the company gave its promissory note for the arrears of the annuities, which was afterwards paid by a cheque of the solicitor. I have a transaction, therefore, recognised in a variety of ways during several successive years. Now then, with the light which I ought to derive from these circumstances and the conclusions with which they are pregnant against the company, I come to consider the evidence of what took place at the general meeting. There was a general meeting immediately after the transaction of the 10th April 1856. There were other general meetings. Now a foundation of all just presumption is, undoubtedly, this: that what it was right and proper to do at that meeting must be taken to have been done, unless there be evidence to the contrary. There can be no doubt that, under these circumstances, it was right and proper and the duty of the directors to bring before the shareholders that particular transaction which had been thus completed, acted upon, and in respect of which there had been the subsequent dealings with these 300 shares. Nor is there anything in addition to this general ground of presumption which would induce me to draw the conclusion that the matter was before the shareholders at that meeting. We find that a balance-sheet is made out for the express purpose of being produced to the shareholders at that meeting. I undoubtedly deal with this company in no severe manner if I take it for granted that this balance-sheet was explained to the shareholders, and that the shareholders understood the balance-sheet before they adopted it and passed the resolution which they did. Now the balance-sheet contains, on the one side, "Purchase-moneys for annuities, 450*l*." It contains, on the other side, an entry of "Deposits returned generally," which would be deposits paid when there had been no issue of shares; and then a marked entry, "Deposit returned on shares, 300*l*." The deposit returned on shares must mean deposit returned on shares which have been issued. Am I, then, to infer that this particular transaction—and there is no other to which it can be referred than that transaction with Mr. Lane—was explained to the shareholders, or understood by them. The V.C. has said it was *per se* insufficient to give full information. But it was not the duty of Mr. Lane to make the entry; it was the duty of the directors to make the entry; it was the duty of the shareholders to ascertain to what the entry referred. And I conceive myself bound, therefore, to draw the conclusion, first, that this entry referred to the particular transaction, for there is no suggestion of any other transaction which it was intended to denote; secondly, I draw the conclusion that the entry was understood by the shareholders, and therefore, upon the ground of the general duty of the directors to bring this before the shareholders, and on the ground that there is an entry in the balance-sheet which I must take the shareholders to have understood, I am warranted in drawing the conclusion that the transaction was made known to the shareholders at that general meeting. Well, but is there anything in any manner to rebut this presumption, or to weaken the force of this conclusion? It was the duty, as I have said, of the company to keep accurate entries of the business transacted at that

meeting. A book is produced, called the minute-book, containing the minutes of the meeting. The minutes of this particular meeting are most important; but they are not completed in any way, neither are they signed by the chairman or the secretary. It is impossible, therefore, to derive from that book anything whatever that rebuts the presumption, or weakens the conclusion I have arrived at. Now, I adhere entirely to the principle which was stated in *Grady's* case, which is entirely consistent not only with all reason and good sense, but with the whole line of authorities, namely, that if a company has power to do a thing, and there is only required a particular formality, such as the consent of a general meeting, in order to warrant the exercise of that power; and if a company be found dealing with an individual at arm's length, taking a transfer of shares, duly completing the transfer, and entering the transaction in the books of the company, the court is justified and warranted in imputing a knowledge of it to every shareholder and also in inferring against the company that the consent of the general meeting was given to the transaction. By adhering to that principle, I not only satisfy the law that the requisitions of the deed must be abided by; but I entirely satisfy all duty of moral justice, in holding that a transaction of this kind could not by possibility have been dealt with by the company in the manner in which it has been dealt with, unless it had been formally completed in the manner required by the deed. Then I find a meeting at which the thing might have been done, at which it is plain from the balance-sheet that it was one of the subjects submitted to the shareholders. I find nothing presented to me to show that it was not considered at the meeting; and therefore, in the absence of any evidence to the contrary, I shall undoubtedly conclude and presume that the surrender of the shares to the company was assented to and approved of by the shareholders at the meeting that was held on the 10th April 1856, and that, in consequence of that, the subsequent transactions and dealings with those shares were entered into by the company. Now, perhaps I am wrong in speaking of this consent of the shareholders as a mere formality. I do not mean by the use of that expression to weaken at all the necessity of the fact being found. There can be no valid surrender or transfer without it; and therefore, when the court arrives at the conclusion that the transfer is valid and effectual, it must arrive at that conclusion through the medium of first finding the fact that the consent of the shareholders at the meeting was given to the transaction. The V.C. therefore and myself agree, undoubtedly, in the principles on which the case is to be considered. We differ, unfortunately, in this—that the V.C. thought he was not at liberty to draw that presumption which, under the circumstances of the case, I think it is my bounden duty to draw. I am not aware that there are any other grounds upon which an opposition to the application has been made before me. The main argument has been, perhaps, in some degree superfluous—the necessity of abiding by the deed. That might have been taken for granted. Another argument has been attempted to be raised upon this, that in the absence of anything proving the fact that it was submitted to the general meeting, the presumption cannot be drawn that it was considered and assented to. I differ entirely from that argument. I adhere to the grounds and reasons for deriving this presumption which I stated in *Grady's* case, and which exist to my mind in the present case even in a stronger degree than they did in *Grady's* case, and I am bound therefore to hold that this gentleman, Mr. Lane, was, by reason of the assent of the general meeting held on the 10th April 1856, validly divested of the 300 shares held by him, which must be taken and considered to have been lawfully purchased and assigned

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[CHAN.]

by him to the use of the company, and that he ought not therefore to have been included in the list of contributories. I must reverse the order of the V. C. and make that declaration.

Glasse, Q.C. asked for the costs of the app. in the office, in the court below, and before his Lordship, together with the deposit.

The LORD CHANCELLOR said that the deposit must be returned.

Karslake asked for the costs of the official manager out of the estate.

The LORD CHANCELLOR said, that the official manager had been fully justified in what he had done by the judgment of the V. C. He must have his costs throughout; that is, the costs in the office, the costs before the V. C., and the costs of the appeal. He must make that order with respect to the app. which, in his view, the V. C. ought to have made, namely, to have given him the costs of the proceedings before him, and in the office; but he could not give him the costs of coming before the Appeal Court. With respect to the section in the Joint-Stock Companies Act which had been very properly cited by Mr. Shebbeare, his Lordship said, he ought to have mentioned that it must, in his judgment, be taken to refer to transactions of this kind, namely, where directors enter into contracts with servants, and contracts for the supply of goods, and that it was in order to limit transactions of that kind, and to put a check upon them (which were of the most mischievous kind), that that particular section of the Joint-Stock Companies Act was introduced; but it would have no application here, and the particular provision of the deed, even if it had application, would supersede it.

Shebbeare asked for the costs of the creditors' representative.

The LORD CHANCELLOR said he must have his costs.

Solicitors: for the app. Peckham; for the official manager, W. J. Scott; for the creditors' representative, H. Gover.

Nov. 18 and Dec. 12.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte COCKBURN, re SMITH.

Bankruptcy—Deed of composition—Act of 1861, s. 192 et seq.—Inequality.

An assignment or surrender of the debtor's estate is not necessary in order to render valid a deed of composition under the 192nd section of the Act of 1861.

But it is necessary to the validity of such a deed that the non-executing minority of the creditors should stand in the same situation, and have the same advantages, as the majority.

A deed of composition was entered into between the debtor of the first part, the creditors whose names and seals were subscribed in the schedule of the second part, and all others (if any) the creditors of the third part. The second schedule comprised names of some creditors who had executed, and of others who had not executed nor assented, and there were creditors who were not mentioned in the deed at all. The deed recited that the debtor proposed to pay to all his creditors a composition of 3d. in the pound, and that the persons whose names were thereto set had agreed to accept such composition, and to give a release. It then witnessed that, in consideration of the composition in hand paid by the debtor to the parties of the second part, and in consideration of the covenant therein contained, the parties of the second part thereby released the debtor, &c., and the debtor thereby covenanted with the parties thereof of the second and third parts

to pay to them a composition of 3d. in the pound:

It was held that the deed was invalid under the 192nd and following sections of the Act of 1861, on the ground of the unequal advantages which it held out to the two classes of creditors, those who executed it and those who did not.

This was an appeal against an order of Mr. Commissioner Fane made in August last, whereby he annulled a joint adjudication in bankruptcy against two persons on the ground of their having each executed a deed of composition with their creditors under the 192nd section of the Bankruptcy Act 1861.

The debtors, Messrs. Smith and Laxton, were in partnership, and dissolved partnership in Nov. 1862. On the 16th of May last they were served with a writ at the suit of Messrs. Cockburn, the apprs., in proceedings on a bill of exchange, which had been accepted by the firm before they were dissolved, and which lately falling due, had been dishonoured.

On the 19th May Messrs. Cockburn served them also with a notice of bankruptcy, and on the 23rd May an act of bankruptcy was committed.

On the 22nd and 23rd May Smith executed the deed of composition on which the contention turned; and Laxton on the 23rd executed a deed in precisely similar terms, *mutatis mutandis*. The deeds were left for registration on the 30th June, and on the 1st July the certificate of their registration was issued.

On the same 1st July Messrs. Cockburn presented a petition in bankruptcy against Messrs. Smith and Laxton, and on the 31st Aug. the learned commissioner annulled the bankruptcy on the ground that the farther administration of Smith and Laxton's affairs must be left to those who were entitled to act under the deeds.

Smith's deed was made between himself of the first part, and the several persons whose names and seals were thereunto subscribed and set in the schedule thereunder written (being severally creditors in their own right, or in copartnership, of the said John Benjamin Smith), of the second part, and all other (if any) the creditors of the said John Benjamin Smith of the third part. It recited that Smith was indebted to the parties thereto of the second part, and to other persons in divers sums of money, and that he had proposed to pay to the whole of his creditors a composition of 3d. in the pound; also that the persons whose names and seals were thereunto subscribed and set had agreed to accept the said composition and to release Smith from their respective debts and from all other sums of money (if any) which were then due and owing from him to them respectively, or to them and their respective partners. The indenture then witnessed that, in pursuance of the said agreement, and in consideration of the composition of 3d. in the pound on the amount of their respective debts as mentioned in the schedule, in hand well and truly paid by Smith to the several persons parties thereto of the second part, they and each of them thereby respectively relieved and discharged Smith, his heirs, executors, administrators and assigns; and also in consideration of the covenant thereafter contained by or on the part of the said Smith, they the said parties thereto of the second part, for themselves, &c., severally and respectively, and for their several and respective executors or administrators, partners and assigns, but every one of them, so far only as concerned his own respective acts and deeds, and the respective acts and deeds of his own respective executors, administrators, partners and assigns, their and every of their executors and administrators, and not further or otherwise, did, and each of them did, thereby acquit, release, and for ever discharge the said Smith, his heirs, &c. (in the usual form). And Smith, in consideration of the premises, did thereby, for himself,

his heirs, executors and administrators, covenant, &c. with the said parties thereto of the second and third parts, and their respective executors, administrators and assigns, that he the said Smith, his executors or administrators, should and would upon demand truly pay "unto all and singular the existing creditors of him the said J. B. Smith (including the said parties thereto of the second part, unless the same shall have been paid to them on the day of the date of those presents) or their respective executors, &c., a composition of 3d. in the pound on the amount of the respective debts or sums of money then due and owing by him (either alone or jointly with any other person or persons) to them respectively."

A former decision in the same appeal is reported ante, p. 403. The question of the validity of the deeds was ordered by his Lordship to be reargued before him, and this argument was taken on the 18th Nov., at the conclusion of which judgment was reserved.

Druce for the apps., the dissentient creditors.—First, none of the creditors of either debtor other than those who are parties to the deed of the second part, can sue upon the covenant to pay. It is settled that no one can maintain an action on a covenant unless he be named in the deed :

Gilby v. Copley, 3 Lev. 138;

Metcalf v. Ryecroft, 6 M. & S. 75;

Berkeley v. Hardy, 5 B. & C. 355.

This doctrine is not in any way affected by the provisions of the 8 & 9 Vict. c. 106, and it is founded on two principles: one, that parol evidence cannot be admitted to explain a patent ambiguity, or to show who are the parties to a written contract; and the other that, if a covenant is made by deed indented with persons who are not parties, the deed works no estoppel. Hence there is no binding admission on the part of the debtor of the amount of the respective debts. Secondly, even supposing that other creditors than those named could maintain an action upon the covenant, it will appear that the benefit given to parties of the second part is so much greater and so different to that given to parties of the third part, that the creditors do not stand in a position of equality. The parties of the second part receive their compensation at the time they execute, whilst all that the non-executing creditors get is the covenant of a man of straw that he will pay. Thus a majority may combine to sweep off all the assets by dividing them between themselves, leaving the dissentient creditors to their remedy by covenant. In no case can a mere covenant to pay, without more, be the foundation of a composition within the meaning of the statute. If there be not a *cessio bonorum*, there must be at least an assignment of some part of the property: (*Walter v. Adcock*, 7 H. & N. 541; 31 L. J. 380, Ex.; 6 L. T. Rep. N. S. 583.) The deed must be as much for the benefit of all as of some. Thirdly, upon the terms of the deed there is no release whatever by any creditor who has not executed. The release is only by parties of the second part. There is nothing to extend the provisions to those who do not in fact execute the deed: (*Ex parte Morgan, re Woodhouse*, 7 L. T. Rep. N. S. 729; 32 L. J. 15.) The release is not co-extensive with the covenant. No composition-deed is effectual as a bar, unless the debtor has done all that is obligatory on him. The old liability still remains for some purposes (as in respect of a debtor about to leave England), but this deed would operate as a release from his old liability before he had done that which is the consideration for his release. The interposition of a surety would, no doubt, give a consideration which does not exist in this case, but still there is the difficulty that those persons are to release who have not received their money.

Bacon, Q. C., for the reas., supported the deeds.—First, the very nature of a composition-deed precludes the

possibility of a man's putting into a single schedule the names of all his creditors. He may be unable to ascertain who are the holders of his acceptances, or his creditors may be absent. But even although he may know the names of all his creditors, and the amount of their debts, he cannot say beforehand how many will execute, and how many will not. The object of the two schedules is to provide for the uncertainty of how many will sign, and when. Secondly, the alleged inequality disappears on examination. The creditors have the option of taking 3d. down, or a covenant to pay. A combination to defeat the minority would be a case of fraud, a transaction which would vitiate the whole deed. The statute does not require a man to make a schedule of all his creditors, nor could he do so if it did. Thirdly, all creditors are parties to the deed by force of the Act of Parliament. They can sue, and can give releases; and in this sense the deed is for the equal benefit of all the creditors.

Sargood (with *Bacon*, Q. C.).—Common law principles do not apply to the construction of this statute. All creditors who do not sign must be parties of the third part; and directly a man signs, he becomes a party of the second part. It is a fallacy to say that that arises from anything which is done by the debtor. If there is any inequality, it is one which is admitted by the statute, in the absence of fraud. The creditor who comes to the court complaining of inequality has only himself to blame; the fault is his own.

Druce in reply.—The question is not as to the conduct of parties, but as to the legitimate consequences of the deed. The debtor taking the benefit of the statute must fulfil the statutory obligation, and give to each creditor the same benefit that he gives to everybody else.

Dec. 12.—The LORD CHANCELLOR.—In this case I am desired to hold that two deeds of composition and release executed, one by John Benjamin Smith and the other by Thomas Laxton, are not binding on creditors who have not executed or assented to them, and therefore that the deeds have not been duly registered under the 192nd and subsequent sections of the Bankruptcy Act 1861. These deeds of release do not contain any assignment, or make any surrender of the estate and effects of the debtors; but it is, in my opinion, well settled, and is the clear intent of the Bankruptcy Act of 1861, that an assignment or surrender of the debtor's estate is not necessary for the validity of a deed of composition or release under the 192nd section. The provisions of the Act appear to have been intended to prevent the necessity of breaking up in every case a debtor's business, or bringing his property to a forced sale. The Legislature appears to have supposed, and I think with reason, that in many cases the power of escaping this necessity might lead to results more beneficial to the creditors than would follow from the breaking up of the debtor. But to render a deed of composition and release binding on the minority of the creditors who have not executed or assented to or approved of it in writing, it is necessary that the non-assenting creditors should stand, under the deed, in the same situation, and with the same advantages, as the creditors forming the majority. The 192nd section enacts that the creditors who have not assented are to be bound, "as if they were parties to and had duly executed the deed." It follows that the provisions of the deed must be such as will apply to all the creditors equally, and without distinction or difference. To apply these rules to the deeds in question (each of which is a counterpart of the other), and taking Laxton's deed as an example, I find that it is made between Laxton of the first part and the several creditors whose names and seals are subscribed and set in the schedule thereunder written (being severally creditors in their own right, or in copartnership, of Laxton), of the second part, and all other (if

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any) the creditors of Laxton of the third part. In the schedule are included the names and debts of various creditors, some of whom have signed and sealed the deed, and others of whom have neither executed nor assented to or approved of the deed. It appears also from the account of debts, which, in conformity with the regulations, was produced to the registrar when the deed was left for registration, and which is verified by affidavit, that there are several other creditors whose names do not appear at all in the schedules to the deed, and that the number of creditors in each case, who have neither assented to nor approved of the deeds, is considerable—in Smith's case, amounting to sixteen. A distinction is thus drawn between those of the creditors named in the schedule who have not executed the deed and those who have executed; and further, a distinction is drawn between the creditors who have not executed but are named in the schedule, and those who are not so named. The deed recites to the effect that Laxton had proposed to pay unto the whole of his creditors a composition of 3d. in the pound, and that the several persons whose names and seals were thereunto subscribed and set had agreed to accept the composition and to release Laxton from their respective debts. And it is witnessed that in pursuance of the recited agreement, and in consideration of the composition of 3d. in the pound on the amount of their respective debts as mentioned in the schedule, in hand well and truly paid by Laxton to the several persons parties of the second part, and also in consideration of the covenant by Laxton thereafter contained, the parties of the second part did thereby acquit, release, and discharge Laxton, his heirs, executors and administrators, and his and their estate and effects, from all the sums of money set opposite to their respective names or firms in the schedule, and from all sums of money (if any) which at the time of the execution of the deed by the several parties thereto of the second part, were due and owing by Laxton to them respectively, or to them and their respective partners, and from all and all manner of actions (following the words of a general release); and Laxton, for and in consideration of the premises, did thereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the several parties thereto of the second and third parts that he (Laxton) would, on demand, pay unto all and singular the existing creditors of Laxton, including the parties thereto of the second part (unless the same should have been paid to them on the day of the date of the deed), a composition of 3d. in the pound on the amount of their respective debts then due and owing by Laxton, either alone or jointly with any other person or persons to them respectively. It appears from this statement of the deed that the creditors who have not executed the deed, and those who are not named in the schedule, are placed by the deed in a situation very inferior to that of the majority of the creditors. To the latter the composition is paid down in hand, whereas the former have to rely upon the covenant. But further, it is clear that the creditors who have not executed the deed could not sue upon the covenant of the debtor. The covenant is with the parties to the deed of the second and third parts, and as the deed is between parties, no person who is not a party could sue upon the covenant. This clearly follows from the settled principles of law which are illustrated by the cases cited in the argument. Again, the creditors whose names and debts are not set forth in the schedule are under a great disadvantage in this respect, namely, that there is no admission by the debtor of the debts due to them respectively. Even, therefore, if any one of such creditors could now come in and execute the deed and sue upon the covenant, he would be under the necessity of proving the fact and amount

of his debt. But the deed to be binding must be complete at the time it is registered, and it cannot be subsequently executed by any creditor who had not previously assented to or approved of it in writing. Therefore it is plain that there are several creditors in each case who are in a situation of great disadvantage. The deeds have been framed in an imperfect manner. If the names and debts of all the creditors who are not parties to or have not assented in writing to the deeds had been included in distinct schedules written under the deeds, and the amount of the composition on such last-mentioned debts had been deposited in a bank or with a trustee for such last-mentioned creditors respectively, with directions to pay the amount on demand; and if the debtors had also respectively covenanted with the persons named in such schedules that they or the trustees respectively should and would pay such composition on demand, it might perhaps have been reasonably contended that all the creditors were, as far as possible, placed in a situation of equality. The power given by the Act to a certain majority of creditors to bind, and is a fact to release, the debts of the minority, in cases where there is no *cessio bonorum*, is no doubt a great and extraordinary power. It of course rests on the assumption, that terms, which so large a proportion of creditors both in number and value are willing to accept from an insolvent, must be advantageous to the whole body of creditors; and this assumption necessarily implies that the terms agreed to are the same for all, and that those who bind and those who are bound are in a situation of equality. Where this is not the case, it seems to me that non-assenting creditors are not bound according to the true intent and meaning of the statute. I must therefore declare that these deeds of composition are not binding on the creditors who are not parties, or have not assented thereto, and that the order of the commissioner annulling the adjudication which is founded on these deeds of composition, must be discharged. The deposit may be taken back.

Solicitors for the apps., *Crowder and Maynard*.
Solicitors for the resps., *Batt and Son*.

Thursday, Dec. 10.

(Before the LORD CHANCELLOR (Westbury.)

Ex parte STUART, *re* WAUGH.

Bankruptcy—Release of bankrupt when in prison or in custody for debt—Discretionary jurisdiction—Act of 1849, sect. 112.

Where a man, made bankrupt in April 1857, for having shortly before left the country in debt, remained abroad without surrendering until 1863, and then visited this country in secrecy and lived in London under a false name; and upon his being discovered was arrested on a capias on *mesne* process in an action at common law, issued upon an affidavit that he was about to quit the country again immediately, the Court refused to exercise its statutory power of granting his immediate release, although the application was supported by the assignees on the ground of the greater facility that would thereby be afforded in preparing the account. The discretionary power in the 112th section can only be exercised for the purpose of bringing about some great benefit or advantage to the creditors.

Bacon, Q.C. and Bagley appeared in support of a motion on behalf of the official managers of the London and Eastern Banking Corporation, to rescind or vary an order made by Mr. Commissioner Goulburn, on the 25th Nov. last, whereby he ordered the immediate release from prison of the bankrupt William Petrie Waugh.

The facts of this well-known case, material to the present application, were as follows:—Col. Waugh

having left this country on the 28th March 1857, largely indebted, was adjudicated a bankrupt on the 15th April following. He did not surrender to the bankruptcy, but remained abroad, with the exception of four short visits to England in secrecy and under a feigned name, until Aug. 1862, when he returned and lived in London in concealment, and under the same false name.

One of the creditors of Col. Waugh was the above-named banking corporation, of which he was at first a customer in March 1855, and afterwards a shareholder and director. After the bankruptcy, an order was made for winding-up the company, and on the 29th Jan. the official manager applied for leave to prove against the estate for a sum of 254,106*l.* 18*s.* 10*d.*, in respect of money lent, bills of exchange, promissory notes discounted, and also certain sums alleged to be due for shares in the corporation. The claim was disallowed on the ground that the company had not complied with certain statutory provisions, but subsequently the managers were allowed to enter a claim in the proceedings in bankruptcy for a sum of 14,500*l.*, being the amount of a call for 50*l.* a share on 290 shares in the bank, the rest of their claim being rejected.

The rejected portion of the above claim included a sum of 50,000*l.*, for which Col. Waugh had given a bill, dated the 17th Nov. 1856.

On the 24th March last, a creditor, who had discovered Col. Waugh's place of concealment, arrested him for a debt of about 300*l.*; and thereupon, on the 26th March, the official managers of the bank caused a writ of summons to be issued in an action against Col. Waugh, on which the particulars of claim indorsed were 50,000*l.* and interest from the 20th March 1857 until payment, with costs; and on the same day a *capias ad respondendum* was issued at their suit by order of Blackburn, J., indorsed to hold the debt to bail in the sum of 50,000*l.* This writ was issued under the 3rd section of the 1 & 2 Vict. c. 110, whereby arrest on *mesne process* was abolished, upon an affidavit by John Ball, alleging his belief that Col. Waugh, if he could settle the said claim of 300*l.*, would quit England, unless he were forthwith apprehended.

Col. Waugh, being in custody under this writ, on the 19th July surrendered to the bankruptcy, and on the 28th July he made an application to the court to be released from custody, upon which Mr. Commissioner Holroyd ordered that he be not released except upon finding two sureties in 2000*l.* each and giving security himself for 4000*l.* for his re-appearance at the several sittings, &c.

The last examination having been postponed till the 18th March next, the accounts not being ready, another application for the bankrupt's release was made on the 20th Nov., and on this application Mr. Commissioner Goulburn made the order which was now appealed from.

The order recited the various proceedings in the bankruptcy above mentioned, and proceeded as follows: "And it appearing to the court that the further detention of the said bankrupt in custody would be prejudicial to the interests of the creditors; and that by his discharge from prison the said bankrupt would be better able to give to his assignees and creditors a full and true account of his dealings and estate than if he were kept in prison, I, the said commissioner, with the consent of the said assignees, do, in pursuance of the statute, hereby order the immediate release from prison of the said bankrupt at the suit aforesaid, subject nevertheless to the following conditions, namely, that this order remain in the custody of the registrar of this court and be not issued by him until the expiration of fourteen days from this date, or until such further period (if any) as the Court of Appeal in Chancery shall, before the expiration of such fourteen days, direct."

The statutory power under which the release was ordered is contained in the 112th section of the Consolidation Act of 1849.

The case having been opened and the above facts stated,

The L. C. called upon *Rozburgh*, for Col. Waugh, who said that the assignees were perfectly satisfied that it was in the bankrupt's power materially to assist them, and that his facilities for so doing would be materially increased by his being let out of prison. Col. Waugh had been in prison now for nine months, his release was opposed by no one except this detaining creditor, and his health was suffering.

The LORD CHANCELLOR said that the state of a man's health was not a sufficient ground for his release; there must be some paramount object to serve under the bankruptcy. It was for that purpose alone that the power was conferred by the Legislature.

Rozburgh said there was no intention on Col. Waugh's part to abscond; the motive for his absenting himself was at end. The detaining creditor had taken no steps to prove his debt, his claim was disallowed in bankruptcy, and was it to be permitted that a creditor in such a situation should keep a bankrupt in perpetual custody? In the next place the official managers were not prosecuting the action, they ought to have been more diligent.

The LORD CHANCELLOR.—That is matter for the court in which the action is; this is not an action in bankruptcy.

Rozburgh said that one of the objects of the Act of 1861 was to clear the prisons of debtors who were not guilty of fraud. There had been great laches on the part of the detaining creditor, who in the bankruptcy had no debt, but only a claim.

Sargood (with *Rozburgh*) contended that it had always been the practice to treat the power in this section as applicable to arrests upon *mesne process*, as well as to arrests upon final judgment; and as to the principle upon which judges were guided in granting a *capias*, cited *Larchin v. Willan*, 4 M. & W. 351; Harr. Dig. 315. He contended that the exigencies of the writ were satisfied, and relied upon the laches of the creditor.

Daniel, Q.C. (*Thesiger* with him), for the assignees, contended that this would be a discreet exercise of the statutory power. He observed that the language of the 112th section, "where any person who has been adjudged bankrupt and has surrendered, is in prison or in custody for debt," received illustration from the 216th section (now repealed); and that the 112th section in all probability related to debts co-extensive with those for which protection from arrest was afforded by the 216th.

The LORD CHANCELLOR.—I am very desirous of confining my judgment in this case to the bare facts and circumstances which have been indisputably brought forward in evidence, without mixing them up with any other considerations whatever. I have here an order made by a commissioner, in exercise of a very great and singular discretionary power given to the Court of Bankruptcy by the statute of 1849. The commissioner is authorised to exercise that power only for the benefit of the creditors under the bankruptcy. If he is perfectly satisfied that it will conduce to the benefit of the creditors under the bankruptcy, he is to exercise that power. Strictly and properly I have to sit in review only on the grounds which the commissioner has assigned for the exercise of his power; but of the validity of those grounds it is impossible to judge without to a certain extent reviewing the proceedings of this bankruptcy, so far as they have been brought before me. I find that the adjudication of this man as a bankrupt took place as long ago as in April 1857; that in the March preceding he had fled the country,

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and that for several years he absented himself from his creditors and remained abroad. It is stated upon the evidence before me, that this man returned to this country some time afterwards under a feigned name, and remained here in studied concealment, not surrendering to his bankruptcy. It appears that some creditors discovered his lurking place, and arrested him in the place where he was living under an assumed name, and that they were successful in arresting him upon an affidavit framed in conformity with the power reserved to creditors by the Act which abolished arrest upon *mesne process*. Under an affidavit thus framed, the man was successfully arrested, and was lodged in prison on the 26th or 27th March 1863. Then and not till then does it appear to have occurred to him to surrender to his bankruptcy. Whether he had been advised that by that surrender and by the subsequent application which he made to the court he might possibly escape from prison, I do not know, nor is it necessary to inquire. But the fact is that no surrender by the bankrupt to the bankruptcy took place until the 1st June 1863. Now it was competent to the bankrupt to have made an application to the judge in chambers, and to have shown to the satisfaction of that judge that the allegation against him of his intention, if he were released, to abscond again and quit the country, was unfounded. If I am now to be asked to believe that he had no such intention, and that he has no such intention, I think the bankrupt might, with more propriety, have applied to the judge at common law upon whose writ he has been arrested, and have satisfied that judge of the existence of his alleged determination. But no application of that kind has been made, and I am therefore compelled to draw the inference that this man was justly arrested, because he did intend to leave the country; and I am compelled to draw the further inference, that he has not the means of legitimately proving to the satisfaction of that tribunal that he does not now intend to leave the country. Now I desire to draw no conclusion which in the smallest degree depends upon a single fact or circumstance other than that I have stated—the absconding of this man, his failure to surrender, his return to this country and residence here under a feigned name, his arrest, and after his arrest his surrender made at this late period, and the absence of any attempt to contradict or remove the grounds upon which the writ at common law was issued. Under these facts and circumstances I am to approach the consideration of that to which the learned commissioner has given credit—the representation on the part of the bankrupt that, if he gets out of prison, he means to remain in this country for the honest purpose of assisting his creditors in the preparation of his accounts. Now, if I could be credulous enough and innocent enough to give credit to such a representation, I should be still bound to say that sufficient reason has not been shown for the exercise of this discretionary power, because I do not consider that either the commissioner or I should be entitled to interfere with the legal rights of a creditor, on the ground that a man out of prison can give greater facilities to the assignees in the preparation of his accounts than if he remained in prison. It may be considered a probable thing that a man out of prison would find himself more frequently at the office of the assignees than the assignees would attend upon him at the prison. But that greater convenience is not, in my mind, a sufficient ground for the exercise of this power, keeping in view the right of the detaining creditor. The power is a discretionary judicial power, and is not to be exercised unless some great benefit is to result from its exercise, and unless the detaining creditor has the power of availing himself of the bankruptcy for the purpose of permitting the bank-

rupt to be discharged from prison. Therefore, supposing that the Act of Parliament intended to deal only with custody under final process—custody under execution upon final judgment—there would appear some reason for the execution of the power, seeing that the bankrupt is not to get the benefit of it until after he has surrendered, and the creditor would have the power at once of transferring the debt upon which he holds the body of the bankrupt to the file of the proceedings in bankruptcy, a course which is in some respects convenient, because the creditor is by this means enabled to let the debtor go without injury to his right under the bankruptcy. I do not mean to decide that the statute is to be so limited. I think there is some strength in the opposite conclusion, judging from the section to which Mr. Daniel has referred. But, laying that aside as not being an element of my determination, I repeat I cannot give judicial credit to the conclusion which the bankrupt wishes to impress upon me, that such a man as he has shown himself to be intends to remain in this country on his discharge; and if I could, I do not believe that the mere convenience which would result from his being released from prison is a sufficient ground for the exercise of the discretionary power. Now, I am pressed to take into consideration the demerits of the detaining creditor. But I think there is no ground for my doing any such thing. The proper tribunal for the consideration of a question of that kind is the court of common law out of which this process has issued. The bankrupt has elected not to appeal to that tribunal. At present, therefore, I can only recognise the detaining creditor as a man who originally got, in conformity with the statute, a process which has remained unchallenged by the bankrupt, and to which, therefore, I am compelled to give credit, as being *prima facie* legally granted. Many other considerations have been pressed upon me by both counsel for the bankrupt—no topic has been left untouched which could have been properly urged; but there is none to which I can give ear for the purpose of enabling myself either to entertain a more favourable expectation of the bankrupt's conduct in future, or to sanction this exercise being made of the discretionary power. I think it would have been much better if the order of Mr. Commissioner Holroyd had not been reversed; and I further think it would have been better if the present order had not borne on the face of it the fact that it was made with the consent of the assignees. I am sorry that the assignees should have lent their countenance to the proceedings before the commissioner (Goulburn). The position in which the matter was left by Mr. Commissioner Holroyd was reasonable and discreet, and I can see nothing that has arisen in the subsequent conduct of the bankrupt to induce me to depart from that order which Mr. Commissioner Holroyd has made. The fact that the detaining creditors have not established their debt in bankruptcy, is a circumstance on which I can found nothing at all. There has been ample time for the bankrupt to compel the creditors to go on at law or to abandon their proceedings. But the bankrupt acquiesces in everything that has been done, and only since he has got into prison bethinks himself of the duty of surrendering; and now only bethinks himself of it in order that he may have the benefit of this section, by alleging that he can render better service to the assignees by being out of prison than by remaining in. Why he has allowed such a long period to elapse before he returned to this country, why he carefully avoided meeting the facts stated in the affidavit on which he was arrested—these are things which do not lie within the proper ambit of this proceeding. But there is nothing in the history of this bankruptcy, in its origin or prosecution, or in the conduct of the bankrupt throughout, to justify me in crediting for a moment that the applica-

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Ex parte ROBERTS, re HOLDEN—TERRY v. TERRY.

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tion for his release was made *bonâ fide* to advance the interests of his creditors, or in the expectation that any great and material benefit would result to them from his release. The order of the commissioner therefore must be discharged, and with costs of the application before the commissioner, and of the appeal.

Bacon, Q. C. asked for his costs out of the estate.

The LORD CHANCELLOR refused, but allowed the deposit to be returned. As to the costs of the assignees, his Lordship said that, as the assignees seemed to have acted under the commissioner's order, he would give them their costs. Had it not been so, he should not have allowed them.

Solicitors for the apps., *Harrison and Lewis*; for the bankrupt *J. T. Luscombe*; for the assignees, *Linklater, and Hackwood*.

Saturday, Dec. 12.

(Before the LORD CHANCELLOR (Westbury.)

Ex parte ROBERTS, re HOLDEN.

Bankruptcy—Assets—Books of a solicitor—Act of 1861, sect. 137.

The ownership of a solicitor in the books relating to his business is subject to his client's right to have them protected from publication.

Hence, the books of a solicitor who has been adjudicated a bankrupt cannot be sold, as they may be in the case of a trader, under the provisions of the 137th section of the Act of 1861.

Little appeared in support of a petition praying that the assignees in bankruptcy of John Holden and John George Holden, solicitors, might be ordered to carry out the sale to the petitioners of the book-debts of the firm, and of the books relating thereto.

From the opening statement it appeared that the bankrupts, father and son, were in partnership together as solicitors at Liverpool. On the 6th Nov. 1861 John Holden was adjudicated a bankrupt on his own petition; Charles Turner was appointed assignee, Harwood Walcot Banner, accountant, and William Hargreaves Manifold, creditors' assignee of his estate.

On the 20th Feb. 1862 J. G. Holden was also adjudicated bankrupt on his own petition, and by an order made on the 28th Feb. 1862, the two bankruptcies were consolidated. Messrs. Atkinson and Bartlett were appointed solicitors of the assignees, and William Henry Eddis was appointed manager of the estate. The assignees, with Mr. Eddis, proceeded to get in the book-debts until Aug. 1863, when the transaction which gave rise to the present petition took place.

The LORD CHANCELLOR interposing, observed—I find it to be the practice in almost every case, however trifling, to have a manager employed. The alteration with respect to the official assignee seems to have led to nothing but a new source of expense to the estate. I desire it to be understood that in every case in which I find that a manager has been employed, and that there was no reason for his employment, I shall direct that all the costs so occasioned be disallowed. Why should assignees delegate their duties to another person?

Little continued.—On the 19th Aug. 1863 Mr. Eddis, with the authority of the assignees, wrote to the petitioner Mr. Roberts as follows:—"I am instructed by Messrs. Atkinson and Bartlett to sell the books and debts of the late firm of J. Holden and Son by tender, at reserve of 50l. All tenders to be sent in on or before Wednesday (this day), at four p.m. The highest offer, if amounting to 50l., will be accepted finally, and no tender will be accepted after the above date."

The petitioner, who was an accountant in Liverpool, proceeded to state that he offered 106l. 15s. for the business, and, contending that he was the highest

bidder, he prayed that the assignees might be ordered to carry out the sale to him.

The LORD CHANCELLOR observed that the sale of a solicitor's books would put into the market some of the most confidential communications between a solicitor and his clients. If the prayer of this petition was granted, there would be a number of applications to this court to restrain him.

Little said there might be applications to restrain publication.

The LORD CHANCELLOR said there could be no more improper publication than the sale of a solicitor's books by public auction.

Little referred to the 137th section of the Act of 1861 as authorising a sale of the bankrupt's book-debts "and the books relating thereto."

The LORD CHANCELLOR observed that that was only when it could be lawfully done. He could not listen to any such proposal as that of the books of a solicitor being put up for sale. The words of the statute must be construed on the hypothesis that the books might be properly and lawfully sold. The books of a grocer or an ironmonger might with great propriety be sold. But the books of a solicitor were not his own, in this sense, that his clients had a right to have them protected. Consequently they were not his own for the purpose of a public exposition and sale.

Little contended that these were parts of the bankrupt's estate which the statute had made assets. There must be some means of collecting the debts. The books would go to the purchaser under the condition of secrecy. Undoubtedly there was no condition of secrecy in this case, but the law would impose on the purchaser the obligation of secrecy.

The LORD CHANCELLOR.—I do not know that the law will do anything of the sort. This attempt has been founded on an entire misapprehension of the duties and obligations which attach to the office of an assignee. It is utterly impossible to sell the book-debts of a solicitor without divulging information which it is not in the power of a solicitor to make public, and an attempt of the kind ought never to have been made. It was an extremely wrong thing to do, and it only shows that the assignees, and the solicitors of the assignees, in this instance, have not attended to their duties at all. The ordinary course on these occasions appears to be to appoint a manager, and the whole thing is left under the control of the manager. I shall not give costs to either party on this application. The deposit may be taken back.

North appeared for the assignees.

Solicitor for the petitioner, *Lydall*, agent for *Neale and Martin*, Liverpool.

Solicitors for the assignees, *Atkinson and Bartlett*, Liverpool.

ROLLS COURT.

Reported by H. R. Younq, Esq., Barrister-at-Law.

Wednesday, Nov. 11.

TERRY v. TERRY.

Will—Construction—Bequest of stock-in-trade, &c.—Use of book-debts or capital therein—Absolute bequest of.

A testator bequeathed his stock-in-trade, &c., to his wife and son to be used by them in his trade business, which he directed to be carried on by them, in partnership, during the widowhood of his wife; "and for that purpose they were to have the use of the book-debts or capital which he at his death might have employed therein."

Held, that the widow and son were entitled to the book-debts or capital absolutely.

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GLANVILLE v. GLANVILLE.

[ROLLS.]

William Terry, the testator in this suit, by his will, dated the 29th Aug. 1840, bequeathed to his wife Fanny Terry the shop and premises in which he carried on his business of a butcher, for the remainder of the term which at his death he might have in them, together with all his furniture, &c., for her own use during her life or widowhood. He then made the following bequest to his wife and his son Thomas Terry, viz., a bequest of "all the stock-in-trade, horses, carts, carriages, harness, tools, implements and other articles used in his said trade or in husbandry which should belong to him at the time of his death, to be used by them in the same trade or business, which he thereby wished and directed to be carried on by them after his death, upon and for their joint use, account and benefit, in equal shares as partners in trade, so long as his said wife should continue a widow; and for that purpose they were to have the use of the book-debts or capital which he at his death might have employed therein." Upon the death or marriage of his wife the testator bequeathed the house, furniture, &c., and the horses, carts, carriages, harness, tools, implements and other articles used in his said trade or in husbandry, to his said son Thomas, for his own sole use. The will contained other dispositions in favour of the testator's wife and his son Thomas and other children.

The testator died. The widow and Thomas Terry carried on the business, but it fell off from what it had been in the testator's lifetime. The widow and Thomas Terry had received large sums on account of the testator's book-debts, which they had applied in payment of his general and trade debts, and in carrying on the business.

They had however lately dissolved the partnership in it; and thereupon the bill in this suit was filed praying an order for them to bring into court the amount of the capital and book-debts received by them; and to invest it as part of the testator's residuary personal estate.

The plt., and the widow, Thomas Terry and another person (now deceased) were the four co-executors of the testator.

Baggallay, Q.C. and *H. F. Shebbeare*, for the plt. in the suit, contended that the widow and Thomas ought to account for and pay into court the book-debts received by them; for the direction as to the use of them in the will was a qualified one only, viz., for the purpose of the business. In fact it amounted to a loan, and no more.

Selwyn, Q.C. and *Prendergast*, contra, insisted that the bequest of "the use of the book-debts or capital" for the purpose of the business was an absolute specific bequest; or, if not, that it was to be subject to the contingencies of trade; and therefore not properly a matter of account.

Baggallay, Q.C. in reply.

The MASTER of the ROLLS, having read the will, said:—I am satisfied from this will that the testator, by giving his son and widow the use of the book-debts or capital which he at his death might have employed in the business, for the purposes of it, meant to give them the book-debts or capital absolutely.

Solicitor for plt., *A. T. Hewitt*.

Solicitor for defts., *Tompson, Pickering and Styant*.

Nov. 17 and 18.

GLANVILLE v. GLANVILLE.

Will—Construction—Postponement of division of property—Payment of shares to legatees at twenty-one.

A testator bequeathed a sum of stock to trustees, "upon trust for his four nephews and niece, children of his brother Robert, viz., Robert, Richard, Francis, and Margaret Jane," to be "equally

divided between them." He directed that the shares of those who died under twenty-one should accrue to the survivors, and that the interest of the shares should be applied during the minorities of his nephews and niece for their maintenance and education till 1872, when his property was to be divided. The testator died, leaving the three nephews and niece named in his will, some of whom attained twenty-one. He also left another nephew Thomas, who was not named in the will, and who would attain twenty-one in 1873:

Held, first, that the nephews and niece named in the will were entitled to be paid their shares of the bequest as they respectively attained twenty-one years of age; and

Held, secondly, that Thomas was not entitled to any share in the bequest.

Robert Glanville, the testator in this suit, by his will dated the 14th July 1862, bequeathed a sum of stock to trustees, upon the following trust: "Upon trust for my four nephews and niece, children of my brother Richard, viz., Robert, Richard, Francis and Margaret Jane, to be equally divided between them." The will contained a direction that the share of such nephews and niece as should die under twenty-one, should go over and accrue to the others of them; and that during the minorities of such nephews and niece, the trustees should pay the interest of their respective shares for their maintenance and education until the end of 1872, when there was to be a general division of the testator's property.

The testator died, leaving his three nephews and niece named in his will, some of whom attained twenty-one years of age. The youngest of these nephews and niece would attain twenty-one in 1871. The testator left a fourth nephew, Thomas, who was also the son of the testator's brother Richard. Thomas was not named in the will, and would attain twenty-one years of age in 1873.

The questions were, first, whether Thomas was entitled to share in the stock as one of the testator's "four" nephews? And second, whether the shares of such of the nephews and niece named in the will, as had attained twenty-one years of age, were to be paid over to them now, or not before 1872?

E. Lloyd appeared for the plt., the testator's nephew Robert, and did not object to the nephew Thomas sharing in the bequest.

Willcock appeared for the other two nephews and the niece named in the will.

T. B. Williams for the nephew Thomas.

Bevir for the executors.

The following authorities were cited in the arguments:

Scott v. Fenhoulsett, 1 Cox, 79;

Stebbing v. Walkey, 2 Br. C. C. 85;

Harrison v. Harrison, 1 B. & M. 78;

Garvey v. Hibbert, 19 Ves. 125;

Saunders v. Vautier, Cr. & P. 240.

The MASTER of the ROLLS.—I will decide the second question first. With respect to that I am of opinion that, notwithstanding the direction in the will as to the division of the property in 1872, the shares of the nephews and niece named in the will are payable to them as they respectively attain twenty-one years of age. I will consider the authorities cited in the first question, and will mention the case again.

Nov. 18.—The MASTER of the ROLLS.—I have considered the authorities cited to me in this case, upon the first question in it, and also the testator's will. The conclusion at which I have arrived is, that however anxious I am to admit the nephew Thomas to a share of the bequest, I cannot do so. The word "four" in the will does not appear to me to be necessarily confined to "nephews." It may include "the niece." If that be correct, the will is made com-

sistent with itself, and that being so, the court cannot introduce the word "Thomas" into it. If the testator had said "for my four nephews and for my niece," Thomas might perhaps have been included; but he has not said so. As Thomas will not attain twenty-one, if he lives, until 1873, no deduction in his favour can be drawn from the direction to apply the income for maintenance until the division of the property in 1872. It is not probable that if the testator had intended to include Thomas, and yet to postpone the division of the estate, he would have directed it to be divided before Thomas attained twenty-one. I must therefore decide that the three nephews and the niece named in the will are entitled to the bequest of the stock equally.

Solicitors: *Whitehurst*; and *Coode and Co.*

Thursday, Dec. 3.

GRUNING v. PRIOLEAU.

Practice—Cons. Ord., ord. 37, r. 3, ord. z. r. 7—Deflt. out of the jurisdiction—Appearance—Demurrer.

On the 11th Sept. 1863 defts. out of the jurisdiction were ordered to enter an appearance to the bill within fourteen days after the service of the copy of it upon them; and to plead, answer, or demur, or obtain further time to make their defence to the bill, within six weeks after the service of a copy of the interrogatories upon them. The copies of the bill and interrogatories were duly served upon the defts. on the 3rd Oct. 1863. After the time limited for their appearance, the defts. entered one and then demurred to the bill within twelve days from the time of entering their appearance, but after the expiration of the six weeks from the service of the interrogatories.

The plt. moved to set aside the demurrer, on the ground of irregularity in the filing of it:

Held, that the demurrer was not irregular; and the motion was refused, with costs to be paid by the plt.

This was a motion to take a demurrer off the file, on the ground of irregularity in the filing of it.

By the 37th order of the Consolidated Orders, r. 3, it is provided that a deft. may demur alone to any bill, within twelve days after his appearance thereto, but not afterwards.

By the 10th order, r. 7, it is provided that, where a deft. in any suit is out of the jurisdiction of the court: (1) The court, upon application supported, by such evidence as shall satisfy the court in what place or country such deft. is, or may probably be found, may order that a copy of the bill, under the statute 15 & 16 Vict. c. 86, s. 3, and if an answer is required, a copy of the interrogatories, may be served on such deft., in such place or country, or within such limits, as the court shall think fit to direct. (2) Such order shall limit a time after such service within which such deft. is to appear to the bill, such time to depend upon the place or country within which the copy of the bill is to be served; and where an answer is required, such order shall also limit a time within which such deft. is to plead, answer, or demur, or obtain from the court further time to make his defence to the bill. (3) At the time when such copy of the bill shall be served, the plt. shall also cause such deft. to be served with a copy of the order giving the plt. leave to serve such copy of the bill.

Two of the defts. in the suit were out of the jurisdiction of the court. On the 11th Sept. 1863 the plt. obtained an order for leave to serve the defts. with a copy of the bill and interrogatories. That order fixed the time for entering the appearance at fourteen days after the service of the bill, and the time within which the defts. were to plead, answer, or demur, or

obtain further time to make their defence to the bill, at six weeks after the service of the interrogatories. Both the bill and the interrogatories, together with a copy of the order of 11th Sept., were served on the defts. on the 3rd Oct. 1863.

The defts. entered an appearance after the fourteen days fixed by the order of the 11th Sept. 1863. They then demurred to the bill within twelve days from the time of their appearance having been entered, but more than six weeks after the service of the interrogatories upon them. The question was, whether the order of the 11th Sept. 1863 had been duly obeyed by them?

Baggallay, Q.C. and *E. K. Karslake* appeared for the plt., and supported the motion, contending that the order had not been obeyed. Here the plt. had required an answer from the defts., in which case, if they thought it right to demur, as they had done, they should have demurred to the bill *within the twelve days after the time when they ought to have entered their appearance.* The demurrer was therefore irregular, and the order now asked for ought to be made.

Cotton (*Hobhouse*, Q.C. with him), contra, cited *Blenkinsopp v. Blenkinsopp*, 8 Beav. 612; s. c. 2, Ph. 1;

Brown v. Stanton, 7 Beav. 582;

Preston v. Dickinson, lb.;

Consolidated Orders (*ubi sup.*)

Karslake in reply.

The MASTER of the ROLLS.—I am clearly of opinion that this demurrer is not irregular. The 37th order provides that a deft. may demur, demurring alone, to a bill within twelve days from his appearance to it, but not afterwards. That order applies to all defts. The only question is, whether the 10th order, r. 7, creates any exception to the 37th, so far as regards defts. out of the jurisdiction? Whether, in fact, in this case the order of the court of the 11th Sept. 1863 overrides the 37th General Order? I think that it does not. If I were to hold otherwise, I might be introducing a very wild practice; for a deft. might then have sometimes one week and sometimes six for demurring to a bill. The old orders on this subject were couched in terms similar to those of the 10th Consolidated Order, rule 7; and the cases referred to in Beavan show that Lord Langdale took the same view of the former orders as I do of the present. The intention was that the defts. should have twelve days from the time of their appearance within which to demur to a bill. But the words "plead, answer, or demur" to a bill, in the 10th order, rule 7, are explained by those which follow, viz., "or obtain further time to make their defence to the bill." Those words mean, "not demurring alone." I am of opinion that this motion must be refused, and that the plt. must pay the defts. their costs of it.

Solicitors: for plt., *Cotterill and Sons*; for defts., *Gregory and Rowcliffe*.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs.
Barristers-at-Law.

Nov. 5, 6 and 9.

WYLDE v. RADFORD.

Equitable mortgage—Banker's lien—Title-deeds—Estate specified.

W., being indebted to his bankers, sent them certain title-deeds, with a letter in which he stated that he thereby pledged his grant of coal under a certain estate, which he specified, as a security for the money advanced, and also as a "general cover" for his banking account with them. There were

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other estates belonging to W. comprised in the deeds sent :

Held, that the bankers could only claim a lien upon the estate specified.

This was a petition by the deft. Thomas Radford asking for a rehearing. The following were the facts of the case:—

Joseph Wilson, who was entitled to property consisting of farms and coal-mines in Derbyshire, had a banking account with Messrs. Wylde and Co., bankers of Southwell, to whom he was indebted in a sum of 1383*l.* 17*s.* 5*d.* in respect of advances made by them in the usual course of business, and he requested them by letter dated the 5th Dec. 1836 to lend him 400*l.*, and stated that he would leave with them a mortgage for 545*l.* upon freehold property at Walton, and also his coal grant, and he hoped the firm would consider such pledge a sufficient security. This they consented to do on having the title-deeds deposited by him with them as a security for the loan or sum of 400*l.*, as also for the moneys then due, or which might thereafter become due, from him to them.

The mortgage-deed referred to was dated March 4, 1814, and was made between Edward Lomas of the first part, John Clayton of the second part, and John Bower of the third part, whereby Edward Lomas granted and released, and John Clayton at the request of Edwd. Lomas bargained, sold and released unto John Bower certain hereditaments at Walton in Derbyshire to secure 545*l.* The other property was conveyed by a deed dated 15th Jan. 1834, made between the deft. Thos. Radford of the first part, Joseph Wilson of the second part, and the deft. Wm. Wilson of the third part, whereby Thos. Radford appointed, granted, sold and released unto Joseph Wilson and his heirs all and every the mines, beds, veins, seams and depths of coal, ironstone, and other minerals and mineral substances whatsoever, as well opened, if any, as unopened, lying and being within and under (amongst other farms, lands, grounds and hereditaments therein respectively described and comprised in certain indentures of lease and release of the 13th and 14th days of Jan. 1834 in the indenture now being stated recited) all that message or tenement, farm, closes, lands and premises situate, lying and being in the manor and parish of Alfreton, in the county of Derby, containing by estimation 68*a.* 1*r.* 15*p.*; together with certain liberties, powers and authorities to and for Joseph Wilson, in, over and upon the said lands, hereditaments and premises, or any part or parts thereof, for the using, working and getting the said coal, ironstone and other minerals, and for the beneficial enjoyment thereof. To have, hold and enjoy all and singular the said mines, beds, veins, seams and depths of coal, ironstone and other minerals, and all and every the said powers and privileges, and all other the premises thereinbefore mentioned and intended to be thereby appointed and granted, unto Joseph Wilson, to such uses, upon such trusts, as he should by any deed or deeds, with or without power of revocation, direct or appoint. And for want of such appointment to him for life, remainder to Wm. Wilson in trust for him for life, remainder to him in fee so and in such manner as the deft. Thos. Radford should not have any concurrent right as to the coal; and by the indenture now being stated, Joseph Wilson covenanted with Thos. Radford as to the working of the mine.

On the 6th Dec. 1836 the firm of Wylde and Co., in pursuance of the before-mentioned arrangement, advanced to Mr. Wilson the sum of 400*l.*, and Mr. Wilson deposited with them the above-mentioned indentures of the 3rd and 4th March 1814, and the 15th Jan. 1834, and gave to them the following letter or memorandum:—

“ Carnfield, Dec. 6, 1836.

“ Dear Gentlemen,—I inclose you the cheque signed by me for the 400*l.* you have been so kind as to ad-

vance me at this time, and for which I feel exceedingly obliged, and I do hereby pledge the mortgage-deeds for the 545*l.*, and my grant of coal under the farm therein described to be in the occupation of James Marples, and which deeds I delivered over to Mr. Collinson, as a security not only for this advancement, but as a general cover of my banking account with you. I consider the coal under this farm to be worth not less than 200*l.* an acre, there being there the coal known by the name of the Swanwick coal, which is considered the most valuable coal in the neighbourhood. As you in your letter expressed a wish that the deeds should be pledged as a general cover of my account, I have done it so, though it was not what I mentioned; however, having so made the general pledge, should it so happen that I should be necessitated to call upon you for a further accommodation, I hope I may do so for 200*l.* or 300*l.* I had great difficulties to encounter to complete this purchase, but which was effected, and there has not yet been sufficient time (besides the tides of the times running against us) to get matters straight. I hope, however, that in the end all will turn out prosperously for us; and with best regards I am, dear gentlemen, yours respectfully,

“ JOSEPH WILSON.

“ To Messrs. Wylde and Co., bankers, Southwell.”

After the deposit of the above-mentioned title-deeds and the above letter had been made Messrs. Wylde and Co. discovered that by an agreement, dated the 2nd June 1832, Mr. Wilson had leased the mines at South Normanton to Mr. John Coke, with a covenant that no one else should work them, the restriction to extend to Alfreton, but it appeared the lease did not extend to the other coal-mines. In 1837 the bankers pressed Mr. Wilson to close his account, but he stated that it was out of his power to do so, and in Sept. 1839 he called a meeting of his creditors, who all agreed to accept a composition of 10*s.* in the pound, with the exception of Messrs. Wylde and Co., the bankers, who stated they should abide by the above-mentioned security.

In Dec. 1839 the draft of a legal mortgage was prepared by the bankers' solicitors of the minerals under the farm stated to be in the possession of James Marples, but before it was executed Joseph Wilson died, in 1840, intestate and insolvent, leaving his daughter Isabel (since deceased), then the wife of the deft. Thos. Radford, his only child, him surviving, owing to the bankers at that time 2170*l.* After this a considerable correspondence ensued, but nothing was done until 1853, when a mortgage security was prepared and sent to Mr. Thos. Radford's solicitor, but was never executed.

The plt., who was the representative of Messrs. Wylde and Co., the bankers, stated by his bill that he had discovered that Joseph Wilson, a few months before his death, by two indentures, dated respectively the 18th Jan. 1840, duly conveyed all his real and personal estate to the deft. and one Geo. Wilson, since deceased, upon certain trusts therein mentioned, and he prayed that an account might be taken of what was due to him for principal moneys, interest, and other usual banker's charges upon security of the mortgage-debt, beds and seams of coal, hereditaments and premises, the title-deeds relating to which were deposited with the said firm of Wylde and Co. by Joseph Wilson as aforesaid, and that it might be declared that the amount so found due should be prior to any charge the deft. might have on such hereditaments and premises under or by virtue of the indentures of the 18th Jan. 1840, or either of them, and that the deft. might be decreed to pay to the plt. what should be found due upon taking the accounts, together with the costs of the suit, and also the costs of and incident to the preparation and engrossment of the before-mentioned mortgage securities, and for a sale and receiver.

By a decree made on the 17th Jan. 1857, it was ordered that the beds and seams of coals, hereditaments and premises comprised in the indenture of the 15th Jan. 1834 should be sold, and the money applied towards what should be certified to be due to the plt. for principal, interest, charges and costs. By the chief clerk's certificate, dated the 3rd May 1861, it appeared that the beds of coal and other minerals, by the decree directed to be sold, had been sold to Mr. Woodhouse, mineral agent, for the sum of 3650*l*.

By an order of the V.C., made on the hearing of the cause for further consideration, it was ordered that an inquiry should be made whether any part of the beds and seams of coal, hereditaments and premises comprised in the indenture of the 15th Jan. 1834, in the said decree mentioned, remained unsold, and if any part remained unsold, it was ordered that the same should be sold. The petitioner stated that, until the hearing of the above-mentioned cause for further consideration, it had been assumed by all parties that the beds and seams of coal under the farm in the occupation of James Marples, and not those under South Normanton estate, were comprised in the equitable mortgage to the plt., and he submitted that the terms of the decree of the 17th Jan. 1857 were too extensive, and that the late plt. ought not to have been declared an equitable mortgagee of the beds and seams of coal comprised in the indenture of the 15th Jan. 1834, but only of the beds and seams of coal under the farm in the occupation of Mr. Marples, namely, the Alfreton estate, and on these grounds he prayed for a rehearing.

Glasse, Q.C. and Nalder appeared for the plt. and submitted that, according to the custom of bankers, they had a general lien upon the security deposited with them, notwithstanding the terms of the memorandum. They cited

Brandon v. Barnett, 12 Cl. & Fin. 787;

Ashlon v. Dalton, 2 Coll. 565;

Jones v. Peppercorne, John. 430.

Osborne, Q.C. and *Currie* appeared for the deft., but were not called upon.

The VICE-CHANCELLOR, after stating the facts, said, that after looking through the papers and authorities, the impression he had at first entertained was entirely confirmed. It was clear, upon the terms of the letter of application, the memorandum of deposit itself, the language of the deed of Jan. 1834, of the bill, answer and affidavits, that the mines under the property at Alfreton only were intended to form the security for which the deeds were deposited. That property was particularly referred to, whereas the other property at South Normanton was merely designated as "other farms and lands described and comprised in certain indentures recited." Moreover, in the draft legal mortgage sent to Mr. Barber, and prepared by the plts.' solicitors, it was treated in the same way, and this was conclusive that the bankers never imagined there was any other intention. The cause came on as a short cause and neither side adverted to the fact that there was other property. The decree was taken for a sale of the whole lands comprised in the deed, and (*per incuriam*) it was so drawn up, the chief clerk stating in his certificate that the lands at Alfreton only were sold, yet stated inaccurately that the lands sold were all the lands comprised in the deed. The passages in the answer and affidavits related to what was to be secured, not to the subject of the security, and it was impossible to read the bill without seeing that no other arrangement ever existed. As to the plt.'s contention with regard to the banker's lien, the law stood thus. If a customer deposited with his banker a security, and nothing more appeared, the banker had a lien for any balance due from the customer upon such security; but all the cases referred to the case of the deposit of

the security, and there was a little ambiguity in the term. They referred to things that were in their nature securities. True that deeds, plate, or any other property, may be securities; but the cases referred to promissory notes, bills of exchange, exchequer-bills, coupons, bonds of foreign governments, &c., and the courts held that, in the absence of an indication of intention one way or the other by the customer, the bankers had a lien for any balance in which the customer might become indebted to them, irrespectively of the question of deposit; that where, according to the custom of bankers, in any case A., being indebted to B., deposited in B.'s hands a security, and nothing was said, the court assumed the purpose of the deposit to be to give security. But even with respect to the custom of the law of bankers, the same cases that established that law also established that, notwithstanding the general law of deposit of a security, if it took place for a special purpose, then there was not a general lien. A case was referred to where a customer deposited a box containing Exchequer-bills, of which he kept the key, and taking some out, deposited them with the bankers, and got them renewed. This was a security in the proper sense of the term, and it was held that the law of general lien did not apply. Those cases did not apply to the present; not only was the property deposited not a security, but the purpose expressed by the instrument accompanying the act of deposit was a special one. For these reasons the decree was manifestly erroneous, and must be rectified as to the inquiry, for all the property which was the subject of the deposit had in fact been sold.

Solicitors, *Thomas Smith and R. Smith and Son*.

Friday, Dec. 11.

FOSTER v. M'GREGOR.

Payment out of court—Fraud.

Where a fund had been paid out of court in consequence of a fraudulent representation that one of the parties beneficially interested was dead and buried, the Court, on the discovery of the fraud, permitted the person to whom the fund had been paid, and who was clearly no party to the fraud, to retain the money upon his giving security that he would refund it in case it should be required, or that he would deal with it in such manner as the court might at any time afterwards direct.

This was a petition by a Mr. Rosenthal, and it prayed that he might be allowed to retain a certain sum of 490*l*. Bank Annuities, which had been wrongfully paid out to him by order of the court, or that if he were ordered to repay the same into court, he might be allowed to make certain deductions therefrom, or that such order might be made in respect of the same as to the court should seem just, &c.

W. Wellington Cooper appeared in support of the petition, and narrated the circumstances, which were very peculiar.—Francis Foster, by his will dated in 1843, gave a life-interest in a sum of 500*l*. to Maria, the wife of Chas. Higgins, and after her death the fund was to be divided amongst her children, and in default of children, as she should by will appoint. The estate of Foster had been administered under a decree of the court, and the sum of 500*l*. having been paid into court to represent the legacy, it had been invested in the purchase of 490*l*. Bank Annuities, and carried to the account of Maria Higgins and her children. In the year 1856 Mrs. Higgins wishing, with her husband, to raise money, made a will, bequeathing the corpus of the fund to her husband, which, as she had no children, she was entitled to do. She and her husband then mortgaged their respective interests in the fund, and the security was subsequently transferred to one Clark, as a trustee for Rosenthal, the petitioner.

Some time afterwards, in the same year, Higgins called upon the petitioner's solicitor, who resided in Dublin, and informed him that Maria Higgins, his wife, was dead, that she had revoked her first will, and by a subsequent will had made an appointment of the fund in question in favour of her husband's brother Charles Higgins. He produced a certificate of her burial, and stated that a Dr. Thorne, who had seen her die, had been paid ten guineas for his attendance. It was subsequently ascertained that a coffin filled with stones had been followed to the grave, and that there had been a three days' wake after the burial. Mr. Rosenthal at first said that he should dispute the second will, on the ground of fraud; but it was, however, subsequently agreed that Mr. Rosenthal should advance 90*l.* more on the security of the fund; that Mrs. Higgins's executors should prove her will; that they should execute a deed confirming the first mortgage-deed, and that they should join Mr. Rosenthal in petitioning the court for payment to Rosenthal of the fund in court. This arrangement was carried out, and the V. C. consequently made an order directing the fund to be paid to the petitioner's agent. Six months after this transaction a woman called on Mr. Rosenthal's solicitor, and informed him that she was Maria Higgins, and that she had come for her dividends. Upon being told that Maria Higgins was dead and buried, she asserted that Mr. Byrne, who had been her solicitor, could identify her as Maria Higgins, and on his being sent for he did so identify her. The parties to the fraud were then indicted; John Higgins, however, had absconded, and Maria Higgins was acquitted on the ground that she had acted under the influence of her husband; but Charles Higgins the husband, and Devereux, an attorney's clerk, who had acted as an executor under the second will, were found guilty, and were sentenced to two years' imprisonment. Mr. Rosenthal had been advised to wait till all the parties were out of prison, and this accounted for the delay in applying to the court that had taken place. The petition had been served on Charles Higgins and his wife. Mr. Cooper argued that Mrs. Higgins was a clear party to the fraud, as she had admitted to the solicitor that she was aware of the whole transaction, and he maintained that where a married woman was a party to a fraud, she might be ordered to make good any loss that might arise. Mrs. Higgins had not been punished because she was a married woman, and was therefore under the control of her husband. Mrs. Higgins had stated that she had never had a child, and that she was sixty years of age.

The VICE-CHANCELLOR said that he did not see any reason why Mr. Rosenthal might not be allowed to retain the money upon his giving sufficient security to refund it in case it should be required, or to deal with it in such manner as the court in any subsequent proceeding should direct.

V. C. STUART'S COURT.

Reported by JAMES B. DATIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-inn, Barristers-at-Law.

Thursday, Dec. 3.

EDWARDS-WOOD v. BALDWIN.

Injunction—Action at law—Jurisdiction—C. L. P. A., sect. 83.

Where a bond for a sum of 1000*l.* payable at six months' date was given by the plt., a customer, (being then ill in bed) to the def., an hotel keeper in whose house he was living; and the plt. showed that at the time of his executing the bond the def. signed a memorandum stating that the bond was given "to settle all accounts" which def. then had against the plt., and that he (def.) promised "to

rectify any error which might be found in such accounts;" and the deft. himself by his affidavit showed that there were receipts and payments on both sides:

The Court interfered by injunction to restrain an action at law by the deft. on the bond.

MALINS, Q.C. and J. H. TAYLOR moved for an injunction on behalf of the plt. William Edwards-Wood to restrain an action at law upon a bond.

The bill alleged as follows:—The plt. William Edwards-Wood, being the owner of large estates near Warwick, upon which in the year 1856 he commenced making various improvements, having let his residence at Budbrooke-park, went to reside at the hotel of the deft. Leonard Baldwin, at Warwick, until the month of March 1862. During that period plt. was often absent from the hotel, and his servant often remained there to superintend the works which were in progress upon the estates, and the deft., as plt. alleged, frequently paid money for or on account of the plt. for wages, rates and other matters, and at various other times made advances of money to the plt., who also (as he alleged), made advances and payments to the deft. by cheques and otherwise to the amount of 800*l.* and upwards.

In Dec. 1862 the plt. was suffering under acute inflammation of the lungs, which confined him to his bed for twelve weeks, and being in a dangerous state and not expected to live, his medical man gave strict orders that he should not be disturbed. Notwithstanding this, on the 19th Dec., the plt.'s servant came into plt.'s bedroom and told him that the deft. Baldwin and Mr. Smith, his solicitor's clerk, desired to see him. They were admitted, and Mr. Smith immediately said he had come relative to the deft.'s account; that the deft. had no wish to put the plt. to any inconvenience, but that he (Smith) had arranged to get the deft. some pecuniary accommodation, and to enable him to carry that out he had brought with him a bond for 1000*l.*, payable in three months. The plt. could only speak in a whisper, but he objected to the shortness of the period. Upon this Smith said he would make the bond for six months and for 1000*l.*, but that Baldwin should give to the plt. a memorandum, so that the bond should stand as a security for so much as should be found due on the delivery of Baldwin's cash accounts, which Smith promised should be made out forthwith and delivered to the plt. Mr. Smith added that the plt. should have free access to the deft.'s books, to satisfy him of what was the balance really due. The plt. then signed the document presented to him by Smith, and Smith wrote and gave to the plt. a memorandum, signed by the deft. as follows:—

"19th Dec. 1862.

"Mr. Wm. Edwards-Wood having this day given me a bond to settle all accounts which I have against him, I promise to rectify any error which may be found in such accounts, if any.

"LEONARD BALDWIN."

No cash account was sent, and on the 21st Jan. 1863 the plt. received a letter from Smith (for G. C. Greenway), saying that the bond was due, and requesting plt. to remit the amount with as little delay as possible. On the 26th June the plt. received another peremptory letter, requesting payment of principal and interest.

The plt. replied, saying that the demand should be speedily arranged, and the accounts forthwith examined. On the 30th June the plt. went to Warwick, and saw the deft., but was unable to inspect the accounts.

The plt. afterwards received a letter from the deft., dated the 7th July, in which deft. said, "The bills you have in your possession; therefore I cannot allow my books being inspected without a just cause, which my solicitor can do." Plt. went again to Warwick, on the 10th July, but with the same result.

The action was commenced on the 11th July 1863, for 1048*l.*, and 5 per cent. interest.

The plt. prayed that an account might be taken of all sums due from himself to the deft., and of all sums paid and advanced by the deft. to or on account of himself, and of all sums paid and advanced by himself to or on account of the deft., and that the balance due on such several accounts might be ascertained, he (the plt.) being willing to pay any balance which should be found due from him to the deft. And that the bond might stand as a security for the amount of such balance, and that an injunction might be granted to stay further proceedings in the action.

By his affidavit the deft. denied that the plt. had ever made any advance of money to him, and said that the only sums which he had received were in payment of accounts rendered. He denied that it had been arranged that the bond should stand only as a security for so much as should be found due on delivery of his cash accounts, and he said that at the interview in Dec. 1862 the plt. said that he had received the accounts, but had not had time to look over them, though he had no doubt they were correct, and that he must ask the deft. to give him a memorandum that if he (the plt.) found any error it should be rectified, and thereupon the deft. gave the plt. the memorandum above mentioned. He also stated that fully detailed accounts had been delivered to the plt. prior to the date of the bond, amounting to 1025*l.* 3*s.* 7*d.*, and that it was understood that there should be two other small accounts furnished, amounting to 18*l.* 19*s.* 2*d.*, making together with the former 1044*l.* 2*s.* 9*d.* The deft. at the time the bond was given held bills of exchange by the plt. for 170*l.* and 300*l.* which had been dishonoured, and for 600*l.* which had not arrived at maturity, making together 1070*l.*, all of which had been given up when the bond was executed. The deft. said that the plt. was indebted to him in the sum of 1048*l.* with interest on the bond, and that such sum was due for hotel bills extending from the 4th Feb. 1859 to the 6th Oct. 1862, and for 270*l.* cash lent and advanced since the 4th Feb. 1859.

In support of the motion it was argued, that the bond having been given only for such sums as should be found justly due, there having been advances by either party on account of the other, and receipts and payments on both sides, the court would interfere and have the accounts taken in equity.

Greene, Q.C. and *R. Hawkins*, for the deft., contended that the bond was given in liquidation of hotel charges, and for money advanced by the deft. to the plt. The question was one of an ordinary tradesman's account, and, as such, could be decided in a court of law. There had been nothing of a fiduciary nature between the parties, and no agency, and the statement that money had been advanced by the plt. to the deft. was incorrect. They said, that the plt.'s only motive in coming to the court was to create delay, and that the case ought to be allowed to proceed at law. They referred to 17 & 18 Vict. c. 125, s. 83, and cited

Phillips v. Phillips, 9 Hare, 471; and *Smith v. Leveaux*, 1 Hem. & M. 123; on appeal, ante, p. 313.

THE VICE-CHANCELLOR.—I think that the injunction asked for must be granted. This is not a case where the receipts and payments are all on one side, for the plt. has received moneys from the deft., and the deft. from the plt., and the deft. has received not only moneys but also bills of exchange. The observations made by Turner, L. J., when V. C., in the case referred to of *Phillips v. Phillips*, certainly do not appear quite reconcilable with decisions in other cases; at the same time the decision of the Lords Justices must now be considered the law of the court. But, even according to the view taken by the Lords Justices in this recent

case of *Smith v. Leveaux* (overruling Wood, V.C.), nothing was said to cover a case like the present, where the deft. in his own affidavit has introduced long and confused statement of complicated transactions in which there were receipts and payments upon both sides, and as to which the deft. does not say that any vouchers were produced and signed to show that an account had been settled and signed between the parties. It is also a very unfavourable feature in the case of the deft., that, contemporaneously with the bond given by the plt. a memorandum was signed by the deft. and given to the plt., the language of which, though equivocal, amounts, as I read it, to nothing more than an assurance that the bond was given as a security, and contemplated a further investigation of the accounts. The memorandum was in these terms: "Mr. Wm. Edwards-Wood having this day given me a bond to settle all accounts which I have against him, I promise to rectify any error which may be found in such accounts, if any. Leonard Baldwin." The natural construction of the language of that memorandum is, that the bond was certainly given as a security, but as a security only, after there had been an investigation of the accounts, in which errors might appear, and when the balance had been adjusted for which it should stand as a security. But, supposing the language does not bear that construction, it is impossible to say that the memorandum did not contemplate that an opportunity should be given to the plt. to point out any errors in the account, no vouchers having been at any time given by the deft., but merely bills of the current expenses of the plt. at his hotel, and which the deft. had offered to give to the plt. All that is not enough to deprive the plt. of that to which upon the transactions on both sides he is entitled, namely, an investigation of the accounts. It has been said that this is not the proper jurisdiction in this case, and the C. L. P. A. has been referred to; but although a jurisdiction in equity has by the section been given to the courts of law, there is nothing in the Act which takes away from this court its inherent jurisdiction to consider such a case as this. The plt. is entitled to an injunction, but he must give judgment for the whole amount claimed by the deft., and the deft. must submit to such order as this court may direct.

By consent of both parties an order was made directing the accounts to be taken.

Solicitor for the plt., *James Fluker*.

Solicitors for the deft., *Bell, Steward and Lloyd*, agents for *G. C. Greenway*, Warwick.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs., Barristers-at-Law.

Saturday, Dec. 5.

Re CHAPLIN'S TRUSTS.

Will—Construction—Lapsed legacy—Class.

The testator by his will bequeathed the residue of his estate and effects to the children of P. and B. who should be living at the time of his, the testator's, decease, and also to several other persons nominatim. One of these latter persons died in the lifetime of the testator:

Held, that the share of the residue given to this person lapsed.

This was a petition for the payment out of court of a sum paid in under the Trustee Relief Act, and the question raised was, whether this sum of money, being a share of the residuary estate and effects of the testator, had lapsed or not.

The testator devised and bequeathed all his real and

personal estate and effects to trustees to convert, and to hold the proceeds upon trust for all and every the children of his late cousins Richard Brook and Philip Brook equally who should be living at his decease, and to Mary East and nine other persons whom he named in his will. Mary East died in the lifetime of the testator.

Kenyon, Q.C. and Woodroffe, for the petitioners, contended that there was no lapse, and that the legatees taking as a class, those who had survived the testator were entitled to have the fund divided between them:

Clarke v. Phillips, 17 Jur. 886;

Re Stanhope's Trusts, 27 Beav. 201;

Porter v. Fox, 6 Sim. 485;

Shaw v. McMahon, 4 Dr. & W. 431.

Daniel, Q.C. and Marten, contra, contended that there had been a lapse.

C. Hall, Eddis and E. R. Turner, for other parties.

The VICE-CHANCELLOR said he must hold that this share of the residue had lapsed in consequence of the death of M. East in the testator's lifetime. The only doubt that had arisen in his mind was from the decision in *Clarke v. Phillips*. It was not quite correct to speak of a class of residuary legatees as such. Strictly speaking, a class was a set of persons filling a defined and similar position. Thus in *Shaw v. McMahon* the testator had directed that the residue of his estate should be divided amongst all his children; and it was there held that such legatees took as a class. This he then considered a correct decision, although in that case two of the children had been named in the will. The circumstances of this case were different from those in *Clarke v. Phillips*. There the testator had revoked the bequest in the will by a codicil. That being a case of revocation, a doubt might reasonably have arisen whether the testator had not intended that his will should be read as if the legatee's name had been erased from it.

Order accordingly.

Solicitors: *Richards and Walker* for the petitioners. *Norris* for the other parties.

Tuesday, Dec. 8.

SMITH v. ETCHES.

Practice—Pleading—Suit by husband and wife—Real estate of wife—Wife co-plt.—Costs of next friend.

In a suit by husband and wife for redemption of real estate of the wife, she ought to be a party separately by her next friend, as having an interest distinct from that of her husband.

The husband, though bankrupt, is a proper party, as having the legal estate.

This was a bill filed by a husband and wife to redeem a mortgage of real estate of inheritance belonging to the wife. The husband had since the institution of the suit become bankrupt. The debts to the bill were now the mortgagees, the assignees of the husband, and parties by whom the estate had been subsequently purchased. At the hearing of the cause the objection was taken that the wife's interest was not properly represented, since a suit by husband and wife was the suit of the husband only; and further, that he, as a bankrupt, had now no interest in the suit.

Daniel, Q. C., and C. Jones for the plt.

Roll, Q. C., W. Morris, Cracknall and H. Smith, for the several debts, cited

Hughes v. Evans, 1 S. & St. 185;

Reeve v. Dalby, 2 S. & St. 464;

Wake v. Parkin, 2 Keen, 59;

Ex parte Paine, re Gleaves, 8 L. T. Rep. N. S. 190;

Hope v. Fox, 1 J. & H. 456;

Mitford on Pleading, 28.

The VICE-CHANCELLOR held that this suit was wrongly framed. The interests of husband and wife in the subject-matter of this suit were clearly distinct, and he knew of no case where a suit by husband and wife to redeem the wife's estate had been allowed. As to the question whether the husband ought any longer to be a party to the suit, he was of opinion that he might properly continue to be so in respect of his legal estate, though any beneficial interest he might have as tenant by the curtesy was, of course, vested in his assignees in bankruptcy. Under the circumstances, the bill would not be dismissed, but there would be leave to amend, by making the wife, by her next friend, a party to the suit. The next friend would, of course, be responsible for all costs incurred from the beginning of the suit.

Solicitors for plt., *S. W. Johnson*; for several debts, *Etches, Sadler, Depres and Austen*.

Friday, Dec. 11.

CUDLIP v. SMEDLEY.

Practice—Award—Rule of court—Motion not ex parte—Costs.

Where an agreement by the parties to a suit has been sanctioned by the court, that all matters in difference between the parties should be submitted to arbitration, a motion to make the award of the arbitrator an order of the court ought not to be made ex parte.

In this case an agreement had been entered into by all the parties to the suit, on the 11th April 1860, that all matters in difference between them should be submitted to arbitration; the agreement had been confirmed by order of the court, and an award had been made in pursuance of it.

Bagshawe, for the plts. in the suit, now moved that the award be made an order of the court.

Osborne Morgan, for the several debts., assenting to the motion, applied for the costs of his clients, on the ground that the motion should have been *ex parte*. He cited

Wood v. Taunton, 11 Beav. 449;

Dowse v. Coxe, 3 Bing. 20;

Thomas v. Hewes, 2 Cr. & Mees. 519,

to show that the parties were sufficiently bound by the agreement and the award in pursuance of it, even without the final order of this court. He also referred to *Russ. on Arbitration*, p. 29.

The VICE-CHANCELLOR said that he thought there was sufficient occasion for the motion in this case, and that it ought not to be made *ex parte*. The proper course was to serve the other parties to the suit with notice of the motion, though he thought that each party should bear his own costs, and he should therefore make no order as to costs.

Solicitors for the plt., *Bolton and Grylls Hill*.

Solicitor for debts., *Southgate*.

Thursday, Nov. 12.

WILLIAMS v. MOSTYN.

Creditors' deed—Volunteer's covenant to pay debts—Proviso for execution within limited time—Time of the essence of the contract.

M. voluntarily covenanted to raise a fund for payment of a composition on the debts, owing by his father and late grandfather, to all such of their creditors as should execute the deed of composition within a limited time.

Certain creditors executed within the time stipulated, and a sum sufficient to satisfy their claims was charged by the covenantor, by way of mortgage, to the trustees of the composition-deed, on his real estate:

Held, that in this case time was of the essence of the contract, and that, as against creditors who had executed in due time, others who had failed to execute were not entitled to have the benefit of the deed.

Seemle, that, as against the covenantor, in respect of any surplus of the sum charged, there might be a special equity in creditors, who could plead mistake or fraud as the cause of their omission to execute.

By an indenture of the 30th May 1854, the parties to which were the creditors who executed the deed, persons acting as their agents in the negotiations preceding its execution, trustees for the creditors, Lord Mostyn, and his eldest son Thomas Mostyn; after stating that the late Lord Mostyn and his son the present lord were indebted on judgment and otherwise to a large amount, and that Thomas Mostyn was entitled to the entailed estates of which they had been and were respectively tenants for life, and to other estates in various modes of devolution from them, and that nearly all these estates were subject to heavy charges by way of mortgage or judgment; Thomas Mostyn covenanted to raise by sale or mortgage of those estates a sum of money sufficient to pay all such creditors as should execute the deed within six months, a composition of 6s. 8d. in the pound, and he was then to have from such creditors a general release of their debts. The deed contained a proviso that no personal liability on the part of Thomas Mostyn should be created thereby; and also a proviso for extending the time within which creditors might come in and execute the deed, with the consent of Thomas Mostyn, and of a majority of the parties agents for the creditors. In pursuance of this proviso, by a deed of the 9th Aug. 1856, the time allowed for execution of the composition-deed was extended to six months from the date of the former deed.

No further steps were taken until the month of June 1858, at which time the composition on debts of creditors who had come in had been estimated to amount to 62,000*l.*, and by a deed of the 21st June 1858, Thomas Mostyn mortgaged certain estates to the trustees of the composition-deed for that amount.

Thomas Mostyn died in May 1861, up to which time no proceedings had been taken by the trustees to enforce their security.

They therefore filed their bill in Feb. 1862 against the executors and trustees of Thomas Mostyn, praying that the trusts of the composition-deed might be carried into execution under the direction of the court, and for an inquiry as to the persons entitled to the benefit of that deed.

In the course of the proceedings in chambers to ascertain who were the persons thus entitled, claims were brought forward by a large number of persons, who claimed on various grounds to have the benefit of the deed, although they had not executed it within the enlarged time allowed by the deed of the 9th Aug. 1856.

The chief clerk had expressed an opinion in favour of the allowance of the claims of certain of these creditors, but his certificate had not yet been made, and the debts (the executors of Thomas Mostyn's will) now moved for the reconsideration of the question with a view to the disallowance of these claims.

Cairns, Q. C. and Speed, in support of the motion, after stating the facts of the case, relied upon the terms of the deed of covenant, and contended that time was of the essence of the contract. They cited *Emmett v. Dewhurst*, 3 Mac. & G. 587. The creditors who now claimed might be divided into several classes, viz.: 1. Those who had charges on the estates of Lord Mostyn, which they abstained from enforcing, and who had in various ways assented to the deed, though from one cause or another they had not executed it. 2. Those who had refrained from executing it upon certain in-

ducements held out to them by the solicitors who managed the transaction. 3. Those who claimed to have received payments under the provisions of the deed, or had been informed that their execution was unnecessary.

Daniel, Q. C. (Rawlinson with him), for a creditor coming within the first class, contended that this was not a deed purely voluntary, as their client had an incumbrance on the estates, to which the covenantor, as stated by the deed, was entitled; this incumbrance he had abstained from enforcing, on the faith of having the benefit of the deed. They referred to the provisions in the deed relating to the application of the money to be raised in part to the costs of the trustees in procuring its execution, as showing that the trustees were bound to obtain the signatures of the various creditors.

J. N. Higgins and Kay, for creditors of the second class, stated that they had been induced to abstain from executing by the representations of Thomas Mostyn's solicitors, to the effect that the covenantor was anxious to offer them better terms than were given by the deed. They cited

Nicholson v. Twiss, 2 K. & J. 18;

Whitmore v. Turgand, 1 J & H. 445; 4 L. T. Rep. N. S. 38, 102.

The provision in the deed that such creditors who did not execute within the time limited should not have the benefit, "any rule of equity notwithstanding," could not oust the jurisdiction of this court:

Scott v. Avery, 5 H. of L. Cas. 811.

Joliffe and Osborne Morgan, for creditors of the third class.—In one case an offer had been made to execute the deed, and a request that it should be sent to the party for that purpose, the answer to which was, on the part of the solicitors, that until the amount of compensation was paid it was not necessary to execute the deed; in another case the party had assented to the deed, had been recognised by the trustees, and had been allowed payments on account of the compensation covenanted to be paid, as a set-off against money due from her to Thomas Mostyn for rent. These facts, it was contended, raised a general equity as against the covenantor, arising from the acts of parties as his agents, by which their clients had been induced to abstain from executing the deed. They cited

Field v. Lord Donoughmore, 1 Dr. & War. 227;

Biron v. Mount, 24 Beav. 646.

Kenyon, Q. C. (Fry with him), for creditors who had executed the deed within the time fixed, supported the case of the debts.

C. Hall for the pits.

Cairns, Q. C., in reply, as to the claim of the creditors of the third class, argued that their equity, if any, rested on grounds which must be made the subject of a distinct suit.

The VICE-CHANCELLOR said that the contention of those creditors who now sought to be admitted to the benefit of the covenant of Thomas Mostyn, although they had, from various causes, failed to execute it within the time fixed by the deed, was founded on a false analogy. The cases that had been referred to were those in which a party had handed over certain property to trustees for the benefit of his creditors, the consideration being, immunity of person and from suit, at the hands of such of those creditors who should execute the deed of composition; so that it was immaterial at what time a particular creditor should execute, for then, and not till then, did the debtor on one side and the creditor on the other mutually obtain the benefit of the deed. Now there was no obligation on Thomas Mostyn to pay any of those debts; for although some of them were debts by judgment on the life-estate of his father, which he had purchased, yet there was no charge created by him on this life-estate; indeed, no

property was handed over by him, but there was a simple obligation at law to hand over certain proportionate sums. This was not a contract as to how an estate, which had been handed over, was to be administered, but how certain covenants were to be performed. In the absence of any special equity, this court could not extend the legal liability of the covenantor; he had covenanted to create a certain charge on his property, and it could not be said that he was to be bound to pay something he had never engaged to pay; or, in other words, that this court should enter into a fresh covenant for him. Nor was the case any stronger on the ground that it was sought to fix the liability, not on Thomas Mostyn or his estate, but on a fund in the hands of trustees; for if the fund raised had been only just enough to pay 6s. 8d. in the pound to creditors who had executed within the time limited, they alone could, under the covenant, have claimed a share in the fund; if, on the other hand, there had been a surplus after the satisfaction of all such claims, it must have been taken to have been raised by mistake and would have been the covenantor's. Was there then any special equity in any of the claimants? As to the first class, he thought that there was no obligation on the trustees to give notice of, or take any active steps to procure the execution of, the deed; and certainly in this case time was of the essence of the contract, considering how important it was for Thomas Mostyn to be acquitted, as soon as possible, with the extent of his liability under his covenant, and the inconvenience to him of being tied up by it for an indefinite time. As to the second class, it was clear that they had an alternative offered them: on the one hand to execute the deed and take the composition; on the other not to execute, in the hopes of getting more: they had preferred the latter course, and must abide by their determination. There was certainly more difficulty in the cases under the third head, as they approached more nearly to similar instances where parties had been misled, or were put off from executing deeds of this sort. Those claims seemed to have received some sort of recognition, and if, after payment of all creditors who had executed within the time, there remained a surplus in the hands of trustees, his Honour was not prepared to say there was not in this class an equity which might obtain the recognition of the court. But, as against the creditors who had executed, there could be no claim in the face of the express provision that there should be no extension of time without the assent of a majority of the committee who were acting for the creditors.

Solicitors engaged: *Law, Hussey and Hulbert; Blozam, Ellison and Blozam.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

Tuesday, Nov. 24.

FORDHAM v. AKERS.

County Court—Jurisdiction—Title—Replevin.

A County Court has jurisdiction in actions of replevin commenced in such court, even though a question of title to a corporeal or incorporeal hereditament should arise.

Rule nisi, calling on Mr. Gurdon, the Judge of the Waltham Abbey County Court, Essex, to show cause why a mandamus should not issue to compel him to hear this action.

It appeared that this was an action of replevin brought for distraining the plt.'s cattle damage feasant.

Cattle of the plt.'s, which had been placed by him upon certain Lammas Land, in the exercise of an alleged right of common, strayed on to the deft.'s land which adjoined, through a gap in the deft.'s fence. The deft. thereupon distrained the cattle damage feasant, and the plt. brought this replevin in the Waltham County Court. When the action came on for trial the deft. stated that he disputed the plt.'s right to put his cattle upon the Lammas Land, and he declined to give his consent in writing (under 19 & 20 Vict. c. 108, s. 25) that the County Court Judge should, notwithstanding such dispute of title, proceed to try the cause. The Judge thereupon refused to try the cause, on the ground that the plt.'s title to an incorporeal hereditament, namely, a right of common, was denied by the deft.

Bulwer showed cause.—Previously to the County Courts Act, 9 & 10 Vict. c. 95, all actions of replevin were commenced in the County Court, but either party might remove it to the Superior Courts, or if in the course of proceeding any right of freehold came in question, the sheriff could proceed no further: (3 Bl. Com. 149.) Sect. 58 of 9 & 10 Vict. c. 95, enacts that the County Court "shall not have cognisance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments shall be in question." Then sect. 119 enacts "that all actions of replevin in cases of distress for rent or damage feasant which shall be brought in the County Court shall be brought without a writ in a court held under this Act;" and by sect. 121 it is provided that "in case either party to any such action of replevin shall declare to the court in which such action shall be brought that the title to any corporeal or incorporeal hereditaments is in question, and shall become bound with two sufficient sureties to prosecute," &c., "and to prove," &c., "then and not otherwise the action may be removed before any court competent to try the same in such manner as hath been accustomed." The decision in *Reg. v. Raines*, 1 E. & B. 855, shows no doubt that sect. 119 gave jurisdiction in the County Court to entertain all actions of replevin, whether title came in question or not, subject only to removal into a Superior Court in the manner and form required by sect. 121. But sect. 2 of 19 & 20 Vict. c. 108, repeals sect. 121 of 9 & 10 Vict. c. 96; and sect. 25 of 19 & 20 Vict. c. 119, gives power to the County Court only on consent in writing of the parties to try "any action in which the title to corporeal or incorporeal hereditaments shall incidentally come in question." Sects. 65 and 66 were also referred to. It is submitted that these sections leave sect. 58 of the first Act in force, and that the judge had therefore no jurisdiction to proceed.

Philbrick, in support of the rule, cited *Tummons v. Ogle*, 6 Ell. & B. 582, and contended that sect. 58 of 9 & 10 Vict. c. 95 does not apply to actions of replevin, and that sects. 65, 66 and 67 of the 19 & 20 Vict. c. 108 are a separate and complete legislation upon the proceedings in that action.

COCKBURN, C. J.—The rule must be made absolute. The 58th section of the first Act applies to one set of actions, and there is a distinct series of actions relating to replevin. The last Act contains a series of provisions on the one hand enabling the replevisor to bring his action in the Superior Courts upon certain terms, and on the other hand enabling the deft. to remove the action into a Superior Court upon complying with certain conditions there set out. Here the question of jurisdiction did not really arise.

WIGHTMAN and MELLOE, JJ. concurred.

Rule absolute.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Friday, Nov. 13.

RINGLAND v. LOWNDES.

Arbitration—Waiver of objection that award was not made in time.

A cause having been referred, it appeared before the commencement of the arbitration that the time limited for the making of the award had expired, and had not been enlarged under sect. 124 of the Public Health Act 1848, and the deft., upon this ground, objected in writing, and verbally at the termination of the reference, to the arbitrator proceeding to hear the case. The deft., however, took part in the proceedings, cross-examined pl.'s witnesses, called his own witnesses, and addressed the arbitrator:

Held, in an action to enforce the award, which was in favour of the plt., that the deft., by acting as he did, had precluded himself from saying that the arbitrator had no jurisdiction to proceed with the reference.

This action was brought against the deft., who is the clerk of the Burslem Local Board of Health, to obtain the sum of 135*l.* 16*s.* as compensation for damages, and 154*l.* for costs under an award dated the 30th Dec. 1861, a copy of which is hereafter given, and also a writ of *mandamus*, commanding the Burslem Local Board of Health to levy a rate in pursuance of the Public Health Act 1848, for the payment to the plt. of the said sums of money.

The cause came on for trial before Byles, J., at the Stafford Midsummer Assizes 1862, when a verdict was taken by the plt. by consent for the sums named in the declaration, subject to a special case to be stated, and the following case was accordingly stated for the opinion of this court:—

CASE.

In the year 1850 the Public Health Act, 11 & 12 Vict. c. 63, was applied to the town of Burslem, in Staffordshire, and by virtue of the powers therein contained the local board of health for that town began to lay down a system of sewers within the precincts of the town for the drainage thereof.

Hans Ringland the younger, the plt. in this action, is the owner of four houses in Waterloo-road, Burslem, and the deft. is clerk to the Burslem Local Board of Health.

In the year 1856 the said houses of the plt. were alleged to have been materially damaged by the operations necessary to construct the said sewers, and in 1858 application was made by the plt.'s attorney to the local board of health for the town of Burslem, through their attorney, for compensation, and a request also made that they would appoint an arbitrator, under the 123rd section of the Public Health Act, to whom the matter in dispute might be referred.

A rule was subsequently obtained for a *mandamus*, commanding the board to make compensation, and this rule was made absolute, but eventually the plt., on the 17th Dec. 1860, appointed Henry Ward, of Hanley, in the county of Stafford, to act as arbitrator under the said statute on his behalf, and gave the said board notice of the appointment, and required them to appoint another arbitrator on their behalf within the time required by the said statute, otherwise the said Henry Ward would proceed *ex parte*; and thereupon, on the 2nd Jan. 1861, they appointed Richard Stone, of Derby, to act as arbitrator on their behalf.

The arbitrators having refused to appoint an umpire, an application was made by the plt., under the 125th section of the said Public Health Act, on the 11th April 1861, at the Easter sessions, to the Court of Quarter Ses-

sions for the county of Stafford, to appoint an umpire under the said section of the said Act, which was resisted by the board on several grounds, and was refused upon the ground that the plt. had not complied with the rules of the Court of Quarter Sessions by giving seven days' notice to the said board of their intention, as required by the practice of that court.

The required notice having been subsequently given, a second application was made at the Midsummer sessions, on the 3rd July in the same year, to the said Court of Quarter Sessions, when the court decided that they would appoint an umpire, and a Mr. Johnson was accordingly appointed. Mr. Johnson was not present when the appointment was made, and neither side was instructed as to whether he would consent to act. It is the duty and practice of the clerk of the peace to make an entry of the acts and proceedings of the court, from which the orders of the court are subsequently formally drawn up, and there is no other entry made by the chairman or otherwise of motions or orders of the kind referred to. No order would, in the course of practice, be formally drawn up unless the assent of the umpire to act had been previously obtained, but the representation of counsel at the sessions would be treated as sufficient for that purpose.

No assent had been given by Mr. Johnson or anyone on his behalf, and the clerk of the peace therefore abstained from making any entry of or relating to any nomination or any appointment of an umpire, but if the assent of Mr. Johnson had been obtained or signified before the end of the sessions, and there was time to communicate with him, the clerk of the peace would have then informed the court of that assent, and made the entry of the appointment, and the order would have been afterwards drawn up and an office copy sent to Mr. Johnson without the further intervention of the parties. No assent having however been obtained or signified, no minute or record whatever was made of any appointment or order, and none was drawn up. The clerk of the peace, on being subsequently applied to as to what had been done in the matter, stated that no order had been made, his view being that no order could be made, the consent of the umpire not having been obtained.

At the following quarter sessions, on the 14th Oct. 1861, an application was made to the same Court of Quarter Sessions for the appointment of an umpire. The application was resisted by the counsel on behalf of the board on the ground that a valid appointment of umpire was made at the Midsummer sessions, notwithstanding that no entry was made of it in the court, and that as the umpire had failed to make his award within the period of three months from the date of his appointment, the matter referred to him should be again referred to arbitration, as if no former order of reference had been made pursuant to the provisions of the said statute, and consequently that the proceedings should begin *de novo*, and new arbitrators be appointed who might agree upon an umpire, and that the court having once at the former sessions exercised its authority under the statute to appoint an umpire, it had no jurisdiction or authority to again appoint an umpire in the same matter at a subsequent sessions without the requirements of the statute having been duly complied with. Notwithstanding these objections the court, after hearing the counsel for the plt., who dissented from the view of the facts taken on the other side, appointed a Thomas Johnson to be umpire, whose assent had been then obtained, the chairman at the same time saying that the order was made out on the condition of the applicant, namely, the plt., taking on himself the responsibility of its validity. The appointment was entered, and formally made out by the clerk of the peace, and the first meeting was fixed for the 29th Nov. At that meeting,

the local board objected in writing to Mr. Johnson's acting as umpire on various grounds, the main one being that the time for making the award had not been enlarged, pursuant to the provisions of the 124th section of the Public Health Act 1848. The arbitration however proceeded, and the real question for the opinion of the court was, whether the attendance of the defts. at the reference examining their opponent's witnesses, addressing the arbitrator and calling witnesses in support of their case, waived a protest against the proceedings.

Hayes, Serjt. (Beasley with him), for the plt., cited

Bradshaw's case, 12 Q. B. 562;

Tyerman v. Smith, 6 E. & Bl. 719;

Palmer v. Metropolitan Railway Company, 31

L. J. 289, Q. B.; 5 L. T. Rep. N. S. 542;

Holdsworth v. Wilson, 39 L. J. 289, Q. B.;

8 L. T. Rep. N. S. 434;

Public Health Act 1848, sects. 124, 125;

Lush, Q. C. (M'Mahon with him), for the defts., cited

Holt v. Meadowbank, 4 M. & S. 468;

Lycett v. Tennant, 4 Bing. N. C. 168;

Davis v. Price, 6 L. T. Rep. N. S. 713;

Haigh v. Haigh, 31 L. J. 420, Ch.; 5 L. T.

Rep. N. S. 507;

Burland v. The Local Board of Kingston-on-

Hull, 32 L. J. 17, Q. B.; 7 L. T. Rep. N. S. 316.

BYLES, J.—I am of opinion that in this case our judgment must be for the plt. The first objection to which our attention has been called, and which has been strongly urged by Mr. Lush, is, that there was an order made at the Midsummer sessions. Now, if the said "order" is to be understood in the sense of a formal order, or even of a written memorandum in the book of the clerk of the peace, there was no such thing. If it is to be understood in the sense of a substantial appointment, there was no such thing, because the party had not accepted the appointment down to the next sessions, to wit, the Michaelmas sessions, and supposing an order could have been drawn up, embodying the facts, what would it have stated? That A. B. was appointed subject to his acceptance of the appointment, and that he had not accepted, and that being so, it seems to me there was no appointment whatever at the Midsummer sessions. The Act of Parliament gives the power to either party complaining of delay to go to the sessions and apply for an umpire to be appointed, and it seems to me he is at liberty to go to any sessions within a reasonable time. Well, they go to the next sessions, and then the umpire is appointed and the umpire agrees to act. The hearing took place on the 29th Nov., which appears to be more than twenty-one days from the date of his appointment. I agree with my brother Hayes that the enlargement must be made within twenty-one days, and it is plain here that the enlargement was not made within the twenty-one days, and that being so, there was an objection to the jurisdiction of the umpire; but what sort of an objection? Not an objection that he was not the proper person to decide the question, if he had performed this formal act; not an objection that he had not jurisdiction over the subject-matter. The objection was, you have not gone through the form (not in writing, that is not necessary) of saying to yourself alone in your chamber, "I enlarge the time;" that is all he need do. Now, then, supposing that to be a fatal objection, what has he done, and what have the parties done? They go before him and ask if he has performed the ceremony, and he says he has not; and then they say to him in effect this: "Now then, we will appear before you; if your award is for us, we will avail ourselves of it; if it is against us, we will not be bound by it." They appear, they cross-examine the witnesses, they address the arbitrator and they call witnesses; and then they say, "The

award is void, because, although we appeared, yet we appeared under protest." Now they have certainly cited several cases which show that where a tribunal has no jurisdiction, and a party appears under protest, that appearance is not to bind the party protesting. The leading case upon this subject, which has been cited ever since I can remember, is the case of *Holt v. Meadowbank*; but what was the objection there? That was a case where a proper special jury had been struck, and the words of the Act of Parliament are these: "A jury so struck shall be the jury to try the cause." The party there appeared, and said, "I am *coram non judice*. The gentlemen have no more right to try my case than any twelve gentlemen in the street." But they said, "If you do not appear, the verdict shall be entered against you." There, Lord Ellenborough says, he wasted to the stake, and dragged on to trial. Then how did he appear? He appeared under protest, but the distinction between that case and the present is, that in that they were before the wrong tribunal, in this they were before the right tribunal; in that case there was a substantial objection, in this there was a shadowy one. In *Lycett v. Tennant* there was a variance between the writ of trial and the issue. The parties there had sent down the wrong issue to be tried. There the defect was not as to the jurisdiction of the judge to try the cause, but in the issue to be tried. That, again, was a fatal objection, and the party who appeared under protest was allowed to dispute the regularity of the proceedings. In the case of *Davis v. Price*, my brother Crompton does certainly say, "We are also disposed to think that, as the arbitrator persisted in going into the consideration of damages after objection taken by the defts., he did not waive his objection by attending subsequent meetings under protest, no case having been brought to our notice in which it has been held, that a substantial objection has been held to be waived by subsequent attendance before the arbitrator under protest." There, by a very learned judge, every word that falls from whom is worthy of respectful attention, it is said, "We are disposed to think;" but what was the objection there? That the arbitrator had taken into consideration the question of damages, and had assumed a power with reference to part of the case over which he had no jurisdiction; that again was a substantial objection. With respect to the case, *Re Haigh*, which was a decision of the L. J., the arbitrator had excluded from the room the son of one of the parties and the shorthand writer; the party had nevertheless proceeded with the reference, and, so far as I can collect, even without protest. But in that case the arbitrator had misconducted himself, and there is no reason to quarrel with that decision of the L. J. With these observations upon the cases cited I am of opinion, that an objection such as this which really comes to nothing more than the mere non-utterance of certain words to himself in his chamber, is waived by the conduct of the parties; and we should be going against the weight of authority and against common sense if we were to send the parties back on that ground for the sake of the defts., who in every possible manner have thrown a difficulty in the way of assessing the sum to be paid to the plt. That observation is not made with reference to any prejudices which ought not to, and shall not, affect our decision upon any question of law; it is made with reference to the next matter which we have to consider, namely, the question as to a right to a *mandamus*. I say that the right to a *mandamus* is, to a certain extent, within our discretion. The difficulty that occurred to me was this, that the interval between 1856 and 1858 was not very satisfactorily accounted for. I think that the word "incurred" must be read with reference to the ultimate ascertainment of the amount, for it is impossible to make a rate which I presume would include

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the costs of the proceedings until you know what the decision is or is likely to be; therefore there is no objection so far as regards the time that has elapsed since the year 1858. But between 1856 and 1858 the time is not satisfactorily accounted for. Yet when we see what has been the conduct of the defendants to that part of the case which we do understand, I cannot help thinking that, if there had been anything to be said which would have assisted them with respect to that interval, it would have been said; and as we decide for the plaintiff, we are bound to do him full justice, and give him the only remedy he has in his right to a *mandamus*.

KEATING, J.—I am of the same opinion. The distinction which my brother Byles has taken with reference to all the cases cited seems to me to be a valid one upon the only question on which some doubt might have been entertained as put forward in the argument by Mr. Lush, namely, as to how far the attendance of the parties before the umpire did or did not waive the objection, which I also agree did exist at that time, that the arbitrator had not enlarged the time within the twenty-one days. Now that distinction runs through all the cases, and will be found to reconcile all the cases where it has been held that such an attendance or appearance of the party did not waive the objection; the objection was one to the tribunal before which the party appeared, the objection being, "I am before the wrong tribunal," and that cannot be waived. None of the cases which were cited with reference to arbitrators struck me with much force, except the case of *Davies v. Price*; and there my brother Crompton says that he is disposed to think that the appearance of the party there did not waive the objection, the objection being that the arbitrator was assuming to himself jurisdiction over a subject-matter which the parties never agreed to invest him with; and he also says that no case had been cited in which the appearance of the party under protest had been held to waive a substantial objection, and he was disposed to think it had not been waived in that case. But the judgment of the court did not proceed even upon that, but upon this, viz., that the declaration was upon the express submission of the parties, and not upon an implied submission arising from the acts of either of the parties during the course of the reference. What was sought to be done there was in truth to alter the terms of the submission by the conduct of the parties during the reference, and that was what the court held could not in that case be done. But I must say that I should have been surprised if any case could have been adduced to sustain the defendants in this objection, because it appears to me to be a contradiction in terms to say that, having protested that there was no jurisdiction in the arbitrator, the party is not merely to attend to watch, but is to call witnesses, and to submit his case to the judgment of the party, and that then, if the award be against him, he may set it aside, but if in his favour, he shall be permitted to maintain it. Entirely agreeing with the views expressed by my brother Byles, I think the objection on the part of the defendants cannot be sustained, and that the plaintiff is entitled to our judgment. If he is entitled to our judgment, then the question comes, should the *mandamus* go? Now I think, notwithstanding the ingenious argument of Mr. Lush, that the board may be so well provided with funds that it does not necessarily follow that they are obliged to make a rate; that practically the only remedy this party has is to a *mandamus* to make a rate. If they pay him out of funds without making a rate, and we should ever hear of it again, in that event we probably should be disposed to endeavour to discover a possible construction in favour of that being a discharge in obedience to the *mandamus* on the part of the Board of Health. With reference

to the operation of the 89th section of the Board of Health Act as a law, which was also referred to by Mr. Lush with regard to the question as to the six months' limit of time, it seems to me that the time we are to look to is the period which has elapsed between the six months, and therefore the objection founded on the terms of the 89th section must fail. For these reasons, and for those stated by my brother Byles, our judgment must be for the plaintiff, both upon the questions referred and the *mandamus*.

REGISTRATION APPEAL.

Tuesday, Nov. 17.

ROBINSON (app.) v. DUNKLEY AND ANOTHER, Overseers of the Parish of St. Sepulchre (reaps.)

Election law—County franchise—Member of building society.

The claimant, a member of a building society, purchased land of the annual value of 3l. and mortgaged it to the society for 73l., the amount of the purchase-money which they had advanced, and which he was to repay by monthly instalments, amounting to 4l. per annum. If these were not duly paid, the society had power to enter into possession. 71l. had been repaid to the society prior to the 31st Jan. preceding the time when the claim was made, and the remaining 2l. had been paid prior to the revision of the lists:

Held, that the claimant had a freehold interest in the land of the value of 40s. per annum, and was therefore entitled to vote.

The following case was stated for the opinion of the court by the revising barrister for South Northamptonshire:—

CASE.

At the court held on the 28th Sept. 1863, at Northampton, for the revision of the list of voters for the parish of St. Sepulchre, Northampton, Francis Charles Robinson, the younger, duly objected to the name of Charles Derby being retained on the list of voters for the said parish of St. Sepulchre. The name of Charles Derby appeared upon the list of persons claiming to be entitled to vote thus, viz.:—

Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in this parish or township, and number of house (if any) where the property is situate, or name of the property, if known by any, or name of the occupying tenant; or, if the qualification consist of a rentcharge, then the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property.
Derby, Charles.	34, Mayfair, Northampton.	Freehold building land.	Marriott-street, Kingthorpe-road, Northampton.

The facts of the case as proved were as follows:—Charles Derby is a member of a freehold land and building society in which he held one share.

The society advanced the purchase-money of the land, 73l., some years since and the voter mortgaged the property to secure the monthly payments due upon his share, amounting annually to 4l., and upon failure of the payment by the voter of his instalments for a certain limited period the society is entitled either to suspend enforcement of payment, or to enter upon possession, and the voter is entitled to redeem the premises by the payment of these monthly instalments alone without any other payment of principal. The funds of the society arise out of the monthly payments of the members, which are for the proportional benefit of the members. It was proved before me that the whole money paid up by the claimant was 73l., and that the annual value of the property was 3l. for building par-

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poses, and that during the past year ending in June last, he had paid instalments back to the society to the amount of 4*l.*, 2*s.* whereof had not been paid before the 1st of Jan. last.

It was contended, on the part of the objector to the vote, that, as the annual value as admitted by the claimant was less than the annual payment made by the claimant to the society, there was no freehold worth 40*s.* per annum. I was of opinion that upon these facts the claimant was progressing towards the acquisition of his freehold, which, when fully paid up, would have cost him 73*l.*, of which he had paid 71*l.* before Jan. 1863, and this having been completed by the payment of the remaining 2*l.* in July last, I found that he had a freehold prior to the 31st Jan. last of the value of 40*s.* per annum, and therefore I retained his vote.

If I was right in thus finding the value, according to the above facts, the claimant's name ought to be retained. If I was not right the claimant's name ought to be rejected. (Signed)

W. H. R., Revising Barrister.

Markham for the app.—The purchase-money of the estate was 73*l.*, and the annual value 3*l.*, but then there was a mortgage on it, and the annual payment was 4*l.* By 8 Hen. 6, c. 7, it is enacted that knights of the shire shall be chosen by people who "shall have free land or tenement to the value of 40*s.* by the year at the least above all charges." Now, is this an estate of free land of the annual value of 40*s.*, free of all charges? The case finds that on the 31st Jan. he had paid 71*l.* of the purchase-money of the estate, but inasmuch as it was subject to an annual payment of 4*l.*, and only received 3*l.*, the annual value is nothing. [BYLES, J.—But he pays that on account of principal.] Principal and interest. The case finds that the annual payment was 4*l.*, and in considering whether this is a good vote, the only test is the annual value free of all charge. The revising barrister was of opinion that he was progressing towards the acquisition of the freehold; now, I contend that he is not entitled to a vote till he has got his land free of all charge; it will not do that he is progressing towards it. If a man takes a step here he may be said to be progressing towards Scotland, but he is not in Scotland. The only question here is, is this a charge? In *Copland v. Bartlett*, 18 L. J. 50, C. P. Wilde, C. J., speaking of "charges," says that, "interest on a mortgage is a 'charge' upon the estate. . . . If the owner of an estate receives 20*s.* with one hand, and at the same time pays 30*s.* with the other, he has not left that quantum of interest in the estate which the law contemplated he should have as a qualification for a vote."

Lee v. Hutchinson, 20 L. J., N. S., 4, C. P.;

Beamish v. Overseers of Stoka, 21 L. J., N. S., 9, C. P.

[ERLE, C. J.—The mortgagor has paid all principal and interest except 2*l.*; now, is there any case to show that he is incapacitated from voting because this 4*l.* remains due? BYLES, J.—The distinction between your case and *Copland v. Bartlett* is, that in that case the revising barrister did not find how much principal and interest still remained to be paid.] The society could enter and take possession if the interest was not regularly paid; how then could he be said to have the freehold? [BYLES, J.—They could only enter subject to the equity of redemption.]

No counsel appeared for the resp.

ERLE, C. J.—I am of opinion that the revising barrister was right. The difficulty that I have had in deciding the case has arisen from the decision in *Copland v. Bartlett*. In that case and in the present one the party taking land under a building society was bound to pay monthly instalments, which exceeded per annum the annual value of the pro-

perty, and in each of them the mortgagor had not paid all the instalments. I think that with reference to the distinction between the two cases the proper course is to look at the substance of the transaction and the nature of the charge which the party has to pay. The claimant here was to pay 73*l.*, and when he has paid that he is owner of a freehold interest of the value of 3*l.* per annum. At the time the revising barrister had to ascertain his interest he had paid 71*l.*, he had never been in arrear, and according to the contract, the remaining 40*s.*, to make him the absolute freeholder would be due between the 31st Jan. and the time of the revising barrister's sitting. On the 31st Jan. he had paid 71*l.* of the 73*l.*, which was to give him a value of 3*l.* per annum, and the revising barrister says, "I find the value of that interest to be more than 40*s.* per annum." I think he was right in that finding; the claimant here has 40*s.* to pay, and then he has 3*l.* per annum for him and his heirs for ever. That is the distinction between this case and *Copland v. Bartlett*. In that case the court asked the counsel arguing the case, what was the value of the mortgagor's interest at the time? how much had he paid? had he become entitled to an interest of the value of 40*s.* per annum? And Maule, J. says that, as the learned counsel declined to send the case down to be retested in order to ascertain the value of his interest, he must be presumed to have done so, for the best of reasons, because, if a return was made, it would show that it was not of the annual value of 40*s.* The court therefore came to the conclusion that if the revising barrister had found an interest that amounted to 40*s.* per annum, and so much money had been paid off as vested an interest in him to that extent, they would have held him qualified; because that was left in doubt he was disqualified beyond all question. Here the revising barrister finds that the mortgagor had an interest of the value of 40*s.* per annum, and he gives the facts which led him to that conclusion—facts which were left unfound in the former case, and which, if they had been found, would have led to a different result. I think, therefore, the decision should be affirmed.

WILLIAMS, J.—I am of the same opinion. I think the revising barrister was right, and I agree with the view he has taken of the point. But it has been said that we cannot come to this decision without differing from the decision in the case of *Copland v. Bartlett*. But, in my opinion, when that case comes to be narrowly examined it would seem that the point upon which this case turns was not raised in that case. The real contest in that case was this: It was contended on the part of the claimant that the statutes, by enacting that the mortgagor in possession was to vote, gave him a right to vote irrespective of what his interest was when the incumbrance was taken into consideration; and the court decided two points in the case: first of all, that by reason of the language of other statutes upon the question of the qualification of voters, the word "mortgage" was a charge within the meaning of the statute of Hen. 6, and that therefore the enactment that enabled the mortgagor in possession to vote must be considered to give him that right supposing he had 40*s.* a-year free from charges; and then the second point decided was, that the incumbrance which the member of this building society has is a mortgage within the meaning of that rule. Then in the course of the argument it was suggested that perhaps here the mortgagor had an interest of the value of more than 40*s.* a-year, deducting the amount of the incumbrance. But the facts in that case were imperfectly stated, and the court being apprised of that fact put it to the counsel arguing the case, "Will you venture to have the case amended?" He declined to advise the parties to have that inquired into, therefore it was clear the estate

was not of the value of 40s. a-year when you deducted the incumbrance. Now, here it is clear, as found by the revising barrister, and, that being so, the claimant has a right to his vote.

BYLES, J.—I am of the same opinion, and were it not for the case of *Copland v. Bartlett* I should have entertained no doubt. As the facts are stated they amount to this: A man has an equitable interest and a beneficial interest in an estate of 71*l.* to the extent of 71*l.*, and that 71*l.* is worth more than 40s. a-year, exclusive of all charges; that gives him, as the mortgagor or party beneficially interested within the statutes of Will. 4 and Victoria, a vote. I certainly was embarrassed at first by the case of *Copland v. Bartlett*, but in that case the distinction already pointed out, upon a careful examination, seems to be perfectly well founded. In that case the value of the beneficial interest was not found, and therefore it did not appear that the allotment to him was of the value of 40s. a-year. I cannot help thinking that the counsel there ought to have pointed out the distinction between the payment of interest in respect of principal and where a man pays off the principal, and when he has paid all claims gets the value in another shape in augmentation of the value of his beneficial interest. I therefore cannot help thinking the principle wrong which would reduce the value of a beneficial interest by sums paid from year to year in diminution of the principal: if it were acted on, it would come to this—that if a man mortgages an estate for 500*l.*, the value of which is 400*l.* a-year, and he has to pay 500*l.* in the course of the first year, he would have no beneficial interest at all during the course of the first year. So, if you were to look at the legal relations existing between the parties, there would be the same result. Upon these grounds I cannot help thinking the case of *Copland v. Bartlett* is distinguishable, and if you take the facts of this case, it seems to me free from all doubt.

KEATING, J.—I am of the same opinion. I think that the revising barrister was right. The position of the voter was that of a mortgagor in possession, with an incumbrance upon the land, not reducing his interest in the land below 40s. That is distinctly found by the revising barrister as a fact, that finding having been omitted in the case referred to of *Copland v. Bartlett*. Looking at the case of *Copland v. Bartlett*, I do not believe that the court intended to decide anything beyond that which was decided in the case of *Lee v. Hutchinson*. That was a case in which land, of the value of 5*l.* a-year, was mortgaged for 100*l.* It was held, that the mortgagor there had no vote, simply because he had not an interest in the land to the amount of 40s. a-year. In the present case I think the revising barrister was quite right. *Judgment for the resp.*

Attorney for app., Henry Smith.

Monday, Nov. 23.

WHITELEY v. ADAMS.

Label—Privileged communication—Social and moral duty.

The plt., a member of the congregation attending the church of St. B., and esteemed by the clergy and congregation of that church as a zealous and religious man, visited in the country, where she was then temporarily residing, a Mrs. H., also a zealous member of the same congregation, and by her he was introduced to the deft., the incumbent of the country parish, and to the family of a farmer named F. He became on intimate terms with this family, but subsequently disputes arose, and F. sued the plt. for board and lodging and the price of a horse. Pending the litigation, the plt. communicated with C., one of the assistant-curates of

St. B., who thereupon wrote down to the deft. begging him to act as an arbitrator in the dispute between the plt. and F. The deft. declined to do so. C. then wrote again to him, exhorting him as a Christian clergyman and as actuated by the same strong marked religious sentiments which prevailed among the clergy and congregation of St. B., to act as a peacemaker, and to prevent the scandal which must be caused to the congregation of St. B. if the action proceeded. The deft., in reply, wrote a letter to C., giving his reasons for declining to act as arbitrator. The letter contained various defamatory statements respecting the plt., and expressed the deft.'s belief that it was his duty to unmask him to C. This letter was shown by C. to the plt., who thereupon commenced an action against the deft. for libel. The deft. then came to town, and called upon Mrs. H., the person who had introduced the plt. to him, and complained to her of the way in which he had been treated by the plt. and also by C. Mrs. H. expressed a confident belief that the deft.'s bad opinion of the plt. was an erroneous one, and that the charges made against the plt. were false, but she promised to ask the plt. about them and to communicate to the deft. the result of her inquiries. She saw the plt., and questioned him about the imputations upon his character, and he denied that there was any foundation for them. With the plt.'s knowledge she then wrote to the deft., stating that the plt. denied the charges. The deft. wrote back in reply a letter reiterating the charges, and stating that if the plt. denied them he would be prosecuted for perjury. This letter was handed to the plt., who commenced a second action against the deft. for the libel contained in this second letter. The actions were consolidated, and at the trial the jury found that the imputations upon the plt.'s character were unfounded, but that the letters were written by the deft. bona fide and without malice:

Held, that the first letter was privileged as being written by the deft. in the discharge of a social and moral duty, and also on the ground that the deft. had an interest in writing it:

Held also (per Erle, C.J., Williams and Keating, JJ.), that the second letter was privileged as being written by the deft. in the discharge of a social and moral duty; and (per Erle, C.J., Williams, Byles and Keating, JJ.), that it was privileged on the ground that the deft. had an interest in writing it.

Libel.—Two actions were brought by the plt. against the deft. for libel, but they were consolidated by a judge's order.

The declaration in the first action stated, that the deft. maliciously wrote and published of the plt. a letter, containing the words, figures, and abbreviations following; that is to say:—"Stockcross-parsonage, March 17th. Dear Sir,—I cannot, I am sorry to say, accede to your request for the following reasons: first, because Mr. Fowler's lawyer, Mr. Smale, whom I know to be an honourable man, will, I am sure, be quite ready to compromise the matter instead of carrying it into court if Mr. Whiteley will make fair overtures to him; secondly, because Mr. Whiteley's conduct has been so bad that I should be sorry to have my name in any way associated with him or his affairs. To give you an outline of all the charges which I hear laid against him would occupy more time than I have to spare this morning, but I will mention two or three which I believe to be well founded. Though only a lawyer's clerk, he passed himself off for some time in this parish as a lawyer of considerable wealth, and talked largely about his landed property in Kent. This enabled him to impose on the rustic simplicity of the Fowlers in a way which he would not otherwise have done. Under the impression that he was a gentleman of considerable

means, they allowed him from time to time to make himself an unbidden guest at their house and to send his son to stay with them for the benefit of his health for a month or two; they also sent him, at his request, poultry, &c., &c., and were given to understand by him that full compensation would be made to them for all the trouble and expense to which he had put them. But, with the exception of a shawl sent by Mr. Whiteley to Mrs. Fowler, they have received no payment whatever. Last of all, he bought a horse of Mr. Fowler, which is not yet paid for, and his attempts to avoid payment have been characterised by extreme meanness if not downright dishonesty. There are unpleasant rumours about his being immoral and intemperate, but how far they are true I am unable to say. It grieves me very much to make these statements respecting a man who evidently wishes to be considered a religious man and a good churchman; but inasmuch as he said a great deal to my parishioners about his intimacy with the clergy of St. Barnabas, I think it my duty to unmask him to you, and I should be very thankful to be enabled to tell some of my neighbours that his position at St. Barnabas is not quite what he led them to suppose it to be, and especially that his official connection with the English Church Union had ceased:"—by means of the committing of which grievance, the plt. had been and was greatly injured in his character and credit, and brought into public scandal and disgrace.

Pleas:—1. Not guilty. 2. Justification.

The declaration in the second action stated that the deft. falsely and maliciously wrote and published of the plt. a letter, containing the words, figures and abbreviations following; that is to say:—"Stockcross-parsonage, May 6th. My dear Mrs. Hurry,—Time will show whether I have been misinformed or not respecting Mr. Whiteley. A writ has been served upon me, and a public investigation must therefore take place. If he states on oath, in the witness-box, what he has stated to you, especially as to the charge of assault, he will be most certainly prosecuted for perjury, for there is not a shadow of a doubt but that the complaint of the servant girl is correct. She is a person of unblemished reputation and a communicant, and no one can listen to her statement as I have done without believing every word of it. As to the story about the farmer's wife and the beer drinking at ten o'clock on the Sunday morning, I do not attach much importance to it. They are charges of a very minor consideration, but the alleged assault is a very weighty accusation. I am sorry I shall not be able to call on you again for some time. Until the trial comes on I shall be hardly able to leave home, but if you have any inclination to ask for further information and details my attorney Mr. Smale, 18, New Bridge-street, Blackfriars, will be happy to see you. With kind regards to Miss Hurry, sister Pauline and yourself:"—by means of the committing of which grievance the plt. had been and was greatly injured in his character and credit, and brought into public scandal and disgrace.

Pleas:—1. Not guilty. 2. That the plt. being a married man indecently assaulted the servant girl referred to in the said letter, and then indecently and dishonourably solicited her to permit an illicit and adulterous intercourse between the plt. and her, of which the said servant girl complained, and the plt. made a false statement to the person to whom the said letter was addressed with respect to the matter aforesaid, wherefore and because the plt. had committed such matters as alleged, the deft. published the said alleged libel.

At the trial before Erle, C. J., at the sittings in London after Trinity Term, the plt. proved the writing by the deft. of the letters set out in the declarations. It was further proved that the plt. was a junior clerk in the chambers of Wood, V.C. He was also a member

of the congregation of the church of St. Barnabas, at Pimlico. Mr. Cleaver, to whom the letter contained in the declaration in the first action was written, was one of the assistant-curates of St. Barnabas. Mrs. Hurry, to whom the letter contained in the second declaration was written, and her daughters were members of the congregation attending that church. The plt. and Mrs. Hurry and her daughters took an active interest in matters affecting the church and congregation, and an acquaintance existed between them. In the year 1860 Mrs. Hurry was residing temporarily at Stockcross, in Berkshire, and the plt. visited her there. He was introduced by her to the deft., who was the rector of the parish, and to the family of a farmer named Fowler. He became on intimate terms with this family, stayed with his children in their house, was supplied with farm and dairy produce by them, and ultimately bought a horse of Fowler. The servant girl alluded to in the above letter to Mrs. Hurry resided in Fowler's family. Towards the end of the year 1861, Fowler brought an action against the plt. for board and lodging supplied to the plt. and his children, and for the price of the horse; the plt.'s defence to that action was, that he and his children had resided in Fowler's family as guests, and not as lodgers, and that the horse had been sent on approbation, and that he had declined to purchase it. Before this action came to trial, Mr. Cleaver, at the request of the plt., wrote to the deft., who was a person holding the same strong religious opinions that were held by the clergy and congregation at St. Barnabas, asking him to act as arbitrator in the matter. The deft. wrote back, declining to interfere in the matter. Mr. Cleaver then wrote again, exhorting the deft. in very strong terms to accept the arbitration, intimating that it was his duty to do so as a Christian minister, and that it would be the means of preventing a grievous scandal to the congregation of St. Barnabas. The deft. wrote in reply the letter contained in the declaration in the first action. This letter was handed by Mr. Cleaver to the plt., who thereupon brought the first action mentioned above. This action having been commenced, the deft. came to town, and after calling upon Mr. Liddell, the perpetual curate of St. Barnabas, called on Mrs. Hurry, and complained to her of the position in which he had been placed in consequence of his letter to Mr. Cleaver having been communicated to the plt., and told her of the plt.'s alleged misconduct. Mrs. Hurry expressed a strong opinion that the plt. was quite incapable of acting in the manner in which he was said to have acted, but that she would ask him about it, as she was quite sure that he would tell her the truth. She did subsequently make inquiries of the plt. and on his denying the truth of the charges, she wrote to the deft., stating that he had done so. The deft. replied in the letter contained in the declaration in the second action. Mrs. Hurry's letter had been written with the knowledge of the plt., and he called upon her soon after she had received the deft.'s answer, and she gave him the letter, whereupon he commenced the second action.

At the trial the deft.'s counsel contended that the letters were privileged communications. This question was reserved for the opinion of the court. Evidence was then given on behalf of the deft. in support of the plea of justification in the first action, and the special plea in the second. Two questions were left to the jury, first, whether the charges contained in the letters were or were not substantially true; and secondly, whether the plt. wrote them without malice and *bona fide* believing them to be true. The jury found for the plt. on the first question, with forty shillings damages on each libel, and for the deft. on the second question. A verdict having been entered accordingly for the plt.

Coleridge, Q.C. obtained a rule to enter a nonsuit

C. B.]

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[C. B.]

or a verdict for the deft. pursuant to leave reserved, on the ground that the letters were privileged communications, or for a new trial on the ground that the verdict was against the weight of evidence.

M. Chambers, Q.C. and *Joyce* showed cause.—The question of malice does not arise, and it ought not to have been left to the jury. In *Bromage v. Prosser*, 4 B. & C. 255, the rule is laid down by *Bayley, J.* in the judgment of the court: "If the law implies such malice as is necessary to maintain the action it is the duty of the judge to withdraw the question of malice from the consideration of the jury." (see also *Com. Dig.*, "Action upon the Case for Defamation," G. 5.) It is for the judge to say that the occasion did not require the communication, and that it was not privileged:

Tuson v. Evans, 12 A. & E. 733;
Cooke v. Wildes, 5 E. & B. 328;
Brown v. Croome, 2 Stark. 297;
Woodward v. Lander, 6 C. & P. 548;
Warren v. Warren, 1 C. M. & R. 250;
Gordon v. Horne, 1 B. & B. 7;
Wentman v. Ash, 13 C. B. 836.

The first letter contained charges which were unnecessary as far as the occasion went, and were irrelevant for the purpose of justifying the deft. in declining to become arbitrator.

Coleridge, Q.C. and *H. James* supported the rule.—The communications were privileged as being made to persons set in motion by the plt. for the express purpose of eliciting these letters. The first letter was written by the deft. in reply to an urgent request made by a brother clergyman who, if not acting for the plt., was certainly acting with his knowledge and approval. The circumstances were most confidential. *Mrs. Hurry* was also acting with the plt.'s full concurrence. The jury have expressly found absence of malice in fact, and perfect *bona fides*. The law is laid down correctly in *Harrison v. Bush*, 5 E. & B. 344. It is impossible that there should be any legal definition of moral duty. In the case of *Toogood v. Spyring*, 1 C. M. & R., at p. 192, *Parke, B.* explained the proper test whether or not communications are privileged on the ground of duty. In the absence of any legal definition reference may be made to what is said of social and moral duty in *Cicero de Officiis*, lib. 3, and *Bishop Butler's sermon on the Government of the Tongue*. Again, malice in fact is essential to the action: (*Starkie on Libel*, pp. xlvi., lxxiv., 320, 321.) Then it is for the judge to tell the jury that the communication is or is not privileged: (*Blackburn v. Pugh*, 2 C. B. 611.) [*ERLE, C. J.*—We are all agreed that, given the facts of the case, it is for the court to say whether or not the communication is privileged.] If the plt. had a right to make the statement contained in either letter, it cannot disentitle him to the privilege that he had some other motive besides that of discharging a duty. The test of *bona fides* is whether or not the deft. believed it to be his duty to make the communication, although he might be mistaken. [*KEATING, J.*—If you introduce the element of honest belief you refer the question of privilege to the jury.] The real question is this: was the deft. in such a position that he might reasonably believe that it was his duty to make the communications? In this case he clearly was, and therefore the communications were privileged.

The following authorities were also referred to in the course of the argument:

Coxhead v. Richards, 2 C. B. 590;
Pattison v. Jones, 8 B. & C. 578;
Peacock v. Reynald, Brown. 2nd part, 151;
Harrison v. Bush, 5 E. & B. 344;
Gilpin v. Fowler, 9 Ex. 615;
Somerville v. Hawkins, 20 L. J. 131, C. P.
Pater v. Baker, 3 C. B. 831;

Child v. Affleck, 9 B. & C. 403;

Pitt v. Donovan, 1 M. & S. 639.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The action was brought in the first count of the declaration on a letter to *Mr. Cleaver*, and in the second count on a letter to *Mrs. Hurry*. Each letter contains matter defamatory of the plt., and each contains matter sufficient to maintain the action, unless the circumstances under which it was written show that it comes within the protection afforded to privileged communications. No action lies for defamation unless there be malice; but defamation pure and simple is presumptive evidence of malice, which may be rebutted, however, by showing the circumstances under which the words were written or spoken. The rule has been lately laid down in the Courts of Ex. and Q. B., that if the circumstances of the case bring the judge to the opinion that a communication has been made in discharge of a social or moral duty, or on the ground of an interest on the part of the party making it, with a corresponding duty or interest on the part of the person receiving it, and that the words complained of passed in an honest belief that the party uttering them was performing his duty in doing so, the judge is to say that the action fails. The jury in the present case have found that the letters were written by the deft. under a *bona fide* belief that they were true, and that it was his duty to write them. Then do the circumstances show that they were written in the discharge of any social or moral duty, or on the ground of any interest? I am bound to answer in the affirmative with respect to both letters. They were confidential communications in the sense that they need not have passed beyond the parties to whom they were written. The plt. had obtained a great estimation with the persons in authority at the church of *St. Barnabas*. *Mr. Cleaver* was the curate there. *Mrs. Hurry* and her daughters were persons taking a deep interest in the parish. Then when *Mrs. Hurry* and her daughters were residing in lodgings in the deft.'s parish, the plt. came down on a visit to them, and was introduced by them to the deft., and became acquainted with the family of *Mr. Fowler*, a farmer. The plt. visited this family on friendly terms, and took a horse of them and hay, and in respect of the remuneration for these and for board and lodging, there arose between them disputes and litigation—it matters not what was the result of the litigation—the award was, I believe, in favour of the plt.; but, pending the litigation the occasion for the writing of these letters occurred. The plt. applied to *Mr. Cleaver*, who in his capacity of clergyman of the parish in which the plt. resided, wrote to the deft. asking him to join in an arbitration. The deft. declined, and said in effect, "If you or any of the clergy of *St. Barnabas* will come down to *Stockcross*, I will give you such information as will induce you to admit that I have good ground for my refusal." *Mr. Cleaver* then wrote long and earnestly to the deft. asking him to be a peacemaker between the disputants, putting it to him as a person of the same marked religious opinions as prevailed at *St. Barnabas*, that it was his duty to do this and prevent scandal to the members of the congregation of *St. Barnabas*. It was the case of a clergyman of strong religious opinions writing to another clergyman of the same strong religious opinions exhorting him to do what was said to be his duty. The deft. in answer wrote the first letter, the effect of which is this: "I cannot act as arbitrator, and I will state why I cannot do so. It is my duty, as you attach great value to *Mr. Whiteley's* being a member of your congregation, to unmask him. It is my social and moral duty, as between clergyman and clergyman, to give you true and correct information concerning him. You are exhorting, almost blaming, me for not acting as you wish in this matter. You are mistaken in your con-

fidence, and I feel that I ought not to undertake the arbitration with the knowledge that I have, and that with that knowledge I ought to give you a more correct opinion of Mr. Whiteley's character." I think also that it was to the deft.'s interest, if he wished to stand well with the religious body, who considered that he was almost failing in his duty in not coming forward, to explain his reasons for not doing so. With regard to the second letter, the difficulty of the deft. was greater than with regard to the first, because there had been no request made to him by Mrs. Hurry to interfere. Probably the plt. knew that Mrs. Hurry had written to the deft., and his coming to her house for the deft.'s letter would make it appear that such was the fact; but still it was the deft. who initiated the movement of Mrs. Hurry, by calling upon her and making a statement to her. But the statement was made with a fair regard to his own interest. Mr. Cleaver had deluded him into the belief that he might write confidentially to him, and he wrote under the belief that he was so writing confidentially to a man of Christian feeling, and then Cleaver gave his letter to the plt., and an action was commenced, and under the pressure of this calamity the deft. called on Mrs. Hurry, who had introduced the plt. to him, and said to her what he thought might lead to a cessation of the action. She told him that his opinion of the plt. was a mistaken one, and that she would see the plt. and ask him about it, and communicate with the deft. on the subject. She did see the plt., and he denied all the charges made against him, and she wrote to the deft. in great kindness of spirit, stating what the plt. had said, and hoping for a settlement of the action. As the litigation then stood, in what position would the deft. have been if he had sent no answer? Had he not a right to say, "Whiteley is not to be depended upon. The imputations I have made are true, and if he denies them he will most certainly be prosecuted for perjury." If the deft. believed that to be true, and Mrs. Hurry's letter showed that she had great confidence in the plt., looking on him as a religious man, and as a prominent person in the congregation, the deft. discharged a social and a moral duty in saying, "your confidence is misplaced." I think, also, that with the litigation then pending, the deft. had a direct interest in not letting Mrs. Hurry's letter pass as if he acquiesced in it. Thus the deft. discharged a social and a moral duty, and had an interest in writing these letters. Judges who have had to deal with matters of this character have all felt a difficulty in defining what social and moral duty and what degree of interest would be sufficient to create a justification; but they are clear that it is a question for the judge to decide. I agree with the doctrine cited from Starkie, that it is necessary that there should be a means of getting at a true estimation of the character of persons in regard to whom we are placed in a position of confidence. The law of privileged communications was first confined to private relationships. The first case on the subject, that of *Peacock v. Reynal*, is the strongest example of this, for it decided that a person might write to a father words that were defamatory of his son with a view to his reformation; but that the same words written to a more distant relation would be actionable. The rule became gradually extended, on the principle that it was to the interest of society to get correct information of the character of its members. If every word that was said were to be made the ground of an action, cautious people would take care that their words were words of praise only, and would cease to obey the dictates of truth. The rule as to privilege in criticising the conduct of public men has been extended very widely in modern times; and so also the rule with respect to the characters of private men has been much extended, and in my judgment very wisely.

WILLIAMS, J.—The jury found that the deft. acted *bonâ fide*, believing the imputation which he was making to be true. That being so, he found Mr. Cleaver and Mrs. Hurry under what he had a right to believe was a delusion with respect to the plt., who was publicly enloured and favoured as a religious and pious man. They stood to him in such a relation that it was his duty to undeceive them and set them right, although it would not have been his duty to proclaim the plt.'s delinquencies in public. Applying the rule laid down in *Harrison v. Bush*, these were privileged communications.

BYTES, J.—The rule has been clear since the case of *Toogood v. Spyring*, that "if fairly warranted by a reasonable occasion or exigency, and honestly made, communications are protected for the common convenience and welfare of mankind." The more carefully the canons laid down there are examined, the more carefully they will be found to be expressed; but there always will be a difficulty in applying them to particular cases. The first part of the first letter is privileged as being written in a matter in which the deft. was interested. He had a right to give his reasons for refusing to accede to Mr. Cleaver's request. But then comes a passage which it is more difficult to justify: "Inasmuch as he said a great deal to my parishioners about his intimacy with the clergy of St. Barnabas, I think it my duty to unmask him to you, and I should be very thankful to be enabled to tell some of my neighbours that his position at St. Barnabas is not quite what he led them to suppose it to be, and especially that his official connection with the English Church Union had ceased." But he says that he thought it was his duty to write as he did, and the jury have found that he did think so. Both the deft. and Mr. Cleaver were zealous, conscientious men, and it may be considered, looking at the sacred character filled by them, that it was the deft.'s duty to write the second part of the letter, and thus the whole of the letter will be privileged. The second letter is privileged on the ground that the deft. had an interest in writing it. Having been served with a writ in what he believed to be a groundless action, he wrote this letter believing that it would be shown to the plt. If it had been written directly to the plt. it would not have been actionable, and it was invited by the plt., and I think that, as the action then stood, the deft. was interested in writing it.

KEATING, J. concurred.

Rule absolute.

Attorneys: for plt., Peckham and Salt; for deft., C. Small.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Wednesday, Nov. 11.

BAKER V. THE GUARDIANS OF THE BILLERICAY UNION.

Poor-law guardians—Action for debt against—Limitation to time for suing—Extension of time by Poor Law Board—22 & 23 Vict. c. 49, ss. 1 and 4.

The 22 & 23 Vict. c. 49, s. 1, having enacted that "every debt due from the guardians of any union shall be paid within the half-year in which the same shall have been incurred or become due; or within three months after the expiration of such half-year but not afterwards; provided that the Poor Law Board, by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt."

Held, that an action commenced for the recovery of a debt after the expiration of the half-year, and the three months, in a case where the commissioners had

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[Ex.]

not extended the time for payment, was not maintainable, and that a plea, setting up those facts as a defence, was a good answer, although at the date of the issuing of the writ the period to which the commissioners might have extended the time for payment, had they thought fit to do so, had not expired.

Seemingly, if the commissioners think fit afterwards to extend the time, a fresh action may be brought and judgment in the present action would not be a judgment in another and fresh action brought with the authority of such extension.

These were two actions consolidated by order, and by an order of Nisi Prius referred to a medical arbitrator, who stated a special case for the opinion of the court.

The plt. is a medical officer of the Billericay Union. The defts. are the board of guardians of the same union.

The claim is for medical fees beyond the salary to which the plt. is entitled as such officer.

The date of the writ in the first action was 9th June 1862.

For the purpose of the case, the pleadings are as follows:—

Declaration, indebitatus count.

Plea:—1. Except as to 35l. 10s., never indebted.
2. As to the 35l. 10s. excepted, payment into court.
3. Except as to the 35l. 10s. excepted, that the matter herein pleaded to was a debt, claim, or demand, incurred by the defts., as the guardians of a union, after the passing of the Act, 23 Vict., intitled "An Act to provide for the payment of debts incurred by boards of guardians in unions and parishes and boards of management in school districts," and that the plt. did not commence any proceedings for the said debt within the half-year in which the same was incurred or became due, or within three months after the expiration of such half-year, nor has the Poor Law Board granted any extension of time for the payment of the said supposed debt or any part thereof, nor was this action commenced within the time limited by the statute in such case made.

The defts. affirm and the plt. denies that the third plea, assuming it to be good in law, is an answer to the plt.'s claim.

The plt. also affirms and the defts. deny that the third plea is bad in substance.

The question for the opinion of the court is, whether the third plea is not bad in substance, and the plt. entitled to have judgment arrested on it.

The 22 & 23 Vict. c. 49, s. 1, enacts that, "With respect to any debt, claim, or demand which may, after the passing of that Act be lawfully incurred or become due from the guardians of any union or parish, &c., such debt, &c., shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards; the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board; provided that the Poor Law Board by their order may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand." And sect. 4 of the same Act enacts that "If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any court of law or equity, or before any justice or other competent authority within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question,

such judgment shall be satisfied by the guardians or managers against whom or against whose officer the same may be brought, notwithstanding that such judgment may be recovered, or such final settlement arrived at after the expiration of the period hereinbefore provided; and all proceedings taken by *mandamus* or otherwise for the enforcing of such judgment without delay, shall be deemed to be within the operation of this section."

At the date of the writ the commissioners might have extended the time if had they thought fit so to do.

D. D. Keane for plt.—The statute prohibits, not the bringing of an action, but merely payment, and is therefore no answer to the action, though possibly it may be to the execution. How this court might act to stay execution I do not know, but the authorities show that if the execution were wrong a court of equity would restrain it. The statute simply says it shall not be paid, but the same section says that it shall be paid within the prescribed time. The only limitation I can find is the one under the 4th section, and if so it does not meet the case, for plt. had a right to bring his action under the 1st section. The 4th section does not alter the effect of the first, and the effect of the 1st section is only to prohibit payment after the time. [*PIGOTT, B.*—It prohibits payment of the debt by means of an action. *CHANNELL, B.* refers to the preamble, which his Lordship reads.] It was defts.' duty to pay within the time, and they now invoke the aid of the section, but do not show any reason for not paying. They are setting up their own wrong. He cited

Attorney-General v. Wilkinson, 28 L. J. 392, Ch.;

Ince v. The Guardians of the City of London Union, 24 J. P. 358, Q. B. (1860);

Harrison v. Stickney, 2 H. of L. Cas. 108.

C. E. Pollock, contra, for defts., was not called on. *POLLOCK, C. B.*—I am of opinion that the defts. are entitled to judgment. This was an action against poor-law guardians to recover a sum claimed to be due for medical fees, beyond the salary of plt. as the medical officer of the union. Now the Act says substantially that payment of any debt, claim, or demand shall not be made by the guardians unless within half-a-year of the time when it was incurred or became due, or within three months after the expiration of such half-year; but the Act also provides that the Poor Law Board may by their order, if they see fit, extend the time within which payment may be made for a period not exceeding twelve months after the date of such debt, claim, or demand. The present action was brought after the expiration of the two first-named periods of half-a-year and three months, and the question is, whether a plea setting up that fact as a defence is or is not a sufficient answer to the action, or whether, where the Legislature has said that the money shall not be paid, this court is to say that the Legislature, as my brother Bramwell observed, enacted a thing so absurd as that the action might be brought at law, but that the defts. should be at liberty to go to a court of equity, which would be bound to restrain the plt. from proceeding to issue execution? I am of opinion that when a statute forbids a thing to be done no action will lie to enforce the doing of it. There are a large class of cases illustrative of that proposition. For instance, a man promises to do something, the doing of which becomes subsequently unlawful before the time has arrived for the performance of his promise. In that case no action could be brought against him for not doing that which the altered state of the law has made unlawful. So here it is equally consonant with common sense as with law, that, if the money claimed is not to be paid, the creditor cannot maintain an action for it. The difficulty suggested as to the form of the plea may be

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answered thus: first, it is an answer to say that the time allowed by the Act of Parliament is wholly gone by now, and so judgment may be given for the debts; or, secondly, if when the plea was pleaded the time was not wholly gone by, the answer is, that the Poor Law Commissioners had not extended the time. Here the action was brought after the two periods first named in the Act had passed, and no extension of time had been granted by the commissioners, and so this action cannot be maintained, none being maintainable until such extension be granted. The action would fail in the first instance for the want of an element in the claim on the part of the plt. which, in a second action, might be previously supplied. The debts are entitled to our judgment in their favour.

BRAMWELL, B.—I am of the same opinion. Except for the proviso at the end of the 1st section, I should have no doubt at all upon the matter, for where a statute expressly says that a debt shall not be paid, the obvious and sensible meaning of that is, that it is a bar to any action in respect of such debt, and that a man shall not sue, or if he does, that he shall sue in vain. The only difficulty or doubt which I have felt arose from this, that there is a power given to the commissioners to extend the time. Is, therefore, the statute a bar to the action until the period, within which the commissioners have power to extend the time, has gone by? The answer to that, I think, is probably this, that if the action is commenced after the two first periods limited by the section and before the extension of time by the commissioners, then the action is barred, though, if the board should think fit afterwards to extend the time, then another and fresh action may be brought. Against this view it may be said, that an action, if once barred, is barred for ever; but there are exceptions to that general rule. For example, the case of an attorney bringing an action on an unsigned bill. In one sense he has a cause of action, but it cannot be maintained. The statute runs against him and he is barred; but when he has delivered a signed bill under the Attorneys Act, he can recover. So here the plt. is barred of his action, but not of his claim. It may be that he may afterwards obtain an extension of the time. But in the present state of things our judgment will be for the debts.

CHANNELL, B.—I agree with the rest of the court in thinking that our judgment should be for the debts. The important question in this case is, what is the operation of the statute? I am of opinion that it is a bar to the plt.'s maintaining the present action. We have nothing to do with the consequences which will ensue. It has been held, over and over again, that the language of the enacting clauses of a statute cannot go beyond the preamble, and that is a safe mode of constraining an Act of Parliament. If we look at the preamble of this statute it will guide us to a proper construction of the statute itself. Now the preamble is as follows: [His Lordship reads it.] I think then the case stands clear on the 1st section. That section refers to three periods of time—two of them being definite periods—viz., first, the half-year within which the debt or claim shall have been incurred or become due; and secondly, the three months after the expiration of such half-year; the third period being an indefinite one, viz., the period, beyond such two definite periods, to which the commissioners have power, under the proviso at the end of sect. 1, of extending by their order, if they see fit to do so, the time within which such payment shall be made. Independently of the proviso, the statute means that payment shall only be made within the current half-year and three months beyond it. Then comes the proviso, which in case of any doubt about the limit of the half-year and three months affords a means of relief at the discretion of the commissioners. The plea here negatives that the action was brought within the two definite periods of

the half-year and the three months; it negatives also that the board made any order extending the time; and, looking at the 1st section, I think the plea is an answer to the action. But then Mr. Keane has very ingeniously argued that, if we construe the 1st and 4th sections together, the plt. has a right to maintain his present action. I think the 4th section raises no difficulty. It provides that an action must be brought within either the two definite periods limited by the 1st section, or within the time to which the Poor Law Board may grant extension. And if that be done, and the proceedings be prosecuted with due diligence to judgment, such judgment may be satisfied even after the expiration of the period therebefore provided. It would have been monstrous had it been otherwise, for a man might then have brought his action, and it might have been resisted by proceedings causing delay and carrying it on over the time limited by the 1st section. I am clearly of opinion that the present action is barred, but I am also inclined to think that a new action may be brought if the plt. can clothe himself with the requisite authority, the order of the Poor Law Board extending the time. The judgment in the present action will not be a judgment; in another and fresh action brought with such authority.

PROCTOR, B.—I am of the same opinion. I have very little to add to what has already been said by the rest of the court. The clear object of this statute was to provide a remedy for the former administration of the poor-laws under which the overseers were in the constant habit of letting matters fall into arrear, and then rates were made retrospectively for the payment of the arrears, and the result was frequent disputes and constant litigation, the costs of which occasionally fell upon the overseers themselves in their individual capacity, so that they could hardly tell what was their duty or position. Then this Act was passed, of which it was the intention and effect both to protect the rate-payers and to define the duties of the guardians. Were we to give judgment for the pls. in the present case, we should entirely defeat the Act of Parliament. It seems to me that everything is made consistent by our holding that this statute is in fact and effect a statute of limitations; if not, we should repeal the statute and embarrass the guardians of the poor. It is impossible to see or to say how far it would go; judgment might be obtained, at the election of a plt., against any one of the guardians discharging a public duty, a proceeding which would be productive of frequent dissensions, and be attended possibly with ruinous consequences to individual guardians. If the plt. can get the time extended, he may bring another action. It is far better so to decide and to hold the plea good, than to take so artificial a view of the Act of Parliament as a contrary decision would involve.

Judgment for debts.

Plt.'s attorney, *Eaden*, 10, Gray's-inn-square.
Def't.'s attorney, *Lewis*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 14.

REG. V. THOMAS AND WILLETT.

Treasure trove—Concealment from the Crown—Occultatio fraudulosa—Evidence.

In an indictment for concealing the finding of treasure trove from the Crown, it is not necessary to aver that the prisoner concealed it fraudulently. The words "unlawfully, wilfully and knowingly," are sufficient.

A., in ploughing, found large rings of old gold of considerable value and sold them for brass to B. for 5s. 6d., saying where he found it. B. afterwards found

out that they were gold and offered them to a jeweller for sale as gold. Then B. said he had sold them to C. for brass. Then B. and C. were at a bank together, depositing part of the proceeds for which C. had sold the gold rings:

Held, that there was evidence to support a conviction of both B. and C. for knowingly concealing treasure trove from the Crown.

Case reserved for the opinion of this court by Bramwell, B., at the Sussex Summer Assizes 1863.

(Copy Indictment.)

Sussex, to wit.—The jurors for our Lady the Queen upon their oath present that heretofore and before the committing of the offence hereafter mentioned, to wit, on the 12th day of Jan. A.D. 1863, one William Butchers, a labourer, in the employ of one Thomas Adams, farmer, of the parish of Mountfield, in the county of Sussex, while he, the said Wm. Butchers, was ploughing in a certain field in the occupation of the said Thomas Adams, at the parish aforesaid, in the county aforesaid, did find hidden in and under the ground and soil of the said field certain treasure of gold of the value of 500*l.* and upwards of lawful money of Great Britain, and which said treasure was of ancient time hidden as aforesaid, and the owner whereof at the time when the same was so hidden as aforesaid cannot now be found. And the jurors aforesaid upon their oath aforesaid, do further present that our Lady the Queen, in right of her Royal Crown, and by virtue of her Prerogative Royal, is, and at the time of the said finding was, entitled to the said treasure so found as aforesaid. And the jurors aforesaid upon their oath aforesaid, do further present that Silas Thomas, of the parish aforesaid, in the county aforesaid, labourer, and Stephen Willett, of the parish of Ore, in the county aforesaid, labourer, from the said 12th day of Jan. in the year aforesaid to the time of taking this inquisition did unlawfully, wilfully and knowingly conceal the finding of the said treasure from the knowledge of our Lady the Queen, against the peace of our said Lady the Queen, her crown and dignity.

(Copy Inquisition.)

Rape of Hastings, Sussex, to wit.—An inquisition taken for our Sovereign Lady the Queen, at the dwelling-house of Richard Thompson, known by the name of the John's-cross Inn, in the parish of Mountfield, in the rape of Hastings, in the county of Sussex, on the 27th March 1863, before me, Nathaniel Pollhill Kell, gentleman, coroner for the said rape, by virtue of my said office, and of the statute in that case made and provided, upon the oaths of Isaac Mannington, James Crouch, Thomas Buas, Robert Fuller, Daniel Olney, John Pinyon, Edward Muggeridge, Thomas Badcock, James Moon, Richard Jempon, George Hayward and Isaac Thompson, the several persons whose names are hereunder written and seals affixed, good and lawful men of the said rape duly chosen, and hereby assembled before me at the time and place aforesaid, and now here duly sworn and charged to inquire on the part of and for our Sovereign Lady the Queen, of and concerning certain treasure lately found in the earth and soil of and in a certain field situate and being in the said parish of Mountfield, and in the occupation of one Thomas Adams, of the said parish of Mountfield, farmer; and they, the said jurors, being duly sworn and charged, upon their oath aforesaid, to inquire on the part of our said Lady the Queen of and concerning the said treasure as aforesaid, and having heard evidence upon oath produced to them, do, on their oath aforesaid, say, that on the 12th Jan. 1863, William Butchers, of the said parish of Mountfield, labourer, being employed by the said Thos. Adams in ploughing in the said field, did then and there find deposited, hidden and concealed in and under the earth and soil of the said field, in the parish of Mountfield aforesaid, in the rape aforesaid, certain

pieces of old gold of the weight of 11*lbs.*, or thereabouts, and of the value of 530*l.* and upwards sterling of current moneys of this realm, and which said pieces of old gold were of ancient times deposited, hidden and concealed as aforesaid, and that the owner or owners whereof cannot now be known. And the jurors aforesaid, upon their oath aforesaid, do further say that the said several pieces of old gold so deposited, hidden, concealed, and found as aforesaid, before and at the time and so finding the same as aforesaid, were, and from thence hitherto have been, and still are, the gold, money and property of our said Lady the Queen; of the jurors aforesaid, upon their oath aforesaid, do further say that the said William Butchers and Silas Thomas, of the said parish of Mountfield, bricklayer, and Stephen Willett, of the town and port of Hastings, cab proprietor, from the time of the said finding, until and at the time of taking of this inquisition at the said parish of Mountfield, in the said rape of Hastings, in the said county of Sussex, concealed the said finding of the said several pieces of old gold from me the said coroner, and from our said Lady the Queen, and did not make known the said finding to any person or persons whomsoever lawfully authorised or empowered to receive the said old gold, or the information respecting the finding thereof, on behalf of our said Lady the Queen. And the said jurors do further say that the said William Butchers and Silas Thomas are now respectively in full life and living in the said parish of Mountfield, in the said rape of Hastings, and that the said Stephen Willett is also now in full life and living at the town and port of Hastings aforesaid. In witness, &c.

The prisoners' counsel having addressed the jury, a verdict of "Guilty" was returned.

The following questions were reserved for the opinion of the Court of Criminal Appeal:—

1. Whether the indictment and inquisition, or either, is sufficient in law?

2. Whether the evidence against both prisoners, or either, was sufficient to justify the verdict.

Denman, Q.C. (Hance with him) for the Crown.—

It is submitted that the conviction was good. The points reserved were:—1. Whether the indictment is good? 2. Whether there is evidence to go to the jury? The indictment alleges that the prisoners "unlawfully, wilfully and knowingly" concealed the finding of the treasure from the Queen, and it was contended at the trial that it was bad for not averring that the prisoners concealed the treasure "fraudulently." The prisoner's counsel argued that the word "fraudulently" was necessary, on the authority of the following passage in Co. 3rd Inst. c. 58:—"Treasure trove is, when any gold or silver, in coin, plate, or bullion hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the King, or to some lord or other by the King's grant or prescription. The reason wherefore it belongeth to the King is a rule of the common law, that such goods whereof no person can claim property belong to the King, as wrecks, strays, &c. . . . It appeareth by Bracton and Glanvil also, that *occultatio thesauri inventi fraudulosa* was such an offence as was punished by death." It will be found, however, if the authorities are carefully examined, that "fraudulosa" in this passage means nothing more than the wilfully and knowingly concealing the treasure trove. In Black. Com. 295, treating of the King's prerogative, "treasure trove" is stated to be "where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth or other private place, the owner thereof being unknown, in which case the treasure belongs to the King." In Glanv. lib. 1, c. 2, the words used are, "*occultatio inventi thesauri fraudulosa*;" and in lib. 14, c. 2, it is said, "A *plea de occultatione inventi*

thesauri fraudulosa is usually managed in the manner above stated where a certain accuser appears: (Beame's translation, Lond. 1812, p. 352.) In Bracton, lib. 3, de Coronâ, ff. 119, 120 (edit. 1569), the words are "*quasi crimen furti scilicet occultatio thesauri inventi fraudulosa . . . est autem thesaurus quedam depositio pecuniarum vel alterius metalli, &c.*" In Britton (edit. 1640) De Coroners, c. 1, the word "maliciously" and not fraudulently is used, "*Et volons que come nule felonie ou mesaventure soit avenue ou que tresor soi trove desouthe terre mauveysement musce.*" The translation by Kelham (edit. 1762), is "It is our pleasure, as soon as any felony or misadventure has happened, or treasure be found *designedly* concealed under ground," &c. that the coroner, as soon as he has notice, issue his precept. See also,

Fleta, p. 61;

The Mirror, c. 1, s. 13; c. 3, s. 18, pp. 43, 165; and

Stat. 4 Edw. 1, st. 2;

Stauford's pless del Coron. (1583-90), c. 42, p. 39, tit. "Treasure trove;"

Chitty's Perog. (edit. 1820) p. 152;

Hawk P. C. C. 101, s. 57.

The result of the authorities is, that "*fraudulosa*" is not the essential word in the indictment, and need not be alleged. The offence is the knowingly concealing treasure trove without making it known to the coroner. The only precedent of an inquisition the Crown officers have discovered, is one drawn by Lord Abinger, when Attorney-General, of which the inquisition in this case is a copy. The indictment contains the additional words "unlawfully, wilfully and knowingly." Secondly, the offence was proved as against both prisoners. It is shown that treasure trove having been found, the prisoners knew it, and while it was in their possession concealed it from the Queen. [MARTIN, B.—I do not see that the evidence is so clear that Thomas did know that what he was buying was gold.] There is evidence that he knew the circumstances under which the things were found; but not that at the moment of the purchase he knew that they were other than brass. [MARTIN, B.—The evidence is that Butcher found the metal which he believed to be brass, and that Thomas bought it of him under the same belief, but afterwards discovered that it was gold and neglected to give any information.] The policeman's evidence is important to show that both were knowingly concealing the finding of the treasure from the Crown.

Ribton (amicus curiæ) referred the court to *Reg. v. Fitzsimons*, 4 Cox. C. C. 246. In that case the Court of Criminal Appeal in Dublin held that it was necessary in an indictment on the 31 Geo. 3, c. 31, for driving away cattle under colour of a civil bill decree, to aver that the party did so fraudulently.

ERLE, C. J.—I am of opinion that in this case the conviction was good. It appears to me, first of all, with respect to the form of the indictment, that there is no law which has said that it is essential to the validity of the indictment that the concealment should be charged to be a fraudulent concealment. The old authorities describe that the offence consists in the "*occultatio fraudulosa*," for two or three use the word *fraudulosa*, and two or three more show clearly what they mean by it, viz., that the party knew that he was concealing from the King treasure trove without any of the excuses which it is afterwards said the party may bring forward. He may say, "I hid it myself." He may say, "My friend hid it and I knew it at the time, and I always intended to find it." He may have other causes which will justify the concealment. We find that the meaning of the words "*occultatio fraudulosa*" in the earlier writers was an unlawful concealment, because the offence is, that if you know that it is treasure trove and do conceal it you are

guilty of an unlawful act, "*occultatio fraudulosa*," unlawful concealment. The whole line of authorities, which we are very much obliged to Mr. Denman for going through, satisfies us that it is by no means the essence of the offence that it should be a fraudulent concealment. If a statute makes an offence and uses a word by which the delinquent is to be indicted under that statute, that word must be used. If a statute gives a short form of indictment and says that the description of the offence may be as follows, then using that short form of indictment, the leaving out of the essential description which is given in that short form loses the benefit of the statute which gives that form. Nothing of that sort applies to the present case. Then as to the offence itself, the law is perfectly clear. At one time this was a branch of the revenue to which importance was attached. Probably it may have been, after disturbed times, a source of considerable wealth. The Queen has a right to the treasure which is concealed, and the party who finds it is bound not wilfully to hinder the finding from coming to the knowledge of the Queen's officers. If he is guilty of a wilful act of concealment by which he has deprived the Queen of this treasure, that is the offence which all the law writers have laid down, and that is the offence charged in this indictment. The facts are, that a ploughman came upon a quantity of gold; that he was a perfectly innocent finder; that he believed it to be brass, because he sold it for brass. But the two persons here indicted, namely, Thomas and Willett, knew from the beginning that it was gold, and knew where it was found, from Butcher the finder; they got from him with a payment as for brass the gold which he had so found; they sold it for its value as gold; they continued to assert with falsehood that they had received only brass and sold it for brass. To my mind there is very clear evidence that Thomas was informed by Butcher of the field where the treasure was found, and the nature of the article, and Thomas from the beginning said, "My brother-in-law will dispose of it." That brother-in-law being Willett, was applied to; he said, "I have been in California; I know what gold is; and he is the person who takes this for brass; he joins in paying for it as brass; and is the man who sells it for gold, and has the benefit of the account which is opened out of the proceeds.

WIGHTMAN, J.—Agreeing, as I do, with the Lord Chief Justice in the nature of the offence which is charged, I should not have thought it necessary to say one word upon the matter, but that I am not satisfied that in this case there was not any sufficient evidence to show that Willett knew of the finding of the treasure. The offence is, the concealing the finding of the treasure, knowing that it had been found under such circumstances as would make it treasure trove and render it necessary to inform the Queen of it. But in this case I do not find any evidence to satisfy me that Willett knew that it was treasure trove, and that it had been found under such circumstances as would make it treasure trove. He seems to have given a very inadequate price for it, and if this had been an indictment for receiving stolen goods knowing them to have been stolen, there certainly might have been sufficient to warrant a conviction. But, as it is, I confess that I am not satisfied (I say no more than that) that there was sufficient evidence to warrant any verdict against Willett. However, the rest of the court are of opinion that there was sufficient evidence, and therefore it is unnecessary for me to say more than that I do not feel satisfied that it was sufficient.

WILLIAMS, J.—I am of the same opinion as the Lord Chief Justice upon the law and upon the question whether there was sufficient evidence against Willett. I think that it was for the jury, and I would only say that I think that, in addition to the direct evidence

in the case, there is a fact which must not be lost sight of, and which would probably be considered by the jury, namely, the extraordinary and significant nature and appearance of the articles.

MARTIN, B.—I am also of the same opinion. I take the offence to be that which is stated in the passage read from the Third Institute, that it is a fraudulent concealment of found treasure, that treasure being gold or silver. The first question is, is that alleged in the indictment? And it seems to me that, in the absence of any authority to the contrary, the allegation that the prisoners unlawfully, wilfully and knowingly concealed the finding amounts to that. If there had been any authority to the effect that the word "fraudulent" must of necessity be used in the indictment, I would have bowed to it, but the authority cited by Mr. Ribton by no means goes to that effect. I have looked into the precedents in Chitty on Pleading, and the text also, and I find no case which goes the length of saying that, when special demurrers existed in an action for false and fraudulent misrepresentation, the word "fraudulent" must of necessity be used, and that it would not be competent to use equivalent words. If that be so, it seems to me that the indictment is right. The next question is, is there evidence against these two prisoners? Now the doubt which I had originally, and the reason why I requested Mr. Denman to read the evidence was, that it struck me that the offence was committed upon the first concealment, namely, that the first person who arrived at the knowledge that this article had been found in the manner in which it was found, and who knew that it was gold, was the guilty party, and if there had been any guilty party anterior to the two prisoners, I should have required to have looked into the authorities upon accessories. But it seems to me clear that Butcher was an innocent agent in this matter, and was not guilty of any crime at all, and that the first person who was criminally guilty was Thomas, he being aware of the fact that it was gold. And I own that it seems to me that the question is not whether, if I had been a jurymen, I should have convicted the prisoners, but whether there was evidence to go the jury, and whether my brother Bramwell was bound to let the case go to them; and without saying that if I had been upon the jury I should not have participated in the doubt of my brother Wightman and have acquitted the man Willett, it seems to me that the most probable state of things is that the first prisoner Thomas bought this article believing that he had made a good bargain of brass; that he then went to his brother-in-law, and that they made some further inquiry about it, and I should apprehend that the two together ascertained it to be gold by going to a goldsmith, and that being ascertained, Thomas sent Willett to London, and he got the money, and they divided it between them. It appears to me that such was the transaction, that there certainly was evidence to go to the jury, and that we must uphold the conviction.

BRAMWELL, B.—I cannot help saying with very great respect that it appears to me that there is evidence against Willett. He says, "I bought it for brass and sold it for brass. I gave 6d. a pound for it, and sold it for 6½d." That is utterly untrue. It shows that he knows something wrong has been done which must be concealed, and if it had been shown *alunde* that this gold had been stolen, this would prove guilty knowledge. But where you show *alunde* that another offence has been committed, why does not this show guilty knowledge? It seems to me almost a matter of demonstration that it does show it. Supposing that it had been a case of stealing, it shows guilty knowledge on the part of Willett. and I therefore think that there is evidence against him.

Conviction affirmed.

COURT OF PROBATE.

Reported by Dr. SWABBY, of Doctors'-common.

Nov. 24 and Dec. 1.

(Before Sir J. P. WILDE.)

MITCHELL AND MITCHELL v. GARD AND KINGWELL.
(On Motion as to Costs.)

Will—Unsuccessful opposition by next of kin—Misconduct of residuary legates—General rules as to costs.

In considering the question of costs in probate causes, the court will be guided by the two following rules: first, if the cause of litigation takes its origin in the fault of the testator, or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be a sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be delivered from the costs of his successful opponent: In the present case, the Court, holding that the misconduct of the residuary legates gave the next of kin a reasonable ground for litigation, ordered their costs to be paid out of the estate, though they had failed to prove, inter alia, a plea of undue influence.

This was a question of costs, arising out of a testamentary suit, the facts of which are sufficiently stated at 8 L. T. Rep. N. S. 438; a. c. 3 Swab. & Tr. 75.

Karslake, Q. C. (*H. T. Cole* with him) now moved that the costs of the next of kin, the unsuccessful opponents of the will, should, under the particular circumstances of the case, be paid out of the estate. It seems doubtful whether any strict rule has been or can be laid down; but in the 4th edition of Coote & Tristram, 263-4, the nature of the cases in which the court has granted costs out of the estate to an unsuccessful suitor is indicated, and we submit the circumstances of the present case are such as to warrant the application, which is in each case within the discretion of the court.

The *Solicitor-General* (Sir R. P. Collier) (*Dr. Wamby* and *Lopes* with him) prayed the court to condemn the next of kin in costs. The case falls within the rule laid down in *Summerell v. Clements*, 8 L. T. Rep. N. S. 172; s. c. 23 L. J. 32, Prob.; and 3 Swab. & Tr. 35. Besides the issue of incapacity, undue influence was pleaded and negatived by the verdict of the jury. The parties opposing the will should therefore be condemned in costs, or, at the best, the court will make no order as to costs.

Curr. adv. vult.

Dec. 1.—Sir J. P. WILDE.—This was a testamentary suit. After a long and careful trial, conducted before Byles, J., at the assizes for the county of Devon, the will was here pronounced for and admitted to probate. The court is now asked by the plts. that their costs may be allowed them out of the estate, and by the defts. that the plts. may be condemned in costs. These questions of costs are addressed to the discretion of the court. It is hardly in the nature of discretion that its exercise should be adjusted by exact rule. No positive regulation could be established that would bear the strain put upon it by the justice or hardship of particular instances. But, where all is not possible, something may yet be done. By acknowledged method and general classification, the suitor may in some measure be enabled to estimate the prospect before him, and foresee the penalties under which he launches into litigation. To this extent it is the duty of the court, so far as may be, to assist him. The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties, and the question who shall bear the costs will be answered with the other question, whose fault was it that they were incurred? If the fault lies at the door

[PROB.]

Ex parte AUSTIN AND OTHERS, *re* BIANCONI.

[BANK.]

of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate. If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he by his own improper conduct has induced a litigation which the court considers reasonable, it is not unjust that the estate should bear the costs of the litigation which his conduct has caused. But if the testator be not in fault, and those benefited by the will not to blame, to whom is the litigation to be attributed? In the litigation entertained by other courts the question is in general easily solved by the presumption that the losing party must needs be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this court. It is the function of this court to investigate the execution of a will and the capacity of the maker of it, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon us. Those who are instrumental in bringing about and subversing this inquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this court has been in the practice on such occasions of deviating from the common rule in other courts and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt. There is still a further class of cases. I speak of those in which, beyond the question of the will and the capacity of the testator, the opposing party takes upon himself to question the conduct or the good faith of others, and to place on the record pleas of undue influence or fraud. These are affirmative charges; they ought not to be made except upon some apparently very sufficient ground. But though they may and do differ largely in the degree of probability or suspicion to be demanded for their justification, it is not easy to say that they differ in nature from pleas denying execution or capacity. Both classes of defence are addressed to the same question, what was the will of the testator, and both are within the scope of the subject intrusted to the vigilance of the court. Here, also, it seems just and meet, if the circumstances of the case have rendered the inquiry a proper one, that neither party should be condemned in costs. From these considerations, the court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, and to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. I am aware that there are many cases to be found in which costs have been granted out of the estate under circumstances different from those I have predicated. I am aware also that in some cases a less liberal view than I have taken of the conduct of parties pleading undue influence and fraud has prevailed; but there are cases to be found pointing both ways. I have sought in vain in the authorities of the Prerogative Court, and especially in the reports of the Judicial Committee, for anything like a general classification or rule. Sir Cresswell Cresswell had to make the same confession in the case of *Broadbent v. Hughes*, 29 L. J. 134, Prob. I have also considered the cases reported in this court. They will be found collected in a most useful and compendious note to the case of *Summerell v. Clements*, 32 L. J. 33, Prob. But

it is hard to extract a general rule. It is of high public importance that doubtful wills should not pass easily into proof by reason of the costs of opposing them. It is of equal importance that parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by others. These opposite reasons appear to have alternately swayed the decisions to be found in the books. It is the desire of the court to keep both in view, while yielding to neither, and it is in this spirit that the above rules have recommended themselves. Of the present case, on the facts, little need be said. I have carefully read the learned judge's notes, and fully conferred with the learned judge himself, by whose opinion I am strongly fortified in the decision I am about to pronounce. The court considers that Mr. Gard, to whom the bulk of the property of the testatrix was bequeathed in a will made by himself, a professional man, has been guilty of improper conduct in the transaction, and particularly so in knowingly omitting from the will legacies which he knew (for so the jury found) that the testatrix had ordered and still desired, but which escaped her memory at the time the will was executed. This conduct and the suspicions which flowed from it gave the next of kin a fair and reasonable ground for litigation. The court therefore orders that the costs of the plts. be paid out of the estate.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs.,
Barriers-at-Law.

Saturday, Dec. 12.

(Before Mr. Commissioner FANE.)

Ex parte AUSTIN AND OTHERS, *re* BIANCONI.

24 & 25 Vict. c. 134, s. 88—Practice.

Any application by a creditor to dismiss a bankrupt's petition, upon the ground of non-residence, should be by petition, and not by motion.

This was an application on motion to dismiss the bankrupt's petition for adjudication, filed against himself, on the ground that his principal debts had not been contracted in England, and that he had not a "residence" within the statute sufficient to support the petition. The case was before Mr. Commissioner Goulburn on the 30th Oct. last upon the question whether or not the bankrupt should be allowed to pass his last examination.

The following appear to be the facts:—The bankrupt was a native of Ireland, where he chiefly resided. In April 1863 he came to this country from Prussia, and resided at an hotel in Seaford, Sussex, until the 6th Aug., when he came to London, and on the same day filed his petition. Since then he had resided with his father, at Longfield, co. Tipperary, in Ireland.

It further appeared that he had eighty-four creditors, the aggregate of whose debts amounted to £233*l.* 13*s.* 9*d.*, which may be distinguished as follows:—

follows:—					
47	creditors in Ireland,	amounting to	£6833	15	4
30	"	France	"	693	13 6
1	"	Brussels	"	142	5 0
6	"	England	"	563	19 11

— £8233 13 9

It also appeared in evidence that the bankrupt admitted to the commissioner in open court that he had lived for the longest period of three months at Seaford aforesaid, until the 6th Aug. last, when he came to London and stayed at an hotel there; that since filing his petition he had resided with his father in Ireland; and that he came to England for the express purpose of endeavouring to free himself from his difficulties by petitioning the court for an adjudication of bankruptcy against himself.

Reed appeared for the Messrs. Austin and five other creditors whose debts amounted to 3529*l.*, and asked that the petition might be dismissed upon the ground of non-residence within the meaning of the Act of Parliament. The bankrupt had admitted before the commissioner his object in filing the petition. The word "residence" was synonymous with "domicil," and this was defined by Mr. Justice Story in his book on the Conflict of Laws, sect. 43, to be the place where the habitation of the party is "fixed without any present intention of removing therefrom." Lord Cottenham, in *Munro v. Munro*, laid it down that "domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and acquiring another as his sole domicil." (7 Cl. & F. 876.) It was clear, therefore, that the bankrupt had his "domicil" or "residence" in Ireland, and that the bankruptcy ought to be administered in that country where the majority of his creditors also resided. He referred to sects. 86, 87 and 88 of the B. A. 1861, and contended that the word "resided," in the 88th section, must be taken in its strict legal sense. [THE COMMISSIONER.—It seems clear, both from law and reason, that this is a bankruptcy which ought to be administered in Ireland, where the bulk of the creditors reside.]

Sargood, for the bankrupt, contended that the application should be by petition and not by motion. The foundation of the bankruptcy was petition, and it could only be got rid of by petition. In its present shape the court had no jurisdiction. How was the court to know that the bankrupt was aware of this application, made, too, in the absence of creditors who did not assent and who would lose their title to the property of the debtor if it were acceded to? There must be a petition setting forth the grounds upon which the prayer was made, and a copy served upon the bankrupt. Until that was done the court had no jurisdiction.

Aldridge (solicitor), for the official assignee, also opposed the application upon the same grounds. A portion of the property had been realised by the official assignee under the bankruptcy, so that the application came too late.

Mr. Commissioner FANE.—Yes; it is a matter which must be brought on by petition and not by motion. The application is dismissed. Question of costs reserved.

Ordered accordingly.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKERANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Thursday, Nov. 19.

(Before the LORDS JUSTICES.)

Re WHEAL EMILY MINING COMPANY, *ex parte* COX.

Winding-up—Contributory—Trustees—Companies Act 1862, sect. 200.

Under the extended definition of the word "contributory," in the Companies Act 1862, a person who took 300 shares in an unregistered company, and, in order to raise the value of the shares, caused 100 only to be transferred to his own name, whilst the remaining 200 were placed in the names of two other persons, ostensibly the owners of the shares, as trustees or nominees for him, was

Held to be properly inserted in the list, under the winding-up of the company, in respect of the whole number of 300 shares.

This was an appeal by Mr. John Cox, against a decision of the Vice-Warden of the Court of Stannaries, in Cornwall (S. Smirke, Esq.), whereby his name was placed upon the list of the contributories of the above

company, now in course of winding-up in that court, as the holder of 300 shares, of which only 100 were standing in his own name, and the remaining 200 in the names of two other persons named Giles and Pulley. Mr. Cox appealed against this decision to the Lord Warden of the Stannaries, the Duke of Newcastle, who remitted the case to this court, under the 18 & 19 Vict. c. 32, s. 26. The circumstances were as follows:

The Wheal Emily Mining Company was an unregistered company, conducted on the cost-book principle, which was established in 1856 by the present app. and Hugh Stephens, a mining agent in Cornwall, and it was situated in the parish of Gwiltian, in that county. Its capital was to consist of 2000*l.*, in 1000 shares of 2*l.* each, and on the formation of the company it was arranged that Mr. Cox should take 375 of the shares. In April 1857 Mr. Stephens, who acted as purser of the mine, by arrangement between himself and Mr. Cox, transferred 100 shares to Mr. Cox and placed the remaining 200 in the names of Giles and of Pulley, and the result of the evidence in this transfer was, that it was made in order that it might appear that the shareholders in the company were more numerous than they were in reality. The remaining seventy-five shares were transferred to the name of Mr. Stephens, and the evidence showed that neither Giles nor Pulley was ever treated as the owner of any of the shares, but that the real state of things was well known to Stephens and Cox. It is, however, unnecessary to do more than state this, inasmuch as the facts fully appear in the judgment of the learned Vice-Warden, given below.

In Nov. 1862 the company was helplessly involved in debt, and, on the petition of one of its creditors, it was ordered to be wound-up in the Stannaries Court. The registrar, in settling the list of contributories, inserted the name of Mr. Cox as holder of the entire number of 300 shares, and, on appealing to the Vice-Warden, that order was affirmed in the following judgment:—"In this case an unregistered mine company is in the course of winding-up under an order made on the petition of Samuel Stephens, a contributory of the company, and the question is, whether John Cox ought to be placed on the list of contributories, not only for 100 shares, but also for 100 shares standing separately in the cost-book in the names of Pulley and of Giles. It is admitted that the real owner of these 200 shares is John Cox, and that neither Pulley nor Giles had any interest whatever in, or knew anything about, the concern, except that Cox had requested them to accept the transfers of them from Hugh Stephens, the local agent of the company, from whom Cox also received his shares by like transfer, and with full knowledge, on the part both of Stephens and Cox, that Cox was the real owner of the whole 300, and was to pay the requisite calls on them; in fact, the company may be truly said to have been originally got up by and between Stephens and Cox, with the assistance of three or four other gentlemen. It is proved to my satisfaction that the names of Giles and Pulley were used as nominal shareholders for the sole purpose of giving a more favourable aspect to the scheme in the share market; for it is not generally considered satisfactory to those who wish to invest in mines to see that the shares are chiefly in the hands of one or two persons, whose influence will, in fact, overrule the voices of all other shareholders; nor is a company likely to attract shareholders which appears on the face of it to have very few supporters. The witnesses, however, differ as to whether this distribution of shares to nominal holders was at first suggested by Stephens or by Cox. Neither Pulley nor Giles ever attended any meetings, or received circulars for calling them. Giles is since deceased, and without property; Pulley is a retired tradesman, a neighbour of Cox, who thinks he is a man of some property, but neither of them was to be entitled to any benefit from the sale of

shares or other profits of the mines. On the part of Cox it is contended that Giles's representatives and Pulley's ought, as trustees, to be alone put on the list of contributories in respect of these 200 shares; and they cite various cases, which are referred to in Lindley on Partnership, vol. 2, p. 1092, and supplement, p. 167. Do the facts above stated show that a *bonâ fide* relation of trustees and *cestui que trust*, in the sense of the above cases, subsisted between Cox and his nominees? If it is to be treated as a question of fact, then I find, as a fact, that it did not subsist, though, if Pulley or Giles had attempted fraudulently to appropriate the shares, they would, for this purpose, have been treated at law and in equity as mere trustees. In truth, they were mere names by which Cox chose to call himself in the books of the company, for the purpose of profiting by the false colours which the use of them held out; and this device is now relied on for the simple purpose of protecting him (if possible) from personal liability. Under such circumstances I am of opinion that, even if this were a winding-up under the Joint-Stock Companies Act 1848-9, or under the Acts 1856-7, the Court of Ch. would have allowed the name of Cox to be put on the list. But, in truth, this is a winding-up under the latest Act, viz. the Companies Act 1862, which gives a different definition to the term "contributory" from that in previous Acts. Under the first Act, 1848, sect. 3, mere liability to the payment and creditors was not deemed sufficient to constitute a contributory. That Act was, indeed, strictly an Act to facilitate the process of accounts as between members and shareholders, and the rights and interests of creditors were unaffected by it. These were left to their former remedies. Under the last Act both creditors and contributories are parties to the proceeding, both are affected and both are benefited by it, and the older Acts are now wholly repealed. Under the 200th section of the Act 1862, which applies to unregistered companies, every person is to be deemed a contributory who is liable at law or in equity to pay, or contribute to payment of, any debt or liability of the company. This distinction has been very properly noticed by Mr. Lindley (Supplement, p. 231). What, then, is the effect of this section on the present company and its members. The Wheal Emily Company is a company formed on the principle of a cost-book mine. The constitution of such a company, when not varied by any special rule of the company at its outset, is well known and understood at this court, and no proof is here required to explain it. It is presumed to be the rule of management in all cases where it is not expressly modified or altered by the company. In this case one of the earliest resolutions of the company in 1857 provides that it is to be carried on on that principle as practised in the Stannary Court. What, then, is that practice in the case of such a company as this? It is treated as a common law parol partnership, with nearly all its incidents, and subject to all the customary process and powers of this court, as sanctioned by usage, and recognised and extended by recent Acts of Parliament. Hence each shareholder is liable only to contracts made while he holds shares. If he relinquishes to the company or transfers to a stranger (which on certain conditions he is entitled to do), he neither throws on the company, nor transfers to his assignee, any antecedent liability of his own. In case of relinquishing his shares, or any of them, he is entitled to, and subject to, an account with his partners in respect of his past liabilities, and his share of the assets, if any, but the company are under no obligation to save him harmless from such contracts, except only in the way of contribution, as in case of other partnerships. In the case of a transfer, the transferee is not liable either to the company or to the transferor in respect of any past transactions

or any contracts but his own, unless he has agreed to become so, or has so conducted himself as to have recognised or adopted them. The only way in which future shareholders may be affected by past liabilities arises in consequence of the customary lien, which supplying creditors can enforce, by Stannary process, on the machinery and materials on the mine, as long as they are in the hands of the same company, or of the fluctuating shareholders who from time to time and for the time being become members of it. I believe the correctness of this description will be disputed by no practitioner or experienced miner in the district of the Stannaries. And wherever a different constitution has been incidentally assumed or proved before the Superior Courts, it will be found that the so-called cost-book company has in fact worked in some other district, or under a special deed of settlement which has departed more or less from the cost-book type. Indeed, it is notorious, that as soon as the Joint-Stock Companies Act of 1844 exempted cost-book mines from its operation, they had only to call themselves cost-book companies in order effectually to protect themselves from the trouble and expense and the consequences of registration, and to some extent this practice has survived the Joint-Stock Act of 1856, which was to exempt cost-book mines within and subject to the Stannary jurisdiction. Hence it should seem that wherever an unregistered mining company is to be wound-up, all members, whether ex-members or still on the books of the company, who are liable upon any unsatisfied contract, may be and ought to be put on the list of contributories, whether their liabilities be the subject of an action at law or a suit in equity. Mr. Cox is liable to the present debts of the company, both at law and in equity in his capacity of the real, though dormant, partner in respect of the shares held by him in the names of Giles and Pulley, and this, even although the relation of trustee and *cestui que trust* had really and truly subsisted between them, which, in my judgment, it does not. I therefore order that the name of Mr. Cox do stand on the list of contributories in respect of the 300 shares now standing in his name and the names of Pulley and Giles."

Mr. Cox now appealed to the Lord Warden.

Fooks (with whom were *Glassey*, Q. C. and *Rowburgh*) supported the appeal.—The contest was only as to the 200 shares in the names of Giles and Pulley; as to the 100 in his own name Mr. Cox admitted his liability. But as to the 200, the persons in whose names they stood ought to be inserted in the list, and not that of the *cestui que trust*: (2 Lindley on Part. 1092, and supplement to that work, 167, and the cases there cited.) [Lord Justice KNIGHT BRUCE.—Where the relation of trustee and *cestui que trust* exists and is admitted, is it not an open question which of the two names should be inserted?]

Baggallay, Q. C., for the resp., admitted that under the Acts before the Companies Act 1862, the name of the trustee would, in the absence of fraud, be primarily inserted, though there were exceptions to that rule in the authorities.

Fooks continued.—Here there was no fraud, and Giles and Pulley, if trustees at all, were trustees for other persons besides Mr. Cox. This gentleman's name ought to be removed from the list, and the names of Giles and Pulley substituted for it; it might hereafter be a question whether Mr. Cox was in respect to the 200 shares liable to them or to the company.

Baggallay, Q. C. and *Rowcliffe* supported the order.—The shares were not held by Giles and Pulley as *bonâ fide* trustees for Mr. Cox, but as his nominees for the fraudulent purpose of inducing other persons to accept shares. Where there was anything like fraud, the general rule which had been admitted was not adhered to:

[CHAN.]

CHAPMAN v. BRADLEY.

[CHAN.]

Chinnock's case, John. 714; 1 L. T. Rep. N. S. 435;

Bunn's case, 2 De G. F. & J. 275; 3 L. T. Rep. N. S. 567;

Hgam's case, 1 De G. F. & J. 75; 1 L. T. Rep. N. S. 115;

Costello's case, 2 De G. F. & J. 302; 3 L. T. Rep. N. S. 421.

Moreover, the 200th section of the Companies Act 1862 greatly extended the definition of the word "contributory" which the earlier Winding-up Acts contained. Giles was now dead, and had left no property, and Pulley was a tradesman, and a personal friend of the app., and not believed to be of any substance.

FOOTE, in reply, urged that the *cestui que trust* was not the person whose name was to be inserted on the list. [Lord Justice TURNER called attention to the words "liable in equity" in the definition of a contributory in the Act 1862.] The app. was not the exclusive owner of the 300 shares.

LORD JUSTICE KNIGHT BRUCE said:—I am of opinion that the conclusion of the learned judge of the Stannaries Court is right. Mr. Cox was substantially the owner of the 200 shares; that fact is undisputed and indisputable, and although in a sense the two gentlemen named Pulley and Giles may have been trustees for him, yet the relation was not a trust of the ordinary character. Their names were used for the mere purpose of holding out erroneously to the world that the 300 shares were held, not by one person but by three, so as to induce the unwary part of society to suppose that there was a greater number of members in this company than really and in fact existed. This, I repeat, is not a trust of the ordinary character, and I am not prepared to say that, even if the Act of 1862 had not passed, the result would not have been the same. But, looking at the language of that Act of Parliament, and the undisputed circumstances of the case, I feel no doubt whatever that Mr. Cox has been properly placed upon the list of contributories in respect of the whole number of 300 shares. Whether some other person or persons should not be added to the list in respect of 300 of those shares is a separate question, and, as far as I myself am concerned, I have no objection, if it should be wished, to declare in the order that it is to be without prejudice to any application which may be made to add the name or names of any person or persons in respect of those 200 shares. But the appeal must be dismissed, and the app. must pay the costs of the appeal.

LORD JUSTICE TURNER said, that he agreed in this decision, and for the same reasons. His Lordship briefly reviewed the facts of the case, and said that his conclusion was, that the real owner of the shares was Cox, and that neither Giles nor Pulley ever paid any sum of money whatever for the shares, which were paid for by Cox, and that neither Giles nor Pulley was ever treated as the owner of the shares which stood in their names. That being so, it was not necessary to go further into the consideration of the case; in truth, Giles and Pulley were nothing more than the nominees of Cox, for the purpose of inducing the public to believe that there were numerous persons shareholders who had, in fact, nothing whatever to do with the company. He agreed in the order of his learned brother, and had no objection to the insertion that the order should be without prejudice to any such application as had been mentioned.

LORD JUSTICE KNIGHT BRUCE.—The judgment of the court below will be affirmed without prejudice to any application to add the name or names of any person or persons in respect of the 200 shares; but such addition to the list must not be in substitution for Mr. Cox's name, but in addition to it.

Solicitors for the app., *Hopps and Boyle*.

Solicitors for the petitioning shareholder, *Gregory and Kewcliffe*.

Saturday, Dec. 5.

(Before the LORDS JUSTICES.)

CHAPMAN v. BRADLEY.

Settlement—Consideration—Invalid marriage—Trust until solemnisation.

The testator in this suit executed a settlement in contemplation of his then intended marriage with J., who was his deceased's wife's niece, and "in consideration of that intended marriage, and of his natural love for his children by his then late wife, and for divers other good causes and considerations," assigned certain funds to trustees upon trusts for himself until the said marriage should be solemnised, and from and after the solemnisation thereof for himself and the lady for their lives, with remainder for the children of his late and contemplated marriages. The marriage ceremony was performed in Switzerland according to Swiss law, and the testator having died insolvent this suit was instituted by a creditor to administer his estate, and to have the settlement declared void:

The M. R. so decreed, on the ground that the two considerations could not be separated, and that the intended marriage was a wholly illegal consideration. And, on appeal, their Lordships affirmed the decree, but on the ground that no marriage had ever been solemnised within the proper meaning of the settlement, and that the first trust in favour of the settlor remained therefore in force.

This was an appeal by Mary Elizabeth Bradley, one of the children of the testator in the cause, William Orton Bradley, by Susannah his first wife, against a decision of the M. R. under the following circumstances:—

The first wife of the testator died in Aug. 1856, leaving him and six children surviving. In 1857 the testator formed the design of marrying Miss Elizabeth Dorothy Jones, a niece of his deceased wife, and, under the impression that, as such a marriage would be valid in the Protestant cantons of Switzerland, it would, if solemnised there, be also valid in this country, he and the lady, in the month of Sept. 1857, proceeded to Neuchatel, where a proper ceremony of marriage was legally performed between them.

In contemplation of this pretended marriage, a deed of settlement was executed between the parties. It bore date the 30th Sept. 1857, and after reciting that such a marriage was intended to be solemnised between the said William Orton Bradley and Elizabeth Dorothy Jones, it was witnessed that, "in consideration of the said then intended marriage, and in consideration of the natural love and affection which he the said William Orton Bradley bore for his children by his then late wife, and for divers other good causes and considerations," he, the said William Orton Bradley, assigned certain funds and property to trustees upon trust for himself, his executors, administrators and assigns, "until the said intended marriage should be solemnised, and from and after the solemnisation thereof," upon trust for himself and the said Elizabeth D. Jones for their lives, and for the survivor of them for his or her life, and after the death of the survivor upon trust "for such of the children of the said William Orton Bradley, whether by his said former marriage, or by his then intended marriage," as being sons should attain twenty-one, and being daughters should attain that age or previously marry, in equal shares as tenants in common.

Very soon after the marriage ceremony the lady and gentleman returned to England, and cohabited there till August 1860, when Mr. Bradley died leaving two children by Elizabeth Dorothy his reputed wife. At his death he was in embarrassed circumstances, and

the present suit was instituted by two of his creditors on behalf of themselves and his other creditors, against his legal personal representative, the surviving trustee of the settlement, the present app., as representing the children of the testator by his first marriage, and the repated wife and her two infant children, and the bill prayed the administration of the testator's estate by the court, that it might be declared that the pretended marriage was null and void, and that the trusts of the settlement limited from and after the solemnisation of that marriage had not arisen, and that neither the said Elizabeth Dorothy Jones nor her children, nor the children of the former marriage, were entitled to any interest under the settlement, but that the funds thereby assigned remained in trust for the testator, his executors or administrators, and were now distributable as part of his personal estate.

The M. R., in delivering judgment, said that if the consideration for the settlement had been confined to the then intended marriage and future children, the settlement would have been altogether void upon the authority of *Robinson v. Dickinson*, 3 Russ. 399; and *Coulson v. Allison*, 2 Giff. 279; 3 L. T. Rep. N. S. 260; a. c. on appeal, 2 De G. F. & J. 521; and 2 L. T. Rep. N. S. 763. For it would be nothing more than an attempt to make a valid settlement upon an illegal contract of marriage. But here there were other considerations stated, and if for those considerations the testator had chosen to execute a voluntary settlement for the benefit of his children by his former marriage, his Honour would have considered such a settlement valid. But in this case the two considerations were so mixed that the one could not be separated from the other. It appeared to him that the only valuable consideration for this settlement was the intended marriage, which could really never be performed, and therefore the settlement failed. There was a further objection, namely, that the objects of the limitations took as a class; the then present and the future children. This introduced a new element of uncertainty, for that one class would consist of legitimate and illegitimate children. The same rule must be applied which held in cases that violated the rules against perpetuities, which made the whole gift void where it was impossible to distinguish between the objects who could, and those who could not take. Upon this further ground his Honour thought the settlement void.

Mary Elizabeth Bradley now appealed against this decision.

Hobhouse, Q.C. and *Haddan*, for the plt., supported his Honour's decree. The settlement was altogether void, as founded on an illegal contract; or, if it was valid, the first trust had never been displaced, and the settled property had never ceased to be held in trust for the settlor.

Baggallay, Q.C. and *Bromehead* supported the appeal.—The considerations, other than the intended marriage, would maintain the settlement, and the children of the first marriage were entitled to the exclusion of the children by Miss E. D. Jones. Looking at the recital of the deed that a marriage was intended to be shortly solemnised between the parties, the court could only consider that the ceremony which had taken place was what the parties intended. Upon this the subsequent trusts came into operation.

The following were the authorities cited at the Rolls and in this court:

Robinson v. Dickinson (*ubi sup.*);
Coulson v. Allison, 2 Giff. 279; 3 L. T. Rep. N. S. 260; on appeal 2 De G. F. & J. 521; 3 L. T. Rep. N. S. 763;
Brooke v. Brooke, 9 H. L. Cas. 193; 2 L. T. Rep. N. S. 480; 4 L. T. Rep. N. S. 93;
Ellerton v. Gastrell, Com. Rep. 318;

Newstead v. Searles, 1 Atk. 265;
Clayton v. Earl Winton, 3 Madd. 302, n.;
Webster v. Boddington, 26 Beav. 128;
Porter v. Fox, 6 Sim. 485;
Medworth v. Pope, 27 Beav. 71;
Davenport v. Bishop, 2 Y. & C. 451;
Skarf v. Souby, 1 M. & G. 364;
Whalley v. Whalley, 1 Mer. 436.

Lord Justice KNIGHT BRUCE said that the first trust in this settlement was for the settlor, his executors, administrators and assigns, until the then intended marriage should be solemnised between himself and the lady therein mentioned; and the first question was, what was the meaning to be ascribed to the word "solemnised," as used in that instrument? As it was used in that instrument, he thought that it must mean validly and effectually solemnised. The ceremony of marriage was indeed gone through afterwards, but the lady and gentleman were domiciled in England, and their domicile had not been changed, and the lady was his wife's niece. Therefore, although the marriage ceremony took place at Neuchâtel, it was as ineffectual as if there had never been any such ceremony at all. The husband, the settlor, was now dead, and therefore there could not be now any change of domicile. In that view of the case, the whole beneficial interest in the funds assigned by the settlement remained vested in the intended husband until the time of his death. He was not prepared to adopt the language of the M.R., because it involved the decision of a point which, if there were so necessity, he should prefer not to decide. What he should propose to do was, to declare that, as a valid marriage had never taken place between William Orton Bradley and Elizabeth Dorothy Jones, and as he the said William Orton Bradley had departed this life, the whole beneficial interest in the funds and property comprised in the settlement was vested in the said William Orton Bradley at the time of his death, and that neither the said Elizabeth Dorothy Jones, nor any child of William Orton Bradley, or of Elizabeth Dorothy Jones, acquired any interest in the said funds or property.

Lord Justice TURNER was of the same opinion. The word marriage must be taken to mean a valid and effectual marriage. That this was its intended meaning was plain from the language of the settlement generally, and from the provision in favour of the children, as it could not be supposed that there was any intention to provide for illegitimate children who were yet unborn. As there had never been any valid marriage, the trust in favour of William Orton Bradley remained in force, and none of the ulterior trusts ever took effect.

Solicitors for the plt., the resp., *Bell and Co.*
 Solicitor for the deft. appealing, *T. H. Dixon.*

Nov. 6, 9, 10, and Dec. 10.

(Before the LORD CHANCELLOR (Westbury).)

COVENTRY v. BARCLAY.

Partnership articles—Construction—Interpretation by usage—Omission of formality supplied by acquiescence—Suspense fund.

Where articles of partnership have been followed by a long uninterrupted course of practice, which, though not wholly inconsistent with, is not the proper meaning and intention of, the articles, that course of practice will be held to be the practical construction of the language of the articles, as evidence of a new agreement by the partners.

Articles of partnership provided that a valuation of stock should be taken every year, and entered in a book called the valuation and rest-book, which was to be signed by the several partners. One of the partners, who had regularly signed the books from 1831

to 1859, was absent through ill-health or bodily incapacity from the meeting in 1860, and died two months after it took place. He never expressed any dissatisfaction at the mode of making out the account:

Held (affirming the decision of the M. R.), that the estate of the deceased partner was as much bound by the settlement of 1860, as if the book had actually been signed by him; and that he must be considered, in equity, as if he had signed the same.

It was the practice of the firm to set apart, every year, out of the balance, a portion which was left undivided, called (erroneously) a "sinking fund," out of which to pay contingencies, losses, and uncertain liabilities:

Held (reversing the decision of the M. R.), that the estate of the deceased partner was entitled to participate in this fund.

This was an appeal from the M. R. The question turned upon the construction of certain articles of partnership. A full report of the case, embodying the provisions of the instrument which were the subject of discussion, will be found in the previous report, 8 L. T. Rep. N. S. 754.

The Attorney-General, Selwyn, Q. C. and Speed supported the appeal on behalf of the plts. They cited *Bissett v. Daniel*, 10 Hare, 493; *Jackson v. Sedgwick*, 1 Sw. 460.

Sir H. Cairns, Q. C., Amplett, Q. C. and Hoare were for the defts.

The Attorney-General was heard in reply.

Dec. 10.—*The LORD CHANCELLOR*.—The first question is, whether the practice which has existed throughout the duration of this partnership, of fixing the value of the permanent property of the partnership, is consistent with the words of the 10th section of the articles. It is contended by the plt. that the language of the 10th article requires and directs that a regular valuation shall be made annually, by surveyors or persons of skill, of all the lands, buildings and fixed property belonging to the partnership, and that the mode adopted could not have been followed consistently with the articles if any partner had objected to it. I am of opinion that the mode which has been uniformly followed, of acting on the 10th article, is not inconsistent with the meaning of the words of that clause; and, further, that if it be not the proper meaning, yet, as it is the mode and practice of making valuations which was followed by the partners in this brewery concern for many years before and down to the formation of the partnership of 1831, and has ever since been followed without deviation or objection, it is a practical construction of the 10th clause of the articles, which is valid and binding upon all the partners, and must be accepted as the rule of this partnership. For if the usage, which on this subject has been uniform and without variation, be not strictly in accordance with the written articles, it becomes evidence of a new agreement by the partners, and is as binding as if it had originally been clearly prescribed by the articles. This is a well established doctrine of the law of partnership as administered by this court. But then a question arises, whether this usage or practice has been followed with respect to the valuation of July 1860. It appears from the evidence that the valuation made in every year, and entered in the valuation-book, has been signed by all the partners. Even if all the partners were not actually present at the prescribed time for making the valuation, yet the entry of the valuation in the book was afterwards signed by those who were absent. It is contended, therefore, by the plt. that the valuation of 1860, not having been signed by Mr. Henry Bevan, is not a binding valuation, even according to the usage, and is not effectual for the purposes of the 38th clause of the articles. But I think it is not necessary

for the due observance and execution of the 10th section, either taken by itself or in connection with the usage, that every single partner should be present and actually participate in the work of making the valuation. Many cases might occur in which that would be impossible, and if the actual presence of every partner were held to be necessary, great inconvenience might in many cases arise from the postponement of the valuation. Until the valuation was made, there could be no final ascertainment and distribution of profits for the preceding year. I am of opinion, therefore, that a valuation, made in accordance with the custom, by the partners present on the partnership premises at the prescribed time, would be a good and binding valuation for all the purposes of the articles, if it was afterwards accepted or assented to by the absent partner or partners. To make a binding account or valuation, it is not necessary that the book containing it should have been actually signed by every partner. The account is conclusive and binding from the time when it is finally settled and agreed to, or, in the language of these articles, "fully finished" between the partners. When that has been done, the account ought to be signed, and the signature of any partner who had not signed might be required by the other partners. But it is the rule of this court to consider that as done which ought to be done, and, if, therefore, I find that the account and valuation of July 1860, at the making of which Mr. Henry Bevan was not present, was afterwards accepted and agreed to by him, I shall hold that the account was in equity signed by him at the time when it was so accepted. Now the facts are these. It was the rule and practice of the partnership to make out annually a balance-sheet and valuation of all the capital, stock and property of the partnership on the 5th day of July in every year. For that purpose it was the duty of the partners to attend at the principal brewery. On that occasion the partners who were present put a value on the freehold and leasehold premises belonging to the partnership and also on the fixed plant and machinery. This valuation appears to have been made by the same rule and in the same manner from the beginning of the copartnership. The account and valuation thus made were entered in a book kept for the purpose, called the rest or valuation-book. The partners who attended usually signed this rest-book at the time of the valuation; but as it often happened that some partner or partners was or were unable to attend, it was the practice of the firm to send an abstract or balance-sheet made up or taken from the rest-book to such absent partners for their information, and unless an objection was made, the assent of such absent partners was assumed, and the rest-book was afterwards signed by such partner as a matter of course, whenever it was convenient to do so. For three or four years before his death, which happened in the month of Sept. 1860, Mr. Henry Bevan had been unable through age and infirmity to attend the annual stock-taking and valuation at the brewery. Abstracts of the rest and valuation for the years 1857, 1858 and 1859 had been duly sent to him, and the rest-book had been afterwards signed by him, as a consequence of his assent to the account included in the abstract. So much was the signature of the rest-book deemed a matter of course that the rest-books for the years 1857, 1858 and 1859 appear to have been signed by Mr. Henry Bevan at one and the same time in the year 1859. At the usual time in the year 1860, the account, rest and valuation of the property of the partnership were taken in the accustomed manner. Mr. Henry Bevan and Mr. Hudson Gurney were unable to attend. Accordingly, an abstract or balance-sheet was made up or taken from the rest-book, and brought by his nephew, Mr. Charles Bevan, one of the partners, to

[CHAM.]

Ex parte JONES, re WILSON.

[CHAM.]

Mr. Henry Bevan at his private residence, on a day in July shortly after the making of the valuation. There is no doubt as to what passed on this occasion. One of Mr. Henry Bevan's daughters was present at the time, and there is no material difference between her evidence for the plt. and the testimony of Mr. Charles Bevan, who has been examined for the defts. Mr. Henry Bevan was well aware that the valuation had been made in the usual manner, but he did not express any dissatisfaction with it, or any desire that it should be altered. He expressed some disappointment at the amount of the profits of the year being less than usual; but there was no sign of complaint or dissatisfaction with the mode of making out the account. The abstract or balance-sheet was left with him, and he did not at any time during his life in any way intimate to his partners that he desired any alteration to be made. The valuation-book was signed by all the other partners; and under these circumstances they acquired and had, in my judgment, at the time when Mr. Henry Bevan died, a right to insist as against him that the book should be signed by him also. I am therefore of opinion and decide, that the account and valuation of July 1860 were in conformity with the partnership articles and the subsisting agreement between the partners; and that the account, rest and valuation, as entered in the rest-book of July 1860 are as binding on Mr. Henry Bevan as if the same had been duly signed by him. I derive this conclusion from the partnership articles, the uniform understanding and practice of the partnership, and the good faith and honour of the dealings between the partners. So far I agree with his Honour the M. R. But a question then arises as to what constitutes the share of Mr. Henry Bevan in the partnership, according to the valuation and balance-sheet of July 1860. There is entered in that account, among the assets of the partnership, a sum of 51,133*l.* 5*s.* 11*d.*, under the title of "Sinking Fund." It appears from the 29th paragraph of the first answer of the defts., the evidence of Arthur Kett Barclay, and the balance-sheet itself, that this sum of 51,133*l.* 5*s.* 11*d.* was part of the money divisible among the partners for the year 1860, but which was left undivided to meet contingent and unascertained liabilities. It is thus described by Mr. Arthur Kett Barclay, p. 2: "The sinking fund is a varying fund each year. It is an estimated fund, in which salaries to clerks, losses and other contingencies are included to be provided for—as, for instance, we might receive advice of an adventure being unprofitable. It is an amount of a portion of the balance of the year, left undivided, to meet the payments before mentioned, the amounts of which were uncertain or contingent." It is contended by the defts.'s counsel at the bar, that for the purposes of the valuation of the share of the deceased partner, as directed by the 38th clause of the articles, this sum must be taken, as between the surviving partners and the representatives of a deceased partner, to be the actual amount of the current debts and contingent liabilities, and that the practice of constantly estimating these demands and setting apart the amount in the balance-sheet must be taken in connection with the 38th article, and considered as done for the purpose, in the event of any share of a deceased partner becoming subject to valuation during the ensuing year, of enabling that valuation to be at once finally made, and of excluding these representatives of the deceased partner from any interference with the future accounts of the partnership. But the case thus made at the bar is not supported by any statements in the answers or evidence of the defts. The sum in question is expressly treated by the defts. in their answer as money which, but for these contingencies of unknown amount, would have been liable to be divided; and there is nothing in the 33th section of the partnership articles to prevent the share

of the deceased partner from including a right to participate in the surplus of this reserved sum, so carried to what is in reality a suspense account, but here erroneously called a "sinking fund." It certainly is not competent to the executors of Mr. Henry Bevan to question the propriety of this reservation. By that they are bound; but this is perfectly consistent with a right to a share of the surplus of the fund, if it be more than what is required for the purposes for which it was reserved. It is objected that this money gave the executors of a deceased partner a right of interfering with the accounts of the future partnership for an indefinite period of time. It certainly will give them a right to an account of the losses actually accrued and the payments made, for which this sum was left undivided; but the interference of the executors is limited and restricted by the 37th section of the partnership articles, and so long as any of the contingencies remain unascertained, it will be competent to the continuing partners to determine, at each successive valuation, how much of this "sinking fund" ought to be retained to answer such contingencies, and what portion, if any, may be divided among the persons entitled to the profits of the partnership for the year ending on the 5th July 1860. I must therefore reverse the decree of his Honour the M. R., and in lieu thereof declare that the estate of the testator Henry Bevan, deceased, is bound by the account, rest and valuation for the year ending 5th July 1860 as fully as if he had duly signed the rest or valuation-book for that year; but declare that, subject to and after answering the purposes for which the sum of 51,133*l.* 5*s.* 11*d.* was reserved in the account ending the 5th July 1860, the surplus of that sum, if any, is divisible among the then existing partners, according to their shares in the partnership. No costs on either side.

Solicitors: *Dimmock, Nash and Field; Marson, Dudley and Marson.*

Saturday, Dec. 19.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte JONES, re WILSON.

Bankruptcy—Option to creditors—Suspense of bankruptcy—Discharge of bankrupt—Discovery—Act of 1861, sect. 110.

Where proceedings in a bankruptcy have been suspended by a resolution of the creditors under the statute of 1861, upon an application by the bankrupt for his order of discharge under sect. 110, the commissioner is bound to entertain an application by a creditor for leave to examine the bankrupt upon the accounts filed by him, although these accounts may, at a previous meeting, have been unquestioned.

It is the duty of the commissioner, before granting an order of discharge under the above action, to satisfy himself judicially that the bankrupt has made a full discovery of his estate.

This was an appeal on a special case.

On the 11th Aug. last an adjudication of bankruptcy was filed against James Wilson and Walter Slater, trading at No. 2, Rumbold-place, Liverpool, and 150, Leadenhall-street, London, as merchants and shipowners.

At the first meeting, held on the 4th Sept., five persons, W. H. Jones, G. P. Forwood, J. Hargrove, G. F. Miller and A. Brown, were chosen creditors' assignees; G. Morgan having been previously appointed official assignee. At the same meeting a resolution was come to by the majority of the creditors present who had proved their debts, intending to act under the 110th section of the Act of 1861, that it was expedient that no further proceedings should be taken in bankruptcy beyond the appointment of assignees, and that the estate and effects of the bankrupts should be

administered under the supervision of trustees and inspectors.

Upon this the registrar made an order adjourning the meeting for fourteen days, and a limited notice was sent to the creditors giving notice of a meeting for the 18th to confirm or rescind the above resolution.

On the 18th a second meeting was held, when it was resolved that the proceedings in bankruptcy should be suspended, and that the estate and effects be wound-up and administered upon the terms of a trust-deed to be executed by the bankrupts and the creditors' assignees, according to the form of a draft which was produced at the meeting, signed by the registrar.

The deed was executed on the following day. On the 7th Oct. the bankrupt filed a statement of account, which did not include a deficiency account, and on the 19th an order was made that the bankrupts should have till the 5th Nov. to file such account.

This was done. The amount of debts was stated at 170,969*l.* 19*s.*, and the deficiency at 53,250*l.* 16*s.* 5*d.* At the meeting of the 5th Nov. no complaint was made as to the truth of the accounts, or as to the bankrupts not having made a full discovery, but no "last examination" paper was signed by the bankrupts, at this meeting, and it was stated that it is not the practice to treat such a sitting in the same way as a last examination.

On the same 5th Nov. an order was made to the effect that, it appearing that the bankrupts had filed accounts which they had deposed contained a full and true disclosure of their estate and effects, the court appointed a sitting on the 20th Nov., at which the bankrupts might apply for their discharge.

The meeting appears to have been adjourned to the 27th Nov., when four of the assignees, Messrs. Jones, Forwood, Hargrove and Brown, opposed the application for the discharge (Mr. Miller, the remaining assignee, declining to join in the opposition), on the following grounds, as stated in the affidavit of their solicitor, Mr. Forshaw :

That the four opponents could not be heard in their character either of trustees or assignees, because as trustees of the deed they were strangers to the bankruptcy, which had been suspended when the functions of the trustees commenced, and as assignees they had ceased to have any duties to perform. The learned commissioner (Perry) allowed this objection. It was then urged that they might oppose as creditors; but it was objected that creditors could not be heard without first specifying the particular offences against the Act, whereupon the offence was alleged of having "with intent to conceal, &c., wilfully omitted to keep proper books of account," and it was proposed to examine the bankrupts on this charge. It was objected to this, that the bankrupts having already made a discovery of their estate and effects under the 110th section, and the creditors having resolved under that section "that no further proceedings be taken in the bankruptcy," the offences enumerated in the 159th section could not be superadded to the requirements of the 110th section. Further, it was objected that the alleged offence, if committed at all, was committed against all the creditors, and that the four opposing creditors had not sustained thereby any individual injury or grievance.

The commissioner allowed all these objections, and granted to each of the bankrupts an immediate order of discharge.

From this order the four creditors now appealed.

Bacon, Q.C. and *North* supported the appeal.—The language of the 110th section, "and the bankrupt having made a full discovery, shall be entitled to apply for his order of discharge," is to be taken in connection with the 185th and following sections, especially the 188th, which gives the court jurisdiction to entertain applications of any party to the deed, or of

any creditor, respecting the winding-up of the bankrupt's affairs, or any act or thing relating thereto. The apps. are entitled to be heard as creditors. Notwithstanding the proceedings are suspended under the 110th section, the debtor is still liable to the scrutiny of the creditors; and in this case he is amenable to the charge of wilfully omitting to keep proper books of account.

Two small memorandum-books were produced as being the only books that were kept of the Liverpool business; but, on the other hand, it was stated that, in fact, the proper books of both businesses were kept in London.

It was also contended that the words "as herein-before provided," in the 158th section, had reference to the provisions of the 110th section, and that the concluding paragraph of the 158th section applied to every application of discharge, whether made under the 110th or 150th sections. Schedules 17 and 18 to the Orders of Oct. 1861 both contemplated a "hearing" of all parties.

Daniel, Q.C. and *De Gez* appeared for Slater, the London partner, and supported the commissioner's order.—The 110th section cannot be aided in the extension of its powers by the 188th. The 140th section is incapable of being applied when the creditors have taken the matter out of bankruptcy.

The LORD CHANCELLOR.—That is provided for by the express right conferred by the 110th section.

Daniel, Q.C.—That view would leave the powers conferred by the 110th section wholly unlimited in point of time.

The LORD CHANCELLOR.—Quite so; because the trust-deed may contain a release by all the creditors; and if that were so, the order for discharge would not be necessary. If that be not so, and the bankrupt is left to go to the commissioner for his discharge, then he must satisfy the commissioner that he has fulfilled the condition of a full discovery. If the creditors do not touch the question of discharge, the debtor must be left to get it in the ordinary way.

Little, for Wilson, urged that no question of discovery could now arise, a reasonable opportunity of objecting to these accounts having been afforded at the previous meetings, and that the debtor was not to be kept before the court longer than the necessities of the case required.

The LORD CHANCELLOR.—The meaning of the 110th section cannot be mistaken. The bankrupt, if he does not get a release under the trust-deed, is left to get his discharge under the bankruptcy in the ordinary way. But that there may be no mistake, the Legislature has said he shall not have his discharge until he has satisfied this condition, namely, that he has made a full discovery of his estate. This discovery may possibly have been made under the trust-deed. But it is the duty of the commissioner, when he is applied to by the bankrupt under the 110th section, to be judicially satisfied that the condition has been fulfilled, and if it has not been certified to him by the trustees or the creditors that a full discovery has been made, he must proceed to have that discovery made in the ordinary way in bankruptcy. I entirely disagree with the commissioner in allowing these objections to prevail. It was his duty to have permitted the examination to take place, whether the account was or was not previously objected to, and I must refer the matter back to him to fulfil that duty. Discharge the order without prejudice to any question, and refer it back to the commissioner to proceed with the examination of the bankrupts, until he is satisfied that they have made a full discovery of their estate. The deposit may be taken back. As the estate is in the hands of trustees, the apps. can pay themselves their costs. Solicitors: *Marshall*, agent for *Forshaw*, Liverpool; *Ashurst* and *Morris*; *Neal* and *Martin*, Liverpool.

[ROLLS.]

THE ATTORNEY-GENERAL V. GREENHILL.

[ROLLS.]

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Dec. 4 and 7.

THE ATTORNEY-GENERAL V. GREENHILL.

Devise to charity—Direction as to leasing—Perpetuity—Parties.

A testator, in 1641, devised certain real estates at Abbots Langley to or for the benefit of Sydney College, Cambridge, and Trinity College, Oxford, "for the only use, education in piety and learning of four of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife; and in default of such to their next poor kindred, for the first by the father's side, for the second by the mother's side, and the lease of the said Langley to be at one-third part under true value, to my said wives' kindred ever, viz., brothers and sisters there and at Harrow."

The deft. in this suit was a descendant of a brother or sister of a wife of the testator, and a lessee of part of the property demised to Trinity College, Oxford. He claimed to be entitled, by virtue of the direction as to leasing contained in the will, to a perpetual right of renewal of his lease for ever, on the same terms as were therein contained."

Held, that the direction as to the leasing was void in law as tending to create a perpetuity; and that the colleges took the property devised to them for charitable purposes discharged therefrom.

The lessee was the sole deft. on the record; Sydney College, Cambridge, not being a party to the suit:

Held, that the deft. sufficiently represented the descendants of the brothers and sisters of the testator and his wives:

Held also, that as the court decided in favour of the colleges, the absence of one of them from the record was immaterial.

This was an information filed by Her Majesty's Attorney-General at the relation of the president, fellows, and scholars of Trinity College, Oxford.

The information stated that Francis Combe, by his will dated the 1st May 1641, duly devised (*inter alia*) certain manors, lands and hereditaments at Abbots Langley, as follows:—

"Article 4. That my estate in Abbots Langley shall be, so soon as may be, sold to pay my debts and legacies; and also the meadow at Coney-street. See more *infra*, article 22."

"Article 15. I give all my books, except some few my friends desire, equally to Sydney College in Cambridge, and Trinity College in Oxford.

"Article 22. I revoke the former article of sale of Abbots Langley and appurtenances, and will and ordain that all my houses and lands and tithes and goods I have in Hempstead, shall be in possession of my father Greenhill, and my trusty servant Francis Hodges, and two other sincere and impartial men, as aforesaid, to pay the said debt for Abbots Langley, and my legacies, and do presently enfeoff the two colleges aforesaid and their successors for ever, with all I have in Abbots Langley, and the lordship there, and the meadow in St. Stephens, with the appurtenances, equally between the said colleges for the only use, education in piety and learning of four of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife; and in default of such to their next poor kindred, for the first by the father's side, for the second by the mother's side; and the lease of the said Langley to be at one-third part

under true value to my said wives' kindred ever, viz., brothers and sisters there and at Harrow."

The testator died on the 2nd June 1641. The two colleges were duly put into the possession of their respective moieties of Abbots Langley, and, always keeping their interest distinct, have from time to time granted leases of the property to descendants of a brother or sister of a wife of the testator. The leases granted were for terms not exceeding twenty-one years, and at rents varying from 30*l.* to 243*l.* 9*s.* 6*d.*, and always at a rent not exceeding two third parts of the true value.

By an indenture of lease, dated the 13th Dec. 1853, the relators demised to the deft. (as such descendant of a brother or sister of a wife of the testator, as aforesaid) "the moiety of the manor" of Abbots Langley, with the fines, quit-rents, and the capital messuage or mansion house, and the cottages, lands, tenements and hereditaments, reserving timber to the college, from Michaelmas 1853, for twelve years, at the rent of 163*l.* 6*s.* 8*d.* The lease contained the usual covenants and conditions on the part of the lessee, and a proviso against alienation except by will; and the rent thereby reserved was one-third part under the true value of the property. The deft. being now in possession of the property so demised to him, claimed to be entitled, by virtue of the direction as to leasing contained in the testator's will, to a perpetual right of renewal of the lease to him on the same conditions as he then held it. The relators, however, were advised that the direction as to the leasing purported to create in favour of all generations of persons connected in affinity with the testator a perpetual right to a lease of the said estate at one-third part under true value, and was invalid and void in law, as tending to a perpetuity. The relators submitted that, if the direction was void, the whole interest in the moiety of the estate devised to them as aforesaid was theirs, discharged from the direction to lease and from the beneficial interest which it purported to create; but nevertheless, as trustees thereof for the charitable objects mentioned in the testator's will.

The information stated various other matters, to which, however, it is not necessary for the purposes of this report more particularly to refer, and the first paragraph of the prayer was as follows:—

"That the validity and construction of the direction contained in the will of the said Francis Combe, as to leasing the said manor and estate at Abbots Langley, so far as relates to the moiety thereof devised to Trinity College, Oxford, may be determined, and that it may be declared whether or not such direction, if purporting to create in favour of all generations of persons connected in affinity with the testator a perpetual right to a lease of the said estate at one-third part under true value, is invalid and void in law, and if so, that it may be declared that the whole interest in the said moiety, discharged from the said direction as to leasing, belongs to Trinity College." The information also asked that a scheme for the management of the college property in question might be settled, under the direction of the court.

Sydney College, Cambridge, was not made a party to the suit, and Frederick Joseph Greenhill was the sole deft. in it.

Selwyn, Q. C. and *F. Vaughan Hawkins* appeared for the Attorney-General and the relators.

Willcock Q.C. and *Charles Hall* for the deft.

The following cases were cited in the arguments: *Hope v. The Corporation of Gloucester*, 7 De G.

M. & G.;

The Attorney-General v. St. Catherine's, Jac. Rep. 381.

Dec. 7.—THE MASTER of the ROLLS.—In this case I must make a decree in the terms and to the effect of the first paragraph of the prayer of the in-

formation. The will of the testator, upon which the question turns, is a very peculiar one. I have read it all through, and it appears from it, that the testator's property at Abbots Langley was devised by him to or for the benefit of Sydney College in Cambridge, and Trinity College in Oxford. It was devised for certain charitable purposes mentioned in the will; with a direction as to the mode in which the testator wished it to be leased to the kindred of his first and second wife. [His Honour referred to the clause as above stated, and continued:] I am of opinion that the direction as to the leasing forms no part of the gift of the property for charitable purposes. It is in fact an attempt, on the part of the testator, to create a perpetuity; and is therefore void in law. The cases which were cited in the argument exactly apply to the present; and the result is, that I think the colleges are at liberty to let the property as they please. If I were asked to construe the whole of the clause containing the direction as to the leasing, it would be very difficult for me to say what is the meaning of it: "In default of such to their next poor kindred, for the first by the father's side, for the second by the mother's side, and the lease of the said Langley to be at one-third part under true value to my said wives' kindred ever, viz., brothers and sisters there and at Harrow." I suppose the testator meant the next poor kindred residing on the Langley property, or at Harrow—for ever. But without expressing any opinion upon the construction of that part of the will, I think that the colleges have, as I have said, power to grant any leases they may consider proper of the estate devised to them for charitable purposes; and that they therefore take it discharged from the direction. Some questions were raised in the course of the argument, which, but for the view I have taken of this case, would have been important. Mr. Greenhill is the sole deft. on the record; and it was made a question whether he properly represented all the descendants, if any there were, or might be, besides. I think he does; and that it would have been useless to direct inquiries to be taken in chambers on such a will as this. Besides which, the deft. is a lessee of the property; and therefore, in my opinion, fully represents all the class of kindred, whoever they may be, or might have been found to be by inquiry at chambers. It was also said that Sydney College was not a party to the suit. No doubt, if I had decided adversely to the colleges, that would have been a valid objection; but as I have decided in their favour, the absence of one of them from the record is immaterial. I think it is unnecessary for me to make any further observations. There must be a declaration according to the first paragraph of the prayer of the information. There must also be a direction for the settlement of a scheme; and I think that all parties should have their costs as between solicitor and client.

Solicitor for relators, *John Philpot*, agent for *Morrell, Biddle and Hawkins*.

Solicitor for deft., *T. Huxley*.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs., Barristers-at-Law.

Nov. 17, 18 and 21.

HUNTER v. BELCHER.

Jurisdiction—Commercial traveller—Alleged misconduct.

II. filed a bill against B., who had been his commercial traveller, charging misconduct and asking for an account during the term of service and payment by way of damages, and stating that in 1861

he had written to B., directing him to send him a special account. B., who denied the misconduct, stated that he had always given H. a general account:

Held, that H. was only entitled to an account since the date of the letter requiring B. to keep an account prospectively:

Held, also, that even if any particular damage or misconduct had been proved, the court had no jurisdiction over such a matter.

The bill in this case was filed by Messrs. Hunter and Son, merchants of Sheffield, against the deft., who had been their commercial traveller. It appeared that the deft.'s salary had been 120*l.* a-year, but in Oct. 1855 the plts. advanced it to 200*l.* a-year, engaging him for three years and a-half to be employed in travelling for six months each year, with a right mutually to determine the engagement by giving six months' notice, and on the 16th Oct. 1861 the deft. left the service of the plts., his solicitor having given notice in April to that effect in writing. The plts. made various charges of neglect of duty and of misconduct against the deft., and stated that at different times in 1861 they had written to him, directing him to keep an account of all his travelling expenses, stating all the items, &c., which he had neglected to do. They prayed for an account of all sums received by the deft. and properly due to them for damages or otherwise, of all moneys paid for salary, travelling expenses, and for payment of what should be found due, for the delivering up of all papers, &c., for discovery, and for a general account. The deft. denied that he had been guilty of the misconduct imputed to him, and stated that it was not the custom for commercial travellers to give an account of every item of expense, but only a general account on their return, which he had always done.

Cole, Q.C. and G. L. Russell appeared for the plts.

Baily, Q.C. and Cabell for the deft.

Cole, Q.C. in reply.

The following cases were cited:

Stainton v. The Carron Company, 24 Beav. 346;

Padwick v. Stanley, 9 Hare 627;

Cusson v. Stone, 1 E. & E. 248;

Mackenzie v. Johnson, 6 Madd. 373;

Foley v. Hill, 2 H. of L. Cas. 35.

The VICE-CHANCELLOR said that he should avoid saying anything which might aggravate the personal animosity which evidently existed between these parties, from which, in a great measure, these proceedings had arisen, and it was much to be regretted that the bill had been filed, as no good could possibly result from it. The first question was whether, on the facts and only regarding the relative position of the parties, and what had taken place, the plts. were entitled to come into this court for an account at all. It appeared to him, on the authorities, and on principle, that they were so entitled. No doubt the deft. stood in a confidential relation, and was bound to exercise judgment and skill for the benefit of his employers, and sustained such a character towards them in respect of the transmission and application of moneys as entitled them to an account. The deft. contended that there were really only one or two isolated points upon which there could be any such right, and therefore that the court would not direct it, but this was often the case; as for instance in the case of pedigree, where voluminous evidence was gone into to supply the one link necessary to make out the case. That fact was, therefore, not a sufficient ground for not taking the account if the plts. were entitled to it, which *prima facie* they were. The second question was, whether the accounts could be considered as settled accounts. As was almost always the case with commercial travellers, the deft. departed on his tour in May, returning in

August; he received moneys from some customers, made disbursements and remittances to the plts. while absent, and when he returned paid the balance, whatever it was, handing in an account of expenses, &c. There was really no settled account, no going into items—they probably had no means of doing so; but they received and admitted a balance, and it might be sometimes weeks or months before they were able to check the items, perhaps relating to some customer at Roscrea or Wexford. In stating this the pleading was somewhat unusual, for the deft. in the aforesaid settled account claimed to have allowed to him certain items, &c. remitted, which the plts. could test in a short time. But, although there was no settled account of credit for sums remitted, unless such account as was rendered was disputed within a reasonable time, the deft. ought not to be put to prove it. Evidence had been gone into much more than was necessary as to travelling expenses, and as to the practice of commercial travellers, the result being that, ordinarily speaking, a certain degree of confidence was reposed in them, and although the employer has a right to require an account in practice, it was scarcely ever done. And this was not only a general practice, but the practice of this firm in particular, and the fact was, that the account rendered was usually taken for granted, and, indeed, to call in question every item would be simply vexatious. But, whenever a commercial traveller came from a journey, in the absence of any special agreement, his employer had a right to know the amount of items in the mass, such as hotel bills, &c., although that did not apply to turnpikes, cigars, or such small matters. The deft. was never generally asked for an account. It was said, indeed, that he was asked; but it was never rendered, the fact being that he was asked and said, "Oh, yes, you shall have it." Perhaps there were some hasty words uttered in heat, of which the party was afterwards ashamed, and the request was not persisted in. After 1861 an account was always sent in, and it went into the books as a part of the business of the house. It appeared to him that now to allow the plts. to call for an account extending seven or eight years back, requiring their traveller to vouch the several items, would be an act of the grossest injustice, he being allowed to assume that they would not be challenged. This did not, however, apply to the journey in 1861, when the letter was sent after him requiring him to keep an account, prospectively. So far he must account, although such a proceeding as having recourse to the expensive machinery of a suit for such a miserable object was much to be deprecated. The only remaining question was, as to the alleged misconduct, breach of duty, &c., whereby it was said the plts. had sustained considerable loss, but there was no statement of any particular damage or of any particular misconduct, and no evidence to show that in respect of such alleged acts a farthing of loss had accrued. Even if it had been distinctly alleged and proved, this court had no jurisdiction over such a question, and that was fairly admitted at the bar. The bill, therefore, so far as related to alleged misconduct and breach of duty, must be dismissed with costs. The form of the account must be of all sums received and paid, and for goods supplied by the plts. to the deft., who must have credit for all sums appearing to have been paid by him on account of the plts. up to the filing of the bill.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINKLOW,
Esqrs., of Lincoln's-inn, Barristers-at-Law.

Nov. 9 and 10.

YETTS v. HILTON.

HILTON v. SEWELL.

Solicitor and client—Purchase by solicitor pending the relation—Disclaimer by answer—Costs.

Where a solicitor to trustees under a deed, whereby a debtor assigned all his property for the benefit of his creditors, with a resulting trust to himself, on a sale of the property by public auction, became the purchaser of the property, and claimed to hold it as purchaser; but, upon a bill being filed by the debtor, by his answer disclaimed to hold the property as purchaser, and declared himself ready and willing to be dealt with as a mortgagee in possession; he was allowed all the costs of the suit subsequent to the filing of his answer, and also of another suit subsequently filed by himself in the same matter; such costs having been mainly occasioned by the production of evidence to establish that which had been admitted by the solicitor himself.

These causes came on to be heard together.

The plt. in the second suit, Giles Hilton, had already filed a bill relating the same matter against the same defts. in the year 1859, which was dismissed on the ground of his inability to comply with an order directing him to give security for costs, he being then abroad. He now renewed the litigation by filing a bill, on the 16th Aug. 1862, against Henry Sewell, Charles James Sadler and Joseph Musket Yetts.

The bill stated that the plt., having a life-interest in certain estates, conveyed them to the defts. Sewell and Sadler upon certain trusts for the benefit of his creditors. The deft. Mr. Yetts was the solicitor who prepared this deed and acted professionally for the trustees in the matters of the trust.

In Sept. 1856 the plt. wrote to Mr. Yetts, requesting him to state what amount of rents he had received, and also whether he had received any other moneys in respect of the properties conveyed by plt. in trust for his creditors.

In the month of Jan. 1857, in reply to a letter written to Mr. Yetts by the plt.'s then solicitor Mr. Hale, Mr. Yetts on the 2nd Jan. 1857 sent an account with the following item: "Due on mortgage, from Sewell and Sadler, 926*l.* 13*s.* 5*d.* Four quarters' interest to 2nd Oct. 1856, 185*l.* 6*s.* 8*d.*;" and that such item was fictitious and untrue, and in fact related to the debt of 800*l.* secured by equitable mortgage to Miller; and that the said debt of 800*l.* and interest was in Oct. 1852 compromised by the trustees or by Mr. Yetts (as their solicitor) for the sum of 350*l.*

Mr. Yetts afterwards entered into the receipt of the rents and profits.

The bill prayed for an account of all the dealings and transactions of the defts. under the trusts of the indenture of the 10th April 1850, and that, if necessary, the trusts might be performed by the court; also, that it might be declared that the deft. Yetts was a mortgagee in possession of the life-interest of the plt. in the said Broadfield farm, and of the absolute interest of the plt. in the woodland; and that he was also a mortgagee of the said policies for such principal sums only as he had actually paid for the transfers to him; further, that accounts might be taken on the footing of a mortgagee charging wilful neglect and default, and that upon payment of what might be found due to the deft. Yetts, he might be decreed to convey and assign the premises and policies to the plt. and deliver up the possession of the same, and all deeds relating thereto.

On the 6th Dec. 1862 Mr. Yetts filed his answer, stating that, about three years after the date of the deed of 1850, he became entitled to the benefit of the mortgage of the plt.'s life-estate in the Charterhouse Hinton property. He alleged that there was not and never could be any surplus of the trust-estate after payment of the creditors; that the plt. could not possibly gain the slightest advantage by redeeming him; and that he would never do so. Deft. admitted that he acted as solicitor of the trustees in the matter of the deed of 1850 down to July 1852. He alleged that at that time the defts., the trustees, found that not one shilling could be realised by attempting to carry the trust into execution, and they gave up the attempt; that nothing was ever received by the trustees under the deed, and that the real property of the plt. was all in the possession of the mortgagees.

The deft. denied the right of the plt. to redeem him, or call him to account, unless the defts., the trustees and the creditors disclaimed any interest in the premises vested in him; and subject to their claims against Hilton he claimed to hold all the premises as a security for the sums therein mentioned, with interest and costs.

On the 7th Jan. 1863 Mr. Yetts filed the first-mentioned bill against Mr. Hilton and the trustees Sadler and Sewell, in which he more fully set forth the deeds under which he claimed an interest in the property; and prayed for an account of what was due to him for principal and interest, and costs, charges and expenses upon his securities, he offering to account for the rents and profits of the mortgaged premises received by him, and that the three defts. might be ordered to pay what should be found due to him, together with the costs of the suit, and in default, that the defts. might be foreclosed.

On the 20th Feb. 1863 the plt. Hilton amended his bill against the trustees Sewell and Saddler, and Mr. Yetts, in which, in addition to the allegations in the original bill, he set forth the correspondence between the solicitors for all parties, alleging that the deft. Yetts claimed to hold the property as a purchaser, and praying a sale of the plt.'s life-interest in Broadfield Farm and of the two policies.

On the 16th March the deft. Yetts put in a voluntary answer to the amended bill of Hilton, in which he submitted that the plt. ought to pay all the costs incurred by him, the deft., with reference to allegations made, and relief founded on such allegations, which relief might have been obtained in the original bill. On the 23rd March Hilton filed a voluntary answer in Yetts' suit, submitting that the rights of the parties might have been sufficiently ascertained in the former suit.

Bacon, Q.C. and *Chisholm Batten* appeared for Mr. Yetts.—They condemned the suit as a mere speculation for the purpose of attempting to get costs out of their client, and which could result in no possible benefit to the plt. Mr. Yetts had distinctly disclaimed holding the property as purchaser.

Malins, Q.C. and *C. Hall* appeared for Mr. Hilton.—They contended that Mr. Yetts, up to the time of filing his answer, had asserted and maintained his claim as purchaser of this property. It was this conduct that had occasioned the suit, and Mr. Yetts ought to be ordered to pay the costs of it.

Everitt appeared for the trustees.

THE VICE-CHANCELLOR.—The only question, as it seems to me, is as to what extent Mr. Yetts ought to be made to pay the costs of this litigation in consequence of his having assumed the character of purchaser of the property, and, as at present advised, I think the counsel for Mr. Hilton must show me some strong ground for making Mr. Yetts pay any costs after the filing of his answer, inasmuch as by that answer he abandoned the position of purchaser, and claimed only to be allowed so much as should be found to be justly due to him as mort-

gagee. My impression at present, subject to what may be said, is, that the costs subsequent to that answer incurred by Mr. Hilton in entering into the evidence, which has occasioned a large proportion of the costs of this suit—that is to say, the costs of all the evidence which was entered into after Mr. Yetts assumed the character of mortgagee with securities in his possession—ought to be paid by Mr. Hilton. I think that Mr. Hilton should only be allowed to redeem upon the terms of his paying those costs, and that Mr. Yetts should pay all the costs of the litigation up to the time of his answer. I wish the counsel for Mr. Yetts to understand the reason why I think he must be ordered to pay all the costs in the suit of *Hilton v. Sewell* up to the time of filing his answer. He was the solicitor to the trustees to whom had been assigned the equity of redemption. After a series of proceedings needless to relate, that equity of redemption was put up for sale by auction, and under circumstances distinctly stated in the evidence, Mr. Yetts, with the concurrence and with the knowledge of the defts. the trustees, his clients, became the purchaser. It is impossible to say upon the pleadings and the evidence that Mr. Yetts did not assume the character of purchaser, or that he did, until he put in his answer, or shortly before that time, state decidedly that he was willing to be treated as a mortgagee, and that he was ready and willing to take back the money which might be found to be honestly due to him. When he put in his answer he assumed his proper position, but not until that time. The rule of this court, it being one of policy, always requires that a person in a confidential relation, so buying, shall give up his purchase and pay the costs of the litigation. Therefore I propose to make a decree to that effect against Mr. Yetts. But all the costs of the subsequent litigation, which were incurred for the purpose of proving what Mr. Yetts admitted, he is entitled to be paid. The decree I propose to make is this: Tax so much of Mr. Hilton's costs of his original bill in *Hilton v. Sewell* up to and including the answer of Mr. Yetts to the original bill, as have been occasioned by the sale and purchase by Mr. Yetts on the 11th Feb. 1853, and order the amount of such costs to be allowed to Mr. Hilton in manner hereinafter directed. Tax the costs of Mr. Yetts in the original and amended bill of *Hilton v. Sewell*, and in the bill of *Yetts v. Hilton*, up to and including the hearing of these causes, and let the costs allowed to *Hilton v. Sewell* be set off against the costs allowed to Mr. Yetts in *Hilton v. Sewell* and *Yetts v. Hilton*, and let the difference be paid to Mr. Yetts, he renouncing all claims as purchaser under the deed of 1853, and claiming to hold the premises in the bills mentioned only as mortgagee in possession. Direct an account against Mr. Yetts, as such mortgagee in possession, of the rents and profits received by him under the receivership deed of 1853; also direct an account of principal and interest moneys in the pleadings mentioned, and the costs incurred for the defts. Sewell and Sadler, and in taking such accounts let Mr. Yetts be allowed 350*l.* and interest expressed to be secured by the deed of Oct. 1854, and the rents and profits found due from him to be set off against the sum found due to him, and the balance, if any, upon the whole accounts and costs to be paid to Mr. Yetts, he conveying the property upon the payment thereof to Mr. Hilton.

Bacon, Q.C. submitted that the conduct of Mr. Yetts had been of the most satisfactory character, he never showing any anxiety to hold the property on any other terms than those of mortgagee, and that he ought not to be decreed to pay the costs.

THE VICE-CHANCELLOR.—No doubt there is considerable force in all that has been stated on behalf of Mr. Yetts, and these are circumstances which go a

great way in extenuating his conduct in reference to his becoming the purchaser of the property; but it is an imperative rule of this court that a solicitor shall not hold any property purchased by him under the circumstances described in these causes in reference to the purchase made by Mr. Yetts. Mr. Yetts very properly does not now seek to hold the property as purchaser. The rule of the court in these cases is, however, invariable, and I consider that, with the assumption of the position of purchaser, must go the liability to pay all the costs which may have been occasioned in setting the matter right. Until Mr. Yetts put his answer upon the file, he by the deeds—and, indeed, up to that moment—held the property as purchaser; and as he was in the position of purchaser, so far as the costs in the first suit have been occasioned by those transactions which he has properly renounced, I must make him pay them. Those costs will therefore be taxed, and set off against the costs to which he will be entitled.

Solicitors: *J. M. Yetts*; for the plt. *Hilton, H. Harrott*.

Wednesday, Nov. 25.

WOODHAMS v. THE ANGLO-AUSTRALIAN AND UNIVERSAL FAMILY LIFE ASSURANCE COMPANY.

Joint-stock company—Creditor under a decree—Execution against person, property and effects of shareholder—7 & 8 Vict. c. 110, s. 66.

*In the year 1858 a joint-stock company A., registered in 1853 under the 7 & 8 Vict. c. 110, amalgamated with another company B., the terms being that all the shareholders of A. who should sign the deed of settlement of B. should be indemnified out of the assets of B., and that all the assets of A. should be transferred to B. In 1861 the plt. obtained a decree establishing a debt against company A., and directing payment to him, but upon his issuing a writ of *fi. fa.* out of Ch. against the goods of the company, a return was made of *nulla bona*, all the assets having been transferred to company B. under the amalgamation. Plt. then moved in the cause, under the 66th section of the 7 & 8 Vict. c. 110, against the "person, property and effects" of C., who had originally been a shareholder in A., and had signed the deed of settlement of B. Since the amalgamation, company B. was being wound-up, and C. had paid calls under the winding-up in respect of his original shares:*

The Court made the order as prayed, although it was alleged that the plt. had not used due diligence, he not having established his claim under the winding-up, and although more than three years had elapsed since C. had signed the deed of settlement, whereby, as he alleged, he ceased to be a shareholder of company A.

This was a motion in the above suit on behalf of the plt. James Woodhams, in pursuance of a notice given on the 13th July 1863 to one Richard Collins, of High Wycombe, Bucks, in the following terms:—"That it may be ordered that execution do issue against your person, property and effects, for satisfaction of the decree after mentioned, and of the several sums remaining payable thereunder, with interest thereon, together with the costs, charges and expenses of the notice, and of such motion, and the order to be thereupon made, and the subsequent proceedings thereunder and consequent thereon."

The notice of motion stated the decree dated the 19th Dec. 1861, made in the above cause, whereby it was declared that the plt. was entitled to a good equitable charge on two several sums of 119*l.* 14*s.* and 114*l.* 4*s.* 2*d.* due from the said company, and mentioned in two several deposit notes or certificates dated the 22nd March 1856 and the 18th April 1857, for

securing to the plt. the payment of 171*l.* then due to him from one Edward Lacey; that an account should be taken of what was due from the company for principal and interest in respect of the said two sums, and that out of the sum which, upon taking such account, should appear to be due, the company should pay to the plt. the balance due to him in respect of the said debt and interest; and that the costs of the plt. should be taxed and paid by the company: (see *Woodhams v. The Anglo-Australian, &c. Company*, 3 Giff. 238; 5 L. T. Rep. N. S. 628.)

It then stated that the chief clerk had found, by his certificate approved the 19th June 1862, that there was due from the company the sum of 303*l.* 17*s.* 4*d.* in respect of the two deposit notes; and that there was due to the plt. in respect of the debt of 171*l.* with interest, the sum of 105*l.* 4*s.*, that the plt.'s costs against the company amounted to 157*l.* 19*s.* 10*d.*; that the plt. on the 5th Aug. 1862 caused to be issued out of Chancery a writ of *fi. fa.* against the goods and chattels of the company, for the said sums of 105*l.* 4*s.* and 157*l.* 19*s.* 10*d.* with interest, that he had used due diligence to obtain satisfaction of such decree against the property and effects of the company, but that there were not any effects out of which the said sums could be satisfied, and that on the 5th Aug. 1862 the writ was returned *nulla bona*; that on the 16th Jan. 1863 John Turner, one of the shareholders of the company, paid the sum of 100*l.* on account of the sums payable to the plt. under the decree; that the said Richard Collins was a shareholder of the company, and that the remainder of the said sums of 263*l.* 3*s.* 10*d.* (after deducting the sum of 100*l.*) still remained due and owing to the plt.

The company was formed in 1853 and registered the same year under the 7 & 8 Vict. c. 110. It carried on business for some time at 5, Cannon-street west, and in 1858 became amalgamated with the British Provident Assurance Society.

By an indenture dated the 1st June 1858, and made between two of the directors of the British Provident Society of the one part, and two of the directors of the Anglo-Australian Company of the other part, it was agreed that, as and from the 19th April then instant, all the business, property and effects of the Anglo-Australian Company should be transferred to the British Provident Society; and it was provided that the shareholders of the Anglo-Australian should become shareholders of the British Provident, and should execute the deed of settlement of the latter society, and that thereupon the said shareholders should, out of the funds and property of the British Provident, be indemnified against all claims in respect of the Anglo-Australian Company; that such execution should be completed on or before the 24th June then next, and that such of the shareholders as should fail to execute the deed of settlement should be precluded from the benefits of such amalgamation.

By another indenture, dated the 28th Oct. 1858, all the assets, effects and property whatsoever of the Anglo-Australian Company were assigned to three persons as trustees for and on behalf of the British Provident Society; and the evidence went to show that the Anglo-Australian Company had no assets by reason of the above amalgamation.

Collins, who was originally a shareholder of the Anglo-Australian for twenty shares, and who had signed the deed of settlement of the British Provident on the 23rd June 1858 for the like amount, submitted that he had ceased to be a shareholder of the Anglo-Australian on the 23rd June 1858.

It appeared that some two-thirds of the Anglo-Australian shareholders had not signed the British Provident deed, and thus were not entitled to the indemnity, at least, in the express terms of the deed: (*The Anglo-Australian Company v. The Official*

Manager of the British, &c. Society, 6 L. T. Rep. N. S. 68, 517.)

On the 8th March 1861 an order was made by Kindersley, V.C. for winding-up the British Provident Society (see *Re The British Provident Society*, 7 L. T. Rep. N. S. 234), which proceedings were still pending, and a claim had been brought in against the society on behalf of the company, as creditors for the sum of 19,933*l.* 12*s.* 7*d.* and upwards. Among the persons so named, and the liabilities so referred to, was that of the plt. James Woodhams for the sum of 86*l.* 10*s.* and the costs of the suit.

It was shown that calls had been made, and that, amongst others, Collins had paid the calls in respect of twenty shares of the company amounting to the sum of 110*l.*, and that proceedings were pending to make other members of the Anglo-Australian Company, who had not executed the deed of settlement of the British Provident Society, liable for calls in respect of their subscribed capital.

It was contended that the plt. Woodhams had not used due diligence, because he had not carried in any affidavit before Kindersley, V.C. in support of his claim.

It further appeared that in Nov. 1859 a petition was presented by Samuel Smith, a contributory of the Anglo-Australian Company, for the winding-up of that company, which came on to be heard on the 20th Jan. 1860, before Kindersley, V.C., when an order was made to the effect "that it appearing to the court that the Anglo-Australian Company had been amalgamated with the British Society, and that the shareholders of the Anglo-Australian Company, who had executed the deed of settlement of the British Provident Society, were by the terms of the deed of amalgamation indemnified against their liabilities; and it also appearing that Samuel Smith was one of the shareholders of the Anglo-Australian Company who had executed the said deed of settlement of the British Provident Society, and was one of the parties entitled to such indemnity, and that proceedings were pending for winding-up that society, the petition be dismissed with costs." (*Ex parte Smith, re Anglo-Australian Company*, 1 Dr. & Sm. 113; 3 L. T. Rep. N. S. 168.)

Malins, Q. C. and *Shebbeare* supported the motion, relying on the language of the 66th section of the 7 & 8 Vict. c. 110, which enacts, "That every judgment and every decree or order which shall be at any time after the passing of this Act obtained against any company completely registered under this Act, in any action, suit, or other proceeding, prosecuted by or against such company, in any court of law or equity, shall and may take effect and be enforced, and execution thereon be issued, not only against the property and effects of such company, but also (if due diligence shall have been used to obtain satisfaction of such judgment, decree, or order, by execution against the property and effects of such company) then against the person, property and effects of any shareholder for the time being, or any former shareholder of such company, in his natural or individual capacity, until such judgment, decree, or order shall be fully satisfied; provided, in the case of execution against any former shareholder, that such former shareholder was a shareholder of such company at the time when the contract or engagement for which such judgment, decree, or order may have been obtained was entered into, or became a shareholder during the time such contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, decree, or order being obtained; provided also, that in no case shall execution be issued on such judgment, decree, or order against the person, property, or effects of any such former shareholder of such company after the expiration of three years next after the person sought to be charged shall have

ceased to be a shareholder of such company," and of the two following sections. They referred to

Hill v. The London, &c. Assurance Company, 1 H. & N. 398;

Morisse v. The Royal British Bank, 1 C. B., N. S., 67;

Palmer v. The Justice Assurance Society, 6 El. & Bl. 1015.

The 58th section of the Winding-up Act 1848 (11 & 12 Vict. c. 45) expressly reserves the rights of existing creditors.

Bacon, Q. C. and *E. K. Karlake* appeared for Collins.

Several of the witnesses in the cause were cross-examined in court on their affidavits; and it transpired that the plt. Woodhams had by a deed dated 1st Sept. 1862 assigned this debt, with a power of attorney to sue in his name, to one Burgess, whose son-in-law Henry Gover had received a consideration from another person named Webster, on behalf of whom Burgess took the transfer; the plt.'s present solicitor being instructed by Gover.

It was contended that the whole of this proceeding was a scheme invented for the purpose of injuring Collins and screening other members of the company who had not executed the British Provident deed, and thus were entitled to no express personal indemnity: (see the case above referred to.) It was inequitable that Collins should be assailed by two proceedings at once, the action and the winding-up. He could not be a shareholder in both companies at one and the same time. That was proved by the result of the proceeding at the instance of Smith to wind-up the Anglo-Australian. Collins had paid calls to the official manager of the Provident; and more than three years had elapsed since he was a member of the Anglo-Australian Company. Moreover, Woodhams had not used due diligence. The 71st section of the Winding-up Act 1848 provided expressly for the case of debts which shall have been proved before the master or the chief clerk, and directed that they should be placed in a separate list by the official manager. This was in fact a claim enforceable under the winding-up:

Forrest v. The Manchester, Sheffield, &c. Railway Company, 4 L. T. Rep. N. S. 666.

No reply.

The VICE-CHANCELLOR.—It seems to me that not one of the various objections to this motion can prevail. The first objection is, that Woodhams, in whose name the motion is made, has no interest. But it is proved that Woodhams, who obtained the decree against the company, has, for valuable consideration, assigned his debt to Burgess, and that Burgess has by a deed of assignment acquired a right to use the name of Woodhams. Therefore there is no substance in that objection. The next is, that due diligence has not been used against the assets of the company. But the evidence to my mind is quite satisfactory. I think due diligence has been used. The next objection is, that, in truth, Collins has ceased to be a shareholder in the Anglo-Australian Company more than three years ago. But the argument upon that proceeds upon the effect of a deed which is called a deed of amalgamation; and when that deed comes to be looked at, it shows that the liabilities of the shareholders are contemplated and provided for thereby. No doubt the last proviso in the 66th section of the 7 & 8 Vict. c. 110, must have effect given to it, and if it were proved that Collins had executed an assignment whereby he had assigned his shares to anybody, he would have been within the meaning of that proviso. But it is not proved that he ever executed any assignment; and he was not a party to the deed of amalgamation. Lastly, it is said (and this is the most extraordinary objection of all) that the plt., who has obtained a decree against this company, and who, not being able to find any assets of the company, and using

C. B.]

BENNETT v. BLAIN.

[C. B.]

due diligence to find them, comes to have execution against a person whom he proves to be a shareholder, ought to be considered as proceeding under the Winding-up Act, and that his rights (he being acknowledged to have recovered a decree as a creditor) are interfered with by a proceeding under the Winding-up Act before Kindersley, V. C. Really, there is no ground for that argument. As to all that has been said about Mr. Gover, Mr. Webster, and others, it has nothing to do with this matter. Those are objections which, if valid, seem to me to be objections to the decrees in *Woodhams v. The Anglo-Australian Company*. But, after all, Burgess, who is moving in the name of Woodhams, has a right to an order against Collins, who being a shareholder of this company is liable as such shareholder, and must be made liable to the claim now made. The order must be according to the terms of the notice of motion, with costs.

Solicitor for plt., *John Wills*.

Common Law Courts.

COURT OF COMMON BENCH.

Reported by W. MAYN and LOMLEY SMITH, Esqrs.,
Barristers-at-Law.

REGISTRATION APPEALS.

Saturday, Nov. 21.

BENNETT (app.) v. BLAIN (resp.)

Election law—County vote—Shares in joint-stock company provisionally registered—Provision in deed of settlement that shares should be personalty—7 & 8 Vict. c. 110, s. 58.

The app. claimed a right to vote for the county of L. in respect of one share in a freehold corn exchange from which he derived more than 40s. per annum. The corn exchange belonged to a company of shareholders, established in 1837, and registered under the 7 & 8 Vict. c. 110, s. 58. In accordance with the company's deed of settlement the freehold land upon which the exchange stood was vested in trustees. The affairs of the company were transacted by a committee of shareholders called the committee of management, and the profits derived from the corn exchange were divided by the committee among the shareholders. The shares in the exchange were declared by the deed of settlement to be the personal property of the shareholders, and to be transferable in the mode prescribed by the trustees:

Held, that the app. had no freehold interest in land in respect of his share in the corn exchange entitling him to the franchise claimed.

At a court held before one of the revising barristers appointed to revise the lists of voters for the southern division of the county of Lancaster, at Manchester, on the 13th Oct. 1863, the name of James Bennett was objected to as not being entitled to be retained or inserted in the Manchester list of voters for the southern division of the county palatine of Lancaster. The revising barrister disallowed the claim and stated the following case:—

The said James Bennett is entitled to one share in the Manchester Corn Exchange, in Hanging-ditch, in Manchester aforesaid, from which he receives more than 40s. per annum.

The company of proprietors of the Manchester Corn Exchange was established by deed of settlement dated 20th Jan. 1837. (A printed copy of the deed accompanied the case.)

The land upon which the corn exchange is built is freehold, and was conveyed to and is now vested in trustees. The income is derived from letting the offices and cellars under the large room, from letting

stands in the hall or large room for the use of subscribers on the day on which the corn-market is held, and the right of personal entrance to the building, and also from the money paid for the use of the large hall for public meetings, concerts, &c.

The company has only been registered under the 7 & 8 Vict. c. 110, s. 58, and the following is a copy of the certificate:—

"Certificate of formal registration of the Manchester Corn Exchange Company, pursuant to the Act 7 & 8 Vict. c. 110.

"I, Frederic Rogers, Esq., registrar of joint-stock companies, do hereby certify that the company of proprietors of the Manchester Corn Exchange Company is registered pursuant to the 58th section of the above-mentioned Act.

"Given under my hand and sealed with my seal of office, Jan. 8, 1845.

"FREDERIC ROGERS,

"Registrar of Joint-Stock Companies."

It was objected—First, that the said company, being registered as above, became a corporation; and the case of *Bulmer v. Norris*, K. & G. 321; 3 L. T. Rep. N. S. 470, was cited on that point. Secondly, that the interests of the proprietors was merely personalty, and did not confer the right of voting. Upon each of these grounds the revising barrister disallowed the vote. The votes of thirty-eight claimants were also disallowed, who claimed under precisely similar facts, and the revising barrister granted appeals in each case, which were consolidated. The names of all the apps. as they appeared on the list of claimants to vote were appended to the case. The form used in each case was similar to the following:

Name.	Abode.	Nature of Qualification.	Where situate.
Bennett James	Yew-tree-cottage, Cramp-sell.	Share in Freehold Corn Exchange.	Hanging-ditch

If this decision be wrong, the names of the apps. are to be restored to and inserted in the register.

Hansen for the app.—The company has never been completely registered, but only formally registered for the purpose of protecting the directors. By 7 & 8 Vict. c. 110, s. 59, a company is to be considered as incorporated on certificate of complete registration. In *Bulmer v. Norris* the company had been completely registered, which distinguishes that case from the present. As to the second point, it is true that the company's deed provides that the shares shall be considered as personalty, but the agreement of parties can have no effect to destroy the ordinary incidents attaching to the possession of realty. One of those incidents is a right to vote in respect of a freehold producing 40s. per annum. [KEATING, J. referred to *Baxter v. Brown*, 7 M. & G. 198.] The case of a partnership was there expressly distinguished from that of a company incorporated by Act of Parliament. When the partners executed the partnership deed in that case, and declared that the estate and lands belonging to the partnership should be deemed personalty, they had no intention of depriving themselves of their right to vote in respect of their interest in the land, and so when this corn exchange was projected there was no such intention on the part of the projectors.

Welsby, for the resp.—As to the second point, the interest of the app. in the corn exchange is personalty only. The rule is well expressed in *Rogers on Elections*, 7th edit. 132, where *Bligh v. Brent*, 2 Y. & C. 268, is cited. The property here is conveyed to trustees, whose duty it is to divide the profits between the shareholders. The shares are, according to the

deed, to be transferable in any manner prescribed by the trustees, and the mode of transfer prescribed may be quite inapplicable to real property. If the app.'s contention is right it will be difficult to say who are the persons equitably seised. Would the executors of deceased shareholders be equitably seised? Would new shareholders be so? This case is distinguishable from *Baxter v. Brown*. [WILLIAMS, J.—That case is criticised by Lord St. Leonards in *Myers v. Perigal* (reported at law, 11 C. B. 90; in equity, 16 Sim. 533; and on appeal, 2 De G. M. & G. 599), which decided that shares in a joint-stock bank which possessed real estate were not within the Statute of Mortmain.] Shares in gas companies have been held not to come within the Statute of Mortmain, and the interest of a shareholder in a mine worked on the cost-book principle is personality and not realty:

Waller v. Richardson, 2 M. & W. 882;
Thompson v. Thompson, 1 Coll. Ch. Rep. 381;
Watson v. Spratley, 10 Ex. 222;
Edwards v. Hall, 19 Jur. 1189; 25 L. J. 82, Ch.

Hammes in reply.—When an Act of Parliament directs that shares in a company shall be considered to be personality, no difficulty can arise; but from such cases no analogy can be derived which shall govern the present case. The committee here have the power of letting the rooms. The trustees are not consulted about the management or control of the business, which is entirely in the hands of the proprietors and their committee. The proprietors are in the position of *cestuis que trust* left in possession by their trustees.

ERLE, C. J.—I am of opinion that the revising barrister in this case was right in holding that the franchise was not gained. He was right in respect of the one ground that he takes first, namely, that the shareholders in this company have not an interest in land. I think he was wrong in holding that the shareholders in this company were in the nature of a corporation, and were deprived of any of the interests which the individuals had held, because they had been parted with by reason of the rights vested in the corporation. The company was formed for the purpose of establishing a corn exchange in Manchester. The legal estate in the land is vested in trustees under a deed, and it is the duty of the committee of management to make profit of the land, and, after paying the expenses, to divide the profits among the shareholders. I am of opinion that the effect of the deed is to give each shareholder a right to call for his share of the profits, but that he has no right to a share of the land. The shareholders are, by the deed, declared to have only a personal interest, and the deed gives them modes of transferring the property which may not be consistent with the rules of law relating to the transfer of real property, and the whole tenor of the deed appears to be to constitute an interest of a kind which has become perfectly well known, and has been the subject of consideration in the cases of many joint-stock companies. Now, is there any law prohibiting such an intention from being carried into execution? The legal estate in the land is in the trustees, who have undertaken to hold it under a committee invested with specific but very limited powers of letting stands in the market-place, and turning the corn exchange to profit in the manner specified in the deed. The very elaborate judgment in *Bulmer v. Norris* goes into all the cases upon this subject. That was the case of a joint-stock company incorporated, but it is clearly specified in the judgment that there may be many forms of companies contemplating that their lands should be vested in trustees, the shareholders having a right to a share in the profits, but not having any of the rights or liabilities that belong to the proprietors of land. So it is with respect to a company

incorporated under the Joint-Stock Companies Act. And such is the effect of the judgment in *Watson v. Spratley*, in which there is a most learned and elaborate judgment of Martin, B., as to a mine granted to a purser, where there is an arrangement that the mine should be worked by the purser, and the profits divided among the co-adventurers; and the question arose whether the co-adventurers had an interest in the land. Their interest was decided to be in the profits made by the purser, and not in the land. The judges in that case all concur in saying that parties may, if they choose, create such an interest as I have stated; land being vested in a purser in trust to work the mine, and the co-adventurers having a right to the profits. All that the judgment of Barons Alderson and Parke found in this case is, that upon the facts stated by Martin, B., who tried the cause, it was clear it was an interest the parties took in the mine upon the cost-book principle. Parke, Martin and Alderson, BB., said that they thought that the facts had not been sufficiently found by the jury, and that it was right that they should be investigated again by another jury, but all of the judges were of opinion that if the jury found that it was the intention of the parties to carry on the mine on the cost-book principle, the law would give effect to that intention, and that the property would be vested in the purser and the co-adventurers would have no interest in the land. The case of *Myers v. Perigal*, holding that the shareholders in such a company as this are not within the Statute of Mortmain, and the elaborate judgment in *Bulmer v. Norris*, are to the same effect. Whether the former case be rightly decided or not, whether Lord St. Leonards' dissatisfaction with it be well founded or not, the tenor of the cases to which I have adverted affords, in my opinion, an ample foundation for the judgment to which the revising barrister has come in this case.

WILLIAMS, B.—I am of the same opinion. I think that this case must be governed by the principle which has been explained in the several cases to which we were referred in the course of the argument, and in particular in that of *Edwards v. Hall*, before Lord Cranworth, as to shares in joint-stock companies—canal, dock, railway, gaslight, water and banking companies. Now that principle has been solemnly decided to apply equally to a company which is not a corporation as to a company which is, and those cases were considered applicable and taken into consideration in the case of *Myers v. Perigal*. It is that a shareholder in a company of this description, has no direct right to any portion of the tolls or rates, or other income enjoyed by the company, but only to a proportionate share of the profits. Now, applying that principle to the present case, it seems to me that, according to the deed which governs the affairs of this company, the income of the real estate in respect of which the franchise is claimed is an income which is to be taken by the committee who are to conduct the affairs of the company and incur such expenses as are necessary for the conduct of the company, and pay the balance to the shareholders. I conceive that neither in law nor in equity is a shareholder entitled to any particular income arising from the land held in trust for the company. He is only entitled to a proportionate share of the profits. Therefore, according to the principle of those cases, which led the courts to say that a share, in such companies as came under consideration there, was not an interest in land, I apprehend that in the present case the shareholders have no interest at law or in equity in the land or in the income of that which is the subject of the trust, and therefore that they are not entitled to have the franchise in respect thereof.

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KEATING, J.—I am of the same opinion. I think the app. has not an interest, legal or equitable, in the land, and that the deed under which he claims does not confer upon him any such interest. The deed creates a certain amount of capital to be divided into shares, and applied, amongst other purposes, to the acquisition of land and the building of a corn exchange, and the shares are made transferable in the way in which companies' shares are usually transferred, and provisions are made for dividends in the way usual with joint stock-companies. That being so, what are the rights of a shareholder? Could he go at any time and receive the moneys, or any particular portion of the moneys, in respect of the standings in the corn exchange? Certainly not; all that he could do would be to claim, in respect of his share, the dividend which would be appropriated to his share under the terms of the deed; that is, the dividend resulting from the profits of the company. I think, therefore, that unless Mr. Hannen's proposition can be maintained, that it is not competent for the parties by any arrangements to disqualify themselves, as it were, to vote for land which forms part of the property of this company, the app. cannot support his claim. But I think that Mr. Hannen's proposition cannot be maintained to that extent. The case of *Watson v. Spratley* seems to me to be in direct opposition to the proposition, and there is no authority whatever in its favour. In the case of *Baxter v. Brown*, 7 M. & G., though the land was held by the terms of a deed between the parties, it did not appear that the partners intended to divest themselves of the right to have votes incident to the ownership of the land; yet no such proposition was laid down in the case as that it was not competent to any parties by any words or deeds to disqualify themselves. Therefore the revising barrister was right, and the app. has no claim to vote.

Judgment for resp.

Tuesday, Nov. 24.

FORCE (app.) v. FLOUD (resp.)

Election law—Objection.

By 6 & 7 Vict. c. 18, s. 17, a notice of objection to the name of any person being inserted in the list of voters is to be given by the objector to the claimant, and is to be in the form given in schedule B., No. 11, which is in the following terms:—"To Mr. ——. I hereby give you notice that I object to your name being retained, &c." The notice given in the present case was as follows:—"To Mr. Sidney Rice Force. I hereby give you notice that I object to the name of Force Sidney Rice being retained," &c.; this was objected to on the ground that it did not comply with the form given in the schedule, as the names were used instead of the pronoun "your," and the Christian and surnames were transposed:

Held, that the notice was essentially in the form required by the statute, and that if the transposition of the names was a misdescription, it was cured by sect. 101, which enacts that "no misnomer or inaccurate description" of a person shall vitiate the notice.

This was a consolidated appeal from the court of the revising barrister for the city of Exeter, the following case being stated for the opinion of the court.

CASE.

At the court held before me, H. T. E., barrister-at-law, duly appointed to revise the list of voters for the city of Exeter, Thomas Floud objected to the name of Sidney Rice Force being retained on the list of persons entitled to vote as occupiers in the election of members for the city of Exeter.

Sidney Rice Force stood on the occupiers' list of the parish of St. Sidwell, thus:—

Force, Sidney Rice	Dix's Field	House	Dix's Field, in succession from house, Sidwell-street.
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The notices of objection were duly served, and the only question raised is, as to the form of the notice of objection given to the party objected to, which was in the following form:—

"To Mr. Sidney Rice Force.

"I hereby give you notice that I object to the name of Force Sidney Rice being retained on the list of persons entitled to vote as occupiers in the election of members for the city of Exeter.

"Dated this 20th day of Aug. 1863.

(Signed) "THOMAS FLOUD, of Bedford-circus, in the precincts of Bedford, on the list of voters for the said precincts of Bedford, in the said city of Exeter."

On the part of the apps. it was contended that this notice was bad, because it was not according to the form number 11, in the schedule B. of the statute 6 Vict. c. 18. It was argued that the notice ought to have run thus: "I object to your name being retained," &c. &c.; and great stress was laid on the circumstance that by the 17th section of the statute 6 Vict. c. 18, the notice to the party objected to is required to be "according to the form numbered 11, schedule B," omitting the words "or to the like effect," which occur in the 15th and 17th sections in speaking of other notices. It was also argued that the transposition of the Christian name and surname in the body of the notice was likely to mislead the party receiving the notice as to its meaning, and that there were no words to show that the person objected to was the same person as the party to whom the notice was addressed.

There was no other person of the same name on any list of voters for the city of Exeter.

I was of opinion that the notice was not bad merely because it departed from the very words of the form No. 11, schedule B., if it was so framed as to inform with sufficient clearness the person to whom it was addressed that the objection was directed against his name, and I was of opinion that the name of the person objected to was so denominated in the notice as to be commonly understood, and that it sufficiently appeared on the notice that the person whose vote was objected to was Sidney Rice Force, the person to whom the notice was addressed, and I was satisfied that the person to whom the notice was addressed, and on whom it was served, was not misled or in danger of being misled, by the form of the notice.

I therefore decided that the notice was good, and required Sidney Rice Force to prove his qualification, which he failed to do, whereupon I expunged his name from the list.

At the same court Thomas Floud and Merlin Fryer respectively objected to the names of the several other persons whose names and qualifications are set forth in the schedule hereto being retained on the several lists respectively mentioned in the said schedule of persons entitled to vote in the election of members for the city of Exeter. In all the cases the notice to the party objected to was precisely similar to the notice in the case of Force, except that the word "freemen," or "freeholders," as the case may be, was in the proper instances used for the word "occupiers." In all these cases the notices were duly served, and each notice was in the heading thereof duly addressed to the party objected to, the Christian name preceding the surname, and then in the body of the notice the names were transposed as in Force's case. In these cases there was not any instance where two persons of the same name stood on any list of voters for the city of Exeter. In all

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these cases I was of opinion that the name of the person objected to was so denominated as to be commonly understood, and that it sufficiently appeared on the notice that the person whose vote was objected to was the person to whom the notice was addressed, and I was satisfied in all these cases that the person to whom the notice was addressed, and on whom it was served, was not misled by the form of the notice.

The validity of these objections in all the cases hereinbefore mentioned depends upon the same point of law, and the appeals ought to be consolidated. If the Court of C. P. shall be of opinion that my decision was wrong, and that the notices of objection were invalid by reason of their form, then the names of the app. Sidney Rice Force and of the several other persons whose names and qualifications are set forth in the schedule, are to be restored to the respective lists from which they have been expunged.

I name the said Sidney Rice Force (who consents thereto) to be the app., and the said Thomas Flound (who consents thereto) to be the resp. in this consolidated appeal.

(Signed) H. T. E.,

Revising Barrister.

Karslake, Q. C. (Bourke with him) for the app.—The revising barrister decided that the notice of objection, which was not in the form given in the schedule to the Act (6 & 7 Vict. c. 18, sch. B, No. 11), was a good notice on the ground that it was sufficient to inform the party to whom it was addressed that he was the person objected to. The question here arises on the end of the 17th section of the 6 & 7 Vict. c. 18, which enacts that every person objecting shall give to the person objected to "a notice according to the form numbered 11 in the said schedule B. &c.;" that form was not followed in this case. [ERLE, C.J.—What is the departure?] Instead of saying, "I object to your name," it is "I object to the name of Force Sidney Rice;" and besides this, the name really was "Sidney Rice Force." [Mellish, Q. C.—But it was directed to Sidney Rice Force.] I know of no case in which there has been a departure from the form of the notice. *Wansey v. Parkins*, 7 M. & G. 137, has no bearing on the present case except as showing what was passing in their Lordships' minds as to the construction of the Act of Parliament. *Cresswell, J.* says (p. 142-3): "It may be laid down as a safe rule in the construction of Acts of Parliament that we are to look at the words of the Act and to render them strictly, unless manifest absurdity and injustice would result from such a construction." And *Tindal, C. J.*, at p. 141: "The question in this case has not to be determined by any supposed hardships that may arise, but upon consideration whether or not the notice of objection is in compliance with the Act of Parliament." In *Eidsforth v. Farrar*, 4 C. B. 17, it is laid down that "where a man has a power conferred upon him by Act of Parliament of dealing with the rights of another, he must show distinctly that he falls within the description of persons to whom such power is given." Here then he must conform to the terms of the Act which gives him the power to object. The Legislature has given a certain form of objection. [BYLES, J.—You say that the word "your" ought to have been used instead of the word "you" stands for.] I say that the word "your" ought to be used and no other; that is my contention. If this is good, any form of notice might be used that the revising barrister thinks sufficient. Then there is another inaccuracy: the notice is directed to "Sidney Rice Force," and the name in the notice is "Force Sidney Rice." The 101st section (6 & 7 Vict. c. 18), does not apply to this case; all it provides for is that "any inaccurate description of any person, place, or thing," shall not vitiate the notice. The revising barrister had no power to allow a departure from the express words of the schedule, though he

might have altered a mere misnomer, as "St. George" for "Saint George."

Mellish, Q. C., for the resp., was not called upon.

ERLE, C.J.—I am of opinion that the revising barrister was right. Whether the Legislature intended to make a difference between the two sections or not, I am of opinion that the objector has complied with all the essential requisites of the statute in respect of the notice that he has given. The form requires the notice to be directed to a person by name, and then are to come the words, "I object to your name." One objection of Mr. Karslake is, that he uses the actual name instead of the pronoun, "I object to the name of Mr. Force on this list," and that therefore the notice would be void because it must be in the form given in the schedule, or words to the like effect. I do not think the Legislature intended that there should be that species of absolute and literal accuracy as to a known matter of form, and for all useful purposes I should conceive, in such a case as I have put, you might use the name instead of the pronoun. Then the other objection is, that the surname appears first, and it is followed by the Christian names Sidney Rice, "Force, Sidney Rice," as though "Force" was the Christian name. It would be commonly understood that the surname was "Force" and "Sidney Rice," the Christian names. And the 101st section says, no inaccuracy in any description or misnomer shall vitiate the notice. It was perfectly understood by the parties interested, and I think was within the curative effect of the section. It seems to me, therefore, that the notice required in respect of objections under sect. 17 was essentially in the form required, and the revising barrister was right, and the decision must be affirmed.

WILLIAMS, J.—I am also of opinion that the revising barrister was right in holding the notice sufficient as a notice according to the form given in schedule B, as required by the 17th section of the 6 & 7 Vict. c. 18. It is evident it would be absurd to hold that the language of the notice must be servilely followed, and that any variance whatever would vitiate it, when, if there was a variance, it may be explained, and the information conveyed be exactly the same. Therefore, it comes to a question of degree, and it seems to be an inquiry merely, whether the notice is essentially according to the form. I think the notice in this case is essentially according to the form, and that it was sufficient.

BYLES, J.—I am of the same opinion. This notice is addressed to the party objected to by his two Christian names and a surname. Then, says the statute, you shall go on and say, "I object to your name being retained on the list of voters." The objection of Mr. Karslake is, that instead of saying "your name," he goes on and repeats the two Christian names and the surname, and that is but another form of "your," or of the pronomen; instead of using the pronomen, he uses the nomina. I agree with my Lord and my brother Williams, that there is no necessity to have recourse to the healing efficacy of the last clause in the Act of Parliament. Then it is said the names are transposed. I doubt whether that be really so, because, for the purposes of this notice, the surname is more important than the two Christian names, because, on looking at the list, a party would find the surname before the two Christian names. But, at all events, when the statute uses the word "your," it does not say that that form shall be followed implicitly. I cannot see that there is any difficulty, and if there was, the healing section would come into operation.

KEATING, J.—I am quite of the same opinion. The only possible way in which it can be suggested that this notice would be bad was, that there might have been other persons of the same name. The revising

[Ex.]

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[Ex.]

barriater has found, as a fact, there was no other person of the same name. I think, if there be a misdescription, it was cured by the 101st section.

Judgment for the resp.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Nov. 11 and 12.

BUSH AND ANOTHER (Executors, &c.) v. MARTIN.

Actions by clerk to commissioners under Local Act for salary and for law bill—Power to raise money to pay salaries—Retrospective rate—Statute of Limitations.

Plts., as executors of J. B., by their declaration, sought to recover from deflt. as clerk to commissioners under a local Paving and Lighting Act, empowering them to appoint a clerk and to pay his salary out of the rates, &c., the amount of salary due under the Act to their testator, a deceased attorney, for work, &c., done by him for the commissioners as their clerk, duly appointed under the Act, and upon their retainer as such commissioners. Deflt. pleaded in effect that the debt accrued due, part of it nine years, and the residue five years, before action; that the commissioners had not, at its accruing, or at any time since, funds in hand applicable to the claim; that they had collected all moneys and rates which the Act authorized them to collect, and applied all the funds in their hands in manner provided by the Act, except a small part retained by them to satisfy, as they were bound to do, certain just claims accrued due since, and other than the claim of plts., and that all moneys which the commissioners as such were empowered to collect in any one year had not been, at any one time, and would not be, more than sufficient to pay the aforesaid just claims and the necessary current expenses of the year:

Held, on demurrer, that the plea furnished no answer to the claim of the plts. A debt being shown to be due, the plts. were entitled to judgment, irrespective of the question how they might be able to deal with it when seeking to realise its fruits: (Pallister v. Mayor, &c. of Gravesend, 9 C. B. 774; 19 L. J., N. S., 358, C. P.; Payne v. Mayor, &c. of Brecon, 3 H. & N. 572; 27 L. J. 495, Ex.)

Semble, the declaration was not bad for want of an allegation of funds in the hands of the commissioners, which, if it were a necessary allegation, was cured by the plea which admitted some money in hand.

To a declaration by the same plts. against the same deflt., seeking to recover from the deflt. as clerk, &c., the amount of a bill of costs for work, &c. done by the said testator, as an attorney, &c. for the said commissioners as such, upon their retainer and at their request as such commissioners, deflt. pleaded a similar plea to the one above stated, except that it alleged in effect that the debt accrued due, part of it twenty-one years, and the residue twelve years, before action:

Held, on demurrer, that the plea did not amount to an informal plea of the Statute of Limitations, and plts. therefore were entitled to judgment in this action also.

Per Bramwell, B.—A debt may accrue for the purpose of the Statute of Limitations twice over, and therefore it is not enough for the plea to say the cause of action accrued more than six years ago, unless in effect it says that it did not accrue within six years in point of law.

Declaration by plts. as executor and executrix of the will of John Bush deceased, in an action against deflt.

as and being the clerk to the commissioners for putting into execution the provisions of an Act of Parliament (3 Vict.) for paving, lighting, &c. the town of Bradford, in the county of Wilts, for money payable by the said commissioners as such to the plts. as executor and executrix as aforesaid for the wages or salary of the said J. Bush, payable by the said commissioners as such to the said J. Bush in his lifetime, for work and services by him done and rendered in his lifetime as the clerk to the commissioners duly nominated and appointed under the provisions of the said Act in that behalf, and upon the retainer of the said commissioners as such and at their request, and for money in the lifetime of the said J. Bush found to be due from the said commissioners as such to the said J. Bush, on accounts in the lifetime of the said J. Bush stated between the said J. Bush and the said commissioners as such, of and concerning the matters aforesaid, and for money since the death of the said J. Bush found to be due from the said commissioners as such to plts. as executor and executrix as aforesaid on accounts since the death of the said J. Bush stated between plts. as executor and executrix as aforesaid, and the said commissioners as such, of and concerning the matters aforesaid.

Plea 3. That this action was commenced on 21st July 1862, and that the debts and moneys in the declaration mentioned accrued due many years before the commencement thereof; that is to say, to wit, 35l. accrued in and prior to the year 1854, and the residue thereof, to wit, 113l. 15s., in and prior to the year 1857. And further, that the said commissioners had not, at the time of the accruing of the said debts and moneys, nor have they at any time since, had any funds or moneys in hand applicable to the claim of the plts.; that the said commissioners have duly collected as far as it was or is possible to collect the same, all moneys and rates which they were or are authorised to levy and collect; and that they have duly applied, disposed of and expended all funds and moneys, which have ever come to their hands as such commissioners as aforesaid, in and according to the manner provided by the said Act of Parliament, except a small part thereof; and that the said part of the said moneys and funds so remaining in their hands is required by, and has, in the *bond fide* exercise by the said commissioners of their discretion as such commissioners, been set apart for the purpose of satisfying, according to the said Act of Parliament, certain just claims upon the said commissioners which have arisen and accrued long since the accruing of the debts and moneys in the declaration mentioned, and are other and different claims than the said debts and moneys which the said commissioners are bound under the said Act to pay and satisfy out of such funds and moneys so far as the same will extend. And further, that the whole amount of any funds or moneys which could be raised and collected or received by the said commissioners as such by any rate heretofore made or to be made and levied, or in any other manner whatsoever, would be required by the said commissioners to meet the said just claims and the subsequent current costs, charges and expenses of the year in which the said rate was made and levied. And further, that the moneys which by the said Act the said commissioners as such are empowered to raise, collect, or receive in any one year, have not been at any one time, and will not be, more than sufficient to pay and satisfy the aforesaid just claims and interest, and necessary current costs, charges and expenses of the year, and that there never has yet been, and is not likely to be, any surplus in the hands of the said commissioners, or receivable by them as such, whereout the said commissioners as such could pay or satisfy the debts and moneys in the declaration mentioned.

Plea 4. That this action was commenced after the

[Ex.]

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[Ex.]

passing of the 7 Vict. c. 73 (the Attorneys and Solicitors Act) and is maintained for the recovery of fees, charges and disbursements for business done by the said J. Bush, deceased, as an attorney and solicitor for the said commissioners as such, and plts. did not, nor did the said J. Bush, one calendar month before the commencement of the action, deliver, &c. (Plea of no signed bill delivered as required by the said statute.)

Demurrer and joinder in demurrer to the third and fourth pleas.

A ground of demurrer to the said pleas marked in the margin was, that the fact that the commissioners had not nor were likely to have any moneys in their hands to pay the plts.' claim, affords no sufficient reason why plts. should not recover judgment for such claim.

A ground of demurrer to the fourth plea was, the plts.' claim sued for being on the face of the declaration for work and services done and rendered by J. Bush, deceased, as clerk to the said commissioners, the action could not have been for the recovery of fees, charges and disbursements for business done by the said J. Bush as an attorney and solicitor for the said commissioners, and the plea is no answer.

Plts.' points:—As to the demurrer to third plea: That the plea is in effect a statement by the commissioners that they have contracted a debt which they have not the money to pay, and affords no answer to an action of debt to recover that which is admitted to be a just claim on the part of the plts.

As to the demurrer to fourth plea:—1. That the claim in the declaration for the salary of plt., is not a claim in respect of fees, charges and disbursements for business done by plt. in his capacity of attorney and solicitor, but in his capacity of clerk to the commissioners, and is not, therefore, within the Attorney and Solicitors Act. 2. That the office of clerk to the commissioners might be held by any one who was not an attorney or solicitor. 3. That the fact of Mr. Bush being an attorney or solicitor does not render it necessary for him to send in a signed bill in accordance with the Attorneys and Solicitors Act, in respect of work done or salary earned by him, that any one not an attorney or solicitor might perform or earn.

Def'ts.' points:—As to the demurrer to the third plea: 1. The plea sufficiently shows that the commissioners would have no other means of satisfying the claim of plts. than by levying a retrospective rate, which they have no power of imposing under their local Act. 2. The plea shows that part of the debt claimed was incurred more than nine years ago, and that no part of it is less than five years old, and the provisions of the local Act do not render the existing commissioners liable for debts which have been barred by the Statute of Limitations; or empower them to throw the burden of debts more than five years old on the existing ratepayers of the borough.

As to the demurrer to fourth plea.—The declaration admits that this action is brought for recovery of fees, &c., for business &c. done by testator as an attorney and solicitor for the commissioners, and consequently it was necessary that a bill of these fees should have been delivered, according to the provisions of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37), although the testator may, as the declaration alleges, have also been the clerk to the commissioners. 4. The decision of this court on the argument of the rule for reducing the damages in this case on 29th May 1863 does not affect the question raised by this demurrer, because the demurrer admits that all the services of testator as clerk to the commissioners were rendered as their attorney and solicitor also: (see *Bush and another v. Martin*, 8 L. T. Rep. N. S. 509.)

The following sections of the local Act (2 & 3 Vict.

c. 63) were referred to in the course of the argument:—

By sect. 12, annual accounts of the receipts and expenditure of all funds levied by virtue of the Act for every year are to be prepared by the commissioners.

By sect. 13, the commissioners may nominate and appoint a clerk, treasurer, collector of the rates, &c., and such other officers for the execution of the Act as they shall think proper; and the said commissioners may remove and displace any such clerk, &c., from time to time, whenever they shall think proper, and shall and may, out of the moneys that shall arise and be collected by virtue of this Act, allow and pay to such officers such salaries or allowances as the said commissioners shall think reasonable.

By sect. 16, the commissioners may sue and be sued in the name of their clerk.

By sect. 69, rates are to be made annually for the purposes of the Act. Sect. 80 empowers the commissioners to purchase lands and houses for the purposes of the Act; and sect. 94 directs that the rates, &c. to be levied under the Act shall be applied as therein mentioned for carrying the purposes of the Act into execution.

The facts of the case will be found in the report of the same case in another stage of the proceedings: (*vide Bush v. Martin*, 8 L. T. Rep. N. S. 509.)

H. Lopes (with him *Kingleake*, Serjt.) for plts. in support of the demurrer.—The 13th section of the local Act empowered the commissioners to pay their clerk's salary out of the rates, &c., raised under the Act, and therefore to say they had no money, and had properly expended what they had, was no answer to an action of debt. The question whether the commissioners had power to make a retrospective rate to pay the plts.' claim was premature and beside the point. But though that question could not be raised under the third plea, it was clear from *Harrison v. Stickney*, 3 H. of L. Cas. 108, that such a retrospective rate could be made. The plea was bad, and whether plts. could or not hereafter reap the fruits of their judgment, they were nevertheless entitled to judgment on this demurrer: (*Pallister v. Mayor, &c., of Gravesend*, 9 C. B. 774; 19 L. J. N. S., 358, C. P.) The plea here did not negative the fact of the commissioners having other property which might be taken, and was bad also on that ground:

Payne v. Mayor, &c., of Brecon, 3 H. & N. 572; 27 L. J. 495, Ex.; and

Lewis v. Mayor, &c., of Rochester, 3 L. T. Rep. N. S. 300; 30 L. J. 169, C. P.,

were precisely in point, and in plts.' favour. A point raised by def't. appeared to be that the commissioners were not bound to pay a statute barred debt, but if the commissioners had power and acted they were subject to the incidents necessarily attaching to their so acting. *Day v. Emery*, 1 C. M. & R. 245; 3 L. J. 308, Ex., was conclusive on the point which had also been already decided in plts.' favour:

Bush v. Beavan, 7 L. T. Rep. N. S. 106;

Bush v. Martin, 8 L. T. Rep. N. S. 509.

As to the fourth plea, it was not necessary that a clerk to commissioners at a fixed salary should deliver a signed bill as an attorney under sect. 37 of 6 & 7 Vict. c. 73: (*Bush v. Martin*, *ubi sup.*)

The *Solicitor-General* (with him *H. Bullar*) contra, for def'ts.—Plts. were suing the commissioners as such. The first point went to the goodness of the declaration. Without showing there were funds in hand applicable to the claim, plts. could not recover. That was a material allegation; wanting which the declaration was bad: (*Bogg v. Pearse*, 10 C. B. 534; 20 L. J., N. S., 99, C. P.) The cases cited contra were corporation cases and had

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[Ex.]

no bearing here. No bond was given here as in those cases, and debts were not a corporation, but mere commissioners, the creatures of the Act, and without any property but that given by the Act, viz. the rates. They appointed a clerk to be paid out of moneys to be raised, which was an implied contract that there was to be no debt until moneys were levied, which was quite consistent with a corporation being liable on a bond or instrument under seal:

Andrews v. Dally, 4 Bing. 566;

Tilson v. Warwick Gaslight Company, 4 B. & C. 962.

If the commissioners improperly refused to collect moneys, the remedy was by action on the case, as in *Cane v. Chapman*, 5 A. & E. 647, or by *mandamus*. Debts might be personally liable, but here their personal liability was not in question. The demand, too, was stale. The Act itself showed the clear intention, of which the clerk necessarily had notice, that the rates were to be levied annually, annual accounts to be prepared, and every year to close its own accounts; the commissioners were, as it were, "to live from hand to mouth:" (sects. 12, 13, and 69.) In *Woods v. Reed*, 2 M. & W. 777, Lord Abinger laid down the general rule, which clearly showed that there could be no retrospective rate charging the present ratepayers with the plts.' stale claim, nor had the clerk ever required the commissioners to make a rate. As to the fourth plea, the statement there put the plts. out of court. Being clerk was consistent with his acting as an attorney, and for the purpose of this argument it was admitted on the record that the work was done as an attorney, and therefore a signed bill should have been delivered. [CHANNELL, B. referred to and read a part of the judgment of the Court of Ex. in *Bush v. Beavan*, 7 L. T. Rep. N. S. 106.] (a)

H. Lopes in reply.

POLLOCK, C. B.—We are all of opinion that the plts. are entitled to judgment. The plts. say in their declaration, "You have had services for which you ought to pay." The debts do not deny that by their plea, but merely say that they have no means of payment now. But why not? Have they not power to make a retrospective rate? It has been said by Iowen's counsel that they have no such power; but I don't I do not see why they have not, nor can I see on what ground they mean to say, by their plea, that they are not liable. In my judgment, the third plea forms no answer to the plts.' claim, and, as Mr. Lopes has said, I think the plts. are, at all events, entitled to judgment, whatever they may be able to do with it hereafter, which is entirely another question.

BRAMWELL, B.—I am of the same opinion; and, indeed, I am inclined to think that, if the plea stated what the debts have contended, it would still be no answer to the claim of the plts. The debts have put their case on two grounds. First, they say the declaration is bad, because the statute says the clerk is to be repaid out of the rates and there was no averment of funds in hand. Now, I do not think that the words of the 13th section of the local Act directing the mode of payment of the officers appointed by the commissioners under the Act make any difference. The clerk is to be paid; and the case of *Boggy v. Pearse*, cited by the Solicitor-General, was clearly distinguishable. Another ground relied on by the Solicitor-General was, that there could be no retrospective rate; but I think the two cases cited by Mr. Lopes, in his able argument, answer that objection, and show that it furnishes no answer as a plea in bar. The plea says, &c. [his Lordship read the plea]. Then the plts. say, "Well, you have funds in hand, why should not we have them?" To which the debts, by their plea go on to

say, that "the moneys and funds so remaining in their hands are required by, and have, in the *bona fide* exercise by the commissioners of their discretion, been set apart for the purpose of satisfying, according to the Act of Parliament, certain just claims which have arisen and accrued long since the accruing of the debts and moneys in the declaration mentioned," &c. Then "why," say the plts. to that, "did you set aside funds for the payment of debts accrued since our debt was incurred and which you ought to have satisfied first?" In truth, the debts' answer seems very like saying, "We do not owe you this money, because we have determined to pay somebody else with the money by-and-by." I cannot either make out that the plea establishes the second point made by the Solicitor-General, that the commissioners never had or can have funds wherewith to pay the plts. But it is very difficult to say what the plea really is. However, it is clear to my mind, on the authority of the cases of *Pollister v. The Mayor of Gravesend*, and *Payne v. Mayor, &c. of Brecon*, that a debt being shown to be due, the plts. must have judgment irrespectively of the question of how they will be able to deal with it. Their difficulties will begin when they come to realise the fruits of their judgment; but that is not in question now, but remains, perhaps, for future consideration. We do not decide that the plts. can effectually obtain payment of the money due to them, but only that they are entitled to judgment on the demurrer to the third plea, the demurrer to the fourth plea being withdrawn.

CHANNELL, B.—I also am of opinion that the plts. are entitled to judgment in their favour. A point was raised by the Solicitor-General, that the declaration was bad for want of an allegation that the commissioners had funds in hand applicable to the discharge of the plts.' claim. On the whole, however, I am of opinion that the declaration is good; and the question then is, whether it is answered by the plea, and I consider that it is not. The plea admits the possession of a small fund in hand, and for that and the other reasons mentioned by my brother Bramwell, it appears to me that the plea cannot be supported. I quite agree, too, in thinking that the question for our determination here is, whether the declaration is good, and if good, whether it is answered by the plea, and not whether, if the plts. get a judgment in their favour, they will be able to issue execution upon it. That is a question beside the present matter, and one which will have to be settled another day. The plts. having succeeded on a traverse of the fourth plea, are now willing, in compliance with a suggestion thrown out by brother Bramwell during the argument, to withdraw their demurrer to that plea, and our judgment will therefore be in accordance therewith.

PIGOTT, B.—I concur with my Lord and the rest of the Court in the opinions which they have expressed. The declaration is good, and I cannot see what answer is furnished to it by the third plea. Everything that has been said here to-day might have been said year by year, and every year, in answer to a claim of the plt. for his salary. The mere fact that the claim accrued a long time ago is no answer to the claim, unless the plea had gone on to say that it was the intention of the Legislature that all accounts and claims under the Act should be made out, presented and settled yearly. I do not say it might not have been made a good plea by such an averment, but framed as it is, it is clearly no answer to the present case, and our judgment on the demurrer to the third plea must be for the plts.

Judgment for plts. on the demurrer to the third plea; the plts. withdrawing their demurrer to the fourth plea on the usual terms.

The plts. also brought another action (as executors,

(a) At the suggestion of the Court, plts. withdrew their demurrer to the fourth plea.

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&c.), against debt, as clerk, &c., to recover 191*l*. 13*s*. 2*d*. the amount of a bill of costs for work, &c., done by the deceased in his lifetime as attorney and solicitor for the said commissioners as such, upon their retainer and at their request as such commissioners, to which debt. pleaded similar pleas to the third and fourth pleas in the previous case. The third plea in the present case alleging in effect that "the debts, &c., in the declaration mentioned accrued due many years before action, that is to say, part thereof twenty-one years and the residue twelve years before action."

Demurrer and joinder in demurrer to the plea.

The plts.' point for argument was the same as in the previous case.

Defts.' points:—1. The third plea is good in substance, because it shows that the commissioners under the Act have no other means of paying the plts.' claim than by a retrospective rate, which the Act does not empower them to impose upon the rate-payers. 2. The local Act does not authorise the present commissioners in paying debts incurred by their predecessors, part of which are (as the pleadings and demurrer admit) upwards of twenty years old, and all of which are upwards of twelve years old and barred by the Statute of Limitations. 3. The plea also affords an answer to the action under the Statute of Limitations, no part of the debt having accrued due within six years before commencement of action. 4. The declaration, so far as it relates to the claim of plts. for demands of the testator in his character of an attorney and solicitor, is bad in substance, on the ground that the local Act confers no power on the commissioners as such to employ an attorney and solicitor and to pay him out of the said rates.

H. Lopes (with whom was *Kinglake*, Serjt.) appeared for plts.

The Solicitor-General (with him H. Bullar) for the defts.

The case was not argued, the Solicitor-General admitting that it was similar in all respects to and was governed by the decision in the previous case between the same parties, unless the fact that, as appeared affirmatively on the pleadings, no part of the present claim was of less standing than twelve years before action brought constituted a material difference between the two cases, on which point,

Cur. adv. vult.

Nov. 12.—POLLOCK, C. B.—It was suggested yesterday that there was a difference between this and the case then decided between the same parties, because it might be said, that as to the Statute of Limitations there were two modes in which it might arise: either by the claim originally not having accrued within six years, or it might arise from a renewal of the promise by payment of money, or by a promise in writing which might be proved, as a continuing of the claim; and it might be pleaded not as being within the six years. Now, the plea was not in the ordinary way, but it might have been, at least, that the action did not accrue within six years, or it might be that the cause of action accrued more than six years ago. Now, to say that the cause of action accrued more than six years ago may be perfectly true, and yet the action may be maintainable; for though the cause of action originally accrued more than six years ago, yet a payment of money might be sufficient to take the case out of the statute, or there might have been an actual promise to pay, which would revive the liability. We think there is no substantial difference between the case decided yesterday and the present case, and therefore that Mr. Lopes' clients are entitled to the judgment of the court in this case also.

BRAMWELL, B.—The learned Solicitor-General admitted that the case argued and decided yesterday governed this case with one exception. There was this difference, that in this case it appeared affirm-

atively that no portion of the debt was less than twelve years old. Now that of itself, with reference to the question of retrospective rates, makes no difference. But it was suggested that this amounted to an informal plea of the Statute of Limitations. I am of opinion it does not, for this reason—although it says part of the debt accrued twelve years ago, it does not say the debt did not accrue within six years in point of law; as we all know a debt may accrue for the purpose of the Statute of Limitations twice over, that is to say, at the time of the original promise and the time of the renewal, though manifestly by the common answer to the Statute of Limitations, in taking issue on it that was supported in truth, and the plea was disproved by showing a subsequent promise. Therefore it is not enough for the plea to say the cause of action accrued more than six years ago, unless in effect it says that it did not accrue within six years. It seems that the difference between the two cases is not made out, and the plts. are entitled to our judgment.

CHANNELL, B.—In the case of *Bush v. Martin*, which was fully argued yesterday, the court gave judgment in favour of the plts. There followed another case in the paper between the same parties, very much the same sort of case; indeed the same, unless there was the distinction noticed by the Solicitor-General at the bar, and by my Lord Chief Baron and my brother Bramwell. I am of opinion that this plea does not amount to an informal plea of the Statute of Limitations, and therefore they are one and the same case, and judgment for the plts. is to be given in this case as in the case argued yesterday.

PIGOTT, B.—I am of the same opinion. I only wish to say that the plea does say the defts. never had any money in their hands applicable to the claim of the plts. I do not know the meaning of that at all. All I can say is, why have you not? The Act of Parliament has authorised you to appoint a clerk, and authorised you to pay him, and has pointed out the funds out of which to pay him. It is no answer to say, "We have appointed a clerk, we have had his services, and have no funds out of which to pay him." It seems that is only acknowledging a duty on the part of the defts., though they hint a laches on the part of the plts. The plea is not founded on the plts.' laches, if it had been I conceive that by possibility there might have been a defence made out under the statute.

Judgment for plts. as in the previous case.

Attorneys for plts. in both actions, *Kingsford and Dorman*, 23, Essex-street, Strand, agents for *Spackman*, Bradford, Wilts.

Attorneys for defts. in both actions, *Whittakers and Woolbert*, 12, Lincoln's-inn-fields, agents for *Slack and Simmons*, Bath.

Tuesday, Nov. 24.

HUGHES v. MACFIE AND OTHERS.

ABBOTT v. SAME.

Injury by accident—Plt. contributing to the cause of injury.

The defts. had an opening into their cellar by means of a lid or flapdoor in a public highway, the lid was taken off by defts. and pinned in a leaning state, nearly upright, against the wall of a house, but in the highway over which the public had, from fence to fence, a right of user, subject to the existence of the cellar. The plts. were children at play there; Hughes got upon the lid, whether Abbott did was uncertain; the lid fell down upon and injured both plts.

Held, that defts. were not liable for the injury to Hughes, as it was he who contributed to the cause of the accident—whether Abbott did so or not, the evidence left it uncertain; if he did, the defts.

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[Ex.]

would not then be responsible to him—but if he did not, then they would be responsible.

Declaration (in the Court of Passage of the borough of Liverpool), alleged that defts., by their servants, on, &c., wrongfully and unlawfully threw and laid certain timber, iron, and other materials in and upon a certain public street in the borough of Liverpool called Cheapside, being a common public highway, to the great danger and annoyance of all persons using the said street, and contrary to an Act of Parliament, 5 & 6 Vict. intituled "An Act for the improvement, good government and police regulation of the borough of Liverpool," whereby the said timber, iron and other materials fell upon and struck against the plt., without any default of his, and whilst he was lawfully in the said public street or highway, and thereby the plt. was thrown down and grievously wounded, bruised, lamed and permanently injured and rendered maim and halt for life, and incurred great expense for medical attendance.

Second count.—That defts., by their servants, on &c., so wrongfully, negligently and improperly put, placed and managed a certain cellar-lid, in a certain public street or highway, along which the plt. was then lawfully passing, that the said cellar-lid fell upon and struck against the plt. whereby he was thrown down and grievously wounded, bruised, lamed and permanently injured, and rendered maim and halt for life, and incurred great expense for medical attendance.

Pleas:—1. Not guilty. 2. To first count, that deft. did not wrongfully and unlawfully throw and lay certain timber, iron and other materials in and upon said highway. 3. To first and second counts, that the alleged injuries in those counts mentioned were caused by the negligence and improper conduct of the plt. Issue thereon.

The causes came on for trial before the Assessor in Liverpool, when it appeared that defts. were sugar refiners in a large way of business. At one of their warehouses in Cheapside, Liverpool, there is a cellar in hourly use, and entered by a door or trap, and when goods are being taken into or out of the cellar, this door or lid, of seven or eight hundredweight, is lifted up by a kind of crane, swung round, and placed leaning against a wall four or five feet from the cellar. This lid was made of wood, strengthened on the lower side by three cross bars or beams projecting six or eight inches, and fitting, when the lid is down, into grooves in the side, the upper or smooth side being, when lifted up, placed nearest the wall. It was a place of public thoroughfare, but no regular curb-paved footpath on that side where the cellars were. On the 12th June last the lid had been placed against the wall (complaints had been before made of its being left there in that way), when the plts. (two children, about seven years of age) came with others, climbed up the lid, and Hughes caused it to fall on himself and Abbott, and injured them; they had been before cautioned and requested to go away from the lid. It was contended by the defts. that they were not liable under the circumstances. The plts. were nonsuited, with leave reserved to move this court to set it aside and have a new trial, if the court should be of opinion that there was evidence of negligence by the defts., and a rule nisi having been obtained accordingly on the ground that there was evidence to go to the jury to render the defts. responsible for the injury occasioned to the plts.,

Leo. Temple and Littler showed cause.—There was no evidence of any negligence by the defts., and if there had been they would not have been liable, as the plts. (who were little boys and as infants sued by their next friend) had themselves contributed to the accident by getting upon the cellar-lid to play, in consequence of which they threw it down, and thus the accident occurred. Hughes certainly pulled it down. Abbott

being there at play with him, they were both injured by its fall. There was no evidence that it was put up in any improper manner. The lid was one foot and a half from the base of the wall. There was no evidence to go to the jury, and the learned assessor was right in directing a nonsuit in both actions:

Lynch v. Nurdin, 1 Q. B. 29, has been doubted.

See

Lygo v. Newbold, 9 Ex. 302, by Alderson, B.;
Singleton v. Eastern Counties Railway, 7 C. B.
N. S. 287;

Barnes v. Ward, 9 C. B. 392; and
Hardecastle v. South Yorkshire Railway and River Dun Company, 4 H. & N. 67,

which limited *Barnes v. Ward*.

M'Culloch and R. G. Williams contra, in support of the rule.—The defts. were wrong-doers in having placed this obstruction in the highway. The nonsuit proceeded on the ground that the children themselves contributed to the accident; but here there was negligence and carelessness from the very manner in which the cellar-lid was placed, looking to the character of the street, always with a great many children in it: it was, in fact, their playground. Complaints, too, had been made by the police of this lid being placed there. The lid, from its size and weight, should have been fastened to the wall, or laid flat on the ground; but as it was, a rough wind might have thrown it down. This street was an admitted public highway, and the children had a perfect right to be there, as the entire width of the road between the fences belonged to the public. In *Reg. v. Jones*, 3 Campb. 229, it was held to be an indictable offence for a timber merchant to cut logs of timber in the street adjoining his timber-yard, though he should not be able otherwise to get them into his premises, or to carry on his business there. So in *Illidge v. Goodwin*, 5 C. & P. 190, if a horse and cart are left standing in the street without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer by in striking the horse. *Dixon v. Bell*, 5 M. & Sel. 198, is in principle to the same effect, where a deft. negligently left his horse and cart unattended in the street, the plt., a child seven years old, got upon the cart in play, another child incautiously led the horse on, and thereby the plt. was thrown down and hurt. It was held that deft. was liable, though the plt. was a trespasser, and contributed to the mischief by his own act, and that it was properly left to the jury, whether deft.'s conduct was negligent, and the negligence caused the injury. *Lynch v. Nurdin*, 1 Q. B. 29, is precisely this case, and should decide it; it has never had the least doubt thrown upon it; on the contrary it has been recognised in all the subsequent decisions upon the subject, and cited by writers in all the text-books published; it should therefore be conclusive of the present case. *Curr. adv. val.*

Dec. 7.—POLLOCK, C. B. delivered judgment.—We may shortly state the facts thus: It appears there was a public street at Liverpool, over the whole of which, from fence to fence, the public had a right of way, subject to the existence of certain cellars. There was a footpath on one side, and on the other side no footpath, but the cellars alluded to made that side less commodious as a way than it otherwise would be; still, the public had a right to pass there. The deft. was the occupier of a house and cellar on the side where there was no footpath. He took the flap or cover of his cellar off, and placed it against the wall on the same side, nearly upright, so that it could be easily pulled over. It may be admitted, that if a person passing along a street in the ordinary use of a right of way, without any carelessness on his part, has, by his dress blowing against it, pulled it over, and sustained hurt thereby, he might have maintained an action

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[Ex.]

against the deft. for a negligence or wrong in placing the flap so that, without any negligence on the part of the plt., it was likely to do, and had actually done, damage to him. In the first of these two cases, in which Hughes was plt., the flap was pulled over by the plt., a child of tender age, playing up it, and jumping from it, and it fell upon him, hurting him severely. Had he been an adult, it is clear he could have maintained no action for it; he would voluntarily have meddled for no lawful purpose with that which, if left alone, would not have hurt him, and he would therefore have contributed by his own negligence to his own damage. We think the fact of the plt. being of tender years, in this case, makes no difference. His touching the flap was for no lawful purpose, and if he could maintain the action as it is, he could equally maintain an action if the flap had been placed inside the deft.'s premises, but within sight and reach of the child. As far as the child's act is concerned, he had no more right to touch the flap for the purpose for which he did touch it, than he would have had, had it been inside the deft.'s premises. Cases were referred to, supposed to be in favour of the plt., but we think none are decisive of the present case, and no case establishes a principle opposed to our view, which is, that the non-suit was right, and ought not to be set aside. As to the other case, in which Abbott was the plt., the case is different. He was playing with the rest of the boys, but the exact circumstances do not appear. If he was playing with Hughes so as to be a joint actor with him, we think he cannot maintain the action, but, if not, we think he can, as his injuries would then be the result of the joint negligence of Hughes and of the deft. How this is does not appear, and we think, as to his case, there ought to be a new trial, for the purpose of ascertaining the facts which are left in doubt.

Rule absolute for a new trial in Abbott's action.

Rule discharged in Hughes's action.

Wednesday, Nov. 25.

FLOWER AND ANOTHER v. ALLAN.

C. L. P. A. 1852, ss. 217, 218—*Substituted service of writ—Domiciled Scotchman having a branch place of business only in London.*

The plt. issued a writ against a Scotchman, who always lived in Scotland and had no other place of residence. It was taken twice to his place of business in London for service; it was then given to his clerk there, who forwarded it to him where he then was in Scotland. Deft. afterwards acknowledged to his clerk that he had received it. Deft. was not in England when the writ issued, nor afterwards:

Held, that it did not appear that reasonable efforts to serve the writ personally on deft. had been made, and an order for plt. to proceed in the action as if personal service had been effected was directed to be set aside.

This was an action brought to recover 3215l. 12s. 5d., a balance claimed upon an account current to be due to plt., merchants in London and also in Australia, from deft., who carried on his business at Nos. 3 and 4, Thames-street, London, and also in Glasgow. He resided always in Glasgow, and was a native of Scotland. The writ was in the form prescribed by sect. 2 of the C. L. P. A. 1852, and was issued 16th Oct. 1863, and the plt.'s attorney's clerk swore that, being instructed to serve deft. with a copy, he attended for that purpose at deft.'s warehouse in Thames-street, London, where deft. carried on a very extensive business under the firm of James Allan, sen., on the 13th Oct.; he there saw a clerk, who informed him the deft. was not in; that he seldom came there, but that

he, the clerk, would forward anything to the deft. by post. On the next day he called again, saw another clerk, and as deft. was not in he told the clerk he called on a private matter, and left with him a copy of the writ in an envelope addressed to the deft. (which copy writ the clerk said he would forward), and said he would call again in a day or two for an answer. He called again on the 19th Oct., and saw the same clerk he saw on the 14th Oct., who told him that the copy writ had been forwarded to deft., who had acknowledged the receipt, but that he had received no instructions with reference to it; he attended there again on the 20th, and asked to see the manager, and next morning attended again by appointment and saw the manager, when he informed him that, unless an appearance was entered, an application would be made to a judge for leave to proceed without effecting personal service of the writ. The manager promised to write to the deft. and inform him what he said, and also informed him that he had received from deft. an acknowledgment of his having received the copy writ; that the only address of deft. contained in the Post-office London Directory was as follows: "Allan, James, sen., iron foundry and iron merchant, Rutland-wharf, 3 and 4, Upper Thames-street, E. C.," and that he had been unable to ascertain whether deft. had any other residence or place of abode, but from what he could learn deft. had no other residence, place of business, or place of abode whatever within the jurisdiction of the court.

An application was then made to Martin, B., at chambers, under the C. L. P. A. 1852, s. 17, and he, on the 26th Oct., made an order that the plt. should, three days after service of the order at the deft.'s residence, be at liberty to proceed in the action as if personal service had been effected on the deft. A rule nisi was afterwards obtained to set aside that order on the ground that the deft. was resident out of the jurisdiction of the court when the action commenced, and so continued until the order was made, upon affidavits made by deft.'s manager of the warehouse in Thames-street, and one of the clerks there, in which it was stated that the clerk of the plt.'s attorney did not ask for the deft. when he called at the warehouse, but merely requested that the paper he left should be forwarded; that such clerk was then informed that the deft. resided in Scotland; it was sworn that the deft. was a native of Scotland, and always resided there, and that the alleged claim of plt. was not in respect of any transactions with the warehouse in Upper Thames-street. The deft. himself deposed that he was a resident in the city of Glasgow and a native of Scotland, and had always been resident there, and never in England. His solicitor in Glasgow deposed to the same effect.

Hayes, Serjt. and Thrupp showed cause against the rule.—The language of the 2nd section of the C. L. P. A. 1852 is very wide as to the jurisdiction; that section "provides that actions may be brought against persons residing or supposed to reside within the jurisdiction of the courts of England; and it requires "that the place and county of the residence or supposed residence of the party deft. or wherein the deft. shall be or shall be supposed to be," shall be mentioned in the writ. In *Naef v. Mutter*, 31 L. J. 357, C. P.; 7 L. T. Rep. N. S. 159, it was held that the fact that a person carries on his business in England where the cause or action arose is *prima facie* evidence of his residence there so as to give jurisdiction to issue a writ of summons against him under sect. 2 of the C. L. P. A. 1852, and where, after such writ has been so issued, a judge's order to proceed without personal service has been made under sect. 17 of that Act, the deft. cannot set aside such order, on the ground of being resident out of the

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Ex parte BELK.

[Ex.]

jurisdiction, without making an affidavit showing distinctly where his residence was when the writ was issued, and that an affidavit by the manager of the deft.'s business in England, stating that when the action was brought deft. was resident in Scotland, and that deft., to the best of his belief, had not been in England during the year in which the action was brought, is not sufficient to set aside such order to proceed, and it was doubted by Willes, J., whether the order to proceed would not be good though the deft. was resident in Scotland at the time the action was brought:

Hesketh v. Fleming, 24 L. J. 255, Q. B.;
The Attorney-General v. M'Lean, 32 L. J. 101,
 Ex.; 8 L. T. Rep. N. S. 113; and
Lush's Practice, 258 (2nd edit.), were cited.

Lush, Q. C. and *Watkin Williams* in support of the rule.—It is only a branch of the deft.'s business that is carried on at Thames-street, and when the party came to serve the writ he was told deft. was not there but in Scotland. Substituted service means substitution for service which being actually made would be good. It is not because the deft. could not be served under the 18th section of this Act that therefore he is to be within the 17th. *Hesketh v. Fleming* is in favour of the deft.'s view.

POLLOCK, C.B.—I think this rule should be made absolute. It is not necessary to decide in this case what constitutes residence, or what would be the effect where a man is a member of a firm to whose place of business he comes occasionally. There must be reasonable efforts used to serve a deft.; but how can you make reasonable efforts to serve a man at a place where you are told he is not, and where he very rarely if ever comes? In this case, when all the facts are known, it appears that reasonable efforts to serve the deft. were not made.

BRAMWELL, B.—I am of the same opinion. The 19th section provides for serving foreigners residing out of the jurisdiction of these courts; the 18th section for serving a British subject abroad. In the one case, the Queen sends her order; in the other, the deft. not being one of her subjects, notice only is given. Scotland and Ireland are excepted, and can any one doubt that, if they had been comprehended in the enactment, they would have fallen under the provisions of sect. 18? It was said that because the case is not under sect. 18 it is under 17. Then what is the meaning of sect. 2? It is not happily expressed, but it means to denote all personal actions intended for service within the jurisdiction. There are two arguments which are demonstrative. One, as advanced by Mr. Lush, that substituted service presupposes the possibility of lawful actual service; the other, was there a reasonable effort to serve, supposing all the facts known to those who attempted it? I certainly think there was not. If the plt. had known all the facts, he could not have made the requisite affidavit. Reasonable efforts to serve must mean reasonable according to the actual facts. The case of *Hesketh v. Fleming* is in favour of the deft., and Mr. Lush in his argument made excellent use of it.

CHANNELL, B.—I also think this rule should be made absolute, and I base my judgment on the affidavits, which do not show enough to support the order made at chambers; no sufficient reasonable efforts to serve the deft. under the 17th section are shown to have been made. The party going to serve the writ may not have been successful on one or two occasions, but on another occasion he may have succeeded; the attorney's clerk going to the deft.'s branch place of business, and receiving the answer he did, makes insufficient reasonable efforts to serve personally. Substitution of personal service means substitution for that which, if effected, would be good.

FIGOTT, B.—The application made to me was to set aside the writ; the affidavits then were not sufficient,

and I confess I came to the same conclusion I now do. I agree with the rest of the court in thinking that reasonable efforts are not shown to have been made to serve the deft. If it were necessary to determine what is meant by residence under sect. 2, I should be inclined to construe it with Erle, C. J. and Willes, J., in as large a sense as possible, as I believe the Legislature intended it should have its widest meaning, but it is not necessary in the view I take of this case now to do so.

Rule absolute.

Plt.'s attorneys, *Flower and Flower*, Gracechurch-street.

Deft.'s attorneys, *Cotterill and Sons*, Throgmorton-street.

Nov. 13 and Dec. 7.

Ex parte BELK (an Articled Clerk).

Articled clerk—Service under unstamped articles—Payment of duty and penalty—Application for leave to enrol—Date from which service to be computed—6 § 7 Vict. c. 73, sects. 8 and 9—7 § 8 Vict. c. 86, sects. 1, 2 and 3—19 § 20 Vict. c. 81, sect. 3.

In 1857 a clerk who had been many years in an attorney's office desired to be articled, and having 55l. of his own towards the stamp, his father, a tradesman, promised to find the remaining 25l. for him within the ensuing six months, and advised him to be articled at once. Relying on such promise, the son accordingly entered into articles with an attorney and solicitor and commenced service thereunder, but at the end of the six months the father was unable, by intervening losses in business, to advance the 25l., but promised to do so as soon as he could. Thereupon the clerk consulted a barrister, who advised him to continue the service, and that if he obtained the authority of the Treasury to stamp the articles, and paid the penalty under 19 § 20 Vict. c. 81, the articles and the service under them would be valid and effectual. Believing in and acting on such advice, he continued to serve, and his father failing him altogether, he eventually, in the last year of the service, obtained, on mortgage of a small property, not previously available for the purpose, a sum sufficient to pay the 80l. duty and 50l. penalty, on payment of which the Treasury directed the articles to be stamped. The affidavits denied any fraudulent or speculative intention in entering into the articles, or not stamping them in proper time, the omission to do so arising from the unexpected non-performance of the father's promise and the clerk's own inability sooner to pay the money out of his own resources.

The Court of Ex., on an application on behalf of the clerk, under the above circumstances, to enroll the articles *nunc pro tunc*, thought the explanation so far unsatisfactory, and that it was so desirable to prevent the occurrence of such proceedings, that they would not permit the whole five years which had been served to count, but directed the service under the articles to be reckoned to have commenced at, and to be computed from, the expiration of three years from their date.

The provisions of the 6 § 7 Vict. c. 73, s. 8, are not merely for the purposes of the revenue, but also for assisting in securing the due fitness of persons to be admitted as attorneys. It is not enough, therefore, that the Treasury is satisfied; but the court ought to take care that the other objects of the statute are not frustrated.

This was an application, on affidavits, for leave to enroll and register articles of clerkship *nunc pro tunc*, and the following appeared from the affidavits of the applicant, his father, and the attorney to whom he was

[Ex.]

Ex parte BELK.

[Ex.]

articled, and which were used in support of the motion, to be the facts of the case.

Previous to Oct. 1857 the applicant had been for several years a clerk in an attorney's office, and being then twenty-four years of age and about to be married, he desired to be articled. Having explained to his father, who was a joiner and builder at Nottingham, his position relative to pecuniary matters, and told him, as the fact was, that he had about 55*l.* towards the required stamp duty, his father promised to find the remaining 25*l.* within the ensuing six months, and advised him to get his articles completed at once. In pursuance of such advice and full reliance upon his father's promise, the applicant entered into negotiations with an attorney at Nottingham to serve him as a clerk for five years, and articles of clerkship were drawn up and signed on the 4th Nov. 1857.

The applicant duly entered on the service, and shortly before the first six months had expired applied to his father for the promised 25*l.*, who told him that, in consequence of losses in business, he was unable then to advance it, and that the matter must stand over for a time, and he (the father) would advance it as soon as he could. Applicant was therefore unable to pay the stamp duty at the time required, and there appeared to him to be no other course than to serve, according to his covenant, under the articles, and to apply to the Treasury for leave to have them stamped as soon as he should be able to pay duty and penalty, under the 19 & 20 Vict. c. 81. Shortly after the first six months, the applicant, having doubts whether it would not be advisable to enter into new articles, consulted a barrister on the Midland Circuit, now deceased, who advised him that such a step was not necessary, but that, if applicant obtained the authority of the Treasury to stamp the existing articles under the statute, and paid the duty and statutory penalty, the articles would be valid and effectual. That, in consequence of that advice, and applicant's belief that such would be the case, he continued to serve under the articles, intending to apply to have them stamped under the statute as soon as his father advanced the money, or his own resources enabled him to pay it himself. That for a considerable time he continued under the belief that his father would perform his promise, but finding that he did not, and that a larger sum had become necessary to cover the penalty and duty, he ultimately, in 1862, was enabled to borrow, on a mortgage of a small property which he had not been able previously to make available for the purpose, a sum sufficient to pay the duty and penalty; and in Nov. 1862 he memorialised the Treasury, who, upon payment of 80*l.* duty and 50*l.* penalty, directed them to be stamped, which was accordingly done. It was further sworn that he did not enter into the articles, or refrain from stamping them in proper time, with any fraudulent design, or as a mere matter of speculation, but in perfect good faith, and with the full intention of paying, and a full expectation of being able to pay, the duty within the proper time; that the omission to do so earlier was owing solely to the unexpected non-performance of his father's promise, and his own inability to pay the duty and penalty until he was able to do so out of his own resources as above mentioned; and that he paid the same in full belief (acting on the advice he had received) that it would give validity and effect to the service under the said articles.

The five years had been duly served under the articles.

A similar application to the present, and founded on the same affidavits, was made to this court on the 4th Nov., when it appeared from the statement of counsel that a like application had been previously made to the Court of Q. B., and refused by that court, but that subsequently fuller affidavits, stating additional facts, had been furnished, on which the

application on 4th Nov. was made to the Ex., and the Court thought it would be more respectful to the Court of Q. B. that the application should be first repeated to that court on such fresh affidavits. This was done, and the Q. B. said they thought it better for the applicant to go to the Ex., which court had not dealt with the question before, as both the Q. B. and C. P. had done.

Hayes, Serjt. now renewed his application to the Ex. accordingly.—By 34 Geo. 3, c. 14; 6 & 7 Vict. c. 73; and 7 & 8 Vict. c. 85, articles of clerkship are to be enrolled within six months of the date. The 34 Geo. 3 was imperative, and no jurisdiction was thereby given to the court: (*Ex parte Pilgrim*, 1 B. & C. 264.) Consequently annual Indemnity Acts were passed, allowing further time in cases of neglect to enroll through mistake or other cause. Up to the 6 & 7 Vict. no question could arise, nor had the courts any jurisdiction as to stamping articles, because, by the 7 Geo. 4, c. 44, s. 4, the Commissioners of Stamps were prohibited from stamping after six months from the date. Then the 6 & 7 Vict. c. 73, s. 9, gave jurisdiction to either of the courts of law over the matter of enrolment, and a discretion, which has been constantly exercised, was thereby given to them; and the 7 & 8 Vict. c. 86, rather enlarges and expands that jurisdiction; but such jurisdiction was totally independent of the question of stamping. The statute which deals with the question of stamps, and on which this application is founded, is the 19 & 20 Vict. c. 81. Sect. 3 of that Act, enacts, &c.: [he reads it.] Power is thereby given to the commissioners to stamp after the six months on a graduated scale of penalties. Discretion in the matter is given to the Treasury, who have directed the articles to be stamped on payment of the duty and penalty. The Treasury having exercised their discretion, and the penalty having been paid, the object of the Act was to give power to the court to exercise its jurisdiction, otherwise the Act would be defeated; the applicant will have paid his money, and have gotten nothing for it. The difficulty was, that after the Treasury had directed the stamping upon payment of the duty and penalty, the courts had gone into the question of revenue, and asked why the money had not been paid sooner, and so had completely overruled the discretion given to the Treasury as to time of stamping.

[BRAMWELL, B.—I do not see why the Treasury should not secure the revenue if they can get it, nor why the courts should not have discretion in case of a wilful omission to stamp in the proper time, or a speculation on the possible death of the party articled.—CHANNELL, B.—I cannot but think that the non-payment of the revenue for a very long time may be a very proper circumstance to guide the court in the exercise of its discretion, and I protest against the argument that, because the penalty is paid, the jurisdiction of the court is taken away. POLLOCK, C. B.—To my mind, the receipt of the stamp and penalty by the Treasury furnishes no title whatever. They would no more refuse the money than the Chancellor of the Exchequer would send back, if he knew whence it came, a 10*l.* note sent for unpaid income-tax. It may be a *sine qua non* to your being heard here at all.] Payment of the penalty gives validity to the deed, and the analogy of post-stamped instruments is with the applicant. All was *bona fide* and not speculation or evasion. Here was a promise and a disappointment, and in the language of Erle, C. J., it was an "unforeseen emergency," and not intentional on the part either of the attorney or the clerk: (*Ex parte Bishop*, 3 L. T. Rep. N. S. 323; 9 C. B., N.S., 150; 30 L. J. 48, C. P.) [BRAMWELL, B.—It was not a continuing "unforeseen emergency." At the end of six months he knew the state of the case.] *Ex parte Bishop* (*ubi sup.*), and also *Ex parte Norton*, 26 L. J. 24, Q.B.,

[Ex.]

REG. v. ISRAEL HILLMAN.

[C. CAS. R.]

are authorities in applicant's favour. [Pigott, B.—On the principle of the decision in *Ex parte Norton*, we should, I think, be disposed to go almost any length if the clerk himself were not in fault.]

Ex parte Herbert, 1 B. & S. 825; 31 L. J. 33 Q. B.; s. c. nom. *Anonymous*, 5 L. T. Rep. N. S. 579;

Ex parte Breden 6 L. T. Rep. N. S. 494, C. P.; 31 L. J. 321 C. P.; 12 C. B., N. S., 352, are also relied on. In the former case Cockburn, C. J. considers the law as to the duty of the courts in the matter has been altered by 19 & 20 Vict. c. 81, s. 3. The latter case involves the fact referred to by Pigott, B., for there, as here, the clerk knew the duty was not paid, and served his time; and the C. P. permitted the service to be computed from the date of the articles. The Courts of Q. B. and C. P. seem to have put opposite constructions on the statute; for in *Ex parte Breden*, 6 L. T. Rep. N. S., 455, Q. B.; 2 B. & S. 649; 31 L. J. 184, Q. B., the former court refused the application which the C. P. subsequently granted. No doubt, in *Ex parte Edwards*, 8 L. T. Rep. N. S. 360; 32 L. J. 213 C. P., the C. P. refused a similar application on the ground that the clerk had no reasonable expectation of the money, and on the late application to them in the present case the Q. B. seemed disposed to concur with the recent view of the C. P., and to act on their own decision in *Ex parte Breden* (*ubi sup.*) It is submitted that the view taken by the majority of the Q. B. in *Ex parte Herbert* (*ubi sup.*) is correct, and that the notion of the court entertaining the question of revenue is contrary to the intention of the statute. This court has full jurisdiction under 6 & 7 Vict., and is not bound by the decision of any other court. At all events it may allow part of the time, so that all the applicant's time and money may not be thrown away:

Ex parte Broster, per Coleridge, J. (Bail Court); Chitty's Archb., last edit. p. 35, 10th edit. pp. 28, 31.

[Pigott, B.—One of the main objects of the Legislature in having the articles enrolled was to ensure the service under them. BRAMWELL, B.—I am not at all sure that the statute was meant to help people who had not the means of providing the requisite amount of money.]

By the COURT.—We cannot grant the application without first consulting the Court of Q. B. about it.

Cur. adv. vult.

Dec. 7.—POLLOCK, C. B. now delivered the following judgment of the Court (Pollock, C. B., Bramwell, Channell and Pigott, BB.).—In this case, after consulting with the judges of the Q. B., we think the application may be granted so far that the service under the articles shall be reckoned to have commenced at, and to be computed from, the expiration of three years from their date. The applicant will therefore have the benefit of the stamp on the articles, and the two years of the service already performed. Our opinion is, that the provisions for the filing of the affidavit and the enrolment of the registration of the contract in the 6 & 7 Vict. c. 73, s. 8, are not merely for the purposes of the revenue, but also for assisting in securing the due fitness of persons who are to be admitted as attorneys in the courts of Westminster-hall. It seems to us, therefore, that it is not enough that the Treasury is satisfied, but that we ought to take care, also, that the other objects of the statute are not frustrated, and, consequently, if it appeared that the omission to stamp the articles, and so to enrol them and the affidavit, were wilful on the part of the clerk, whether because not stamped, or for any other reason, we should not interfere to assist him; in other words, we think we must consider this question as we should do if the articles had been properly stamped at first, but the affidavit had

not been made, and the articles had not been enrolled or registered by the clerk's desire; except, of course, that the cause of such non-enrolment and registration must be regarded, and in this case we must look at the want of the stamp as the cause. The continued service under the unstamped articles was with notice and was wilful. And it appears, by the affidavits, that the omission to stamp and to enroll and register was not wilful, but the result of what has been called an "emergency," and arose partly also in consequence of an opinion given by a learned counsel. We therefore think that some relief may be given; but the explanation is to such an extent unsatisfactory, and it is so desirable to prevent the occurrence of such proceedings, that we think it right that only two years of the service shall count in furthering the admission of the applicant.

Application granted in part. The articles to be enrolled and the service to be computed from the expiration of three years from their date.
Attorney for app., J. W. Smith, Nottingham.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 21.

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., and KEATING, J.)

REG. v. ISRAEL HILLMAN.

Procuring poison or noxious thing—Intending to be used—Abortion—24 & 25 Vict. c. 100, s. 59.
A person supplying a noxious drug to a woman with the intent that the woman should use it for the purpose of producing a miscarriage, is guilty of a misdemeanor within the 24 & 25 Vict. c. 100, s. 59, although the woman herself did not intend to take it.

Case reserved for the opinion of this court by the Chairman of the Wiltshire Quarter Sessions.

At the Midsummer Quarter Sessions for the county of Wilts, holden at Warminster, in the said county, on the 30th June 1863, Israel Hillman was charged in and by an indictment framed under sect. 59 of the 24 & 25 Vict. c. 100, with unlawfully applying and procuring a certain poison or noxious thing called savin, knowing that the same was intended to be unlawfully used or employed by one Sarah Carrier to procure the miscarriage of the said S. Carrier.

Upon the trial it was contended by the counsel for the deft. that there was no case against the deft. because amongst other objections it was necessary that the deft. should know that the poison or noxious thing is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whereas it was not so intended, except by the deft. himself, to be used at all.

I left the facts to the jury, and they being satisfied, as the evidence well warranted, that the case was in other respects proved, found in answer to the questions of the court, and in accordance with the evidence, that the prosecutrix did not intend to take the substance in question, nor did any other person except only the deft. himself, intend that she should take it.

The jury then under my direction found a verdict of guilty, and the court admitted the deft. to bail to appear at a future sessions to receive sentence (if necessary), and I now pray the opinion of this honourable court as to whether or not the intention of any other person besides the deft. himself that the substance should be used to procure a miscarriage is necessary to constitute the offence with which the deft. was charged.

J. W. AUDRY,

Chairman of the Quarter Sessions.

T. W. Saunders for the prisoner.—The 59th section

enacts that whosoever shall procure any poison or noxious thing knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor. This section creates a new offence and contemplates a case only where the procurer and the recipient have the same intent. Here it is found that the woman did not intend to take the poison. The present case is not within the section, and it may be *casus omissus*.

ERLE, C.J.—The question is, whether or not the intention of any other person besides the deft. himself, that the poison or noxious thing should be used to procure a miscarriage, is necessary to constitute the offence charged under the 24 & 25 Vict. c. 100, s. 95. We are all of opinion that that question must be answered in the negative. The statute is directed against the procuring or supplying of poison or noxious things for the purpose of procuring abortion with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The deft. knew what his own intention was, and that was, that the substance procured by him should be employed with intent to procure miscarriage. The case is therefore within the words of the Act. We confine our judgment to the question submitted to us. The conviction will therefore be affirmed.

The rest of the Court concurring,

Conviction affirmed.

COURT OF PROBATE.

Reported by DR. SWABET, of Doctors'-common.

June 23 and July 14.

(Before Sir C. CRESSWELL.)

In the Goods of WILLIAM COLES (deceased).

Official assignees of creditor of deceased—Assignment of debts to purchaser—24 & 25 Vict. c. 134, s. 137—Assignment by purchaser—Limited grant to purchaser from official assignees.

A. in 1813 assigned certain bills of exchange and negotiable instruments to **B.**, who was in 1833 adjudicated a bankrupt. In 1862, **C.**, being his official assignee, assigned the sums remaining due and to become due on the said bills of exchange and negotiable instruments to **D.**, as purchaser under the Bankruptcy Act 1861, s. 137, and **D.** sold and assigned them to **E.**

The Court declined to make a grant of administration of the personal effects of **A.** limited to the aforesaid sums (the next of kin of **A.** having been cited and not appearing) to **E.**, but made the grant to **D.** as assignee of the official assignee.

William Coles, late of Mincing-lane, in the city of London, merchant, died in Feb. 1835 intestate, leaving his widow (since deceased) and three children, Mr. William Coles, the Rev. George Coles, and Mrs. Hale, his only next of kin. No letters of administrations of the personal estate and effects of the said deceased had been taken out by any of the next of kin, or by any other person.

On the 23rd Jan. 1813 the following letter was handed by William Coles, the intestate, to Meir Macnin, of New Broad-street, in the city of London, merchant:—

"Meir Macnin, Esq.

"Sir,—Your having this day accepted two bills of exchange, the one for 4500*l.* at twelve months' date, and the other for 900*l.* at twenty-four months' date, both drawn by me upon you, I do hereby undertake to pay to you all and every sum and sums of money which shall have been received by me for or in respect of certain bills of exchange and other negotiable instruments this day assigned to me under your directions

by the late firm of J. and A. Anderson and Co., to enable you to provide for and take up your said acceptances on the same respectively becoming due, and in the event of my not having received or paid over to you a sum of money equal in amount to your said acceptances on their respectively becoming due, I do further undertake to pay unto you at the respective times aforesaid, out of my own proper moneys, a moiety or half of the deficiency of such amount, whatever the same may happen to be. I do further also agree and undertake that on the said acceptances being taken up and paid in manner aforesaid, that I will deliver and assign over to you such of the several bills of exchange and other negotiable paper specified in the schedule of the said assignment by the late firm of John and Alexander Anderson and Co. to me as shall be in their or my possession or custody, together with all benefit to be derived therefrom on your releasing me from all claims and demands for or in respect of the same.

"I am, Sir, your most obedient servant,

"WILLIAM COLES."

By virtue of an indenture made on the 20th May 1813, between Alexander Anderson, Alexander Wilson, and George Wilson, of the first part, the said Meir Macnin of the second part, and the said William Coles (the intestate) of the third part, the said intestate became entitled to several bills of exchange, promissory notes, and other negotiable paper referred to in the above letter as assigned to him, and all, right, title and claim whatsoever, both legal and equitable and all powers and remedies for the recovery of all and every the matters aforesaid, in trust, nevertheless, upon the happening of certain events (which have all since happened) for the said Meir Macnin.

The bills of exchange mentioned in the letter of the 23rd Jan. 1813 were duly paid by the said Meir Macnin at maturity respectively.

The said Meir Macnin was in Jan. 1833 adjudicated bankrupt within the intent and meaning of the law of bankruptcy, and Alexander Brumer Belcher (since deceased) and J. A. De Buck (also since deceased) were duly appointed the official and creditors' assignees, and Hatton Hamer Stansfeld was duly appointed the official assignee under the said Bankruptcy Act, in the room of A. B. Belcher, deceased.

The said Hatton Hamer Stansfeld on the 13th Oct. 1862 presented his petition to the Court of Bankruptcy in London, whereby, after stating the bankruptcy of the said Meir Macnin, and his appointment as such assignee as aforesaid, and that there then remained some outstanding debts and other property due and belonging to the estate of the said bankrupt which could not be collected and received without unreasonable expense and delay; and that the petitioner, as such assignee as aforesaid, had subject to the approbation and direction of the said Court of Bankruptcy contracted and agreed with Henry Grua to sell and assign to him such outstanding debts and other property at or for the price therein mentioned; it was prayed that the said petitioner might be authorised to carry out the said contract, and to sell and to assign the said outstanding debts and other property, and also such of the books of the said bankrupt relating to his trade, dealing and estate, as were within possession or power of the said petitioner accordingly.

On the 5th Oct. 1862 the said petition came on to be heard before the said Court of Bankruptcy, and it was ordered that the petitioner, as such assignee as aforesaid, be authorised to carry into execution the said contract, and to sell and assign the said outstanding debts and other property of the said bankrupt accordingly.

By an indenture bearing date the 27th Oct. 1862 and made in pursuance of the said agreement and under the authority of the said Court of Bankruptcy

as aforesaid, the said Hatton Hamer Stansfeld did sell, assign, and transfer unto the said Henry Grua, his executors, administrators and assigns, all the outstanding debts and other property due and belonging to the estate of the said Meir Macnin, with full power and authority, but in the name of the said Henry Grua, to ask, demand, sue for, recover, receive, and give effectual receipts, releases and discharges for the said outstanding debts and other property, and all right, title, interest, property, claim and demand of him the said Hatton Hamer Stansfeld into or upon the said outstanding debts and other property and premises thereby assigned or intended so to be, unto the said Henry Grua, his executors, administrators and assigns to and for his and their own use and benefit absolutely.

By an indenture bearing date the 20th Nov. 1862, and made between the said Henry Grua of the one part, and David Cohen Macnin of the other part, the said Henry Grua did assign, sell and transfer unto the said David Cohen Macnin, his executors, administrators and assigns, all the said outstanding debts and other property due and belonging to the estate of the said Meir Macnin with full power and authority to ask, demand, sue for, recover, receive and give effectual receipts, releases and discharges for the same. To have, hold, receive and take the said outstanding debts and other property and premises thereby assigned or intended so to be, unto the said David Cohen Macnin, his executors, administrators and assigns, to and for his and their own use and benefit absolutely.

There were still moneys due in respect of some of the said bills of exchange, and other negotiable paper comprised in the said indenture of assignment of the 20th May 1813, and there were also still in the hands of certain of the official assignees of the Court of Bankruptcy or other proper officers of such court entitled to the custody thereof, certain moneys, being dividends in respect of some of the said bills of exchange, promissory notes and other negotiable paper, and which the legal personal representative of the said William Coles (the intestate) alone could lawfully sue for, recover, receive, or give a sufficient discharge for respectively; but the said Messrs. William and George Coles and Mrs. Hale have not, nor had either or any of them, as such next of kin of the said intestate William Coles as aforesaid, any beneficial interest whatsoever in the matters hereinbefore referred to or any part thereof.

Dr. *Twiss*, Q.C. moved for a grant of letters of administration of the personal effects of William Coles, deceased, to be granted to David Cohen Macnin, limited to his right, under the said indenture of assignment of the 20th May 1813, to the dividends and other money due or to become due or payable in respect of the said bills of exchange, and other negotiable paper thereby assigned.

Sir C. CRESSWELL.—There are two difficulties in the way of my making the grant. The children of William Coles have not been cited or filed consents to the motion.

Dr. *Twiss*.—The children of the deceased take no interest in the property.

Sir C. CRESSWELL.—The next difficulty that occurs to me is this: can a person who has bought up a debt after the death of the party to whom it was due, thereby become entitled to a grant of administration of the effects of the debtor? What is the practice?

Dr. *Twiss*.—A party cannot by buying up a debt due from the deceased entitle himself to a grant in the character of a creditor. But the official assignee is not clothed with the character of a mere creditor. The whole of the bankrupt's estate is by Act of Parliament vested in him; he is enabled to act in all respects on behalf of the estate.

In fact, he represents the bankrupt and his estate, and as assignment made by him should be treated as an assignment made by the deceased himself:

Drew v. Long and others, 1 Spinks Ec. & Ad. Reps. 400.

Sir C. CRESSWELL.—The case must stand over for the next of kin to be cited.

June 23.—The next of kin having been cited and not appearing, the motion was now renewed.

Dr. *Twiss*.—Meir Macnin was a creditor of William Coles, the deceased. Macnin became bankrupt. His official assignee represents him, as if he were alive. The official assignee has sold and assigned the estate of the bankrupt to Henry Grua, who has assigned it over to David Cohen Macnin, who is the person now interested in the property for which this limited grant is required. He submitted the grant might be made to David Cohen Macnin, the next of kin not having appeared to the citation.

Sir C. CRESSWELL.—I have no authority to exercise a discretion in this matter. If I were to make the grant to David Cohen Macnin, the debts due to a bankrupt after they have been assigned by the official assignee might be sold twenty times over, and the twentieth assignee might come and ask for the grant. If I had a discretionary power in the matter, and in the exercise of it were to make such a grant, it appears to me that it would be a very inconvenient mode of administering the estate of deceased persons. I must reject the application.

July 14.—Dr. *Twiss* now moved the court to draw a grant of administration limited to the dividends and other money due or to become due and payable in respect of the bills of exchange and other negotiable papers assigned to Meir Macnin by the indenture of May 20, 1813, to Mr. Henry Grua, the assignee of the official assignee of Meir Macnin's (the bankrupt's) estate. The assignment of these debts was made to him under the authority of the Court of Bankruptcy, and by the 137th section of the Bankruptcy Act 1861 (24 & 25 Vict. c. 134), when the debts of a bankrupt have been assigned by the official assignee to a purchaser, such purchaser shall, by virtue of the assignment, have power to sue in his own name for the debts assigned to him, as effectually as the assignee himself. He submitted that the words of this section were sufficient to authorise the court to make the grant as prayed.

Sir C. CRESSWELL decreed the grant to Mr. Henry Grua, as prayed.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs.
Barristers-at-Law.

Tuesday, Dec. 14.

(Before Mr. Commissioner GOULBURN.)

Ex parte BURSLEM, re BURSLEM.

Sect. 112—Release from custody—When court will order.

The court will not, in the exercise of the discretion granted to it under the 112th section of the Consolidation Act 1849, order the release of a bankrupt from custody simply because creditors' assignees have been chosen, but will have regard to whether such release will be for or against the interests of the creditors, and, if required, will give time to the assignees to investigate his affairs.

Release from custody. The bankrupt was described as a gentleman residing in Great James-street, Bedford-row. Being in custody, he executed a deed under the 192nd section of the Bankruptcy Act 1861, which deed having been duly registered, he applied for his release. The application having been adjourned, he abandoned the proceedings under the deed, and was

[BANK.]

Ex parte MANNOOCH AND OTHERS, re BALLAD AND BOWMAN.

[BANK.]

adjudicated bankrupt upon his own petition. He neglected to file the statement of debts, &c., required by the 93rd section of the Act, and the 4th of the General Orders 1861, whereupon his petition was dismissed. He then presented a second petition, and accompanied it with the requisite statement. Several applications were made for his release under the 112th section of the Consolidation Act 1849; but the Court refused to release him until after the choice of assignees.

The meeting for the choice took place on the 6th inst., when a creditors' assignee was duly chosen.

Sargood now applied for the bankrupt's release from custody.—An assignee having been chosen, the court would, in conformity with its usual practice, order the discharge of the debtor from prison.

Bagley and *Reed* opposed the application upon two grounds: first, that the statement of debts filed under the bankruptcy differed materially from that filed under the deed; and, secondly, that there was reason to believe that the bankrupt would, if released without bail, never render any assistance to his creditors, but would quit the country. They referred to

Ex parte Stuart, re Waugh, 9 L. T. Rep. N. S. 466, L. C.

Sargood in reply.

Mr. Commissioner GOULBURN.—There is one fallacy which runs through the arguments of the learned counsel in this case, and from which I entirely dissent, namely, that this statute confers upon every bankrupt debtor who is in custody an absolute right to be at once released. I believe the statute was framed without reference to any such right, for if it had been intended by the statute to give such absolute right to be released, it would have been so stated, and the 112th section would have been somewhat in this form: Every bankrupt debtor who has surrendered and who is in prison, "shall" be discharged; not "may be," as the words now stand. But in the imperative "shall." When the Legislature used the word "may" it was plain that it did not confer an absolute right upon the debtor, but annexed impliedly such conditions as the court in its discretion should think right. I agree that, since the passing of the Act of 1861, the practice has been to treat the word "may" as "shall," and as if the statute gave an absolute right of release to the debtor, and that the notion has been that every debtor who is in prison has an absolute right to his release, and that he has only to go the court and say, "I am in prison as a debtor; I have petitioned the court, and have surrendered, now let me out." But I think differently, and that the Act was framed entirely with reference to the bankrupt and his creditors; that it means that the bankrupt who is in custody shall only be released if the commissioner shall think fit, and that it gives the commissioner an absolute discretion, what the L. C. called a singular and extraordinary power, which the court may exercise according to its discretion. The question is not one merely between the creditor and the debtor, for the court has nothing to do with the manner in which the debt has been contracted, unless it is a debt arising out of a tort, or in which there is fraud, in which case the court is prohibited from releasing the bankrupt. What the court has mainly to regard is whether this bankrupt's release will be for or against the interests of the creditors. Who is to tell us that? Is the court to collect it at once from the fact of the bankrupt having surrendered to his bankruptcy? It would be idle to say so. What means has this court of judging before assignees are chosen? The bankrupt is indeed obliged to file the interim account, but that does not tell us much; it gives no dates, and all the court can learn from it is that the debtor states he has contracted a certain amount of debt. It is for the assignees, when chosen, to say whether they will consent to the bankrupt's release; or rather, whether or

not it is for the interest of the creditors that he should be released. In this case, it is true, an assignee has been chosen, but that was only on Tuesday last. The circumstances of the case are very peculiar, for the bankrupt executed a deed and failed to carry it into effect. He then petitioned this court, the first petition was dismissed, and he comes here upon a second petition. The creditors are differently stated under the deed from what they are under the bankruptcy. This bankrupt's description shows all manner of residences, and there is not one farthing of assets to meet debts amounting to 3000*l.* and upwards. Again, may he not have, indeed it is alleged that he has, reversionary interests which it is very important should be looked into? He may have accruing rights, in respect to which it is essential that he should be forthcoming to give information to his assignees. Those who represent the creditors must not be deprived of his assistance, and must have ample time to conduct the inquiry. The order I make is, that it appearing to the court that the assignees want time to investigate the affairs of this bankrupt, and to ascertain if he is entitled to any reversionary or other interest, I adjourn this application to the examination meeting. If in the meantime he can give bail, I will, in conformity with the decision of Mr. Commissioner Holroyd in *Re Waugh*, a decision approved by the L. C., as discreet and proper, release him on finding two sureties in 100*l.* each, and himself in 200*l.*

Order accordingly.

Thursday, Dec. 17.

(Before Mr. Commissioner FANE.)

Ex parte MANNOOCH AND OTHERS (Trustees), re BALLAD AND BOWMAN.

24 & 25 Vict. c. 134, ss. 197 and 137—Trust-deed—Sale of book-debts and goodwill—Jurisdiction.

The court has jurisdiction, under the 197th and 137th sections of the Bankruptcy Act 1861, upon the application of the trustees under a deed executed and registered in conformity with the 192nd and following sections, to order the book-debts and goodwill of the business of the debtor to be sold by private contract.

Trust-deed. J. Ballad and T. H. Bowman, by deed dated the 26th Oct. 1863, conveyed to E. Mannoch and others all their partnership estate and effects absolutely, to be applied and administered for the benefit of all their creditors in like manner as if they had been duly adjudged bankrupts; but the deed contained no power whereby the trustees could dispose of any portion of the debtors' property conveyed by the deed, which consisted partly of book-debts and the goodwill of their business. The trustees having, with consent of the creditors, at a meeting convened for the purpose, arranged to dispose of the book-debts and goodwill by private contract, upon terms very beneficial to the estate, an application was now made for an order sanctioning the arrangement, and directing that it might be carried into effect.

By the 137th section of the Bankruptcy Act 1861 it is enacted that at any time after the expiration of twelve months from adjudication, or at any earlier period with the approbation of the court, the assignees may sell by auction or tender, or with the sanction of the court by private contract, all and every of the book-debts due or growing due to the bankrupt, and the books relating thereto, and the goodwill of his trade or business, and assign the same to the purchaser.

Sargood, on behalf of the trustees under the deed, applied *ex parte* for the court to sanction the disposal of the book-debts and goodwill of the debtors in their

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[BANK.]

business, under the proposed arrangement. He referred to sect. 197 of the Bankruptcy Act 1861, whereby, after registration of a deed, the parties thereto were made subject to the jurisdiction of the Court of Bankruptcy, and the trustees and creditors were to have the same powers, rights and remedies, with respect to the debtor, his estate and effects, and the collection and recovery thereof, as assignees and creditors have under a bankruptcy. He also referred to sect. 137, and submitted that the court had jurisdiction, under these sections, to make the order asked.

Mr. Commissioner FANE considered that he had jurisdiction, and made the order accordingly.

BRISTOL.

Tuesday, Dec. 15.

(Before Mr. Commissioner HILL.)

Ex parte T. PHILLIPS AND OTHERS, *re* M. PHILLIPS AND W. M. PHILLIPS.*Bankrupt firm—Proof by sureties—No privity of contract.*

Sureties under a bond, having paid the debt due from the principal, cannot prove in respect of such debt against the bankrupt firm of which the principal debtor is a member, without first establishing some contract, express or implied, on the part of the payees under the bond with the principal debtor that he should lend the moneys of the payees to the firm.

Proof. The bankrupt M. Phillips was the treasurer of the Bridgend and Cowbridge Union, in the county of Glamorgan; and as such treasurer he, as principal, together with T. Phillips, E. Smith, J. Smith, W. Smith, and T. Lougher, his sureties, in the month of July 1858, entered into a bond to the guardians in the sum of 2000*l.* for the diligent and faithful discharge of the duties of his office in regard to the "receipt and payment of moneys on behalf of the said guardians, and accounting for the same, as well as in all other respects whatsoever," and covenanting that he should "faithfully discharge all the trusts to be reposed in him in virtue of the said office." He also carried on the trade of maltster, spirit merchant, and licensed victualler. He received moneys from time to time on behalf of the union, and paid them to his account with his bankers without distinguishing between such moneys and payments made from the receipts of his trade and from other sources. In May 1861 he took his nephew, W. M. Phillips, the other bankrupt, into partnership. The nephew knew that the uncle was treasurer to the union, and sometimes received moneys for it, which he stated he invariably paid over to his uncle. It was not in the nephew's department to keep the books of the trade, and it did not appear that he knew the terms upon which the union moneys were paid into the bank, or the manner in which they were drawn out. He never drew cheques. At the date of the bankruptcy the balance in favour of the guardians of the union amounted to the sum of 1332*l.* The sureties to the bond thereupon paid the amount to the obligees, and now tendered a proof for the amount against the joint estate.

Stone appeared in support of the proof.—He submitted that the treasurer was a trustee, and that a different rule applied with reference to proofs regarding trust-funds to that which prevailed in regard to moneys not clothed with such a character. He cited

Ex parte Watson, 2 V. & B. 414;*Smith v. Jameson*, 5 T. R. 601;*Marsh v. Keating*, 1 Bing. N. C. 198;*Ex parte* Bolland, 1 M. & A. 570;*Ex parte* Woodin, 3 M. D. & D. 399.

Abbott, for the assignees, maintained that the treasurer was not a trustee, and that even if he were

no liability in this particular case attached to the joint estate. He cited

Montefiore v. Lloyd, 9 L. T. Rep. N. S. 330.*Stone* in reply.

Mr. Commissioner HILL.—It is not made clear to me that the younger bankrupt, the nephew, knew the terms upon which the moneys of the union were paid into the bank, or the manner in which they were drawn out. He never drew cheques, nor was it in his department to keep the books of the firm. The evidence of his knowledge that the moneys of the union were mixed with those of the firm is not satisfactory to my mind. Neither does it appear that the guardians were cognisant that their moneys were so treated. Now it is quite clear, that until it can be established that the treasurer was a trustee, the nephew, even if he had clearly known that the moneys were part of the union funds, will not be shown to have been answerable to the union unless the guardians had entered into a contract, express or implied, with their treasurer, that he should lend their moneys to the partnership. In the absence of any such contract the moneys would only create a debt from the firm to the treasurer. Consequently, unless the moneys are part of a trust-fund, the first step towards the proof of a joint debt cannot be taken. It is equally clear that the sureties would not be liable for a loss to the union occasioned by the bankruptcy of the firm, as, to use the language of Lord Ellenborough in *Bellairs v. Edmunds*, 3 Camp. 453, they have not guaranteed the "integrity" of the firm, but only that of the treasurer, including, of course, in the term integrity, not only upright conduct, but solvency. Then is the treasurer of a poor-law union a trustee? I think not. In support of the proof the language of the bond, which speaks of trusts reposed in the treasurer, was relied on. But a trust does not necessarily imply a trustee, in the strict sense of the term, otherwise every servant would fill the character of trustee of his master's property. To create such a trust as will enlarge or otherwise vary the right of proof, I am of opinion there must be a *cestui que trust*; that is to say, there must be a beneficial owner represented by a party who has a legal title, which he can maintain even against such owner. Trustees commonly so called can maintain such a title against their *cestui que trust*, and so can assignees of a bankruptcy, as against the general body of creditors, but this treasurer had no rights as against the guardians. He was simply their agent. They might have enforced payment of all their moneys in his hands as freely and fully as a master can enforce payment from his clerk or servant. The estate which a *cestui que trust* has in the property of which he is beneficial owner is not a legal but only an equitable estate his remedy lying, not in action at law, but only by subpoena in Chancery. Whereas the guardians might at any moment have maintained an action against the treasurer for the whole balance of the account between them. Probably, too, it might be argued that the relaxation of the rules by which proofs are regulated in ordinary cases is in favour of *cestui que trust* only will not be extended to strangers; this relaxation had its origin in the claim to indulgence possessed by this class of beneficial owners, as arising out of the infirmity of their power to protect their interests. The judgment of the court must therefore be, that the proof is rejected as against the joint estate, the only form in which it has been tendered.

Proof rejected.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUKLEY SMITH, Esqrs., Barristers-at-Law.

Monday, Nov. 16.

ROBBINS (Administratrix) v. JONES.

Highway—Repairs—Dedication—Liability for death by reason of want of repair—5 & 6 Will. 4, c. 50—9 & 10 Vict. c. 93.

The *plt.* was the widow and administratrix of a person who met his death under the following circumstances. The roadway leading to a bridge over a river approached the bridge, which was necessarily at a higher level than the river banks, by means of a causeway springing at a considerable distance from the bridge. A row of houses stood upon the original level of the ground, and ran parallel to the causeway, leaving a gulf or space between the houses and the retaining wall of the causeway. This space belonged to the owners of the houses and was used for areas. The houses were divided, or capable of being divided, into two distinct dwellings, the lower part of each building having an outer door opening into a street on the lower level, and the upper part having an outer door opening upon the causeway leading to the bridge. The inhabitants of the upper part went in and out by that door, getting to and from the street by walking over a structure consisting of flags and gratings bridging over the gulf or space between the houses and the causeway. The gratings were not attached to the houses, but were fixed in the centre of the flagging, and served the double purpose of being walked upon and letting light through. The part of this structure lying between the doors and the roadway was flagging, so that it was not necessary to walk upon the grating in order to get to the houses. There was a flagged foot pavement between the edge of the flagging and grating and the carriage-way on the same level with the flagging and grating. Between it and the flagging and grating there was a narrow strip of gravel. The road on the causeway was a common highway to be repaired by the parish. Before the General Highway Act, the flagging and grating had been dedicated to the public and used as part of the highway, and continued so up to the time of the accident. The *deflt.* was tenant of one of the houses under the owner of the fee-simple for a term of years assigned to him before and vested in him at the time of the accident. Whilst he was in possession, the flagging and grating became or were out of repair and insufficient, whether considered as a passage to the houses or as part of a public path, having regard to the tendency of persons to collect in crowds in or near such ways upon extraordinary occasions. The *deflt.* had notice of this from the parish before the accident, but did no repairs. He afterwards underlet one of the houses to a person, who again underlet the premises to another who let the rooms to lodgers. A crowd having collected upon one of the gratings, in consequence of the attempt of a bailiff to break into the house, and the deceased who had been beckoned by one of the lodgers being engaged in pushing his way through the crowd, the grating and a portion of the flagging gave way and the deceased and others fell down into the area and the deceased was killed. The fall of the grating and flagging was caused by its insufficiency and by the weight of the extraordinary crowd. The action was brought by the *plt.* under 9 & 10 Vict. c. 93, on behalf of herself and her child to recover damages for the loss of her husband:

Held, that if the passage over the area was to be considered as a private way to the house, the *deflt.*

was not liable, he not being the occupier; and that if it was to be considered as a public way the *deflt.* was not liable, the gulf not being caused by excavations made by him; and that the *deflt.* was not liable to repair on the ground that the structure which gave way was beneficial to him as proprietor of the houses; and generally that the action was not maintainable.

Fisher v. Prowse approved.

Declaration.—For that the *deflt.* was owner and possessed of certain houses and premises and a certain area in front of and parcel of the same immediately adjoining and under a certain common and public footway. And the said area was covered and protected with and by an iron grating, and it was the duty of the *deflt.* at all times to keep and maintain the said area and grating in good and sufficient repair so that persons passing over and along the said footway might not be in danger of falling into the said area. Yet the *deflt.* wrongfully permitted the same to be and continue, and the same were and continued, in a dilapidated, decayed, dangerous and unsafe state and condition, to the danger of persons lawfully passing over and along the said common and public footway. And the *deflt.*, well knowing the premises, demised and let his said houses and buildings, and the said area and gratings, in the same state and condition, to certain other persons, to wit, S. A. Jeffs and A. Jeffs, and wrongfully suffered and permitted the said area and grating to be and continue, and kept and maintained, and continued, kept and maintained the same in the same state and condition until the happening of the grievance herein-after mentioned. And the said E. A. Robbins, deceased, afterwards, to wit on the 10th Feb. 1862, was lawfully passing over and along the said common and public footway, as he lawfully and properly might, and by reason of the said dilapidated, decayed, dangerous and unsafe state and condition of the said area and grating, the same fell in, and the said E. A. Robbins was thrown down into the said area, whereby he was severely hurt and injured. And by reason of the said injuries thereby occasioned to him as aforesaid, the said E. A. Robbins, afterwards and within twelve calendar months next before the bringing this suit, died. And the *plt.* sues as administratrix as aforesaid for the benefit of her the said widow, and Louisa Jane the child of the said E. A. Robbins, deceased, according to the form of the statute in that case made and provided.

Pleas:—1. Not guilty. 2. That the said area was not immediately adjoining or under a common and public footway as alleged. 3. That the said E. A. Robbins was not lawfully passing over or along the said common and public footway as alleged. 4. That persons passing in and along the said footway were not, at the time the *deflt.* was possessed of the said houses and premises, and of the said area, in any danger of falling into the said area. 5. That the said area and grating was no part of the common and public footway, and that at the said time when, &c., the said E. A. Robbins unlawfully, and of his own wrong with others broke and entered the said grating, houses and premises, and he and others were unlawfully crowding thereon, and by reason thereof the said grating fell in, and the said E. A. Robbins was thrown down and injured as in the declaration mentioned. Issue.

At the trial before Willes, J., at the sittings in Middlesex after Michaelmas Term 1862, it was proved that the death of the deceased was caused by the giving way of a grating in the public way leading from the south end of Waterloo-bridge. The grating was in front of a house of which the *deflt.* was lessee for a term of years, and which he had sublet to a person who again underlet it to a person who let the rooms out to lodgers. The facts connected with the history of the premises and with the occurrence of the accident, so far as they were considered by the court

to be material to the decision of the case, are set out in the judgment of the court. There was a considerable conflict of evidence at the trial as to the state of repair of the grating and the cause of the accident, and ultimately Willes, J. left ten questions to the jury, which with the answers returned to them by the jury were as follows:—

1. Was there a nuisance causing danger to persons lawfully using the highway, even considered as bounded by the retaining wall? *Answer*.—Yes.

2. Was there a nuisance causing danger to persons lawfully passing from the highway to the houses. *Answer*.—Yes.

3. Was the flagging or grating in a reasonably fit state, having regard to the safety of persons using the highway? *Answer*.—No.

4. Was it in a reasonably fit state, having regard to the safety of persons going to and from the houses? *Answer*.—No.

5. Was it in a reasonably fit state for persons to stand or walk upon in any sense? *Answer*.—Not in the sense of a crowd always liable to be gathered together when it was used as a public highway.

6. Was the accident occasioned by an extraordinary crowd, or by the improper state of the flagging, or by both conjoined? *Answer*.—By both.

7. Was the deceased guilty of any negligence or misconduct contributing to the accident? *Answer*.—No.

8. Was he, when he fell, lawfully using the place to get from the road to the house? *Answer*.—Yes.

9. Was it a public highway? *Answer*.—Used as such by dedication.

10. Do you find your verdict for the plt. or the deft.? *Answer*.—For the plt., with 280*l.* damages, to be portioned into 200*l.* for the widow, and 80*l.* for the child.

A verdict having been entered for the plt., and a rule nisi having been obtained by the deft. to enter a nonsuit pursuant to leave reserved, or for a new trial on the ground that the verdict was against the weight of the evidence,

Coleridge, Q.C. and J. Martin showed cause.

Luah, Q.C. supported the rule.

In the course of the argument the following cases were cited:—

Salmon v. Bensaley, Ry. & M. 189;

Reg. v. Pedley, 1 A. & E. 322;

Rich v. Basterfield, 4 C. B. 783;

Todd v. Flight, 30 L. J., C. P., 21; 3 L. T. Rep. N. S. 325;

Bishop v. The Trustees of the Bedford Charity, 29 L. J., 53, Q. B.; 1 L. T. Rep. N. S. 214;

Fisher v. Prouse, and Cooper v. Walker, 2 B. & S. 770; 31 L. J. 212, Q. B.; 6 L. T. Rep. N. S. 711;

Barnes v. Ward, 9 C. B., 392;

Reg. v. Watts, 1 Sal. 357;

Hounsell v. Smyth, 7 C. B., N. S., 731; 1 L. T. Rep. N. S. 440;

Corby v. Hill, 4 C. B., N. S., 556;

Bolch v. Smith, 7 H. & N. 736; 6 L. T. Rep. N. S. 158;

Reg. v. St. Benedict, 4 B. & A. 447;

La Neve v. Vestry of Mile-end Old Town, 8 E. & B. 1054;

Bayley v. Wolverhampton Waterworks Company, 6 H. & N. 241;

Lade v. Shepherd, 2 Stra. 1004;

Cornwell v. Commissioners of Sewers, 10 Ex. 771;

Roberts v. Hunt, 15 Q. B. 17;

Hardcastle v. South Yorkshire Railway Company, 4 H. & N. 67; 28 L. J. 139, Ex.;

Brock v. Copeland, 1 Esp. 203;

Coupland v. Hardingham, 3 Camp. 398;

Bateman v. Black, 21 L. J., 406, Q. B.

Cur. adv. vult.

Nov. 16.—WILLES, J., read the judgment of the court. This was an action brought by the administratrix of one Robbins to recover damages under Lord Campbell's Act, for the intestate's death. That death took place in consequence of the giving way of a portion of the east side of the public way leading to the south end of Waterloo-bridge. The part which gave way consisted of flagging and grating over the area of one of the houses at the side of the road by the default, as it is alleged, of the deft. The material facts are as follows: Waterloo-bridge was constructed under Acts of Parliament passed in the 53rd, 56th and 58th years of Geo. 3, and was finished in 1817. It was necessarily constructed so that the roadway should be at a level much higher than the river banks, and in order to give access to the roadway of the bridge so constructed, the road leading to the south end of the bridge approaches it upon a high causeway springing at a considerable distance. For some distance from the bridge persons passing along the causeway are protected against the danger of falling over the side by a parapet wall, or continuation upwards of the retaining wall of the causeway. This wall is continued up to a row of houses (of which the deft. is the lessee), and then ceases. This row of houses stands upon the original level of the ground and runs parallel to the causeway and road leading to the bridge, leaving a gulf or space of more than seven feet wide between the houses and retaining wall of the causeway. That space belongs to the owner of the houses, and the bottom of it is used for areas. The houses are divided, or capable of being divided, into two distinct dwellings, having separate outer doors. The outer door of the lower part of each building opens into a street or court upon the lower level. The outer door of the upper part of each house opens upon the level of the causeway towards the road leading to the bridge, and the inhabitants of the upper part of the house go in and out by that door, and get to and from the road by walking upon the structure, part of which gave way under the deceased. That structure consisted of flags resting at one end for about four inches in and upon the walls of the houses, and at the other end for about six inches upon the retaining wall of the causeway so as to bridge over the areas. At intervals there were gratings fixed by means of horns into the flags and forming with them one continuous roadway. The gratings were not attached to the houses, but were fixed in the centre of the flagging, and served the double purpose of being walked upon and of letting through light. The part of this structure lying straight between the doors and the roadway was flagging, so that it was not necessary to walk upon the gratings in order to get to the houses. There was a flagged foot-pavement between the edge of the flagging and grating and the carriage-way on the same level with the flagging and grating. Between it and the flagging and grating there was a narrow strip of gravel. The end houses of the row had no flagging and grating, and the space over their areas was inclosed. The road on the causeway was a common highway to be repaired by the parish. In the course of time, before the General Highway Act of 5 & 6 Will. 4, c. 50, the flagging and grating had been dedicated to the public, and used by them as part of the highway for foot-passengers, and it so continued up to the time of the accident. The fee-simple of the houses was in the Lord Salisbury. The deft. was tenant under him for a term of years, created in 1830, and assigned to the deft. before and vested in him at the time of the accident. Whilst he was in possession, the flagging and grating either became, or at least were, out of

repair and insufficient, whether considered as a passage to the houses, or as part of a public way having regard to the tendency of persons to collect in crowds in or near such ways upon the occasion of a fire or the like. It did not appear that any substructure was out of repair, but only that the flagging and gratings forming the surface were out of repair. It became necessary, in order to effectually sustain the flagging and grating as a way in the state to which time and wear and tear had reduced them, to make an entirely new work viz., to turn an arch under them, and so to make them safe. The deft. had notice of this from the parish in 1859, some time before the accident, whilst he was in possession, but no repairs were done between that time and the time of the accident. The deft. afterwards underlet to a person named Jeffs, who again underlet to a person who let the rooms out to lodgers. The rent fell into arrear, and a distress was put in upon the lodgers, who having paid their own rent barred out the bailiff. The bailiff retook possession by force, and a crowd collected and stood thick upon one of the gratings. The deceased was passing by at the time, and being beckoned to by one of the lodgers, he tried to get through the crowd to the door, and in doing so stepped on to the grating. Scarcely had he set foot upon it when the grating and the flagging resting upon the house wall, and a portion of that resting upon the retaining wall of the causeway, gave way, and the deceased fell, with about thirty others, down into the area and so met his death. The fall of the flagging and grating was caused by its insufficiency and by the extraordinary crowd pressing upon it at the time. The cause was tried at the sittings after last Michaelmas Term. There was conflicting evidence upon the question of repairs and sufficiency; but the above must be taken to be the result of the evidence as established by the verdict. Under the direction of the judge a verdict was found for the plt. for 280*l.* damages, subject to the opinion of the court as to the deft.'s liability. No question was raised upon the pleadings, nor could any usefully have been raised, as the court has power to amend, and the question has been treated as arising upon the general issue. Probably it arises also upon the record. A rule was obtained to enter the verdict for the deft. which was well argued in last Easter Term, before Erle, C. J., and Willes, Byles and Keating JJ., when we took time to consider of our judgment. It is for the plt. to make out that the deft. has been guilty of the breach of some duty which he owed to the deceased, and that thereby the accident was occasioned. Whether he has done so may be considered under the following heads. If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term, for there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any. In this case there was none; not that that circumstance makes any difference in our opinion. If it be considered as a public way, then the deft. is not answerable for the area as for a hole made at the side of the highway, because there was no hole made by the deft. The gulf at the side of the causeway was the result of its being raised by the makers of it, not by the land at the side being excavated by the proprietors of it. The alleged hole was coeval with the highway, and a consequence of the making thereof. In *Barnes v. Ward* there was a hole made by the deft., and it was made after the dedication of the road. As for the suggested liability to repair, upon the ground that the construction was beneficial to the proprietor of the houses, that benefit was only retained by, not conferred upon, him. It is familiar law that a bridge made by a private individual

for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder. The liability to repair a highway has not been made to depend upon the quantum of benefit. If it were so, a man who drove a flourishing trade in the house ought to pay for the benefit of passers by, but not a musician or the inventor of the calculating machine. The flagging and grating were not, like a door, under the control of the occupier, but fixed. They were not worked, used, or worn out by the proprietor of the houses, otherwise than as one of the public uses a public highway on the side of which his house stands. The passage of light and air through the grating does not wear it out any more than the wind wears out the surface of the road. The more or less artificial character of the flagging and grating does not make it more or less a way to be repaired by the parish. Whether it be stone, iron, wood, or composition, as it is a public way, the public are to keep it in repair, and not the person who dedicated it. Hitherto the exceptions to the liability of the parish have been known. They are custom, prescription, tenure and inclosure whilst it lasts. Have we authority to add flagging and grating? The case is not the same as that of an open cellar flap, which may be considered as a trap in its nature and essence, unless it be kept shut. Besides that is worn out by use for the benefit of the occupier of the cellar to which it is the door. The present case is nearer to that of a mine propped up, and a way dedicated upon the surface. In such a case will any one venture to suggest that the owner of the mine and surface, or either of them, must renew the props when they rot and the road threatens to sink into the mine. This does not fall within the law as to keeping buildings adjoining a highway in such a state by repair or otherwise as not to endanger passers-by. What was insufficient here was part of the highway itself. Such law may apply to the arches of a cellar under a footway, though this we conceive to be worthy of argument and open to distinctions as to the state of things at the time of the dedication and other circumstances. It cannot apply to the footway itself. We may refer by way of illustration only to the case of one of the squares, where the footway at one side consists of large flags reaching from the outer wall of the area to the outer wall of the cellar. There the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend the public who walk upon it and wear it out, without which it might last an indefinite time. It is to be observed, that in cases of liability under this head the building need not be repaired, but only prevented from causing injury by its fall, which implies that there is a power to remove, and such power does not exist in this case. It has been suggested, in addition to the grounds relied upon in argument, that the fact of the flagging and grating concealing danger was a special cause of liability. To this we answer, first, that the flagging and grating did not prevent the existence of the deep area from being known to every body passing, and there was no fraud; secondly, that there would have been no danger if the parish had properly maintained and repaired the flagging and grating; thirdly, that the deft. did not erect and, as it was a highway, could not have removed, the structure. Moreover, concealment is relative, and every danger is more or less concealed. If a highway is dedicated with a dangerous obstruction on it, such as would have been a nuisance if placed upon an ancient way—for instance, a flight of step or a projecting flap—no action can be maintained for injury caused thereby, whether by day when it can be seen, or by night, when it is invisible. In such a case, it was held by the Court of Q. B. in *Fisher v. Prouse* 6 L. T. Rep. N. S. 711, that the public adopting

a highway must take it *in statu quo*, and that no obligation is imposed upon the dedicator to remove projections or fill up holes which may be dangerous to passers by. In that leading case, which explained and overruled several out of the vague notions of liability that have sprung up, Blackburn, J., delivering the judgment of the court, expounded with clearness and force the law applicable to this supposed ground of liability as follows: "But the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be, or whether, on the contrary, the dedication must not be taken to be made to the public and accepted by them, subject to the inconveniences or risk arising from the existing state of things. We think that the latter is the correct view of the law. It is of course not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired, it would be doubly so if the consequence was, that he was bound to fill up or fence off his canal." In this statement of the law we heartily concur. This is in accordance with the general law as to gifts, which, in the absence of fraud, must be taken as they are, without redress against the donor in respect of vice, apparent or secret, and all expenses in respect of which for repairs or otherwise are to be borne by the donee. This conclusion is also in accordance with the law as to grants of a right of way or other easement, whether for valuable consideration or not, to the effect that the grantee, and not the grantor, is to maintain and repair the subject of the easement, with a corresponding duty to do so, if by his neglect the grantor may suffer damage, and a corresponding right to enter upon the grantor's land, and to do all acts necessary for such maintenance and repair. The authorities to this effect in our own law, the civil law, and the code civil will be found in *Gale on Easements*, edition by Mr. Willea. It thus appears to us that to hold this action to be maintainable, whilst it would for the first time impose a heavy burden upon reversioners, would violate well established principles of law. The rule to enter a verdict for the deft. must, therefore, be made absolute.

Rule absolute.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Monday, Nov. 16.

(Before the LORD CHANCELLOR (Westbury.)

SHRUBSOLE v. SCHNEIDER.

SCHNEIDER v. SHRUBSOLE.

Practice—Trial by jury—Appeal.

An order made by a judge in Chancery directing a cause to be heard before himself and a special jury, cannot be made the subject of an appeal.

This was an appeal by the first-named deft. from an order of the V. C. in the above causes.

The first suit was instituted for the specific performance of an agreement between the plt. and deft. whereby they purported to compromise and settle certain disputes as to their respective shares and interests in the proceeds of a prize of 8800*l.* drawn in a lottery at Frankfurt.

The cross-suit was for the purpose of setting aside the agreement on the ground of fraud.

When the cause came on to be heard before Kendersley, V. C., his Honour directed that a trial should be had before himself and a special jury. This course had not been asked by either party.

Many of the witnesses were foreigners, whose attendance, it was alleged, there was no means of procuring. The V.C., however, intimated that, if a proper case were made out, he would receive the depositions of absent witnesses.

Glassey, Q.C. and Swanston now supported the appeal. They urged the inconvenience, under the circumstances, of the course proposed to be taken by the V. C.

Baily, Q.C. and Renshaw, contra, were not called upon.

The LORD CHANCELLOR said that the order of the V. C. related to a matter wholly within his discretion, and that he certainly should not interfere with it. A matter of this sort was not properly the subject of appeal.

Appeal dismissed.

Solicitors for the app., *E. I. Sydney and Son*; for the resp., *Walters*.

Saturday, Dec. 5.

(Before the LORDS JUSTICES.)

LADY MARY TOPHAM v. THE DUKE OF PORTLAND AND OTHERS.

Settlement—Power of appointment—Fraudulent exercise of—Bill to upset—Costs of parties.

The hearing of this cause is fully reported, before the M. R., at 7 L. T. Rep. N. S. 11, and before the Lords Justices, 8 L. T. Rep. N. S. 180. It is unnecessary to do more than refer to those reports for a statement of all the circumstances. Their Lordships, however, in giving judgment, reserved the question of costs until an opportunity could be had of obtaining, as to certain charges upon the Scotch property of the present and late Dukes of Portland, the opinion of the Court of Session in Scotland; and upon that being done application was made to their Lordships to dispose of the question of costs.

The Attorney-General, Roll, Q. C., Charles Hall and Rowcliffe appeared for the plt.

Sir Hugh Cairns, Q. C., Hardy and Alfred Baily for the Duke of Portland.

Baggallay, Q. C., Osborne, Q. C. and Frederick P. Morris for Lord Henry Cavendish Bentinck.

Giffard, Q. C., T. Stevens and Freeling for Lady Harriet Cavendish Bentinck.

Chapman for Mr. Heaton Ellis.

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Selwyn, Q. C., Hobhouse, Q. C. and Bardswell for the trustees and other parties.

Lord Justice TURNER said:—The only question remaining to be disposed of in this case is the question of costs. I have again read through and considered the pleadings, and the evidence in the cause, with a view to this question. There are two branches of the case, one relating to the appointments made by the late duke, and the other to the appointments made by the deft., the present duke. We have held all these appointments to be void so far as the plt. is concerned, as being in fraud of the powers under which they were made, fraudulent in the eye of this court, without reference to the question whether they were morally so or not. In this state of circumstances, I think that, so far as the suit relates to the appointments made by the deft., the Duke of Portland, the plt. is clearly entitled to the costs against him, and I think she is also entitled to this portion of the costs against the defts. Lord Henry Bentinck and Lady Harriet Bentinck; it appearing by the answer of Lord Henry, as I read it, that he was concurring in those appointments being made, and by the answer of Lady Harriet that she also has concurred in giving effect to these appointments, and claims under them in opposition to the plt. As to the rest of the plt.'s costs of the suit, those relating to the appointments made by the late Duke of Portland, I am of opinion that they ought to be paid out of the estate of the late duke; and the deft., the Duke of Portland, having undertaken to represent that estate in this suit, I think there must be an order for the payment of this portion of the costs accordingly; but, looking to the answers and cross-examinations of the deft. the Duke of Portland, and of Lord Henry, I think that it would be going too far to throw this portion of the costs upon either of them personally, nor do I think they can be thrown upon Mr. Ellis, who was a mere agent of the late duke in this transaction. I think that neither the deft. James nor the deft. Sir William Topham can have any costs as against the other defts. through the medium of the plt. They have become necessary parties as defts. only in consequence of the settlement made upon the plt.'s marrying, and must take their costs out of the settlement funds. It would be unjust that the parties should be charged with double costs by reason of that settlement. None of the other defts. have, in my opinion, any claim to costs as against their co-defts. What has been said relates to the costs of the suit generally. I think there should be no costs of either of the appeals.

Lord Justice KNIGHT BRUCE.—Continuing to take the view of the merits of this case as affected by the English law, which I stated on a former occasion, I concur in what the Lord Justice now proposes. I had, however, for some time doubted whether the introduction by the plt. into this suit of those matters which we hold to be cognisable by the law of Scotland ought not to have the effect of diminishing the amount of costs to be awarded to her. But the operations set on foot against her with regard to both the Scotch and English funds (operations which as to the English funds, at least, were in my judgment, I repeat, highly irregular and unjust) appeared to have belonged to one scheme, and she was, I think, justified in bringing, and entitled, if not bound, to bring, the whole narrative before the court.

Solicitors for the plt., and for Sir William Topham her husband, *Gregory, Rowcliffe and Rowcliffe*.

Solicitors for the Duke of Portland, Lady Harriet Cavendish Bentinck and Mr. Heaton Ellis, *Bailey, Shaw, Smith and Bailey*.

Solicitors for the deft. Lord Henry Cavendish Bentinck, *Cunliffe and Beaumont*.

Thursday, Dec. 17.

(Before the LORD CHANCELLOR (Westbury.)

ROBINSON v. SHEPHERD.

Will—Construction—“Per stirpes and not per capita.”

Testator gave a sum of money in equal shares among and to the lawful descendants living at the time of his death, of such of the brothers and sisters of his late grandfather as had died leaving lawful descendants, such descendants respectively to be entitled to share the same moneys in a course of distribution, per stirpes and not per capita:

Held, that the descendants were to be classified according to families, and that the property was to be divided into as many shares as there were stirpes or families, at the date of the testator's death.

This was an appeal from the M. R.; the question being as to the construction of the following clause in an artificial will. John Pearson Spedding, late of Silloth, Cumberland, the testator, bequeathed as follows:—

As to the proceeds of the sale of certain hereditaments (A.), upon trust to divide and pay the said last-mentioned sale-moneys, “in equal shares among and to the lawful descendants living at the time of my death of such of the brothers and sisters of my late grandfather, Henry Pearson, deceased, as have died leaving lawful descendants, such descendants respectively to be entitled to share the same moneys in a course of distribution *per stirpes* and not *per capita*.” Testator further bequeathed the proceeds of certain other hereditaments (B.) “in equal shares among and to the lawful descendants living at the time of my death of such of the brothers and sisters respectively of my said late grandfather, Henry Pearson, and of my said late grandmother, Elizabeth Pearson, as have died leaving lawful descendants, such descendants respectively to be entitled to share the same moneys in a course of distribution, *per stirpes* and not *per capita*.”

Testator died on the 5th June 1862. His grandfather, Henry Pearson, had two sisters and one brother, all deceased. The brother never had a child. The sisters both married and both had descendants to four or five generations, and at the time of the death of the testator, there were no children living of either of the sisters, but grandchildren of both, and a great-grandson of at least one.

Testator's grandmother, Elizabeth Pearson, had five brothers and one sister. At the testator's death there were descendants living of two of the brothers and of the sister. Of the elder brother there were living a son, grandson and two great-grandchildren. Of the second brother, grandchildren, but no children. Of the sister, a daughter and two grandchildren. The number of issue of the brothers and sisters of the grandfather and grandmother amounted to at least 150.

The bill was filed by the trustees of the will against eleven defts., selected to represent the various classes of claimants, praying to have the rights of the parties declared, and the M. R., at the hearing before him, decided that the property (A.) was to be divided into two shares in respect of the two sisters, and then that the whole line of descendants of either sister were to take *per capita*, irrespective of their various degrees. A similar declaration was made with respect to property (B.)

Giffard, Q. C. (Speed with him) appeared for John Docker, a grandson (with living descendants) of one of the sisters, and argued that, inasmuch as there was no gift to the two sisters, there could be no such division of the fund as the M. R. had decreed, and that the best mode of carrying out the bequest would be to distribute the fund amongst such of the descendants as were next of kin of the brothers and sisters,

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according to the Statutes of Distribution, living at the testator's death. He cited

Rowland v. Gorrich, 2 Cox, 187;

Dick v. Lacy, 8 Beav. 214;

Pearson v. Stephen, 5 Bli. N. S. 203; 2 Dow. & Cl. 328.

Baggallay, Q. C. and *Edward Lloyd* appeared for Henry Jackson and Jane Ellwood, children (who had children living) of a brother and sister respectively of the grandmother.

Hobhouse, Q. C., for the last six defendants, who were descendants having parents and grandparents living, contended that the division of stocks was satisfied by the division among the stocks mentioned by the testator, and then that the descendants must take *per capita*. When the testator spoke of stocks he must be held to mean the stocks he had already mentioned.

Fry appeared for John Shepherd, a great-grandson of one of the two sisters of the grandfather, who had a mother living. He supported the decision of the M. R., and relied on the use of the word "respectively."

Fischer, for Margaret Shepherd, the mother of the last-mentioned deft., also supported the decree.

W. Brodrick (A.) appeared for the pits, the trustees.

Giffard, Q. C. was heard in reply.

THE LORD CHANCELLOR.—The construction of this will appears to me to depend upon the question to whom the expression *per stirpes* is to be applied. Now there can be no doubt I think, upon the language of the will, that the persons who are to be classed *secundum stirpes* are descendants. The descendants are to be arranged "according to the stocks" from which they have descended, and they are to be arranged among one another. The arrangement *per stirpes*, therefore, to the exclusion of individual arrangement, implies this, that out of the whole body of descendants some are to be selected as being the *stirpes* of the rest. It is plain therefore that the words "*per stirpes*" are intended by the testator as a limitation of the universality of the word "descendants." Now the M. R. has applied the words *per stirpes* as denoting the sisters from whom these persons originally take. But it must be recollected that the gift is to the descendants as purchasers. The will does not contain a gift of a division of the testator's estate into as many families as there might be brothers and sisters of his grandfather who had died leaving issue, but the will is a division among the descendants themselves taking as purchasers, taking as simple legatees, these descendants, however, being arranged *inter se*, according to the principle of families, and not according to the principle of individuals. My answer, therefore, to the question, to whom do the words *per stirpes* refer? is, that they refer to the descendants. And what rule does the expression then give? It gives the rule of selection; but according to what principle? According to the principle of the stocks which are found amongst these descendants. But stocks of descendants may be few as compared with individuals, because there may be a grandson of a brother or sister who himself has children or grandchildren. But persons in the relation of children or grandchildren will be included in the words "descendants," the father being preferred. The father, therefore, is taken as the legatee, inasmuch as the legacy is given to "*stirpes*," and is not a legacy to individuals. But then the word "respectively" does not at all alter that, because the word "respectively" only imports this, that all are to be taken, and then arranged according to the respective relation they bear to the *stirpes* from which they sprung, and who is the legatee. The word "respectively," therefore, is properly used as referring the descendants to the stocks from which they sprung. Upon a proper interpretation the legacy is a gift to the *stirpes* or families of all the descendants who are found to be alive at the

death of the testator, being descendants from such of the brothers and sisters of testator's grandfather as died leaving issue; and it being a legacy to *stirpes* and not to individuals, I have only to inquire how many separate and distinct families there are in the whole body of descendants. I then arrange the descendants respectively under the families from which they have sprung, and I take the head of each family as being a *stirpes*, i. e. a root or stock, and I hold him to be entitled as the legatee. I direct this fund to be divided amongst the families of descendants of such of the brothers and sisters of the testator's grandfather as may have died leaving issue into which these descendants admit of being divided and distributed at the time of the testator's death. The words "equal shares" only imply as to how they are to take, and do not affect the rule of ascertainment; they only imply that each *stirpes* is to have an equal share with every other *stirpes*. Not only is that clearly the interpretation, but I think the word *stirpes* will go further. Suppose at the death of the testator there had been not only some grandchildren of the two sisters, but also great-grandchildren of some of the sisters, being children of grandchildren who had predeceased the testator; then these grandchildren would certainly have taken as representing families or *stirpes*. Applying the same rule to the great-grandchildren, there might be children of grandchildren taking *per stirpes*, to the exclusion of their own children. The rule runs throughout the whole, it being this—that you are to take the father or parent as the person who is to take the share, as embodying in himself all those descendants who are his own immediate issue. I think if I were to divide the fund into as many shares as there were brothers and sisters of the grandfather who had left issue living at the testator's death, I should be doing great violence to the testator's language. The fund would thus be divided into two parts; and I think this process would certainly have been effected by other words, if such had been the testator's intention. I have arrived at a different conclusion in this respect from the M. R.; and I feel myself obliged to decree that this property is divisible into as many shares as there are *stirpes* or families of descendants living at the death of the testator. The expression *secundum stirpes* would be more strictly correct than *per stirpes*. The declaration will be, that the words "*per stirpes* and not *per capita*," used by the testator, are applicable to the descendants, who are to be classified according to families; and the property in question is to be divided into as many shares as there are *stirpes* or families, each *stirpes* or family taking an equal share. Let the descendants be classified according to *stirpes*, and then let there be a division into families according to the actual facts; and for the purpose of ascertaining the various *stirpes*, let inquiries be directed.

Solicitors for the plt., *Bell, Brodrick and Bell*, agents for *Edward Blaymire*, Penrith; for some of the defts., *Allen, Nicol and Allen, Richards and Clarke*; and *R. T. Jarvis*.

Nov. 24, Dec. 3, 7 and 21.

(Before the LORD CHANCELLOR (Westbury).)

FOXWELL v. BRADBURY; FOXWELL v. WEBSTER;
and other suits.

Practice—Multitude of suits by same plt. respecting the same patent—Motion to consolidate suits—Validity of patent—Infringement—Trie in Chancery.

Where 134 bills were filed by the same plt. in respect of alleged infringements of the same patent, upon motions before answer by four assesses of defts. in seventy-seven of the suits, to the effect that the plt.

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should proceed only in such one of the suits as he should select, until such suit should be determined, or the question of the validity of the patent decided; and that in the meantime the proceedings in the other suits should be stayed:

The Court ordered affidavits to be filed by the defts. giving full information as to the variety of machines used by them, by which the alleged patent was said to be infringed:

The Court further declined for the present to order an account of the profits, but ordered the question of validity to be first tried before itself without a jury, directing three of the defts. selected by the rest to conduct the trial on behalf of all the moving defts., with liberty to the defts. in the remaining suits to apply to be made parties to the order.

These were motions by way of appeal from orders made by Kindersley, V. C. on the 20th Nov. last, and reported *anté*, p. 362.

The number of suits brought by the plt. in respect of the infringement of the same patent was 134, and the motions were made by four classes of defts. in seventy-seven of the suits.

His Honour refused the applications, on grounds which will be found fully stated in the previous report.

Rolt, Q.C. (with him *E. F. Kay* and *Bagshawe*), on behalf of the defts. in nineteen of the suits, moved that the order of his Honour might be reversed or varied, whereby he refused the following application: "That the plt. might proceed in such one only of the above-mentioned suits as he should select for that purpose until such suit should have been determined, or until the validity of the patent therein should have been finally decided, or until the court should otherwise order; and that the proceedings in the other eighteen suits might in the meantime be stayed, or that the time for answering and production of documents therein might be enlarged; the several defts. to the said suits thereby undertaking to be bound, and to abide by the result of the said suit so to be selected, so far as the validity of the said patent was concerned, in like manner as if the same result had been arrived at in the said several suits; or that such other order might be made as should be just for the purpose of deciding the validity of the said patent, so as to bind the defts. in all the said suits by one proceeding only." They contended that the plt. had not so strongly established the validity of his patent as to be entitled to stop the defts. from infringing it.

The LORD CHANCELLOR.—The question is, whether I can try the validity of a patent, suspending for the time being the question of infringement.

Rolt, Q.C. argued that the court possessed such a jurisdiction, and cited

Archbold's Practice, 11th edit. 1347;
Goulden v. Lydiat, 4 Y. & C. Ex. 374 (n.);
Towneley v. Deare, 3 Beav. 212;
Fullagar v. Clarke, 18 Ves. 181;
Bacon v. Jones, 4 M. & Cr. 433;
Findon v. Parker, 11 M. & W. 675;
The Mayor of York v. Pilkington, 1 Atk. 282;
Adams v. Fisher, 3 M. & Cr. 526;
Delarue v. Dickinson, 3 K. & J. 388.

Osborne, Q.C. and *C. M. Roupell* appeared on the second motion, which was on behalf of the defts. in seven of the suits, and which differed from the first only that it did not ask that the time for answering or the production of documents might be enlarged.

Freeling appeared on the third motion for defts. in eleven of the suits, which was substantially the same as the last.

Osborne, Q.C. and *Waller* appeared on the fourth motion for the defts. in forty suits, which was in similar terms to the former, but did not ask for an issue as to the validity of the patent.

Glasse, Q.C., *C. Locock Webb* and *Theodore Aston* (of the common law bar) were for the plt.

Nov. 24.—The LORD CHANCELLOR asked whether there would be any objection to this course, namely, that affidavits should be filed by the defts. stating their objections to the validity of the patent, and giving full information of every combination of machine made, sold, or used by them, and whence obtained and when used; and full discovery of the profits derived from the machines which had been made, sold, or used by them respectively; the defts. being held bound to pay the royalty demanded on behalf of the plt. in respect of each machine, if the plt. established the validity of the patent and the fact of the infringement.

Glasse, Q.C. said there was no objection if the defts. were required to verify a model of every machine made, used, or sold.

The LORD CHANCELLOR thereupon ordered the motion to stand over till the first day of sittings after term, no proceedings to be taken in the meantime, the defts. undertaking to file affidavits as above.

Dec. 3.—*Rolt, Q.C.* this day stated that affidavits giving the discovery understood to be required by his Lordship had been filed. They stated the various kinds of machines, whence obtained and when used, but the particulars of objection had not been added; and, as to the account of profits, defts. contended that it would be a question, after the fact of infringement had been established, whether they should have to pay the royalty or to account for profits. Accordingly they had not furnished the account, and submitted that the duty of doing so would be very onerous. He cited

Delarue v. Dickinson (*ubi supra*).

The LORD CHANCELLOR acceded to the postponement of the account, and further said that the plt. should have a discovery without fail the moment the discovery would do him any good; but that this discovery would do the plt. no good. In strictness the plt. was not entitled to it until his patent was established. His Lordship had already, as he had said, done some violence to the practice of this court, because he did not remember a case of this character in all his experience in that court. But if he did violence to the practice, it should be conducted to the end of doing the plt. service by facilitating his proceedings and saving him from the consequence of this number of suits.

The matter was ordered to stand over to allow the plt. time to read the affidavits.

Dec. 7.—After some discussion the LORD CHANCELLOR (this day) made an order directing that an issue, as to the validity of the patent, should be tried; and that two of the defts., Bradbury and Jones, and another, to be selected by the defts. among themselves, should conduct the trial as representatives, and on behalf of the rest; the result to be binding upon the plt. and upon all the defts. who were parties to the four motions. All particulars of objections to the validity of the patent pursuant to the 41st section of the Patent Law Amendment Act (15 & 16 Vict. c. 83), to be delivered to the plt.'s solicitor within a fortnight. The trial to take place, by consent, before the Lord Chancellor, in Hilary Term, without a jury.

His Lordship expressed his intention of selecting some mechanician to be present at the trial for the purpose of assisting the court, but as the parties declined the offer of being allowed to join in naming some person for this purpose, no mention of this intended arrangement was made in the order.

All questions of costs were ordered to be reserved, and liberty was given to any of the defts. in the other suits to apply to be made parties to that order.

Dec. 21.—*Osborne, Q.C.* this day moved for an extension of time, for a week longer, within which objections to the validity of the patent might be delivered.

ROLLS.]

Re ARNOLD.

[ROLLS.]

The LORD CHANCELLOR.—By consent of the plt. you may take three days, and you will give the plt. the costs of this application.

Solicitor for the plt., *H. Wickens*.

Solicitors for the defts., *Field, Roscoe, Field and Francis*; *R. H. Peacock; Sles and Robinson*; *T. White and Sons*; *Johnson and Weatheralls*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Friday, July 31.

Re ARNOLD.

Doe dem. Harris v. Taylor, 10 Q. B. 718, observed upon.

Will and codicil—Construction—Omission of words of limitation in will—"Issue" read "children"—"Moiety"—"Vested."

A devise is vested in the devisees when the right to it is ascertained and the possession only postponed.

Where the construction of a devise or bequest contained in a will is ambiguous, the expression of the testator in a codicil as to the way in which he understands or construes his own words in the will, is conclusive, and must be followed; but if the testator in his codicil recite that in his will he has made a devise or bequest which does not in fact there appear, the codicil does not by such a recital create that devise or bequest.

A testator by his will devised, "all that his undivided moiety or full half part" of his real estates for the benefit of his wife and daughter M. for their lives, and after the death of M. to the use of her first son and the heirs of his body, and in default of such issue to her other sons and the heirs of their bodies successively; "and in default of such issue to the use of all and every the daughter and daughters of the body of M., lawfully to be begotten, as tenants in common, and not as joint tenants; and in default of such issue" to the use of his son J. A. in fee.

The testator, by a codicil, reciting that he had given "the reversion in fee of divers lands, &c., expectant on the deceases of his daughters M., D., A., M., and H.," without issue of their respective bodies, unto J. A. in fee, &c., declared that "if J. A. should depart this life without leaving issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the limitations aforesaid, then he gave the said estates to such of the five daughters as should be then living, and the issue then living of such as should be then dead, in manner therein mentioned:

Held, that the words "all that his undivided moiety" in the will did not pass the fee in the estates; that the word "issue" meant "children;" that the words in the will "in default of such issue," taken in conjunction with the recital in the codicil, did not create an estate tail in the estates in favour of either the daughter M. or her daughters; and that the daughters took under the will life-estates only in the devised property:

Held, also, that the word "vested" in the codicil meant "vested in interest;" and that, as J. A. survived the testator, though he died in the lifetime of M., his representatives were entitled to the reversion in the estates expectant on the death of the two daughters (the only surviving children) of M.

This was a petition presented by two of the grand-daughters of the testator in the matter, praying payment out of court to them of a sum of money paid in by a railway company, in respect of land purchased by the company in Leicestershire and Northamptonshire.

The land sold to the company formed part of the

real estates of the testator in the matter; and the rights of the petitioners and other parties to the fund in court depended upon the construction of his will and codicil.

The facts of the case were shortly the following:—Richard Arnold (the testator) by his will, dated the 28th Jan. 1801, devised "all that his undivided moiety or full half part of certain hereditaments in the county of Leicester, and also 'all that one undivided moiety or full half part' of some meadow land in the county of Northampton," to trustees, upon certain trusts for the benefit of his wife and daughter Mary for their lives; and after the death of the latter, to the use of her first son and the heirs of his body, and in default of such issue to her other sons and the heirs of their bodies successively, "and in default of such issue to the use of all and every the daughter and daughters of the body of his said daughter Mary lawfully to be begotten as tenants in common, and not as joint tenants; and in default of such issue," to his son John Arnold, his heirs and assigns.

The will contained similar devises of other property in favour of the testator's other daughters, Elizabeth, Dorothy, Anna, Maria and Harriett, and their children, with an ultimate remainder in each case to John Arthur Arnold in fee. The will also contained a residuary devise of the hereditaments to or for the use of the testator's wife and son John Arthur Arnold until he should attain twenty-five years of age, and upon his attaining that age, to him in fee.

By a codicil dated in 1803, after "reciting that the testator had, by his will, given the reversion in fee of divers lands and hereditaments expectant on the several deceases of his said daughters Mary, Dorothy, Anna, Maria and Harriett, without issue of their respective bodies," unto his son John Arthur Arnold, his heirs and assigns; and that he had also, by his will and codicil, limited other lands and hereditaments for the use of his said son, his heirs and assigns, until he attained twenty-five years of age, and that upon his attaining that age, the testator had then given the same hereditaments to him, his heirs and assigns; the testator declared as follows:—"That if his said son should depart this life without leaving issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the limitations aforesaid," then the testator gave the said estates to such of his five daughters as should be then living, and the issue then living of such of them as should be then dead, in the manner therein mentioned.

The testator died in 1804. His son and five daughters survived him. Four of the daughters died without issue in the lifetime of John Arthur Arnold. Mary married and had two sons, who predeceased her without issue. John Arthur Arnold attained twenty-five years of age, and died in 1844 without leaving any issue. Mary married, and had two sons, who died in her lifetime without issue. She died in 1861, having by her will purported to bequeath one-fourth of the fund in court to her two daughters absolutely. They were the present petitioners, and the questions were: First, whether under the will of the testator they were entitled to life-estates only, or to estates in fee or in tail in the devised hereditaments? Second, whether, if the petitioners took life-estates only under the will, the gift over in the will to the testator's son, or the substitutional gift contained in the codicil to his daughters or their issue took effect?

Scheyn, Q.C. and Cairman Jones, for the petitioners, contended that the devise in the will of "the undivided moiety" of the real estate was equivalent to a devise of so much of "the estate," in which case, if that word had been used, the fee would have passed. At all events the petitioners were entitled by virtue of

the words "in default of issue," in the devise in the will, to an estate tail in the lands, and in either case to the fund in court absolutely. They also argued that the recital in the codicil explained the true construction of the will, and that the word vested in the codicil did not mean "vested in interest," but "vested in possession." They cited

Doe dem. Harris v. Taylor, 10 Q. B. 718;

Clements v. Paske, 3 Doug. 384;

Doe dem. Atkinson v. Fawcett, 3 C. B. 274;

Montgomery v. Montgomery, 3 Jo. & Lat. 47;

Uthwaite v. Bryant, 6 Taunt. 317;

Randall v. Tuckin, 1b. 410;

Wilkinson v. Chapman, 3 Russ. 145;

Boraston's case, 3 Co. Rep. 19;

Sillick v. Booth, 1 Y. & C. C. C. 121.

Bobhowe, Q.C. and *W. Pearson*, for John Arthur Arnold's representatives, denied that *Doe dem. Harris v. Taylor* (*ubi sup.*) was good law, and insisted that the words "such issue" in the will meant issue before mentioned; that the word "vested" in the codicil meant "vested in interest;" that the daughters of Mary were, under the will, only entitled to life-interests in the devised estates, and that as John Arthur Arnold had died without leaving issue living at his decease, but as the estates had become "vested" in him on the death of the testator, the representatives of John Arthur Arnold were absolutely entitled to the estates expectant on the deaths of the daughters of Mary; and so therefore, subject to their life-interests, to the fund in court. They cited

Denn v. Page, 3 Term R. 87, n.;

Hay v. Coventry, 3 Term R. 83;

Doe dem. Liversidge v. Vaughan, 5 B. & Ald. 464;

Ashley v. Ashley, 6 Sim. 358;

Bridger v. Ramsey, 10 Hare, 320;

Bampfild v. Popham, 1 P. Wms. 54;

Adams v. Adams, 1 Hare, 537;

Smith v. Fitzgerald, 3 V. & B. 2;

Vaughan v. Foakes, 1 K. 58;

Doe d. Hearle v. Hicks, 8 Bing. 475; s. c. 1 Cl. & Fin. 20;

1 Jarm. on Wills, 492, 3rd edit.;

Parkin v. Hodgkinson, 15 Sim. 293.

Baggallay, Q.C. and *West*; and *Fordham* and *Griffith Smith* appeared for other parties.

Cadman Jones in reply.

THE MASTER OF THE ROLLS.—The first question which I have to determine in this case is, what estates the daughters of Mary, a child of the testator in the matter, take under the words of the will. [His Honour then read the devise in the will, and continued:] Those are certainly very common and familiar words, and, generally speaking, there would be no difficulty in saying that they give simply an estate for life. It is, however, to be observed, with regard to this will, that where the testator intended to give an estate of inheritance, he has done so with apt and proper words for that purpose. In the devise, which I have read, those words of inheritance are omitted; and they are also omitted in several other devises in the will of a similar character. It has long been settled that a gift over of property in the event of a person dying without "such" issue, merely refers to the issue "above mentioned;" and that such a clause cannot enlarge the estate of the first taker. The cases on that subject are so numerous and so conflicting that it would be waste of time to refer to them in detail. Several of them which most closely resemble the present were cited in the argument; but I do not believe that the case would on that point have been seriously contested on the part of the counsel for the petitioners, had it not been for the case of *Doe d. Harris v. Taylor*. I must say that I was considerably startled when I first read that case; the more so as the court thereby overruled the judgment of V. C.

Shadwell on the very same will, a judge of great authority on all cases of construction. But that case, if it be law, does more; for it expressly overrules a long series of decisions. Besides that, it gives a reason for the conclusion come to by the court, of which it is difficult to understand the grounds. With all deference to the learned tribunal which decided that case, I am placed by it in a considerable dilemma. It manifestly governs the present; but if it be correct, it is not the daughters of Mary in this case, but Mary herself, who took an estate in tail general in the property devised. I am now compelled to follow either that case or the long series of authorities of an opposite character to which I have been referred. I regret to say that the case in the Q. B. appears to me not to be sustainable on the grounds stated by their Lordships, and that I now therefore feel myself unable to follow it. Mr. Cadman Jones argued that, independently of any other question, the testator had, by the use of the word "moiety," given to the daughters of Mary the absolute interest in the land devised; but I am unable to concur in that argument. The cases cited on that point do not appear to govern the present. Here the testator carefully adds words of limitation to pass the inheritance in the devises in his will, with the exception of the five devises to the daughters. It was justly observed that the same argument was open in the case of *Denn v. Page*, and several of the other cases cited; but that the courts, nevertheless, held that the estates could not be enlarged beyond the life estates. My opinion on the will alone is, that the daughters of Mary took no more than life-estates. That being so, the question next arises, whether the words in the codicil will give the daughters estates tail? [His Honour then read the codicil, as above stated, and continued:] I regret to say that I think the codicil cannot have the effect contended for. The observations of Sir James Wigram, V. C., on that subject, in the case of *Adams v. Adams*, are extremely valuable and very pertinent. They draw an accurate distinction between the interpretation of a devise or a bequest, by means of a reference made to it, where both the devise and the reference occur in the same instrument; and where the reference to, or recital of what has been done is contained in one instrument and the devise itself is in a former one. I admit that, if the construction of a devise or bequest contained in a will is ambiguous, the expression of the testator in a codicil as to the way in which he understands or construes his own words in the will is conclusive, and must be followed. But if the testator in his codicil recites that in his will he has made a devise or bequest which does not, in fact, there appear, the codicil does not by such a recital create that devise or bequest. Upon referring once more to the words of the codicil in this case, it is impossible to say the recital is absolutely false. If the sentence in the will is as the testator intended it, and if it be right as it stands, then the testator used the word "issue" for children and the will gives the estate to the sons in tail general, and then on failure of those estates to the use of all the daughters of the body of his daughter Mary as tenants in common, and in default of such issue, to John Arthur Arnold. Here "issue" means "the children of Mary, which he had previously spoken of." If, therefore, in the codicil he means the words "without issue of their respective bodies" to mean "without children," then his recital of the previous devise is correct. But if the codicil is to be read as if he there meant to say he had by his will made such a devise as is expressed in the exact words used in the codicil, then it is inaccurate, for that would give Mary an estate tail, while, in fact, no such devise is contained in the will, and no such devise could be imported into the will from the words there appearing. Indeed, the argu-

ment which was addressed to me seemed to contain within itself its own refutation; for it amounted to this—assuming the legal meaning of the words as they stand to be, to give to Mary and the other daughters an estate tail, the argument was this: The codicil must be read just as if it ran thus, "Whereas I have by my will devised the remainder in fee of and in the devised hereditaments expectant on the failure of estates tail given to my daughter Mary, &c. to John Arthur Arnold, his heirs and assigns," and that so construing that passage, it furnishes the construction of the one contained in the will, and converts that devise also into an estate tail in Mary. But if I were to acquiesce in that argument, and were to so construe the codicil, I should alter the whole will, and should have enabled Mary, by a disentailing deed, to exclude her sons and daughters. That I could not do. The only remaining question argued before me was, as to the effect of the devise over contained in the codicil, in the event of John Arthur Arnold dying without leaving lawful issue before the estates became vested in him. [His Honour read the codicil as above stated, and continued:] It was argued that the word "vested" must not there receive its ordinary legal acceptation of "vested in interest," but must mean "vested in possession," because the devisees become vested in interest in John Arthur Arnold immediately upon the death of the testator. But I think the word "vested" must mean "vested in interest;" and that the only operation of that devise over is, that it would have taken effect in case John Arthur Arnold had died before the death of the testator. It is important to give words their ordinary interpretation; and particularly when a testator makes use of a word which for the most part has a received, plain, legal, technical meaning. A devise is vested in the devisee when the right to it is ascertained and the possession only postponed. It is true that the court has occasionally been compelled to give the word the meaning of "vested in possession," as in *Taylor v. Frobisher*, 5 De. G. & S. 191, but the court always does that with reluctance; and because the rest of the will and context inevitably fix that meaning upon the word. Here I see no reason for departing from the ordinary legal meaning of the term. Accordingly, in my opinion, the interest of John Arthur Arnold expectant on the decease of the daughters of Mary vested indefeasibly in him in fee-simple on the death of the testator and the devise over in favour of the daughters thereupon ceased to be capable of taking effect.

Solicitors for the parties, *Johnson and Coote, and Skilbeck.*

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-Inn, Barristers-at-Law.

Dec. 3 and 4.

DEPREE v. BEDBOROUGH.

Vendor and purchaser—Conditions of sale—Forfeiture of deposit.

Conditions of sale of property sold by auction under a decree of the court contained no provision for the return of the deposit in the event of non-compliance by the purchaser, but contained a stipulation that, in the event of nonpayment of the purchase-money, or other default, an order might be made by the court for a re-sale, and for the payment by the purchaser of any deficiency and costs.

At the sale a purchaser contracted to purchase and paid the deposit; but before completion became bankrupt. His assignees elected not to complete the purchase:

Held that, in consequence of the act of the assignees,

there had been a forfeiture of the deposit, as far as they were concerned.

The question in this case was, whether a deposit of 916*l.* paid into court by Mr. Boucicault in respect of a contract made by him for the purchase of property sold under an order of the court, was forfeited by reason of his assignees in bankruptcy having declined to elect to accept such purchase.

Certain property in the Haymarket was put up for sale by auction on the 26th Feb. Mr. Boucicault became, and by the chief clerk's certificate, dated the 5th March, was allowed, the purchaser for the sum of 916*l.* The property was bought, as he alleged, not for himself solely, but for "The New Theatre Company (Limited)." A deposit of 916*l.* was paid into court; but before the completion of the purchase Mr. Boucicault became bankrupt, and his assignees refused to elect to complete the same.

Bacon, Q. C. and *E. Leigh Pemberton* now moved on behalf of the plt., that, as the assignees had elected not to complete, the deposit might be forfeited to the vendors, and that the premises might be resold. The notice of motion was also to the effect that such resale might be without prejudice to any right of the vendors against the bankrupt or his assignees in the event of the resale being made at a less price than 916*l.* The conditions of sale did not provide that, in case of non-compliance with the contract, the deposit should be returned, but the last condition of sale provided as follows:—"That if any purchaser shall not pay his purchase-money at the time above mentioned, or at any other time which may be named in any order for that purpose, and in all other respects perform those conditions, an order may be made by the said judge at chambers for the resale of the premises purchased by such purchaser, and for payment by him of the deficiency, if any, in the price which may be obtained upon such resale, and of all costs and expenses occasioned by such default." It was contended, in support of the motion, that, where a purchaser is in default and the vendors have not parted with the property under a resale, the deposit must be forfeited, on the ground that the purchaser has no right to rescind the contract. They cited

Sugd. V. & P., 14th edit., p. 40;

Lethbridge v. Kirkman, 25 L. J., N. S., 89;

Cleave v. Moores, 3 Jur. N. S. 48.

Malins, Q. C. and *Swanston*, for the assignees, argued that the last condition of sale above cited, providing an indemnity in case of a deficiency on resale, showed that it was not the intention of the parties that there should be any forfeiture. Instead of a forfeiture of the deposit, payment of any deficiency and costs was substituted, showing that there was to be no other remedy. They referred to

Palmer v. Temple, 9 Ad. & El. 508;

Casson v. Roberts, 7 L. T. Rep. N. S. 588.

Smith Osler appeared for a mortgagee.

THE VICE-CHANCELLOR.—The question in this case has arisen in consequence of a contract entered into by Mr. Boucicault, through whose bankruptcy a new party to the suit has been introduced, who has a right to abandon or to go on with the contract. This shows that the 15th condition was not intended to apply to the case of a bankruptcy, because, in the case of a bankruptcy, the right to a resale, and the right of the parties prosecuting the suit to have the property resold, arise from other circumstances than those contemplated by this condition. Where a deposit is exacted by the court as part of the contract to be entered into by the purchaser, the purpose for which it is exacted is one for the benefit of the vendor—it is exacted as some security for the performance of the contract; but where, after the payment of the deposit, and before the completion of the contract of sale and purchase, the incapacity of bankruptcy succeeds, and the person who

has paid the deposit has no longer any right whatever, but his right has been transferred to another person, who has the right to go on or to abandon the contract, it is quite clear that in such a case there has been a default on the part of the purchaser. Then, how the person who is in default can, upon that default, and in consequence of that default, acquire any right to the money which was parted with as a security that there should be no default, it is difficult to conceive; and if it be difficult to conceive in any case that the person making the default can upon so doing acquire a right to the money which was deposited as a security against a default, upon what principle can the assignees of that person, who have a new right, make any claim whatever; because they had a choice either to have the benefit of the purchase or to renounce it, and as soon as they made their election and renounced the purchase they abandoned the deposit? I am unable to follow the argument of the counsel for the assignees, that upon the abandonment there arises a right to have the security returned which was exacted to prevent the contract being abandoned on the part of the purchaser; and no case can be found to support that view—at any rate none has been cited to show that in a case like this a person making default has been held to be entitled to the security which he paid to prevent an abandonment of his contract. It seems to me that it would be a violation of principle to countenance any such claim as that now put forward on the part of the assignees. The passages cited from Lord St. Leonard's book have some application; but there is this peculiarity in this case—that this was a sale by the court, and the court having exacted the payment of a deposit, has by its position of deposit a very large power as to the rights of any person who may in any shape make a claim upon it. I do not wish to be understood as laying down any general rule upon the subject—all I decide is, that the assignees have no right whatever to the deposit, and that by abandoning the purchase they have abandoned the deposit which relates to it; and therefore I cannot countenance the right of the assignees to this money in consequence of the course which they have taken. On the other hand, this notice of motion asks for a declaration of absolute forfeiture of the deposit. Now, there has not been a forfeiture by the bankrupt, but there has been a forfeiture by the assignees, if by anybody, from the course which they have elected to take. The proper course to follow now will be, not to determine more than that the assignees in bankruptcy have no right to the deposit, and even if upon a resale of the property it should fetch ten times the amount which Mr. Boucicault bid for it, I do not see that any right can be set up by the assignees to this deposit. On the other part of the motion, which asks that the vendors may be allowed to prove in bankruptcy against the estate of the bankrupt, I shall make no order, for the reason that the assignees of the bankrupt had a right to elect whether they would accept the contract or not, and they have exercised that right by abandoning the contract. In fact, the Court of Bankruptcy, in the exercise of its discretion, compelled the assignees to make an election. The substance of my decision is, that these assignees have no right to be paid this deposit. To say there has been a forfeiture on their part does not exactly state my meaning; but, as some expression must be used, perhaps the word forfeiture is as good as any other that can be found. The order will be to the effect that the assignees having declined to accept the contract, the deposit has been forfeited by them, and the property must be resold. There will be no order as to costs.

Bacon, Q.C. asked that the order might be made without prejudice to the right of the plt. against the estate of the bankrupt. The vendor would have had a right to compel Mr. Boucicault, had he not been made a bankrupt, to make good any deficiency that might

arise through his default. But now, if the vendor should sustain any loss, he has a right to prove against the estate for damages, and it was asked that this question might be left open.

The VICE-CHANCELLOR refused to make any order whatever upon the latter part of the motion.

Solicitors: *Pemberton, Meynell and Pemberton; Linklater and Hackwood.*

V. C. WOOD'S COURT.

Reported by W. H. BENNETT and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Saturday, Nov. 7.

GROVES v. GROVES, *ex parte* WHITEHEAD.

Practice—Married woman—Possibility of issue.

Upon evidence showing the improbability that a woman forty-nine years of age should bear children, the Court will yet not treat her as past childbearing.

The corpus of certain funds in this suit stood limited to S. Whitehead for her separate use for life, with remainder to her husband for life, with remainder to their two and only children absolutely in equal shares.

A petition was now presented by all the parties so entitled, and all *sui juris*, asking the consent of the court to a mutual arrangement for payment out of the whole fund to S. Whitehead.

Evidence was given that S. Whitehead was forty-nine years old, and that she had not had a child for more than twenty years, and medical evidence that she was physically past childbearing.

Boyle, for the petitioners, submitted that, under these circumstances, practically the whole interest was before the court.

The VICE-CHANCELLOR said that the settled rule was not to consider a woman past childbearing until she was fifty years of age; he could not make an order in the teeth of that rule. He would, however, allow the petition to stand over, with liberty to apply in chambers.

Re MARSHAM.

Practice—Legacy duty—Certificate—Payment out of court.

On petition for payment of a fund out of court, the usual certificate from the Inland Revenue Department of payment of legacy duty ought to be produced. Where that certificate was refused on other grounds, although duty had been paid, and an affidavit to that effect was produced, the court ordered such affidavit to be served on the Solicitor for the Inland Revenue, together with notice to show cause within seven days why the fund should not be paid out, and in default, that it should be so paid.

An order of the 20th June 1863 had been made on petition in this matter directing that the residue of the proceeds of the sale of 920*l.* 8*s.* 9*d.* and 990*l.* 11*s.* 8*d.* Three per Cent. Bank Annuities now in court, after payment of costs, be paid to the solicitor of certain parties entitled, whose names were mentioned in the order. Upon application to the Inland Revenue Department, to ascertain whether the proper legacy duty had been paid, and if so, for the usual certificate to that effect, it was found that the duty had been paid, but the certificate was refused on the ground that no general account had been filed.

Torriano now applied that the fund might be paid out on an affidavit of these facts.

The VICE-CHANCELLOR said that he could not, in the absence of the certificate, make the order for payment out of court of the fund upon the mere affidavit before him. He thought the best course would be to order that affidavit to be served on the Solicitor for the Inland Revenue, with notice that the fund would be

Paid out, unless within seven days cause were shown to the contrary by that department.

Solicitor for the petitioners, *C. Fidley*.

Re SOTHERN.

Practice—Infant's share of fund in court—Payment to solicitor—Liberty to apply in chambers.

An infant was entitled on her attaining her majority to a share of a fund in court, and within one month of that time an application was made for the payment of the fund out of court.

The Court declined to order the infant's share to be immediately paid to her solicitor on his undertaking to pay it to her on her attaining twenty-one; but gave liberty to apply in chambers for payment, on a certificate of the chief clerk to the effect that she had so become entitled.

This was a petition for payment out of court of a fund in which several parties were now absolutely entitled to share; one share however would, on her attaining twenty-one, become the property of an infant, who would not attain that age till the 8th Dec. next.

Bardswell, for the parties entitled, asked (to save expense) for an order disposing of the whole fund, the infant's share to be paid to her solicitor, he undertaking to pay it over to her at twenty-one.

The VICE-CHANCELLOR said that he could not make such an order. The share of the infant must be carried over to a separate account, with liberty to apply in chambers for payment out, on a certificate of the chief clerk that she had attained twenty-one.

Tuesday, Nov. 19.

WESTMINSTER BRYMBO COAL AND COKE COMPANY v. CLAYTON.

Practice—Production of documents—Further affidavit.

Unless the answer of a deft. as to the documents, &c. in his possession or power is inconsistent with the original affidavit made by him, he will not be required to make a further affidavit as to them.

But where there is inconsistency, the court will require a further affidavit as to particular documents inquired after.

This was an application from chambers requiring a deft. to make a further affidavit as to the deeds, documents, &c., in his possession or power, more especially a plan therein referred to.

The object of the suit was to ascertain the boundaries of adjoining coal-mines worked by the plts. and deft. under leases.

The bill alleged that in some communication between the parties in Jan. 1861 the deft. had seen a Mr. Napier, the manager of the plts.' colliery and given him a tracing from a map, which was represented by the deft. to be a correct delineation of the boundaries of the lands in question.

By the 31st paragraph in his answer the deft. stated that the tracing above named was taken from a sketch or plan made by himself for the purposes of a contemplated exchange of lands, but denied that it represented, or professed to represent, the correct boundaries of these lands, but he believed it might prove to be such. The exact words were as follows: "I believe that I traced the outline of this sketch or plan from a working plan then and now in my possession, but I gave the said sketch to the said Mr. Napier and have no copy thereof, and do not exactly recollect what it was; but I believe that if it shows the western boundary of the said land numbered 76, I did not take this from the said working plan, but I placed it at what I then understood to be the western boundary of the minerals at this spot as claimed by the company."

The affidavit as to documents omitted altogether the working plan mentioned in the answer.

The plts. thereupon applied in chambers that the deft. might make a further and sufficient affidavit as to this plan, "stating particularly whether he had not now in his possession or under his control, and if not, when last he had possession or control, and accounting for a certain working plan mentioned in the 31st paragraph of his answer filed in this cause, and by such answer sworn to be then in his possession or under his control, or when he had such, if not now, and what has become of certain surface and underground plans and sections and working plans relating to the mines in question in this cause."

It was alleged in the affidavit made in support of this application in chambers that the deft.'s lease contained a covenant to keep an accurate plan of the workings of the mine.

Roll, Q. C., Giffard, Q. C. and Freeling in support of the application.—The answer of the deft. being inconsistent with itself as to this plan, he must make a further affidavit:

Richards v. Watkins, 6 Jur. N. S. 168.

Cotton, for the deft., contended that the answer was not inconsistent with itself. It had not been in any way shown by the plt. that the working plan alluded to had any bearing on, or at all related to, the mines in question in the cause.

The VICE-CHANCELLOR said, that admissions made by a deft. in his answer were the foundation for the practice of discovery as to documents, and a deft. could not be called upon to make any further affidavits as to such documents, unless the answer and original affidavit were inconsistent upon that subject. It was for this reason that the court refused to allow a deft. to be cross-examined on his affidavit as to the custody, &c., of documents. Although the court would not allow exceptions to an answer for insufficiency where the interrogatory was merely a general one, and the same information might be obtained by summons, yet no case had decided that exceptions would not be allowed where a specific document, or deed, &c., was charged to be in the deft.'s possession, and specific information was required as to it. The practice in chambers was, where there were grave suspicions that documents had been omitted from the affidavit, to direct the solicitor applying for a further affidavit to write a letter to the deft.'s solicitor, pointing out distinctly what was the nature of the information required as to the document inquired after. Should the deft., after receipt of such a letter, refuse to make a further affidavit, he would place himself in an awkward dilemma; while, if he made a false affidavit, such letter might be used on any indictment for perjury. In the present case there appeared such inconsistency on the face of the answer as to authorise the court to call for further information upon the subject. He could not take any notice of the covenant said to be contained in the deft.'s lease with the owner of the mine: first, because he could not presume that it had been observed; and secondly, because there was nothing to show that the plans related to the matters in question in dispute in the cause. The deft. must therefore make a further affidavit as to the working plan referred to as being in his possession.

Order accordingly.

Solicitors: *Richardson and Waller.*

Common Law Courts.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

REGISTRATION APPEAL.

Tuesday, Nov. 24.

GARBUTT v. TREVOR.

*Election law—Customary tenure—Copyhold—2 Will.
4, c. 45, s. 19.*

*A tenant who holds his lands by customary tenure, although not strictly a copyhold, provided he has a permanent interest therein of the value of not less than 10*l.* per annum, free of all charges, &c., is entitled to be registered under sect. 29 of 2 Will. 4, c. 45.*

This was an appeal from the court of the revising barrister for Guisborough; the following case being stated for the opinion of the court:—

CASE.

At a court held at Guisborough, on the 5th Oct. 1863, before me, the barrister appointed to revise the list of voters for the North Riding of Yorkshire, John Adamson was objected to. This name was thus entered in the list of voters for the township of Hinderwell.

Adamson, John | Staithes | Copyhold house | Staithes.

The following facts were proved:—

1. The manor of Seaton, in the North Riding of Yorkshire, is co-extensive with the township of Hinderwell. The Marquis of Normanby is the lord of the manor. The township of Hinderwell contains the village of Hinderwell, the village of Staithes, and the village of Runswick; the inhabitants of all three villages are engaged in fishing or other maritime pursuits. In the village of Hinderwell are freeholders only of the said manor. In Staithes and Runswick all the houses and other tenements, hereinafter for brevity's sake called "houses," are held under a customary tenure hereinafter described, which has there obtained for a long period without alteration. No evidence was produced of any other tenure having at any time existed in Staithes or Runswick.

2. Between the said houses and in their immediate neighbourhood are pieces of ground, which are part of the waste of the lord of the manor of Seaton.

3. Every house in Staithes and Runswick is held by a tenant on the court-roll of the manor of Seaton, who pays a rent in respect of such house to the Marquis of Normanby.

4. The houses are generally of small value, but a few are of the value of 30*l.* per annum. The rent in each case is a very small or nominal sum, consisting of a few shillings annually, and is always much smaller than the annual letting value of the house. The rents of the various houses differ in amount, but the rent of each house has always continued the same in amount without alteration.

5. No notice is given as to when and where the rent is payable; but by custom the rent is payable twice a year to the land agent of the Marquis of Normanby, at the place where, and at the time when, rent is payable by all tenants of the Marquis of Normanby, in the manor of Seaton and elsewhere in the neighbourhood, namely, at a public-house in Staithes, called the White Horse, on the last Wednesday of May and the first Wednesday of December in each year.

6. To each tenant of a house in Staithes or Runswick so paying rent a quitance is given in the following form:—

"No. ~ "Manor of Seaton.
"Received the 28th day of May 1863 of
X. Y., one shilling and sixpence for half
a year's rent due to the Most Noble the
Marquis of Normanby at Lady-day last, s. d.
by me 1 6
"Arrear £ "JOHN KEER (agent)."

7. The rent is generally duly paid. One instance only is known of a notice to quit having been served on behalf of the Marquis of Normanby, on a tenant in Staithes or Runswick, and in that case the tenant did not quit. No action of ejectment has ever been brought against any of the said tenants.

8. All repairs to any of the said houses are done by the tenant of the same, and at his expense; and if any of the said houses have become ruinous, it is built up by the tenant at his expense.

9. Many of the said houses are let by the tenants from week to week, or from month to month.

10. Every tenant is rated to the poor, and assessed to the property-tax, as owner of the house which he holds.

11. Tenants of the said houses have occasionally been on the register of parliamentary voters for the North Riding of Yorkshire; their qualifications being therein described as copyhold houses in Staithes or Runswick.

12. The court of the manor of Seaton is held annually in October or November. Before holding the court the steward of the manor issues a precept to the bailiff of the manor, calling upon him to summon a jury to the court about to be holden. The names of the jurors are chosen by the said bailiff, and the land agent of the Marquis of Normanby, out of the freeholders of the manor within the village of Hinderwell, and the tenants of houses in Staithes and Runswick. The steward of the manor presides in the court, and the said land agent is always present. The list of suitors is called over, and the jury are sworn; after other matters are disposed of, applications from persons desiring to be admitted tenants of houses in Staithes or Runswick are heard.

13. The person A. B., desiring to be admitted tenant in the room of the outgoing tenant C. D., attends at the court, having been generally, but not in every case, summoned for this purpose by the bailiff of the manor. C. D., the outgoing tenant, frequently attends also. A. B. is then presented by the bailiff to the steward, who asks of him (but in no set form of words), "For what purpose do you come?" A. B. then replies (but without using any set form of words), "I seek to be admitted tenant of house No. 24, in room of C. D.," adding the circumstance, "I have purchased the house of C. D.," or "C. D. is deceased, and has left me the house by will;" or "C. D. has died intestate, leaving me his heir-at-law," or as the case may be.

Sometimes the bailiff states the circumstances of the case, sometimes one of the jurors, and sometimes the outgoing tenant.

The steward then always inquires of the land agent if there is any objection to the admission of A. B., to which the land agent replies, that there is no objection, or that there are arrears of rent due from the outgoing tenant, or as the case may be. The foreman of the jury is generally asked if he knows any objection to the admission of A. B. In most cases no objection is raised by any one, but occasionally arises in which all the circumstances of the case, as well moral as legal, are inquired into, as, for instance, on the application of the heir-at-law to be admitted tenant in the room of his father who has died intestate, the foreman or one of the jury may say that he, the said heir-at-law, has never done anything for his deceased father or his family, but that E. F., the daughter of the deceased, supported her father during his last illness, and that she is better entitled than A. B. to be admitted tenant.

The steward, after hearing the whole discussion, decides granting or refusing the application for admission, according to his judgment, upon all the circumstances, as well moral as legal, of the case.

14. If A. B. is a purchaser, his application to be admitted tenant is almost always granted; so also if

C. B.]

GARBUIT V. TREVOR.

[C. B.]

he claims under the will of the deceased tenant; but in many instances, notwithstanding the devise of the property in question to the applicant has been admitted to have been in all points of form sufficient and without fraud, his application has been refused by the steward, and another person has been admitted by him as tenant.

15. If A. B.'s application is granted, the name of C. D., the outgoing tenant, is struck out of the court-roll by the pen of the steward, and the name of A. B. is inserted on the court-roll in its alphabetical place among the names of tenants in Staithes or Runswick, as the case may be: A. B. then takes the oath of fealty and pays to the steward a fee of 1s. 6d. No fine is paid to the lord of the manor.

16. A change of tenancy of houses in Staithes or Runswick often takes place between the holdings of the manor court. A. B., the person desiring to be admitted tenant, applies to the said land agent of the Marquis of Normanby, stating the circumstances of the case. The land agent usually requires a letter from the foreman of the jury of the manor court last held, to the effect that, in the judgment of him, the foreman of the jury, the said A. B. is best entitled to be admitted tenant of the house in question. The land agent, at discretion, gives or refuses to give to A. B. a letter to the steward of the manor, assenting to A. B.'s application. As a matter of fact the land agent usually gives such letter, but he has occasionally refused to give the same, on the ground that the outgoing tenant was in arrears of rent. Upon receipt of the letter expressing the assent of the land agent to the admission of A. B., but in no case without receipt of such letter, the steward of the manor indorses A. B.'s name upon the court-roll for the time being in the following form:—

"1862. Abraham Brown, setin tenant for
December 18. house No. 24, in room of Charles Davis."

For every such admittance out of court the incoming tenant pays to the steward a fee of 5s., but no fine is paid to the lord of the manor. At the holding of the next manor court the name of such incoming tenant is entered in its proper alphabetical place in the court-roll among the tenants of Staithes or Runswick, as the case may be.

17. Every alteration or change of tenancy of any of the said houses in Staithes or Runswick, is completed by admission of a new tenant in substitution for or in addition to the former tenant in the court-roll of the manor of Seaton in the manner and on the conditions hereinbefore described.

18. Subject to these conditions, if a tenant disposes of his estate in one of the said houses by sale or by pledging, or if he disposes of the same by will and dies, or if he dies intestate, the vendee, pledgee, devisee, or heir-at-law, as the case may be, is admitted tenant on the court-roll of the said manor, and enters upon the possession of the property.

19. In selling or pledging such estate no deeds or documents of any kind are used, nor is any copy of the court-roll furnished to the incoming tenant. If a tenant sells he usually does so by auction, and the auctioneer, as his agent, usually before selling asks of the land agent of the Marquis of Normanby permission to sell, and in some cases undertakes to pay over part of the purchase-money when received by him to the said land agent to meet arrears of rent due to him from the outgoing tenant. The handbills announcing the sale of a house are usually headed, "By permission of the Most Noble the Marquis of Normanby," and the house is therein described as "the property of" the outgoing tenant. After the sale and purchase the vendee is admitted tenant in room of the vendor, either by act in court or out of court as hereinbefore described.

If the tenant pledges his estate the person lending the money is, subject to similar conditions, admitted tenant in his room, or as co-tenant with him; when the money is repaid, the borrower is admitted sole tenant as before.

A tenant disposing of his estate by will describes it as "his interest in groundage property" in Staithes or Runswick, or his groundage property, or "his groundage," or "his frontage." On his death the person named in the will is, subject to the conditions hereinbefore described, admitted as tenant.

If a tenant being a *feme sole* marries, the husband is admitted co-tenant with her, or tenant in her room.

No instance is known of a tenant becoming bankrupt or insolvent and his assignees being admitted tenant in his room.

In a very few cases one of the overseers of the poor of the township of Hinderwell has been admitted tenant on the court-roll in the room of a tenant who has become chargeable as a pauper to the said township, and on the pauper tenant dying intestate the overseer has continued on the court-roll, notwithstanding the application of the heir-at-law of the deceased to be admitted tenant.

20. Herein follows an extract from the court-roll of the manor of Seaton for the year 1862, which was proved to correspond in form with all the previous court-rolls of the said manor within memory.

"Manor of Seaton to wit.—The Court Leet, with view of Frankpledge and Court Baron of the Most Noble Constantine Henry, Marquis of Normanby, lord of the said manor, held at the house of Johnson Ridlers, situate at Staithes, within the said manor, on Thursday, the 4th day of Dec. 1862, before John Buchanan, gentleman, steward, and the suitors of the said court.

"The names of the jurors of the said court sworn to inquire and present as well for our Sovereign Lady the Queen as the lord of the said manor."

(Then follow the name of the foreman of the jury, the names of the twelve other jurors, and the name of the sworn Pinder.)

No.	Name.	Description of property.	No.	Name.	Description of property.
	Freeholders, owners of lands and tenements within the said manor.		51	Beswick, Geo.	barkhouse
	Runswick		87	Brown, William	dwelling-house
	Tenants and residents.			Here follow other names, in alphabetical order, with description of property.	

Hinderwell.

Freeholders.

Adamson, Luke.

| (Here follow other names, but without description of property.)

Staithes.

Tenants and residents.

[46. Adamson, Elisha, dwelling-house—App.

; 88. Abram, Thomas and Francis, dwelling-house—App.

(Here follow names in alphabetical order, with description of property.)

21. On behalf of the said John Adamson it was proved that the clear yearly value of the houses in respect of which he claimed to vote amounted to 10*l*.; that he had been admitted tenant of the said houses, and his name inscribed as such tenant in the court-roll, in the manor of Seaton, in the manner hereinbefore described; that he had thereupon entered into actual possession of the said houses, and has ever since continued in actual possession of the said houses, or in receipt of the rents and profits of the same, his name also being continued as such tenant as aforesaid on the said manor.

It was admitted that he had during his tenancy regularly paid to the land agent of the Marquis of Normanby a fixed rent in respect of the said houses, and had received receipts for the same as hereinbefore described.

22. A person claiming to vote for the riding in respect of copyhold houses in Staithes or Runswick would there be commonly understood as claiming to vote in respect of houses held in the manner hereinbefore described.

23. On behalf of the objector it was contended that the voter was a mere tenant at will of the lord of the manor, and that he was not seised at law or in equity of houses of copyhold or any other tenure whatever for his own life or for any larger estate.

24. I held that the said John Adamson was seised in law or equity of houses of copyhold or other tenure not freehold for his own life or for a larger estate, and I accordingly allowed his name to stand on the list of voters signed by me, subject to the opinion of the court.

25. The claims of seventeen other voters, whose names and qualifications are together with the name and qualification of the said John Adamson set out in the schedule annexed to this case, depended on the like facts and findings, and were decided by me in the same manner and on the same point of law as the case of John Adamson.

I accordingly allowed the said fifty-seven names to stand on the list, subject to the opinion of the court, and ordered the appeals to be consolidated, and duly named Thomas Garbutt, of Yarm, to be the app. in the consolidated appeal, and Thomas Tudor Trevor, of Guisborough, to be the resp.

If the court is of opinion that in the circumstances stated by me John Adamson was not seised at law or in equity of houses of copyhold or any other tenure whatever (except freehold) for his own life or for any larger estate, the eighteen names contained in the schedule annexed to this case are to be struck out of the list of voters for the township of Hinderwell; otherwise the said names are to be retained.

(Signed) V. L.,

Revising Barrister, Guisborough,

5th Oct. 1863.

Thos. Chitty for the app.—The 19th section of the Reform Act (2 Will. 4, c. 45), enacts that “every male person . . . who shall be seised at law or in equity of any lands or tenements of copyhold or any other tenure whatever, except freehold, for his own life, or for the life of another, or for any lives whatever, or for any larger estate, of the clear yearly value of not less than 10*l*. over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote, &c.” The customs of this manor do not show that these are copyholders; there is no surrender and they do not hold by copy of the rolls. Lord Coke says there is only copyhold and freehold: (Coke’s Law Tracts, p. 12.) Then it will probably be contended that there is fealty in this case:

Co Litt. p. 58;

Vin. Abr. tit., “Copyhold,” “Grant;”

Cruise Digest, vol. 1, p. 266;

Kitchen on Courts, 168;

Starke on Evidence, 1 edit. vol. 1, p. 38, citing

B. N. P. 248.

What is there to show that these are tenants by copy? I am going to contend that the roll is merely a list of suitors of the court leet or barons: (Kitchen on Courts, pp. 6-12.) “App.” put opposite a name on the roll means that the person appears at; and “ess.” that he is absent from the court. Would that be done in any titular roll? There is no livery of seisin, customary grant, or surrender. The person claiming to be admitted appears, and sometimes the outgoing tenant, but not always. There is nothing as to fines, reliefs, escheats, or rights of common. One of the customs is that if a man is poor he is to be turned out. The only thing to show a title in these persons is, that they pay an annual rent, and their names are entered on the roll of tenants, but it is not stated of what lands they are tenants, but merely that they are tenants. [*Melish*, Q. C.—The case sets out that they are admitted in a customary manner, and what the nature of the custom is.] It would be dangerous to open such a wide door to spurious votes. These can be only tenants at will, or at most tenants from year to year.

Melish, Q. C. for the resp.—The court must presume that the parties have departed from the ancient customs. They must be either tenants for life or tenants at will, who may be ejected at any moment. It is quite unnecessary for me to make out that they are copyholds of inheritance; they may be copyholds for life, and it is quite clear that in copyholds for life there may be some limited right of nominating a successor: (1 Scriven on Copyholds, 22 and 43.) This is not strictly descendible, as the lord exercises a certain amount of discretion as to who shall succeed to the possession. The case finds that the rents are very small, and fixed in amount; is this consistent with a tenancy at will? You must presume that the lord has not power to raise the rents. The houses are repaired by the tenants, and no tenant has ever been turned out. [*Chitty*.—I contend that it is a tenancy from year to year, not at will.] Then these facts are quite inconsistent with a tenancy from year to year. They are summoned on the jury, and the arrears of rent are a charge upon the property itself. I admit that this cannot be copyhold of inheritance, as there is no surrender: (Scriven on Copyholds, 361.) He was stopped by the Court.

Chitty in reply.—If there is a customary tenure it is a freehold customary tenure, and they have no right to vote, the statute of Car. 2 (12 Car. 2, c. 24) having destroyed all tenures except freehold and copyhold.

ERLE, C. J.—I am of opinion that the revising barrister was right. I cannot say what the estate is, but it is a permanent interest in the land. If it is not a customary tenure for life, it would be held for some shorter period. There is no sign of its being a tenure at will, nor does it appear to be the case of mere squatters, as the learned counsel has suggested. I believe that, if history were looked into, copyholders were originally tenants at will, and their estate gradually grew up. Upon the whole of the facts stated by the revising barrister, I think that there is a permanent estate in the land; and the statute says, that any one having an estate of “copyhold or any other tenure whatever, except freehold for his own life or that of another, of the clear yearly value of not less than 10*l*. over and above all rents and charges, shall be entitled to vote.” I think, therefore, that the decision of the revising barrister must be confirmed.

WILLIAMS, J.—I am of the same opinion. There are many curious tenures, especially in the north, which are called “customary freeholds,” or “tenants’ rights,” and there has been a long controversy

as to whether those estates are to be considered freehold estates, or in the nature of copyhold estates. In the present case it is quite immaterial whether the estates are freehold estates or copyhold estates, because, if they are not freehold, but of a copyhold tenure or tenure in the nature of copyhold, they being above the value of 10*l.*, are equally within the words of the Act of Parliament, which, by adding "other tenures" to the word copyhold, clearly pointed to estates of this description. The only question in this case is, whether the revising barrister was right in holding that they belonged to some tenure of this kind, be it freehold, as contradistinguished from estates held by copy of court-roll, or in the nature of a copyhold tenement. I think, that although it is true there are in the history of the enjoyment of these tenements circumstances which it may be difficult to reconcile with any tenure at all, and which would be perhaps more directly referred to such an enjoyment as is suggested by Mr. Chitty, or to encroachments on the waste, yet it must be borne in mind that here is the lord, represented by the steward of the manor and by the land agent, dealing with these people who are quite unable to resist them, and that state of things might lead to the commission of many lawless acts on the part of those who seek to secure the rent for the land, and who may impose on those in the enjoyment of the tenements, or representing them, certain restrictions and put upon them conditions which in point of fact the law did not authorise, but which they were too weak to resist. I think the revising barrister might well look at these anomalies as having come into existence in this way, and that notwithstanding there is here substantially a case of a tenancy of right, or a customary freehold, or some tenure of the kind, having nothing at all to do with the relation of landlord and tenant, but a tenure in the technical sense of the word, we cannot say that he had come to a wrong conclusion. I think we ought not to disturb that decision.

BYLES, J.—I am of the same opinion. If the revising barrister had found nothing, I should have thought that the legal freehold here is in the lord. But, on the other hand, the tenants are not mere tenants at will, with or without licence, nor are they tenants for years or tenants for lives; they have what are the various incidents to copyhold tenements. We cannot decide against the revising barrister, unless we can see clearly it is not, and cannot be, a copyhold tenement. Now there is nothing clear, as it seems to me, in this case, except that it is difficult to see what sort of an interest these persons had. It does not appear to have been found that they had a legal copyhold, for the finding is this, "I hold that John Adamson was seised in law or equity of houses of copyhold or other tenure, not freehold," and it may well be that the word copyhold may be consistent with a wider sense than that in which it has been usually employed. I therefore cannot say the revising barrister was wrong.

KEATING, J.—I am of the same opinion. No doubt the circumstances of this case may be of a very doubtful character. The revising barrister has found them to be such as come within the Act of Parliament. I cannot say he was wrong, because the suggestion of Mr. Chitty, as to the possible tenure of these parties, seems to me to be quite inconsistent with the facts as found by the revising barrister. Mr. Chitty seems to have given up the idea about a mere tenancy at will, because the case was too strong against him upon that point, but he seems to think that there was a tenancy from year to year. The facts are equally inconsistent with that supposition. Who ever heard of the oath of fealty being required of a tenant from year to year at the court? That seems to me to be wholly inconsistent with the other facts of the case. If the tenancy

is not from year to year, as suggested, then what is the tenure? It is not very easy to find what it is. I should say, if not strictly a copyhold, it is in the nature of copyhold, so as to bring it within the terms of the Act of Parliament, "copyhold or other tenure." I think the revising barrister was right.

Judgment for the resp.

Nov. 3 and 25.

JOHNSON (Assignee) v. STEAR.

Trover—Delivery of dock-warrant—Wrongful sale by pawnee—Measure of damages.

A., as security for the repayment of a loan from B, deposited with B. brandy lying in a dock, by delivering to him the dock-warrant, and authorised him to sell if the loan were not repaid on the 29th Jan. B. sold the brandy on the 28th, and on the 29th handed over the dock-warrant to the purchaser, who on the 30th took actual possession. The loan was never repaid. In an action of trover by the assignee under the bankruptcy of A. against B. for the conversion of the brandy:

Held, that the wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was a conversion.

Per Erle, C. J., Byles and Keating, JJ. (Williams, J., dissentiente):—That in measuring the damages the interest of the deft. in the goods at the time of the conversion is to be taken into account, and that the amount is to be, not the value of the goods, but the amount of the loss the plt. has actually sustained, which in this case was nominal, as the plt. had no intention of redeeming the pledge.

Per Williams, J.:—That, though the plt. can only recover in respect of the amount of his interest in the goods, the estate, whatever it might be, of the deft. as a pawnee, was the mere creature of the bailment, and as soon as the bailment terminated by the wrongful sale, that estate, being dependent on and growing out of the bailment, was annihilated; and therefore the action of trover, which is substituted for the plt.'s right of resumption, ought to be treated on the footing of his being absolute owner, and the measure of damages to be the value of the goods at the time of the conversion.

This was an action of trover for casks of brandy and pipes of wine. The plt. was assignee of John Cumming, a bankrupt, who was a commission wine merchant. In Dec. 1862 Cumming borrowed money of the deft. for which he gave him a bill for 62*l.* 10*s.*, payable on the 29th Jan. 1863, and deposited with him the dock-warrants for the 243 cases of brandy in question, and at the same time wrote the deft. the following note:—

"Sir,—I have this day deposited with you the undermentioned 243 cases of brandy, to be held by you as a security for the payment of my acceptance; for 62*l.* 10*s.* discounted by you, which will become due on Jan. 29th 1863, and in case the same be not paid at maturity, I authorise you, at any time and without further consent by a notice to me, to sell the goods above mentioned either by public or private sale, at such price as you think fit, and to apply the proceeds, after all charges, to the payment of the bill, and if there should be any deficiency I engage to pay it.—I am, yours truly,

"MOORE, CUMMING and Co."

On the 16th Jan. Cumming was adjudicated a bankrupt. On the 28th Jan. the deft. entered into negotiations for the sale of the brandy, and the ordinary bought and sold notes were exchanged on that day, and an order for inspection was given by the deft. to the purchaser.

On the 29th Jan., the day that the bill became due, the deft. delivered the dock-warrant, which was not

indorsed, to the purchasers, who on the 30th took possession of the brandy, and on the 31st paid for it. At the trial, before Erle, C. J., at the sittings in London after Easter Term, a verdict was entered for plt. for the value of the brandy, with leave to the deft. to move to set it aside and enter a verdict for the deft.

Powell, Q. C., having obtained a rule accordingly, *Denman*, Q. C. (*Howard* with him) now showed cause.—The cases as to the brandy and the wine are somewhat different, and there is no dispute except as to the brandy. The agreement as to the brandy was, "in case the bill be not paid at maturity, I authorise you at any time, and without further consent by notice to me, to sell the goods, and apply the proceeds to the payment of the bill," &c.; but there was no written agreement under which the wine was deposited. The delivery of the warrant constitutes a sale of the goods, and I should further submit that the property passed on the 28th by the bought and sold notes. [*WILLIAMS*, J.—The argument seems to be, that as this was an action of trover, however much talking and writing there might have been, there could be no conversion till the brandy was actually taken possession of.] It is submitted that, as he had made this agreement to sell by bought and sold notes, he could not deliver back the goods to the bankrupt, and therefore there was a conversion: (*Addison on Torts*, 193, and the cases collected there; *Jones v. Cliff*, 1 C. & Mee. 540.) The delivery of the dock-warrant was certainly a conversion, even if the delivery of the bought and sold notes were not.

J. J. Powell in support.—There was no dealing with the property which would constitute a conversion till the 30th, though there might have been a contract with respect to it. The possession was not parted with, though the contract might have given a right of action against the vendor. Assuming that the warrant was delivered on the 29th, that would not affect the case, for if the bill was not paid on the 29th we might sell, and it did not appear that the warrant was delivered till after banking hours; and I submit that if payment was not made on this bill before the bank closed we should have a right to sell, and it was incumbent on the plt. to show that this warrant was delivered and the goods sold before the bank closed:

Jones v. Cliff, 1 C. & Mee. 540;

Lucas v. Dorrien, 7 Taunt. 278;

Ellis v. Hunt, 3 T. R. 464;

Zeigler v. Samuda, 7 Taunt. 265;

Speer v. Travers, 4 Camp. 251;

Cross on Lien, 385.

[*WILLIAMS*, J.—It is not the question of the effect of a warrant given by a person who has authority to sell, but of one from a person who had no right to part with it.] *Cwr. adv. vult.*

Nov. 25.—*ERLE*, C. J. delivered the judgment of himself, Byles and Keating, J.J.—This was an action of trover by the assignees under the bankruptcy of Cumming. The facts were, that Cumming had deposited brandy lying in a dock with Stear, by delivering to him the dock-warrant, and had agreed that Stear might sell, if the loan were not repaid on the 29th Jan; that on the 23th Jan. Stear sold the brandy, and on the 29th handed over the dock-warrant to the vendee, who on the 30th took actual possession. Upon these facts the questions are, first, was there a conversion? and if yes, secondly, what is the measure of damages? To the first question, our answer is in the affirmative. The wrongful sale on the 23th, followed on the 29th by the delivery of the dock warrant in pursuance thereof, was, we think, a conversion; the deft. wrongfully assumed to be owner in selling; and although the sale alone might not be a conversion, yet by delivering over the dock-warrant to the vendee in pursuance of such sale, he interfered

with the right which Cumming had of taking possession on the 29th if he repaid the loan, for which purpose the dock-warrant would have been an important instrument. We decide for the plt. on this ground, and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises. The plt. contends that he is entitled to the full value of the goods sold by the deft. without any deduction, on the grounds that the interest of the deft. as bailee ceased when he made a wrongful sale, and that therefore he became liable to all the damages which a mere wrong-doer, who had wilfully appropriated to himself the property of another without any right, ought to pay. But we are of opinion that the plt. is not entitled to the full value of the goods. The deposit of the goods in question with the deft. to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien, and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract. It is clear that the actual damage was merely nominal. The deft. by mistake delivered over the dock-warrant a few hours only before the sale and delivery by him would have been lawful, and by such premature delivery the plt. did not lose anything, as he had no intention to redeem the pledge by paying the loan. If the plt.'s action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more, and that would be a nominal sum only. The plt.'s action here is, in name, for the wrongful conversion, but in substance it is the same cause of action; and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid. There is authority for holding that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the pledge ought to be taken into account. On this principle the damages were measured in *Chinery v. Viall*, 5 H. & N. 288; 2 L. T. Rep. N. S. 466. There the deft. had sold sheep to the plt., and because there was delay in the payment of the price by the plt., the deft. resold the sheep. For this wrong the court held that trover lay, and that the plt. was entitled to recover damages; but in measuring the amount of those damages, although the plt. was entitled to be indemnified against any loss he had really sustained by the resale, yet that the deft., as an unpaid vendor, had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plt. from the value of the sheep at the time of the conversion. In *Story on Bailments*, s. 315, it is said, "If the pawnor, in consequence of any default or conversion by the pawnee, has recovered back the pawn or its value, still the debt remains and is recoverable, unless in such prior action it has been deducted; and it seems that by the common law the pawnee in such action for the value has a right to have the amount of his debt recouped in damages." For this he cites *Jarvis v. Rogers*, 15 Mass. R. 389. The principle is also exemplified in *Brierley v. Kendall*, 17 Q. B. 943. There, although the form of the security was a mortgage and not a pledge, and although the action was trespass and not trover, yet the substance of the transaction was in close analogy with the present case; there was a loan by the deft. on the plt.'s goods, and a reservation to the plt. of a right to the possession of the goods till he should make default in some payment. Before any default the deft. took the goods from the plt. and sold them; for this wrong he was liable in trespass, but the measure of damages was held

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to be not the value of the goods, but the loss which the plt. had really sustained by being deprived of the possession: the wrongful act of the deft. did not annihilate his interest in the goods under the bill of sale, and such interest was to be considered in measuring the extent of the plt.'s right of damages. On these authorities we hold that the damages due to the plt. for the wrongful conversion of the pledge by the deft. are to be measured by the loss he has really sustained, and that in measuring these damages the interest of the deft. in the pledge at the time of the conversion is to be taken into account. It follows that the amount is merely nominal; therefore the rule that the verdict for the plt. shall stand with damages 40s. must be made absolute.

WILLIAMS, J.—I am of the same opinion as to the point which turns on whether there has been a conversion or not by the trader, but I cannot agree in the view my Lord and my learned brothers have taken of the remaining point, namely, the question as to the amount of damages. As to the first point, I think the dock-warrant was convertible, because it was the symbol, as it is sometimes put, of the delivery, and because it, in fact, was the means by which the property which was capable of manual transfer could be got at; and therefore the delivery by the pledgee of the brandy to his own vendee was a step that prevented the present plt. from getting it, and it enabled a stranger to take it from him and get possession of it. The distinction between being a symbol and being the means of getting at the subject-matter is to be taken. With respect to the amount of damages, I think the plt. is entitled to have the full value of the goods. Now, I apprehend the general rule to be this, in an action of trover the true measure of damages is the value of the property at the time of the conversion. No doubt that rule is subject to several exceptions: one of them is the ordinary rule, that where the plt. has taken back the thing which is the subject of the action he then can only recover the damages he has sustained by reason of the conversion, as he has received the thing back again. Again, there is the exception with respect to the amount of interest of the plt.; if the plt. has only a limited interest, and there is another person who has a further interest posterior to his. But the law, I apprehend, is clear, that though as against a stranger the plt. who has to part with his interest is entitled to recover the whole amount of damages, yet, as against the person who has a joint interest with him in the property, he is entitled to recover only with respect to such interest as he has. That is the decision in *Brierly v. Kendall*. The property was enjoyed by the plt. and the deft., and the plt. by a deed of assignment had a specific or a particular estate in the property that was assigned. In that case it is clear that the *quasi* estate of the remainderman was not destroyed, because the owner of it conveys the right of the *quasi* particular tenant. There the only subject to consider would be the amount of damages for doing so. Therefore the case of *Brierly v. Kendall* is only an example as between two parties, both having an interest in the property. The plt. can only recover in respect of the extent of his interest in the property. Then comes the question of what the law has been as to lien. Now I certainly at one time thought the law was settled that if a person has a lien upon property, and sells the property which is the subject of the lien, he destroys the right of lien, and altogether annihilates the lien. That, I apprehend, will be found to be the principle upon which a great number of cases in the commercial law of this country are decided. I only refer to one class, because that is the class which is referred to in Story in his book on Bailments. He says (s. 325): "The doctrine of the common law now established in England, after some

diversity of opinion, is, that a factor having a lien on goods for advances or for a general balance, has no right to pledge the goods, and if he does pledge them he conveys no title to the pledgee. The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods even for advances or balance due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge without making any allowance or deduction whatsoever for the debts due by him to the factor." This learned writer then goes on to state that "the inconvenience, not to say the harshness, of the latter part of the doctrine has been very seriously felt in England;" and he goes on to express his hope that the American courts would not feel themselves constrained by the pressure of authority to yield to it. However, the editor of the last edition of Story on Bailments adds that "later decisions have, however, fully settled the law that a pledge by a factor of his principal's goods is wholly tortious, and the owner may recover their full value from the pledgor without any deduction or recoupment for his claim against the factor." The law as to lien, also, in the recent case (*Siebel v. Springfield*, 9 L. T. Rep. N. S. 325, Q. B.) decided two or three days ago in the Q. B., establishes the principle as to the title of the owner of goods subject to the lien to recover the whole value of them in case the party entitled to the lien converts them by use; and the law, I apprehend, is adopted in that case to which I allude. But then that being the law as to lien, I apprehend there is no doubt the case of *Chinery v. Viall* establishes the rule that in the case of a resale by an unpaid vendor, an action of trover may be maintained by the original vendee, but that he can only recover the value of the bargain, and not the entire value of the goods. That, I apprehend, is put upon the ground of the peculiar position of an unpaid vendor, upon the principle that he has more than a lien—he has an interest greater than the lien on the goods. The interest which he has is not merely the result of the contract by which the lien is created, he has an ulterior interest and an interest altogether beyond the lien. That is the ground on which that case may be considered as not extending the general principle, but applicable only to the peculiar position of an unpaid vendor. But with respect to a pawnee it may be conceded that he may have something more than a mere lien; but whatever his estate may be, I apprehend that, as soon as the bailment has terminated, that estate would also terminate, because it is the mere creature of the bailment. There is no interest whatever in the pledgee not derived from the bailment; therefore, as soon as the bailment comes to an end, the estate, whatever it may be, of the pledgee dependent on and growing from the bailment must also be annihilated. In Story on Bailments that question is, to a certain extent, considered, and in sect. 327 that learned author says: "It has been intimated that there is, or may be, a distinction favourable to the pledgee, which does not apply, or may not apply, to a factor, since the latter has but a lien, whereas the former has a special property in the goods. It is not very easy to point out any substantial distinction between the case of a pledgee and the case of a factor. The latter holds the goods of his principal as a security and pledge for his advances and other dues. He has a special property in them and may maintain an action for any violation of his possession either by the principal or by a stranger." There is also a case (*Whitaker v. Sumner*, 20 Pick. R. 399), which I am not able to put my hands on now, in which it is laid down in Story (sect. 299), that if a pledgee precludes himself by taking any step that disables him from returning the goods to the pledgor, by that means he terminates the bailment. That was an authority as to

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the effect of a sale by a pledgee at a time when he was not authorised to sell. The case we have now under consideration is one of bailment. It remains to consider what is the effect of the bailment being terminated. It is, I apprehend, as if the bailment had never existed—the property reverts to the pledgor, the absolute owner of it. Then it becomes a question what damages the absolute owner is entitled to recover against the person who converts his property. I conceive the true rule, where an action of trover lies, as to the amount of damages is, this: if the plt. could resume the property, supposing he had an opportunity of laying his hands upon it, and become the rightful and absolute owner against all the world, he is entitled to recover full damages; and in the present case, supposing that instead of bringing this action he had had the means of getting the brandy back into his possession, I apprehend he would have been entitled to hold it not only as against the present deft., but as against everybody else. Therefore the action of trover which is substituted for his right of resumption ought to be treated upon the footing of his being the absolute owner, and deprived of his property. So I apprehend, if the action were brought against the vendee, it would be precisely the case of an action brought against the pledgee of a factor; and, just as in that case the pledgee of the factor, though he is a perfectly innocent pledgee, cannot get damages in law with respect to the amount due from the owner of the goods, so, by analogy to that, in this case the vendee of the present deft. would be unable to set up any claim whatever under an assignment from the plt. to the defts. The defts. therefore were liable to the full damages. I must say I have a strong opinion upon this point, and it is my duty to say I cannot agree with the rest of the court.

Rule absolute.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Tuesday, Nov. 3.

ROUTH v. McMILLAN.

Charter-party—Construction of—Warranty or mere description only—A 1 at Lloyd's, in London—Agent's authority to bind his principal.

A charter-party was entered into at New York in America by the plts., merchants there, with the agent of defts., who were shipowners at Liverpool, in England, for a vessel called the Hannah Eastee, and which was described in the charter-party, and in the power of attorney by the owners to their agent, as "A 1 British brig Hannah Eastee, of Liverpool." 1000 quarters of wheat were agreed to be carried by it from New York to Gloucester, in England, and were put on board. But as the vessel was not of the class A 1 at Lloyd's in London, or of any class at all there when the charter-party was entered into, the shippers had to pay a higher rate of insurance by 262l. on the cargo, than as if the vessel had been of the class A 1 at Lloyd's in London:

Held, that there was a warranty by the owner that the vessel was classed as A 1 at Lloyd's in London, that the power of attorney in this case by the owners gave their agent authority to enter into a charter-party with such an undertaking, and that defts. were liable for the higher rate of insurance which the shippers had to pay.

The plts. were merchants at New York in America, and the defts. shipowners at Liverpool. The plts. having an order for 1000 qrs. of wheat to be sent from New York to Gloucester in England, entered into a charter-party at New York for a vessel called the *Hannah Eastee*, of Liverpool, of which the defts. were

owners; the charter-party was signed on their behalf at New York by one Gilbert Periam as agent for the owners under a power of attorney from the defts. for that purpose. In the power of attorney the vessel was described as "the British brig *Hannah Eastee*, of Liverpool," and Periam, the agent of the defts., was therein amongst other things thereby authorised by them "from time to time to charter the said brig or to employ the said brig as a general vessel on any voyage or voyages; on such terms and in such manner in all respects as our said attorney shall think proper," and also to sell their shares in the said brig, &c. And to enter into and sign, or sign, seal and execute, all such instruments, bills of sale, deeds, and other documents as may be necessary for carrying the same into effect; and generally to act for and represent us and each of us in all respects in relation to the said brig, her management or sale, as fully in all respects as if we were personally present, and to do all acts, matters and things requisite for that purpose, although the same be not specially mentioned," &c. The vessel was described in the charter-party as "A 1 Br. brig *Hannah Eastee* of Liverpool," and the plts. understood this as amounting to a warranty that the ship was of the class A 1 in the register kept at Lloyd's in London, whereas she was not of that class, and the consequence was, that the merchants for whom the cargo of wheat was shipped declined to take it, whereupon the plts.' agent in Bristol, in order to induce them to do so, undertook to pay any extra insurance which might become payable on the cargo beyond the amount which would have been payable if the vessel had been of the class A 1 in the register kept at Lloyd's in London, and he accordingly paid such extra insurance amounting to 262l. For the recovery of the amount of that extra insurance this action was brought.

Declaration alleged, that in ports beyond the seas, to wit, at New York in America; a charter-party was made, &c., by and between plts. and deft. by one Gilbert Periam, the plts.' agent in that behalf, and therein described as agent for the owners of the ship therein mentioned; it then set out the charter-party, dated 6th Jan. 1862, made between G. Periam, agent for owners of the A 1 British brig *Hannah Eastee* of Liverpool, of the burthen of 212 tons, &c. of the first part, and defts. of the other part. It provided for a voyage from the port of New York to Gloucester in England, that the whole vessel should be at the sole use and disposal of the plts. during the voyage, they engaged to provide a full and complete cargo of wheat in bulk, &c. (it then continued in the usual terms of charter-parties). And the plts. averred that they loaded the said cargo of wheat in bulk at New York, according to the charter-party, and performed all things, and all things happened and existed to entitle them to a performance by the defts. of the said charter-party in respect of the matters after alleged not to have been performed by them. And the plts. say that the said terms and words in the said charter-party, that is to say, the said words "of the A 1 British brig *Hannah Eastee* of Liverpool," were by the plts. and defts. at the time of the making of the said charter-party, intended to mean and did mean, amongst other things, that the said brig therein described was of a class called and known as A 1 at Lloyd's, and the defts., by the said charter-party, warranted that the said vessel was of that class. Nevertheless that the defts. broke the said charter-party and the said warranty in this, that the said vessel, at the time of the making of the said charter-party, or at any time since, was not of the said class, and plts. say that by reason of the premises and of the said vessel not being of that class, they could not procure persons to insure the said cargo against damage or loss whilst on board the said vessel during the said voyage without paying extra premiums and moneys for such insurance of the

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same, and the plts., in order to procure such insurance, were forced and obliged to pay, and did pay, divers large sums of money for premiums of insurance to divers persons for insuring the said cargo on board the said vessel from damage or loss during the said voyage, and over and beyond the moneys and premiums which they otherwise would have had to pay for such insurance had the said vessel been of the class aforesaid. And defts. at the time of making the charter-party had notice and knowledge that the plts. would insure the said cargo on board the said vessel against damage and loss during the said voyage, and the plts. were and are by means of the premises otherwise damaged.

Second count.—And also for that the defts. falsely and fraudulently represented to the plts. that a certain vessel called *Hunnah Eastee* was of a class called and known as A 1 at Lloyd's, and thereby they induced and persuaded the plts. to make and enter into, and they did make and enter into the said charter-party with the defts. as in said first count mentioned, and thereupon the plts. loaded the said cargo on board the said vessel at New York aforesaid, to be carried and conveyed on freight as in the said charter-party mentioned. Nevertheless plts. say that, at the time of the making the said representation, the said vessel was not of the class aforesaid, as defts. then well knew, and by reason of the premises and the falsity of the said representation, plts. were put to and incurred and sustained the same losses and damages as those in the said first count mentioned, and the plts. repeat for the purposes of this count the allegations in that count of the said losses and damages.

Pleas:—1. That defts. did not make the charter-party as alleged. 2. And for a second plea to first count, defts. deny that the said words in that behalf mentioned were intended to mean or did mean as alleged. 3. And for a third plea to first count, defts. deny the warranty alleged. 4. And for a fourth plea to second count, defts. say they are not guilty. 5. And for a fifth plea to the second count, defts. say that the plts. were not induced as alleged.

Issue thereon.

The cause was tried at Bristol Spring Assizes 1863, before Byles, J., when a verdict was found for the plts., damages 262*l.* 14*s.*, leave being reserved to defts. to move to set it aside and enter it for them, and a rule nisi having been obtained accordingly, on the ground that there was no warranty that the ship was A 1 at Lloyd's, as alleged, and that the agent Periam had no authority to warrant the ship as A 1 at Lloyd's; also to reduce the damages, on the ground that the plts. were not entitled to recover the difference on premiums.

Karslake Q. C. and *H. T. Cole* showed cause.—First, the agent Periam had full authority from the defts., by virtue of the power of attorney from them, to enter into a charter-party with such an undertaking as this contained. The power of attorney was of the most comprehensive kind, and the context shows an intention to empower Periam to do all the acts which the owners could do in this respect: (*Willis v. Palmer*, 7 C B., N.S., 340.) Secondly, it is said there was no warranty that the ship was of the class A 1 in the register kept at Lloyd's in London; but the plts. contend it is and that it can mean nothing else:

Ollive v. Booker, 1 Ex. 416;

Hurst v. Osborne, 18 C. B. 150;

Thompson v. Gillespy, 5 E. & B. 209;

and the recent case of *Behn v. Burness*, 8 L. T. Rep. N. S. 207, error from the Q. B., a decision of the Court of Ex. Ch., is clearly in favour of the plts.' construction, that this amounted to a warranty. There all the cases upon the subject are collected and referred to. This vessel had no class whatever at Lloyd's in London when this charter-party was entered into. As

to the amount of damages, the jury found the 262*l.* under the direction of the judge. The bill of lading was indorsed over to Mr. Adams, of Gloucester, where the wheat was to be delivered, but he refused to accept it, as the vessel was not A 1 at Lloyd's. Terms were then proposed as to the insurance and state of the vessel, and those terms were accepted. 262*l.* is the proper sum for the difference.

M. Smith, Q. C. and *Bullar*, contra, for defts.—The agent in this case exceeded his authority. Each case must, as was said in *Behn v. Burness*, be looked at on its own merits. This charter-party was entered into in a foreign country, so that the defts. say their agents had no such authority to warrant the vessel, contrary to the facts, as that she was of the class A 1 at Lloyd's in London. The ship is described in the power of attorney, and the owners gave their agent no higher authority to warrant her than she was there described. All the documents must be looked at and considered together, with reference to the surrounding circumstances of the case:

Brady v. Todd, 9 C. B., N. S., 592; 4 L. T. Rep. N. S. 212;

Barker v. Windle, 6 E. & B. 675;

Udell v. Atherton, 7 H. & N. 172; 6 L. T. Rep. N. S. 797;

Smith's Mercantile Law, 4th edit. 118, 119;

Jones v. Edney, 3 Campb. 285,

as also the cases before mentioned, were referred to. There is no express decision upon similar facts to those now before the court, and the cases referred to by the plts. are mere *dicta* upon the point. There was no reference to A 1 in America, where the plts. lived, and where this contract was entered into, or any evidence given of it as to what this meant in America; and objection was taken to the evidence at the trial on that ground. A Bristol merchant was called, but he could not prove or explain what A 1 meant in America. It was an insurance on a cargo of wheat by one Hill; it was Hill's cargo, and he put it on board the vessel, the plts. therefore had no insurable interest. It was in evidence that Lloyd's list was made up every June, and that in June 1861 the vessel had run off the list. The power of attorney was dated June 1861 at Liverpool, and then the vessel was off the list. There could be no intention on the part of the giver of the power, in the absence of fraud, to authorise any one to warrant the vessel A 1 on the list. No power was given to any one to warrant the ship. It would be forcing the words of the power to give a larger meaning to them than the ordinary meaning of the word "charter," which is *letting a vessel for hire*. The authorities referred to are collected in *Smith's Mercantile Law*. A particular agent must pursue his authority directly, and it is the business of the person with whom he deals to ascertain what that authority is:

Attwood v. Manning, 7 B. & C. 278;

Brady v. Todd, 9 C. B. N. S.; 4 L. T. Rep. N. S. 212.

The next point is, whether the description in a charter-party amounts to a warranty. There is a principle, admitted in construing such documents, that every document must stand and fall by what is its own meaning. There is a clear distinction between description and warranty, and this document affords a clear illustration of that difference: (*Budd v. Fairmanner*, 8 Bing. 48.) If the court apply the reasons there to the present case it will be seen that the words in the C. P. were meant to be description and not warranty. This is the common form at New York, and differs from our common form in England. It is a document *inter partes*. Here is no consideration, which is essential to warranty; and when you come to the consideration, it is clear that all before the witnessing part was mere description. "A 1" is only description. The

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only part of this document which is the warranty is that part with reference to seaworthiness. Against that is *Barker v. Windle*, 6 E. & B. *Ollive v. Booker*, 1 Ex. 416, may be distinguished. The question there arose on the eighth plea, and there was misrepresentation. A description known at the time by the describer to be false gives cause of action, but here, *without fraud*, it gives none. It has been said the parties were to be bound by the laws of England, because the contract was to be consummated in England; but it was not only made in New York, but was to be consummated there. If the vessel answered the description and date of the charter-party, the contract would have been satisfied so far; and that part on which the plts. rely, that she was "A 1," was perfected in New York. It lies on the plts. to make out that this was a warranty. As to the damages, it is only necessary to refer to facts. The bill of lading came to England 1st Jan. 1862; indorsed to purchaser of cargo 31st Jan. 1862; Helliard was a commission agent at Bristol, employed in the sale; Adams, the purchaser, communicated with Helliard, and he with Miller, an insurance broker in London, who effected the insurance. Helliard paid the premiums, and after the purchase of cargo Adams paid them. The present action is by the charterers. The plts. are not damaged; there is no legal damage to them, even if there be a warranty. The cargo belonged to Adams. The breach is, that the vessel was not what she was warranted, and special damage is, that plts. could not insure without paying extra premium. There was no evidence of damage as alleged. The plts. did not pay the premiums; Adams paid them.

Cur. adv. vult.

Dec. 7.—*POLLOCK, C.B.* delivered judgment.—We are of opinion that this rule must be discharged. The action was on a charter-party made in New York between two British subjects. It was made by an agent on behalf of the defts., and commenced by stating that it was made between the charterer and the agent of the defts. "owner of a British ship A 1." There were two questions in the case: the first is, whether there was a warranty or undertaking by the owner, that the vessel was classed as A 1 at Lloyd's. It is decided by authority that such a statement is an undertaking or warranty, and that decision can be effectually questioned now in a court of error only, if it can be questioned successfully at all. The other question is, whether the agent had authority to enter into a charter-party with such an undertaking, as to which we may say that he had, if any words can give such an authority, for it is impossible that words could have been used more comprehensive than those that are to be found in the power of attorney under which the agent acted. The rule therefore, in our judgment, must be discharged.

Rule discharged.

Plts.' attorneys, *Henry Brittan and Sons*, Bristol.
Defts.' attorneys, *Gregory and Co.*, Bedford-row.

Jan. 29 and Dec. 7.

ROBERTSON v. POWELL AND ANOTHER.

Ejectment—Will and codicil—Revocation of former by latter—Rule of interpreting—Devise to heir.

A testator, having two legitimate sons and an illegitimate son and daughter, devised by will, in 1802, an estate, subject to certain rentcharges and annuities, to trustees, to the use of his second son, Bowen, for life, with remainder to the sons and daughters of Bowen in tail, with remainder to his eldest son George for life, with remainder to the sons and daughters of George in tail, with remainder to his illegitimate son William (the plt.) for life, with remainder in fee to A. T. The annuities given by the will by way of rentcharge were an annuity of

21l. to his illegitimate son (the plt.); of 5l. to his illegitimate daughter; of 12l. to his housekeeper, the mother of his illegitimate children; and 30l. to another person. He also gave several pecuniary and specific bequests to executors and friends, and 5l. to a servant. In 1806 George, the eldest son, died, a minor, and unmarried, and in Nov. 1818 A. T., the devisee of the ultimate remainder in fee, died. In the following year the testator, by a testamentary instrument duly executed, and dated 31st Dec. 1819, and which he therein declared to be "a codicil to be added to and taken as part of my said will dated on or about the 22nd Oct. 1802," gave to plt., by the description, of "my son William Robertson, by Elizabeth James," the further sum of 21l. annually, in addition to the 21l. left in my devise, making together the annual sum of 42l.; and he gave to his natural daughter Jane 10l. per annum during her life; also to the female servant living with him at his decease 5l., if she had lived one year in his service, to be increased to 10l. if she had lived in his service two years. And he then willed as follows: "And I give my son Bowen Robert Robertson all my estate and property, of every description whatever, after discharging the above legacies." Upon Bowen's death in 1861 the plt. claimed the property under the life-estate devised to him by the will of 1802; and, on ejectment by him against the defts. as trustees and executors of the will of Bowen, it was

Held, that the devise of the life-estate to plt. contained in the testator's will of 1802 was not revoked by the words of the codicil giving all the testator's estate and property whatever to Bowen Robert Robertson. The general rule in interpreting a will and codicil is, that the whole of the will takes effect, except in so far as it is inconsistent with the codicil: (*Doe dem. Hearle v. Hicks*, 1 Cl. & Fin. H. of L. Cas. p. 20; 8 Bing. 475.)

A devise to one who is also heir cannot be considered such a devise of the property as necessarily to show some other intention on the part of the testator; as, for instance, an intention to revoke a previous devise. It is incumbent on those who contend that a devise in a will is not to take effect, by reason of the revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt with the original intention to devise, for if there is only a reasonable doubt whether the clause of revocation was intended to include a particular devise, then undoubtedly such devise ought to stand: (*Doe v. Hicks* (ubi sup.), and *Williams v. Evans*, 1 E. & B. 727; 22 L. J., N. S., 241, Q. B.)

Ejectment to recover a messuage and lands at Hodgeston, in the county of Pembroke. The plt., William Robertson, is the illegitimate son of Robert Robertson, deceased, and the defts. are trustees and executors of the will of Bowen Robert Robertson, who was the second and only surviving legitimate child and heir-at-law of the said Robert Robertson. The question at issue turns upon the effect of the codicil to the will of the said Robert Robertson, which defts. contend operated as a revocation of the devise, in the will, of the life-estate to the plt., and as an absolute gift in fee to the said Bowen Robert Robertson, of all the testator's property whatsoever.

Plt. and defts. claim originally under the same title, viz., the will of the said Robert Robertson, dated 22nd Oct. 1802.

The questions at issue in this case are fully stated in the judgment. It is therefore unnecessary here to set out the will and codicil, which are of great length.

At the trial, before Channell, B., at the Pembroke-shire Summer Assizes 1862, by the direction of the learned judge, a verdict was entered for the plt. as to 13-16ths of the property in question of which it was

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proved that the testator Robert Robertson died seised, and for the defts. as to the remaining 3-16ths, testator's seisin of which was not proved; leave being reserved to the defts. to move to enter a verdict for them for the whole, on the construction of the will and codicil. A rule was accordingly obtained in Michaelmas Term 1862, by *H. Giffard*, for the defts., calling on plt. to show cause why the verdict for plt. should not be set aside and a verdict entered for the defts., on the ground that the codicil operated as a revocation of the life-estate given in the will to the plt., against which rule,

Mellish, Q. C., *H. Allen* and *Owen* (of the Chancery bar), for plt., now showed cause.—The correct construction of this codicil was, that testator was not dealing with his whole estate, so as to revoke every bequest and devise in his will, but simply with the undisposed part of his property. His meaning was to confirm his will, and the codicil was expressly "to be added to and taken as part it." It amounted to a republication. A codicil should always be construed, if possible, to give effect to the previous disposition in the will. If a man gives Whiteacre to A. and "all his estate" to B., that must be taken as all except Whiteacre. In order to revoke there must be a clearly expressed intention. The general principle was laid down by the H. of L. in *Doe dem. Hearle v. Hicks*, 8 Bing. 475; 1 M. & Sc. 759; 1 C. & F. 20; and that case shows that a general devise alone does not necessarily operate as a revocation. The present is a stronger case than that, for there were words showing an intention to revoke, yet the H. of L. held there was no revocation. If this codicil revokes this particular devise, then all the small bequests of annuities and legacies to servants, friends, executors and natural children, &c., will be revoked, which could not be testator's intention, and the smaller amount of the gift the stronger to show no intention to revoke. It will be contended contra, that the 21l. additional annuity to plt., by the codicil, is a sufficient compensation for cutting him off from his contingent life-interest in the realty, but the increased annuity was reasonable for his immediate wants, he being twenty-one years of age at the date of the codicil. The life-estate given to plt. by the will is not inconsistent with the codicil. Testator's intention by the devise in the codicil to Bowen Robertson was to dispose of the ultimate fee, the devise of which by the will to A. Thompson had lapsed by the latter's death. The following cases illustrate the principles on which the courts have decided such questions, and the rules judicially laid down as to the effect of a codicil on a will, and are all of them authorities in plt.'s favour:

Doe dem. Murch v. Marchant, 6 M. & G. 813; 13 L. J., N. S., 59, C. P.; 7 Sc. N. S. 644;

Re Arrowsmith's Trusts (Kindersley, V. C.), 29 L. J. 774, Ch.; confirmed on appeal, 30 L. J. 148, Ch.; 3 L. T. Rep. N. S. 635;

Cleobury v. Beckett, 14 Beav. 586;

Freeman v. Freeman, 23 L. J., N. S., 838, Ch.; 5 De G. M. & G. 704;

William v. Evans, 1 E. & B. 727; 22 L. J., N. S., 241, Q. B. (overruling the decision of the V. C. of England in the same case in equity, nomine *Evans v. Evans*, 17 Sim. 86);

Doe dem. Evers v. Ward, 21 L. J. 145, Q. B.;

Molmeux v. Rowe, 8 De G. M. & G., 25 L. J. 570, Ch.;

Seal v. Bartley, 2 Bos. & Pul. 585; 17 L. J. 316, C. P.; 1 Jarm. 414;

Plenty v. West, 16 Beav. 173; 1 Rob. 264;

Roe dem. Snape v. Neville, 11 Q. B. 466; 17 L. J., N. S., Q. B.

They referred also to Jarman on Wills, p. 414.

Dart (of the Chancery bar) and *C. E. Coleridge* (with whom was *H. Giffard*), contra, for defts., in

support of the rule.—[*POLLOCK*, C.B.—I think Mr. H. Allen's proposition a good and sensible one, viz., that if reading the two instruments together leads to a clear legitimate conclusion that conclusion is entitled to consideration.] No doubt, where both devises are contained in one instrument; but the question is, whether an instrument executed seventeen years after the will, and under another state of circumstances, can be so read: (*Jarm. on Wills*, 159.) The presumption after such a length of time and altered circumstances is in favour of a change in testator's intentions. The effect of deft.'s construction of the codicil would not be, as it was argued contra, to give the legacies, &c., to Bowen Robertson, for the devise in the codicil was to him "after discharging the above legacies." The court were bound in case of a reasonable doubt to give defts. claiming under the will, the benefit of it, so as to uphold and not destroy the will. The general rule in *Doe v. Hicks* is not disputed. The difficulty is as to the subsidiary rules by which the court is to be governed in construing the general rule. First, are the very words of the devise in the codicil large enough to include the subject-matter of the substantive gift in the will? Secondly, are they large enough to include the whole quantum of the interest given by the will? [*POLLOCK*, C.B.—The court has no doubt upon either of those two points.] In *Doe v. Hicks* and *Doe v. Marchant* there was an undisposed of quantum. If then, *quid* the subject matter and *quid* the quantum of interest, the words of the codicil are co-extensive with the will, the court must give them a natural construction, and not conjecturally cut down the plain words of a devise which are sufficient to pass the fee, and so reduce the codicil to a dead letter. An intention to revoke is plain, from the gift of all the testator's estate to Bowen Robertson and the additional 21l. to plt., which was in lieu of his contingent life-interest in the real estate. By plt.'s construction no effect would be given to the devise in the codicil to Bowen Robertson, for he would have taken it as heir-at-law without the codicil. The words are clearly and indisputably technically sufficient to pass the fee, and it is not a case where technicality is opposed to common understanding—the *simplicitas laicorum*. If this were a question in equity whether a particular legacy were revoked, the cases cited contra might apply. They then commented on and distinguished the cases cited by the plt. and cited in addition:

Daly v. Daly, 2 Jones & Lat. 752 (Lord St. Leonards);

Hardwicke v. Douglas, 7 Cl. & Fin. 795;

Phillips v. Allen, 7 Sim. & Stu. 446;

Bowen v. Taylor, 4 Beav. 425;

Evans v. Evans, 17 Sim. 86;

Boulcott v. Boulcott, 2 Drew. 25;

Reed v. Backhouse, 2 Russ. & Myl. 546;

Sugden's Law of Property, 218 (edit. of 1849), 55 Geo. 3, c. 192; and

7 Will. 4 & 1 Vict. c. 26 (Wills Act), were also referred to.

Dec. 7.—*POLLOCK*, C.B.—This was an action of ejectment brought to recover certain premises situate at Hodgeston, in the county of Pembroke. It was tried before my brother Channell, at the summer assizes for that county in the year 1862. Evidence was given, and it is not now disputed, that one Robert Robertson, who died on the 31st Dec. 1820, was at the time of his death seised in fee of thirteen-sixteenths of the property in question. It was not proved that he died seised of the other three-sixteenths, but by consent a verdict was entered for the defts. for three-sixteenths, and for the plt. as to the other thirteen-sixteenths, leave being reserved to the defts. to move to enter a nonsuit or a verdict for the defts. for the whole. A rule nisi to this effect was accordingly

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granted and came on for argument last Hilary Term before myself and my brother Channell, and my brother Wilde, when the court took time to consider its judgment, and I have now to deliver the judgment of myself and my brother Channell. (a) The question is, whether the life-estate, devised to the plt. by the will of the said Robert Robertson, dated the 22nd Oct. 1802, and which life-estate was expectant on the deaths of two persons, sons of the testator, namely, Bowen Robert Robertson and George William Wheeler Robertson, was revoked by a testamentary instrument of the date of the 31st Dec. 1819, described by the testator as "a codicil to his will of the 22nd Oct. 1802." At the date of his will the testator had two estates—the Westbury Hill estate, not the subject of this action; and the Hodgston estate, the property now in dispute. He had two sons, an elder son, George William Wheeler Robertson, and the second son, Bowen Robert Robertson; and he had two illegitimate children by one Elizabeth James, his housekeeper, namely, a son, the present plt., and a daughter. By the will the testator devised his estate called the Westbury Hill estate to trustees to the use of his eldest son George for life, with remainder to the sons and daughters of George in tail male, with remainder to the second son Bowen Robert Robertson for life, with remainder to his sons and daughters in tail, with remainder to the plt. for life, and the remainder in fee to one Alexander Thompson. The testator then proceeded to dispose of the Hodgston estate, the property now in dispute. This estate, subject to certain rentcharges and annuities, he devised to trustees to the same uses as were limited with respect to the former estate, the Westbury Hill estate, but placing, as to the estate now in question, Bowen Robert Robertson, his second son, before George William Wheeler Robertson, his eldest son. The annuities given by the will, by way of rentcharges, were an annuity of 21*l.* to the plt.; 5*l.* to his illegitimate daughter; 12*l.* to his housekeeper Elizabeth James, the mother of the plt. and the illegitimate daughter; and 30*l.* to one Mrs. Lettice Robertson. The testator then, after various pecuniary and specific bequests to executors and other friends, and a legacy of 5*l.* to his servant Elizabeth Powell, on the condition of her being his servant at the time of his death, bequeathed all his leaseholds to Bowen Robert Robertson, his second son, and the residue of his personal estate to George William Wheeler Robertson and Bowen Robertson. After the date of the will, and before the date of the codicil, George, the eldest son of the testator, died a minor and unmarried, namely in the year 1806. In the year 1818 Alexander Thompson, to whom the testator had devised the ultimate remainder in fee, died. In the year following, by a testamentary instrument duly signed and attested, dated 31st Dec. 1819, which the testator therein declares to be "a codicil to be added to and taken as part of his will dated the 22nd Oct. 1802," he gives to the plt., by the description of "his son William Robertson by Elizabeth James, a further sum of 21*l.* annually, in addition to the 21*l.* left to him by his said will, making together the sum of 42*l.*, to be paid half-yearly in two equal payments, the first to commence six months after his decease;" and he gave to his natural daughter Jane, then with Mary Morgan, of Haverfordwest, a sum of 10*l.* per annum to be paid to her during her natural life; he also gave to the female servant living with him at the time of his death the sum of 5*l.* provided she lived in his service twelve months; and 5*l.* more if she lived two years; and he then gave to his son Bowen Robert Robertson "all his estate and property of every de-

scription whatever, after discharging the above legacies."

The said Bowen Robert Robertson died in the year 1861, without issue, and the present plt. thereupon claimed the property in question under the life-estate devised to him by the will of 1802. The defts. contend that that life-estate was revoked by the testamentary instrument of the 31st Dec. 1819. Their first contention is, that that instrument is to be taken as a new will, revoking entirely the former will. This point we may at once dispose of. We think that the express reference which the testator has made to his will, the date of which he mentions, and the obvious confirmation of some of the legacies given by the will, entirely preclude our treating this instrument otherwise than as a codicil to the will of 1802. But, the defts. further contend that, treating it as a codicil, the life-estate devised by the will to the plt., expectant on the deaths of Bowen Robert Robertson and George William Wheeler Robertson without issue, is revoked by the words of the codicil, namely, "*I give my son Bowen Robert Robertson all my estate and property whatsoever after discharging the above legacies.*" Now, the general rule in interpreting a will and codicil is, that the whole of the will take effect, except in so far as it is inconsistent with the codicil: (see *Doe dem. Hearle v. Hicks v. Hicks*, 1 Cl. & Fin. H. of L. Cas. 20.) The plt.'s counsel in their argument mainly rely upon the above rule. They contend that the life-estate given by the will to the plt. is not inconsistent with anything in the codicil. They explain the gift in the codicil of all the testator's estate and property to Bowen Robert Robertson, by suggesting that the testator intended to dispose of the ultimate remainder in fee, which by his will he had devised to Alexander Thompson, who had died in the year preceding the making of the codicil. They contend that it was more probable that the testator should have been influenced, at the time he made the codicil, by the death of Alexander Thompson in the preceding year, than by that of his son George in 1806, thirteen years previously. The defts., in the second branch of their argument, in which they assumed that this instrument was a codicil, and not a new will, did not dispute the general rule as to the interpretation of a will and codicil; they contend, however, that an intention to revoke the life-estate given to the plt. by the will is manifest, not only by the words of the codicil giving all the testator's estates and property to Bowen Robertson, but also by the gift of the additional annuity of 21*l.* to the plt., which they contend was intended to be in lieu of the contingent life-interest in the testator's twolanded estates; and the defts. further contend that, by the construction suggested by the plt., no effect is given to the devise in the codicil to Bowen Robert Robertson, inasmuch as he was heir-at-law of the testator, and could have taken as heir. But so many cases of devises to heirs are found in the books, that a devise to one who is also heir cannot be considered such a devise of the property as necessarily to show some other intention on the part of the testator, as, for instance, an intention to revoke a previous devise. Many cases were cited on both sides; but it is unnecessary for us to review them in detail, because we agree with the remark made by Mr. Jarman in his work on Wills, at p. 146 of the last edition, that the cases on this point are for the most part too special to be of much use as general authorities, and we think that each case must be decided upon the particular words used, having regard of course to the main principle laid down upon the subject. Now, in the same case, namely, *Doe dem. Hearle v. Hicks (ubi sup.)*, in which we find the general rule above referred to, we find it laid down, that "if the devise in a will is clear, it is incumbent on those who contend that it is not to take effect, by reason of the revocation in the codicil, to show that the

(a) Martin, B. was present at part of the argument only, and Wilde, B. subsequently to the argument was moved from the Court of Ex. and appointed Judge Ordinary of the Probate and Divorce Court.

intention to revoke is equally clear and free from doubt with the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include a particular devise, then undoubtedly such devise ought to stand." This principle was acted upon in *Williams v. Evans*, cited during the argument, in which case a clear devise of tithes in a will was held not to be revoked by a general devise of "all my real estates;" and this is a case entitled to more weight because the court, out of deference to the V. C. of England, took time to consider, but finally overruled his judgment, which is to be found in *Evans v. Evans*, 17 Sim. 86. In the present case, the words of the gift to Bowen Robert Robertson in the codicil, which are no doubt sufficiently large to pass the fee, are less clear than the exact limitation of estates contained in the will itself. It is also evident from a reference to the will, and from the words giving legacies in the codicil, that the gift to Bowen Robert Robertson, although expressed to be "after discharging the above legacies," is intended to be also subject to the legacies bequeathed by the will, for the new annuities are described to be *additional* annuities, and it does not clearly appear to us that it was not intended that that gift to Bowen Robert Robertson should be also subject to the life-estate given by the will to the plt. Therefore, on the principle above stated, that it is for the debts in this case to show the revocation, we give judgment for the plt., and the rule obtained by the debts. will be discharged.

Judgment for plt.—Rule discharged.

Attorney for the plt., *Wm. Phillips*, 4, Size-lane.

Attorneys for the debts, *Eyre and Lawson*, 1, John-street, Bedford row, agents for *Powell, Mathias & Evans*, Haverfordwest.

ADMIRALTY COURT.

Reported by ROBERT A. FRITCHARD, D.C.L., Barrister-at-Law.

Tuesday, Nov. 10.

THE PRIDE OF CANADA.

Salvage—Apportionment—Agreement to abandon claim for salvage.

By the ancient law of the High Court of Admiralty, as well as by statute law prior to the Merchant Shipping Act 1862, s. 18, any stipulation by which a seaman agrees to abandon a claim for salvage was invalid.

The burden of proof is upon those who now assert such an agreement to show, not merely the existence of the agreement, but that the seamen were fully aware of all its consequences:

Quære, whether, if a valid agreement of such a kind existed, salvage remuneration would be awarded for the services in respect of which there had been such an agreement.

This was a cause of damage, in which the court, on April 7th last, awarded the sum of 1000*l.* for the services rendered by the steam-tugs *Brother Jonathan* and *United States* (the property of the United Steam Tug Company, of Liverpool) to the American ship, the *Pride of Canada*.

Application was now made on behalf of the plts. Wm. Wikeley, James Bailey and Robert Thomas, seamen on board the steam-tug *Brother Jonathan*, and Thomas Chatterton, seaman on board the steam-tug *United States* at the time the salvage services were rendered, for an apportionment of the above sum amongst the owners and crews of the respective tugs.

Affidavits on behalf of the owners of the steam-tugs stated that the steam-tugs are constructed of unusual power and size, and fitted up for the purpose of rendering salvage as well as their ordinary services;

that the wages of the seamen are paid whether any services are rendered by the steamers or not; and that the working expenses of the vessels are, by reason of their special construction, unusually large. The other contents of the affidavits were argumentative, and are sufficiently referred to by the court.

The following are the cases and sections of Acts of Parliament referred to:

The Louisa, 3 W. Rob. 101;

Spirit of the Age, Swab. 286;

The Princess Helena, 4 L. T. Rep. N. S. 869;

The Enchantress, 1 Lush. 93; 2 L. T. Rep. N. S. 574;

The St. Nicholas, 1 Lush. 29;

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 182. Every stipulation by which any seaman consents . . . to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative.

The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 18. The 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships.

Deane, Q. C., appeared for the seamen.

Brett, Q. C., and *Clarkson* contra.—The steam-tugs are not sea-going vessels within the meaning of the Merchant Shipping Acts, and therefore the clauses in those Acts which render invalid agreements by seamen barring their right to claim salvage do not apply. In this case the seamen have agreed to claim no salvage. [Dr. LUSHINGTON.—If that be so, it might give rise to another question, viz., whether, when such a stipulation has been made, the court could grant any salvage remuneration whatever for services with respect to which there has been such an agreement.] The agreement in this case is to be collected from the whole course of the duties of seamen. Salvage is part of the ordinary duty of these steam-tugs and of the purpose for which they were built.

Dr. LUSHINGTON.—I think it is useless to take time to deliberate upon this case, because I am perfectly certain I shall not alter the impression it has made on my mind. The ancient law of the court in questions of this kind was undoubtedly—viz., that whenever any sum had been allotted by way of salvage, it was competent to any party dissatisfied with the distribution by the owners or master to apply to this court for the apportionment of that sum of money; and so jealous was the law that no man should be deprived of his fair share of this reward, that even before the passing of the Act of Parliament, to which I must presently advert (the Merchant Shipping Act 1854), it was a general doctrine of this court, that no seaman could enter into a stipulation of an inequitable nature; and giving up his salvage would so have been deemed, according to all the authorities and principles laid down by Lord Stowell, and every other judge, upon this subject. Until recently the Legislature also entertained the same opinion, and considered it a matter of great importance, in a case of salvage, to give a just reward for the services performed, and a reward for risk of life, provided there was a competency for so doing. [The learned judge then read the 182nd section of the Merchant Shipping Act 1854, and continued:] Here is the principle recognised, that, if any agreement be made, it shall be null and void, and, I apprehend, upon the principles to which I have adverted. Now, for some reason which the court cannot understand, because it has no information thereon, it pleased the Legislature to modify the law; and to pass the 18th section of the Merchant Shipping Act Amendment Act 1862, but in order to weaken and take away the effect of the former section, the meaning of any new clause in an

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THE GUSTAV. THE NEW ED.

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Act of Parliament must be distinct and clear. The 18th section declares, not that such an agreement shall be legal at all, but that the prohibition mentioned in the principal Act "does not apply to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships." Now, in the first place, I understand this to mean, first, that there must be a stipulation; secondly, that that stipulation must be in a case in which there has been an agreement in terms, not in writing certainly, that the vessel is to be employed in a salvage service, and the stipulation must be with respect to the remuneration to be paid to them for salvage services so rendered. If, therefore, there be a vessel, the crew of which have entered into an agreement for the purpose of rendering salvage services, and have expressly made any stipulation with regard to remuneration for the services, that stipulation would take it out of the operation of the 182nd section, and do no more. But, in considering the evidence as to such agreement, it is important to bear in mind on whom lies the *onus probandi*; and it appears to me to be perfectly clear that in this case, as the ordinary law would undoubtedly hold a stipulation to give up all salvage reward null and void, and as the 182nd section remains in force save as altered by this 18th section, the *onus probandi* strictly lies on the party alleging that there has been such an agreement and such a stipulation. Where then is the evidence of that stipulation? Now, I do not mean to travel through the evidence of Mr. Corkhill, which is as unsatisfactory an affidavit as ever was laid under the consideration of the court. As an advocate, this gentleman has taken upon himself to pronounce what is the legal effect of all he has stated, and to give an opinion upon the law; but the utmost extent he can go without specifying any particulars, is to aver that there has been some agreement or other—whether a stipulation or not, I know not—to give up the salvage remuneration. First, has there been an agreement? I admit, provided the evidence is strong enough, looking at the 18th section, and seeing no particular mode provided by that section whereby the fact of an agreement or stipulation shall be established in evidence, the fact of an agreement may be established by any legal and competent evidence; and it is established in this case, not only by the oath of Mr. Corkhill, but also by the *res gestæ*, and, in fact, not contradicted by oath on the part of the seamen. But that is only a part, and a very limited part, of the case. It is not a question here whether they were engaged to perform salvage and towage services; but whether they entered knowingly and willingly, with their eyes open, into a stipulation to give up and abandon altogether all claim to salvage remuneration; and the stipulation must go the extent of this in order to bind persons in this condition of life, for it has been stated over and over again by my predecessors, that the seamen must be aware of the stipulation into which they enter. They are persons not possessed of knowledge and skill in agreements, and therefore it must clearly appear that, whatever the danger to life, however severe the service or great the reward, they have undertaken to abandon all claim to salvage remuneration. I might put a case of considerable difficulty, where a large salvage remuneration had been awarded. I might put a case in the immediate neighbourhood of Broadstairs, where the services performed did not last an hour, and where the court gave several thousand pounds reward for the salvage service, because the salvors incurred most imminent risk of life; and in such a case I am called upon to declare, upon the evidence of Mr. Corkhill, that the seamen would be deprived of all salvage reward whatever,

and that the owners themselves should take it, which is indeed a strong proposition. In this case I am of opinion that the *onus probandi* being strong upon them, the owners have not brought themselves within the terms of the 18th section; and that they have failed to establish that which it was indispensably necessary for them to do. I, therefore, must pronounce in favour of an apportionment of the salvage; and I shall give 750*l.* to the owners, 30*l.* apiece to the masters, and the crews will take the remainder according to their ratings.
Owners condemned in costs.

Friday, Dec. 4.

(Before the Right Hon. Dr. LUSHINGTON and TRINITY MASTERS.)

THE GUSTAV.

THE NEW ED.

Collision—Position of lights.

Lamps duly screened and fixed on stands secured to the paul-bitts of the windlass:
Held, not to be placed in a proper position, as required by the new regulations respecting lights.

This was a case of damage, and was brought by the Hamburg brig *New Ed*, from Hamburg, with a general bargo, for San Francisco, against the Bremen barque *Gustav*, from Bremen, for Baltimore, to obtain compensation for damage sustained by reason of a collision between them, near the Galloper Sand, in the English Channel, about 3.30 on the morning of the 13th Sept. last. The brig stated the wind as N.W. by W., and the weather as dark, but clear. The barque represented the former as W. by N., and the latter as very dark and cloudy. The case of the brig set forth that, while proceeding under all plain sail, close-hauled on the starboard tack, heading S.W. by W., making four knots, her crew keeping a good look-out, and having a green lamp exhibited on the starboard side of her fore-castle, and a red lamp on the port side of it, both burning brightly, they being screened to prevent their being seen across the bows, and fixed on stands secured to the paul-bitts of her windlass, in a position where the lights could be best seen from a ship approaching, the green light of the barque was made out on the port bow, one mile and a half off, bearing about S. S. W.; that thereupon the brig kept her course, expecting that the barque, which was on the port tack, would keep clear of her, but that instead of so doing the barque kept on, and came into collision with the brig—the starboard side of the barque, about the main rigging, striking the brig upon her head and cutwater, carrying her cutwater away and doing her considerable damage. The *Gustav*, on whose behalf a cross-action was brought, pleaded that she was heading N. by W., close-hauled on the port tack, making three and a-half knots, exhibiting her red and green lights properly, having a good look-out kept, when the brig was seen at a very short distance, broad on her lee bow, no light being then visible from the brig, but that, just before the ships struck, the red light was seen on board her; that, from the proximity and bearing of the vessels, it was impossible for the barque to clear her by porting, and she therefore kept her luff, and those on board her hailed the brig to keep off, but that that vessel almost immediately ran stem on into the *Gustav*'s starboard side; and it was contended, on the part of the *Gustav*, that the collision arose solely from the *New Ed* not properly carrying or exhibiting a light.

Under an order in council, bearing date the 27th July 1863, and the Merchant Shipping Act Amendment Act 1862, the provisions of the Act as to lights are applicable to Bremen and Hamburg vessels.

Dr. Deane, Q. C. and E. C. Clarkson appeared for the *New Ed*; the Queen's Advocate and the Admiralty Advocate for the *Gustav*.

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Ex parte SPARHAM, re SPARHAM.

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Dr. LUSHINGTON (after stating the other pleadings and arguments which proved immaterial in the case), said: I now come to a question of considerable importance in this case, and that is as to the lights. For the purposes of this suit the vessels are to be considered as British, and therefore subject to our municipal regulations as to lights, and those regulations require that a red light must be exhibited on the port side and a green light on the starboard side, and that the lights must be so constructed as to be visible on a dark night, &c., and to be visible on the side itself. I do not mean to say they shall be visible exactly on the right side or on the left, but visible so as to produce a certain effect. It is the effect that the Legislature looks to, and not the position in which the lights are placed; not that the one is to be on the starboard or the other on the port, but that the lights shall be so placed that they shall produce the effect described in the Act of Parliament, viz., that they shall be so constructed as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass. Now, how are we to judge of this? It is not denied that the *New Ed* had lights alight, and that those lights were good, because it is stated by one of the witnesses for the defence, that when the light did really appear, he could have seen it at the distance of a mile, and therefore the question is, not whether the vessel carried good and effective lights, but whether she carried them in such a form and such a position as to be visible to an approaching vessel. That is the point to which you must direct your attention, and you must try it chiefly by evidence of fact, though the skilled evidence of persons who have seen the vessels, as to whether the lights were placed in an effective position or not, may certainly be of some assistance. Now the facts of the case, I think, are not denied on the present occasion, though much argument has arisen, as very probably it would, upon the state of circumstances as proved. It is pleaded by the *New Ed*, and I think the evidence comes very nearly to the words of her plea, that "at this time the said brig had a green lamp exhibited on the starboard side of her forecabin and a red lamp exhibited on the port side thereof, both burning brightly, the said lamps being screened, to prevent their being seen across the bows, and fixed on stands secured to the paul-bits of her windlass, in a position where the lights contained in them could be best seen from a vessel approaching the said brig." That is her statement, and the master, in his evidence, deposes in the following words:—"We had our lights up, the red and green. They were placed forward on the paul bits; they were properly screened, and were fixed on the stands. The position in which they were placed was the best in the ship for the said lights to be seen by approaching vessels. We have carried them in the same position for four years, and they have always been found to answer well. I inspect the photographic view, being the representation of part of the brig *New Ed*, now placed in my hands. I observe therein that our red light is shown therein. The same is quite correctly represented as regards the position of the said light." Now the primary question for you to determine is, whether lights erected in the place as described in these pleadings, and also by the evidence, would be, according to your judgment, so placed that they would be operative on the same nights on which other lights are operative. I use that expression, "the same nights," because there may be nights and times when lights could not be seen. But those are extraordinary occasions, and do not affect the question whether, under all ordinary circumstances, the lights should not be shown in the manner prescribed, and the form prescribed, by the statute itself. It has been said on the present occasion, that the sails might

have interfered so as to prevent the lights being visible; but it is stated that, with respect to the sails, they were cut in a particular manner, in order that they might not hinder the lights from being seen. If you should come to the conclusion that the lights were not properly exhibited on this occasion, the *New Ed* cannot recover, and the other party would not be held to blame; for no question will then arise as to the want of a look-out on board the other vessel, because I cannot look at the argument, that the vessel could have been seen even without lights. It is an extravagant argument, that cannot be maintained or supported upon the present occasion. As to the state of the weather it was a dark, but not a very dark night—dark, but not foggy; the wind was moderate, there was nothing in the nature of a storm, and the tide was then ebb, running E.N.E.

The Court and Elder Brethren having retired for consultation, upon their return

Dr. LUSHINGTON said: The gentlemen are of opinion, and the Court concurs, that the lights were not placed in conformity with the provisions of the statute, and were not calculated to effect the purposes required by it. I pronounce against the *New Ed* in both actions.

Decree accordingly.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs.,
Barristers-at-Law.

Dec. 11 and 16.

(Before Mr. Commissioner GOULBURN.)

Ex parte SPARHAM, re SPARHAM.

Order of discharge—Solicitor—Duties of—Contracting debts, &c.—Extravagance in living.

If a solicitor who is insolvent misapplies the moneys of a client by appropriating them to his own purposes, he contracts a debt without any reasonable prospect of being able to pay it within the meaning of the 3rd clause of the 159th section of the Bankruptcy Act 1861, and the court will visit such conduct with its severest censure, and a suspension of his order of discharge.

A bankrupt, the amount of whose indebtedness for several years prior to his bankruptcy has been constantly increasing until at the date of the adjudication it reaches the sum of 5000l., is not justified in living at the rate of 500l. a-year, and, so doing, lays himself open to the charge of unjustifiable extravagance in living.

Order of discharge.

Lewis (solicitor) appeared for the bankrupt, and asked that he might have his order of discharge.

Linklater (solicitor), for the assignees, opposed upon the ground that the bankrupt, being a solicitor, had misappropriated the moneys of his clients, and had also been guilty of unjustifiable extravagance in his expenditure within the 159th section of the Bankruptcy Act 1861.

All the material facts are sufficiently stated in the judgment.

Dec. 16.—Mr. Commissioner GOULBURN.—This is a case in my mind of considerable importance, where an attorney, placed in a position which all parties agree is one of the highest trust and confidence, conducts himself in a way to bring down the severe censure and reprobation of the court. It seems that the bankrupt commenced practice as a solicitor with something of his own, that his father and father-in-law had agreed to and did advance him money which he was unable to repay. In fact he has been going on behind the world ever since, and stopped eventually owing more than 5000l. with not one farthing for dividend. It was said, and with great truth, that he had been guilty of extravagance of living, and that to

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this offence against the Act his failure may in some degree be attributed. It is charged against him that he contracted a debt without in the words of the statute "a reasonable or probable ground of expectation of being able to pay the same." I am clearly of opinion from the evidence and the figures that this man was in a state of hopeless insolvency for eight or ten years before his stoppage, and that he had contracted the whole of his debts without any reasonable prospect of being able to pay them. As to the individual complaint of Mr. Lockington, it appears that this gentleman employed the bankrupt, who was a perfect stranger to him, but who was recommended to him by some third party, to recover a debt. He sued the debtor, who paid the demand in three bills of exchange. Some time after, when Mr. Lockington asked him how he was getting on, the bankrupt replied, "Oh, they offered me a bill, but I do not think I will take it." In fact, however, he took the bills, discounted them at his banker's, and appropriated the money to his own use. All these bills were dishonoured at maturity, but ultimately two of them were paid. The third was not paid, and Mr. Lockington is still a creditor for more than 40%. He has never received this money, and never will. Here, then, is the case of a solicitor employed to sue another, obtaining from the debtor money's worth, and appropriating it to his own use, he being at the time in such a condition that it must be quite plain to him he would never be able to repay it. When we have, in the words of the Act of Parliament, to consider the manner and circumstances in which the debts were contracted, I am bound to say that the manner and circumstances of contracting this debt were fraudulent in the highest degree, and that a gross fraud has been committed upon this creditor. Can any one doubt the commission of the offence? I am indeed met with the case of *Stevens*, 7 L. T. Rep. N.S. 649, which was decided by myself; but I have to observe, that all these cases in bankruptcy depend very much upon their own particular circumstances. The rule *omne simile non est idem* is true in this case. The facts in the case of *Stevens* were very different from those in the present one, and I must say that, if the point upon which reliance is placed here as being the point upon which that case was decided had been properly brought under my notice at the time, I decided it wrongly. I have consulted my brother Holroyd, and I find that he withheld a certificate altogether in a case where these had been a gross fraud by misappropriation of money under circumstances which could render no reasonable hope of its repayment. I can understand a man in good circumstances misappropriating the moneys of another, well knowing that he could replace them at any moment, although such conduct is very far from being praiseworthy. That, however, is not this case, for the bankrupt admits that for many years he has been going on in a state of insolvency, although he says he was in a better position at his failure than he was several years ago. What that "better position" was may be seen from the figures in his accounts; he owes 5000*l.*, and his assets consist of furniture valued at 23*l.* 17*s.*, upon which there is a claim for rent to nearly the full amount, and other property value 5*l.*; and this, too, of a solicitor through whose hands 12,000*l.* of his clients' money has passed in a single year. This is a very sad case, and one which must be visited with punishment; for if a solicitor be permitted to err in such a manner, it would be fatal to the relations between attorney and client which it behoves every man to keep as pure and untainted as they can be. I am of opinion that the charge of contracting debts without any reasonable ground of expectation of payment has been fully established. I am also of opinion that the charge of extravagant living has

been proved, for he spent at the rate of 500*l.* a-year during the two years next preceding his bankruptcy. Nor does what he says of his gross profits being 750*l.* a-year and his wife's separate income being 330*l.* remove from my mind the conviction that he was reckless and improvident. Under these circumstances, pronouncing him guilty of both offences against the statute, I feel bound to show my sense of such misconduct in such a person, and I therefore suspend the issue of the order of discharge for nine months, during six of which he will be without protection from arrest. I will, however, grant protection for one month, so that, if desired, my decision may be reviewed by the Court of Appeal.

Judgment accordingly.

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COURT OF QUEEN'S BENCH.

DUBLIN.

Tuesday, Nov. 17.

(Before LEFROY, C. J., HAYES and FITZGERALD, JJ.)

CONWAY V. RICHARDSON.

Appeal from justices—Costs.

Where an appeal had been lodged with the officer of the court, but due notice had not been given by the app. to the resp., the court has no jurisdiction over it, and therefore cannot give costs to the resp.

This was a case stated by the justices of Tyrone, under the 20 & 21 Vict. c. 43.

Featherston H. Lowry moved, on notice, that the case stated be struck out of the Crown Paper, on the grounds that the app. had not served the resp. with a notice and a copy of the case stated within three days after receiving it from the justices, and had not within three days transmitted the case to this court. The affidavits of the resp. and petty sessions clerk of Cookstown deposed that the justices signed the case on the 24th Oct.; that by the direction of the app. it was forwarded on that day by post to his attorney and the letter registered, and in due course of delivery came to hand on the 26th Oct., before twelve o'clock a.m. The resp. was not served with the notice and copy of the case until the 2nd Nov., and on the same day the officer of the court received the case, and relied on

Morgan v. Edwards, 5 H. & N. 415; 29 L. J. 108, M. C.; and

Woodhouse v. Woodhouse, 29 L. J. 149, M. C.

McCausland, Q. C.—The court having struck out the case for want of jurisdiction, cannot give costs:

Fraser v. Fothergill, 14 C. B. 298.

F. Lowry.—The app., by transmitting the case, has brought himself within the jurisdiction; and, per Alderson, B., in *Peters v. Sheeman*, 10 M. & W. 214, every person who comes before a court is liable to the jurisdiction as to costs. But the cases of *Carr v. Stringer*, 1 E. B. & E. 125, and *Reg. v. Padwick*, 8 E. & B. 704, are clearly authorities, that where a case has been dismissed for want of jurisdiction the court has power to give costs. *Fraser v. Fothergill* is clearly distinguishable. The court never had any jurisdiction, and the resp. had done no act to bring himself within the jurisdiction.

LEFROY, C. J.—Strike out the case. The court. says nothing about costs.

Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,
Barrister-at-Law.

Wednesday, Dec. 9.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT
BRUCE and TURNER, L.JJ.)

CLEARY v. MACANDREW.

THE CARGO *ex* GALAM.

Ship—Lien on cargo for freight and general average
—*Respondentia bond—Priority of lien—Practice*
of Court of Admiralty.

*W., a London merchant, shipped on board a French ship, the Galam, at Hayti, a cargo of wood, to Europe. The Galam became unseaworthy at Terceira, was there condemned, and the cargo discharged and stored, and the captain then raised 1000*l.* from M., on respondentia bond on the cargo, payable on arrival at Falmouth, but did nothing to forward the cargo. W., hearing of the accident, chartered the Mary Jane to go to Terceira and bring home the cargo, and to call at Scilly for orders, which was done; but on reaching Scilly she ran ashore, and expenses were incurred in saving ship and cargo. W. then, in order to defeat the respondentia bond, ordered the cargo to proceed to Hamburg, instead of Falmouth, and discharge the cargo; but before the Mary Jane started, M., the respondentia bondholder, instituted a suit and arrested the cargo at Scilly, by warrant out of the Admiralty Court. The cargo was afterwards removed to London for sale, and fetched 808*l.*:*

Held (reversing the judgment of the Court of Admiralty), that the master of the Mary Jane, not having known of the respondentia bond, and being prevented by the orders of the Court of Admiralty, occasioned by the default of the owner of the cargo, from carrying the cargo on to Hamburg, had a lien for freight on such cargo:

Secondly, that the master, having claimed and obtained a settlement from his underwriters for a total loss, they were entitled in his right to such lien:

Thirdly, that the master's lien for freight was preferable to the claim on the respondentia bond, for the carrying on of the cargo was essential for making the bond available, and the bondholder had done nothing towards forwarding the cargo:

Fourthly, that the master's claim for general average was also preferable to the respondentia bond, for he had a possessory lien for such average at common law, and the sale at London did not displace this lien.

The rule of the Court of Admiralty as to deciding upon questions of average is this: not that when a possessory right of lien arises incidentally before it, such right will be treated as a nullity; but that, when the court is called upon to enforce such a lien not depending upon possession, or to adjust the rights which grow out of it, the court will then refuse to interfere.

This was an appeal from a decree of the Court of Admiralty as to the priority of a claim of a respondentia bondholder over the master's lien for freight and general average.

Mr. White, a London merchant, in 1860 shipped in Hayti a cargo of campeachy wood on board a French ship, the *Galam*, which on its voyage to London became unseaworthy at the island of Terceira, was condemned and sold and the cargo discharged. The master there borrowed on respondentia bond, payable on the cargo arriving at Falmouth, 1000*l.*, but he did nothing towards forwarding the cargo. Mr. White

hearing of the accident, chartered the *Mary Jane* to go and bring home the cargo, and this was in course of being done, when the *Mary Jane* ran ashore at Scilly, and expenses were incurred on getting off the ship and cargo. Mr. White hearing of the bond sent directions to the master of the *Mary Jane* at Scilly to carry on the cargo and discharge at Hamburg and not Falmouth. Before, however, the *Mary Jane* started the respondentia bondholder obtained a warrant of the Court of Admiralty to arrest the cargo, which was taken possession of and sent by the court to London for sale. The amount realised was 808*l.* 8*s.* 10*d.* The master of the *Mary Jane* claimed to be first paid out of this fund the freight and general average for both of which he had a lien. The respondentia bondholder claimed first to be paid. The Court of Admiralty preferred the bondholder. The following were the material parts of the judgment of

Dr. LUSHINGTON.—I do not think it necessary to take time to deliberate in this case, because in my opinion my judgment must be formed much more upon the facts of the case and the evidence, than upon any points of law, respecting which there does not appear to me to be much doubt. This suit was commenced on behalf of the bottomry bondholder, and it is necessary to state how that bottomry bond came to be given. It appears that there was a cargo shipped on board a vessel called the *Galam*, which having sailed from Hayti for Europe, met with misfortunes and put into the island of Terceira, the ship was broken up and no more is heard of it, but the cargo remained there, being a cargo of campeachy wood, and the master of the vessel gave a bottomry bond for the purpose of transporting the cargo to its original destination, which was either London, Falmouth, or what port signifies not. Now it has been said that this bond was not granted until after the charter-party in this case. That appears to me to be a point of very little consideration. It has also been said that Mr. Cleary, who asserts himself now to be the owner, was utterly ignorant that any such bottomry bond had been executed. There are some reasons which I shall presently state why I think not very implicit credit is to be given to the statement of Mr. Cleary, unless supported by other evidence, but is it consistent with any probability that Mr. Cleary, when he got to the island of Terceira, he having proceeded there in pursuance of the charter-party which was to convey the cargo to Falmouth or elsewhere, should have acquired no information with respect to the bottomry bond? Did he not have some curiosity to inquire how the money had been secured or how the money was to be paid, or did he act without reference to any of these matters? It does seem to me singular that he should attempt to carry into execution the charter-party which was to convey the cargo to Falmouth or wherever it might be, without regard to the manner in which the expenses should be defrayed, or without ascertaining whether the bottomry bond was in existence. However, so it stands. Now as to the terms of the bond, I have no hesitation in saying that the bottomry bondholder, assuming it to be a valid bond, which I see no reason at present to doubt, had a certain right the very moment the bond was executed. It was provided in the bond that the sum lent, together with the maritime interest, was to be paid at the first port of destination in Europe, which was to be Falmouth, ten days after the arrival of the vessel thereat. I apprehend that the master, if he was aware of this bond, was undoubtedly under an obligation to fulfil its conditions, and to carry the cargo to the port of Falmouth, and if he was unaware of this bond, then when the ship arrived at Scilly, and when everybody knew of the bond, I cannot entertain a doubt that those concerned for the ship and cargo were subject to similar

obligations. It was on the 22nd Feb. that the *Mary Jane* in bringing the cargo from Angra to this country was wrecked in one of the Scilly Islands; at that time the existence of the bond was distinctly known to Mr. White, who is the owner of the cargo, for as he says he then had knowledge of the bond. Upon becoming informed of the bond on the cargo Mr. White writes a letter on the 25th Feb. in which he directs that the cargo shall be carried on to the port of Hamburg. This comes to the knowledge of the bottomry bondholder, and I have no hesitation in saying that the bottomry bondholder, in anticipation that that direction would be carried into effect, had a perfect right to resort to this court for the purpose of obtaining that which was a right under the conditions of the bond, and for which he had no remedy in another country. There have been very many cases which the court has had similar to this. I will now consider the measures pursued or directed to be pursued by the court. The cargo was directed to be arrested because it was upon the cargo alone that the security of the bottomry bondholder stood. The cargo had been landed at the Island of Scilly because the state of the ship was such that the ship was incapable of retaining it. Now I fully admit that when the cargo was landed, all common law liens attached to the cargo, and that whatever claim there was then for the freight, that claim ought not to be disturbed by this court. I fully admit also that it was at the option of the master either to carry the cargo in the vessel in which he brought it, or to obtain another vessel for the purpose of obtaining the same object. I fully admit that to be so. Now let us consider what was done in reality, and whether I can extract from these proceedings any satisfactory evidence that the master entertained the slightest intention of ever carrying this cargo on to the port of destination, namely to Falmouth or Hamburg. [The learned Judge, having examined the evidence, held, that Mr. Cleary never intended to forward the cargo.] But what is the case further? Mr. Cleary has actually sought another mode of being indemnified, namely, by application to the underwriters for the whole loss, great part of which he has received. Now, if the appearance had been entered in the name of the underwriters, and I were to adjudge the case with the severity with which it would have been adjudged thirty years ago, they would not have been allowed to proceed at all. That strictness, however, does not prevail now; and it is in Mr. Cleary's favour that I assume he is really proceeding for the benefit of the underwriters. If it came to the knowledge of the court that Mr. Cleary was suing for his own benefit—which I hope and trust in honour and honesty is not the case—most assuredly he would not get a judgment from me. What more is there for the court to determine? I dispute not the law; for, no doubt, it is perfectly clear how it stands as to freight. The freight was not earned when the vessel got to Scilly. I apprehend that the master of a ship, who has the power of reshipping or transshipping, if he voluntarily refuses so to do, has no claim to freight whatsoever; and really I have not heard that the law has been disputed, or was capable of being disputed. He might have earned that freight if he had but fulfilled that obligation which the law imposed on him, namely, of carrying on the cargo. I am of opinion in this case that there was no freight; that there was a voluntary abandonment of the voyage; that recourse was had to another quarter for indemnity, which has been obtained. I would not reject the claim if founded in law, because for the benefit of the underwriters; but I am of opinion that here there is no legal claim. Now, I must say one word only on the subject of average. With respect to average, over and over again, from the earliest time I entered this court, the judges of this court have refused to entertain this

question. Why should I break in upon that established practice? It has been very ingeniously said, "We have no hostility to you, the bottomry bondholder; we know you are not liable to contribute to the average; and all we wish is to take the fund and apply it to our own purposes." The court declines to be a party to that arrangement, and I must adhere to the practice of not deciding upon questions of average. I have nothing further to say; but I must pronounce for the validity of this bond, and with costs.

From this decree the owner of the *Mary Jane* appealed to Her Majesty in Council.

Brett, Q.C. and V. Lushington, for the app., contended that at the date of the arrest of the cargo the app. had lawful possession, and had a possessory lien for his freight and general average, and he was entitled to carry on the cargo, and was prevented from doing so by the bondholders.

Dr. Twiss, Q.C. and E. C. Clarkson for the resps.

Cur. adv. vult.

LORD KINGSDOWN.—The circumstances of this case are singular, and though some of the questions of law which have been raised in it are sufficiently clear, others of much general importance seem to be involved in some doubt. In the year 1860, Mr. White, a merchant in London, shipped in Hayti, on board of the French ship called the *Galam*, of which Jean Felix Neau was master, a cargo of campeachy wood, to be brought to Europe. In Nov. 1860 the *Galam* became, as it is alleged, unseaworthy, and put into the port of Angra, in the island of Terceira, where she was condemned, and her cargo discharged and stored in the custom-house there. The captain of the *Galam* took up a large sum of money, amounting to about 1000*l.* English money, on the security of the cargo, and granted a respondentia bond for the amount, payable, with interest at 30 per cent., on the arrival of the cargo at her first port of destination in Europe, which was declared to be Falmouth; and this bond was afterwards transferred to the resps. the present holders. Captain Neau having raised this money, does not appear to have done anything for the purpose of forwarding the cargo to its destination. Information of the accident, however, was given to Mr. White, the owner, who chartered a ship called the *Mary Jane*, then lying at Bristol, of which Philip Cleary, the app., was master and owner, to proceed in ballast to Angra, and fetch home the cargo. By the charter-party, which was dated the 31st Dec. 1860, it was agreed that the ship having taken on board the cargo, should call at Queenstown, Scilly, or Falmouth, for orders, and should carry on and deliver the cargo at any port fixed by the orders within certain limits specified in the charter-party. The port of London, for some reason which does not appear, was expressly excepted from the ports of discharge; the freight was to be 450*l.* if the cargo were delivered at a port of the United Kingdom, and 475*l.* if discharged at Hamburg, which was within the prescribed limits. The *Mary Jane* set out on her voyage accordingly, took on board the timber, and on her return voyage called at Scilly for orders, but on arriving she was, by violence of weather driven ashore, and it became necessary to unship and store the cargo, which was done in the yard of Messrs. Banfield and Co., of Scilly, who stated that they received it on behalf of Captain Cleary, and subject to his claims upon it by way of lien. Considerable expenses are alleged to have been incurred in saving the ship and cargo, in respect of which Captain Cleary makes a claim on the cargo for general average. Messrs. Banfield and Co. immediately informed White by letter of what had happened, and at the same time advised him that it was expected that the ship would be got off the shore. On the 25th Feb. 1861 White, in answer to this communication, sent the following letter

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CLEARY v. MACANDREW

THE CARGO of GALAM.

[PRIV. CO.]

to Banfield and Co.:—"Dear Sirs,—I received this morning your favour of the 22nd inst., announcing the arrival at your port of the *Mary Jane* from Terceira, and that she slipped her cables in a hurricane, and ran on the shore at Tresco to save ship and cargo, and that you were making efforts to get her off, and hoped to succeed. Unless you should receive contrary orders from me by telegraph or by letter before she proceeds to sea, please to order the captain to proceed to Hamburg for the discharge of his cargo. There is a bottomry bond on the cargo for more than its value, therefore he must not deliver said cargo until his freight is paid. Of course any expenses incurred on your part or elsewhere, for repairing, will have to be raised by a bond which will take precedence of the one from Terceira, and there will be ample to cover this latter and freight, leaving something to account against the former one. I remain, &c., ARTHUR B. WHITE. Inclosed a letter for Captain Cleary, which please deliver to him." It appears by this letter that White at this time was apprised of the resps. bond which had been granted at Angra, and that he determined to adopt a course which was calculated to defeat it by diverting the cargo from Falmouth, on arrival at which place only the bond was made payable. At what time White first became acquainted with the fact of the bond having been given does not appear, but there is nothing to show that before this letter was received Cleary had ever heard of or had any reason to suspect the existence of such bond. The resps. having discovered the directions given by White as to the destination of the cargo, immediately instituted a suit in the Admiralty Court, and gave White notice of the proceedings, and on the 4th March 1861 they procured the cargo to be arrested in Scilly by a warrant out of the Court of Admiralty. White refused to appear to the action, the charges upon the cargo being, as it seems from his letter, beyond its value. Cleary of course could not be required or expected to give bail, and on the other hand, till the order of Admiralty was removed, the cargo could not be carried on to its destination, whatever that destination might be. The rule of law is very clear, and was not disputed at the bar, that the master of a vessel is entitled to recover his freight if he has either carried his cargo to its destination, or has been prevented from so carrying it by the act or default of the owner, and if by the occurrence of an accident on the voyage delay be occasioned, the master may claim a reasonable time to carry on the cargo either in the same ship, when repaired, or by transhipping it to another vessel. It is said, however, in this case, that the master had abandoned the cargo to its fate, and was not prevented by the proceedings in the Admiralty Court from carrying it on; and he never intended to do so if no such proceedings had been taken, and that therefore he is not entitled to any freight. With a view to this question it becomes material to examine with some minuteness what actually took place. Cleary had insured both the ship and the freight with the same underwriters. On the 25th March 1861 his agents came to a settlement with them for the loss both on the ship and cargo. The terms as to the ship were, that he should receive 75 per cent. on the value, and take the ship for his own account. He obtained a settlement with the underwriters at the same time on the freight as for a total loss; but the terms on which this settlement was made entitled the underwriters to stand in the place of Cleary. They are thus stated in the letter of Mackay and Dick, the agents of the insurers, dated at Glasgow, March 25, 1861, addressed to the agents of Cleary, at Greenock:—"The freight to be treated as a total loss. The underwriters on this footing getting the charter-party to send on the cargo, and to collect amount of same as per charter-party, Captain

McCleary to give his assistance in having the cargo sent forward. It is also understood that you are entitled to the proportion of general average and charges applicable to freight and cargo." Shortly afterwards, White, in answer to some communication from Banfield and Co., wrote them the following letter:—"London, April 2, 1861. Dear Sirs,—I have before me your valued favours of 15th ult. and 1st inst., and have not to alter the orders already given for the *Mary Jane* to deliver her cargo at Hamburg; the captain taking care to secure his freight and general average with you, and for shipping the cargo at Angra before parting with the cargo. I thank you for informing me that Messrs. Mackay and Dick, 1, Royal Bank-buildings, Glasgow, are now the representatives of the *Mary Jane*, and are making arrangements for the reshipment of said cargo; but I shall wait to hear from them before addressing them, as I have fulfilled my part of the business by having given the orders, unless some suitable proposition is made to me to induce the discharge in a port of Great Britain. I shall feel obliged by your informing me when the *Mary Jane* is likely to be ready to receive the cargo, and any other information that you believe may be of interest to me. It appears to me that the expenses of shipping the cargo at Angra, according to the document sent you, could be included in your statement of general average; it being certain by that matter, and I have paid same.—Claiming your excuse for giving you so much trouble, I remain, &c. (signed) ARTHUR B. WHITE." This letter shows that White refused to order the cargo to be taken to London, and insisted on its being carried to Hamburg; and Cleary, who was bound by his charter-party to carry it to Hamburg, and not to carry it to London, had no right to disobey the orders of his charterer. It must be observed that at this time the reshipment of the cargo on board the *Mary Jane* was contemplated, and that the *Mary Jane* was still in Scilly, and, as it should seem, under charge of the underwriters. On the 13th April 1861 the agents of the underwriters wrote a letter of that date to Cleary, urging him to initiate their behalf on his right to carry the cargo to Hamburg, in terms of the charter-party, and to do all things necessary for the recovery of the freight, and authorising him to appear on their behalf in this suit. Cleary after this seems to have given himself no further trouble about the matter. He sold the *Mary Jane*, which left Scilly about the 1st May, and having received the full amount of her freight, or nearly so, he took himself off to Newfoundland early in May 1861. Before he went, however, he executed a power of attorney, authorising Messrs. Banfield and Co. to take the necessary steps for carrying on the cargo to Hamburg should it be released from arrest, as also for the purpose of protecting his rights in respect of freight and general average, and as appearance in this suit seems to have been entered for the app. under this authority. We do not find that any step was taken by any of the parties till the latter end of May. On the 25th May an application was made to the Admiralty Court to have the cargo in question removed to London for sale, inasmuch as there were no markets for it in Scilly. An order was made for this purpose by the court, and in obedience to such order the cargo was brought to London in the month of June 1861, where it was afterwards sold, and realised, after payment of the expenses incurred by the marshal, 808*l.* 8*s.* 10*d.*, which sum was paid into court subject to the claims of all parties. On the occasion of this application for the removal of the cargo to London, and on the 27th May 1861, notice was given by the proctors for the app. to the proctors for the resps. that the app. was prepared to carry on the cargo of logwood lately landed from his vessel the *Mary Jane*, was

housed at Scilly, upon its being released from the arrest of the High Court of Admiralty. Some correspondence took place, which it is immaterial to notice. It is said that at this time the *Mary Jane* had been sold, and there was no vessel in Scilly which would have been employed in carrying on the cargo to Hamburg; but, however that may be, the underwriters had been prevented from carrying on the cargo to Hamburg when they had the means of doing so, and the orders of the Court of Admiralty still prevented them from completing the contract by transhipping the cargo to another vessel. Can it be said, then, that there is any evidence to show that the intention to carry on the cargo had at any time been abandoned by those whose right it was to receive the freight? The case is in some degree prejudiced by the claims being made in the name of Cleary, who, as far at least as regards the freight, has long since been satisfied every claim which he can have in respect of it. The rules of the Admiralty Court make it necessary that in all suits of this description the party appearing should be the master, though his claims may have been satisfied by the underwriters, and they are the only parties really interested. He is considered in the Admiralty Court as suing as agent and trustee for them, and the same rule seems to prevail at common law according to the doctrine laid down in *Robertson v. Hamilton*, 14 East, 522. If we look then at this claim as the claim of the underwriters, it seems very improbable they should intend to abandon their right to earn this freight. By far the greater part of the voyage for which the *Mary Jane* had been hired out and home had been performed; it remained only to carry the cargo from Scilly to Hamburg, in order to earn the whole amount of 475*l*. Nor can we say that their conduct amounted to an abandonment of their right to do this. The orders of the Court of Admiralty, occasioned by the default of White, made it impossible to carry the cargo anywhere but to London, and there they were not bound, and were not at liberty to carry it. We think, therefore, that they stand in the situation of parties who, having been prevented by the default of the owner of the cargo from completing the voyage, are entitled to claim their freight. There being, then, a lien for freight, the next question is, whether such lien is preferable to, or to be postponed to, the claims under the *respondentia* bond. It is sworn, and there seems no reason to doubt, that Cleary knew nothing of the *respondentia* bond when he took on board the cargo. The *respondentia* bond seems open to great suspicion, though it has not suited the interests of any of the parties in the suit to dispute it. The money raised by it or any part of it seems not to have been applied to forwarding the cargo, and as far as appears in this case, Capt. Neau had entirely abandoned the cargo, and it was carried on not by him or by his procurement, but by the act and at the expense of the owners of the cargo. The subsequent carrying on of the cargo was essential to making it available either for the holder of the *respondentia* bond, or for anybody else. It was in the nature of salvage service, and in a competition of liens the shipowner, who has rendered a service of this description, is entitled to priority over the holder of a *respondentia* bond who has done nothing, and whose money has contributed nothing towards forwarding the cargo to its destination. It is upon this sound principle of justice and common sense that, by the regular practice of the Admiralty Court, a prior bottomry bond is postponed to a subsequent one, and both to claims for salvage afterwards arising, and that wages are also entitled to preference. These demands are all for services rendered to the owner of the bottomry bond, as well as to other persons interested in the ship and cargo. We think, therefore, that the claim for freight is entitled to priority over the *respondentia* bond. There re-

mains the question of the claim for general average. On principle, this seems to stand on the same reason as freight. It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law to contribute ratably; and for this claim the master who has incurred the expenses has a lien on the goods. It is a possessory lien at common law by virtue of which he is entitled to hold the goods till his lien be satisfied. If no *respondentia* bond was in question, there can be no doubt that White could not take the goods out of the hands of Cleary without paying not only freight, but what is due for general average. But it is said that the Court of Admiralty will take no notice of a claim for general average, and the learned judge in this case observes, "that over and over again, from the earliest time he entered this court, the judges of the court have refused to entertain this question;" and again, "I must adhere to the practice of not deciding upon questions of average." But, unfortunately, the judgment does decide the question, and determines that the Court of Admiralty may take a cargo out of the possession of a master who has by common law a possessory lien upon it, without satisfying such a lien. If such be the settled law of the Admiralty Court it must prevail, however contrary to principles usually acknowledged in the administration of justice; but it requires very clear authority to support it, and, upon examination, their Lordships have not found any. To enforce and give effect to a lien at the instance of a party seeking to establish it, is quite a different thing from setting it aside and annulling it when it arises in the court incidentally in the progress of a cause over which the court has properly jurisdiction. The captain there does not say, "I have by the maritime law a lien which the Court of Admiralty will enforce as it does in case of bottomry and other cases not depending upon possession;" but he says, "I am in possession of this cargo and have a lien upon it, and by the law of England no man has a right to take it out of my possession till that lien is satisfied." If he be right in law, as it appears that he is, how can the Court of Admiralty do that which no other court in the kingdom could do—destroy a right which exists by law? The case would be quite different if the captain, having parted with the cargo, sought to enforce a lien in the Court of Admiralty. The lien would be gone (unless there were some special contract) with the loss of possession, and the Court of Admiralty would probably say, "We have no jurisdiction in this matter; we have no means of enforcing contracts or compelling contributions: we decline to interfere." On examination of the cases, referred to at the bar, this appears to be all that they have decided; not that when a possessory right of lien arises incidentally before the Court of Admiralty, such right will be treated as a nullity, but that when the court is called upon to enforce such a lien not depending upon possession, or to adjust the rights which grow out of it, the court will refuse to interfere. Two cases were strongly relied upon by the counsel for the resps.: *The Constancia*, 2 Will. Rob. 487; and *The North Star*, 1 Lush. 45. Neither of these cases sustains the principle now contended for. In the first case, the *Constancia* sailed from Lima, having for her cargo, amongst other things, a quantity of silver. Having suffered damage on her voyage, it became necessary to raise money for repairs. A portion of the silver was sold by the master to raise the necessary funds, and other moneys required were raised by bottomry bond on the ship. Two further bonds were granted by the captain for necessary expenses—one on the cargo and another on the ship. The ship arrived in this country, and was sold in the Admiralty Court; the amount of freight was brought into the court, and also a portion of the value of the cargo equal to the

amount of the bottomry bond. In these circumstances, the owners of the silver made a claim upon the proceeds in the court for a contribution, on a general average, to the loss which they had suffered by the sale of their silver. The learned judge rejected the claim, on the ground that it was a mere personal right to be enforced at law; that there was no lien on the ship or cargo for such demand; that the Court of Admiralty, therefore, would not entertain it, and did not possess the means of doing justice amongst the different parties interested if it did not interfere. The grounds of the judgment are thus explained most clearly at p. 490: "If this be so, and if, upon the authority of my Lord Stowell, thus confirmed by my Lord Tenterden, I am to consider this claim as a subject of general average, two considerations immediately suggest themselves: first, whether I have any jurisdiction at all over questions of general average; and, secondly, whether I could satisfactorily exercise such a jurisdiction under the circumstances of the case. The absence of any precedent where the court has exercised the jurisdiction is of itself a strong *prima facie* proof that I have no authority to entertain the question at all, and I am the more strongly inclined to this opinion by the further consideration that in all cases of average it is essential that the tribunal which is to adjust it should have the power to compel all parties interested to come in and pay their quota. I possess no such power, and if I could not bring all parties interested before the court, I could not adjust a general average, which is a proportionate contribution by all." It is obvious that this case has no bearing upon the present. There was in that case no possession by the owner of the silver of any part of the cargo from which contribution was sought, and of course there could be no possessory lien. There was an attempt to enforce a personal jurisdiction which the learned judge thought it did not possess and could not usefully assume. The case of the *North Star* was substantially to the same effect. The question there was as to the validity of a bottomry bond on a ship. The owners of a cargo who had paid expenses in respect of which they were entitled to a general average contribution from the ship had taken a bottomry bond on the ship from the master. It was argued that such right to contribution formed no lien on the ship, that the owner of the cargo had no possession of the ship, and therefore could have no possessory right of her, though the master of the ship had possession of the cargo, and had therefore a lien for general contribution, which, however, he lost if the cargo passed out of his possession. Dr. Lushington disallowed the claim, and made these observations: "The next step is to consider these claims in respect of general average, how far they affect the ship and homeward freight. Assuming the claims to be well founded in fact, in what legal category ought they to be placed? Are they liens upon the ship in any legal sense of the term, or are they simply debts—the consignees creditors, the owners debtors? Liens, in the common law sense of the term, these claims certainly are not. Are they to be considered as maritime liens of the same nature as salvage, or damage to be enforced against the *corpus* of the ship? I find no authority for such a position. They are demands for which an action might lie, but which the Court of Admiralty has never taken cognisance of. I think these claims are to be considered as conferring rights of personal action only. Neither in these cases nor in any other can we find any decision or dictum that, when a clear legal right of lien is proved in the Court of Admiralty to exist, that court can dispose of the property without regarding it, and thus, in effect, decide against it. It was said, however, that the resp.'s bondholder was entitled to preference because the holder of such security is not liable to contribute to general average. That is so as between the owner

of the cargo and the holder of the bond, and those whose lien arises in respect of services by which the cargo itself has been made available. Upon the whole their Lordships are of opinion that the claim for freight and general average is the first demand upon the funds in court. The resp., however, must be at liberty to have the claim for general average strictly investigated, though their Lordships feel themselves compelled, upon principles of law, to advise Her Majesty to reverse the present judgment, and to give to the app. his freight and what may be found due to him for general average, and his costs of the suit out of the fund in court. They think that both his conduct and that of White are open to so much observation, and the facts of the case afford such ground for doubt as to the proper inferences to be drawn from them, that they will not give any costs of the appeal.

Decree reversed.

App.'s proctor, *C. Waddilove.*

Resp.'s proctors, *Clarkson, Son and Cooper.*

Tuesday, Dec. 1.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT
BRUCE, L. J., and Sir J. T. COLERIDGE.)

VIVERS v. TUCK.

Contract—Specific performance—Agreement for partnership—Intoxication of one of parties—Unfairness—Remedy at law.

A court of equity will not decree specific performance of an agreement more favourable to the plt. than is the def't., involving hardship upon the def't., and damage to his property, if he entered into it without advice or assistance, and there be reasonable ground for doubting whether he entered into it under intoxication, i. e. without a knowledge and understanding of its nature and consequences. In such a case the plt. will be left to his remedy at law.

This was an appeal from a decree of the Supreme Court of New South Wales, in a suit for specific performance of an agreement for a partnership.

The app. in 1859 agreed to enter into partnership with the resp. for the purpose of establishing and carrying on certain gasworks at West Maitland, New South Wales. These gasworks were then in course of erection upon part of the resp.'s property, and resp. had just returned from England, where he had ordered the necessary plant. An Act of the Colonial Legislature was obtained, authorising the resp. to light with gas the towns of East and West Maitland.

On 27th Sept. 1859 a written document under seal, purporting to be (and which, as the app. positively stated, in fact was) a memorandum of the agreement which had been come to between himself and the resp. was drawn up by the app., and duly executed at the house of the resp. by both parties, in the presence of Mr. Buchanan, a coachbuilder at West Maitland, who attested its execution. The following is a copy of the document thus executed:—

"Memorandum of an agreement made this 27th Sept. 1859, between John Warn Tuck, of West Maitland, in the colony of New South Wales, hotel-keeper, of the one part, and Robert W. Vivers, of King's-plains, Wellingrove, in the said colony, of the other part. The said John Warn Tuck hereby agrees to receive the said Robert W. Vivers as an equal partner and proprietor with himself of the West Maitland Gas Works, and plant and premises, consisting of one-half that parcel or block of land on the south-west side of High-street, West Maitland, on which are situated the commercial hotel, the coach manufactory, and the said gasworks and plant, that is, the south-east side or half thereof on which the said gasworks are situated, and extending from the said High-street to the south-western end of the said block or parcel of land, and all

Priv. Co.]

VIVERS v. TUCK.

[Priv. Co.]

the buildings and improvements contained thereon, and the gas-house, furnace and fittings, the gasometer and fittings, the purifiers and fittings, and every other part of the said gasworks and plant. And the said John Warn Tuck agrees that the said Robert W. Vivers shall become proprietor of one-half of the above-named property on the following conditions: that is, the said Robert W. Vivers shall pay one-half of the expenses justly and necessarily incurred in the erection of the said gas-house, works, and plant, and one-half of the cost, freight, and commission, paid by the said John Warn Tuck for all the fittings now used in the said works. And the said John Warn Tuck and Robert W. Vivers further agree to continue to invest equal amounts of capital for the completion of the said gasworks, and the lighting up of the town of Maitland with gas, and to bear equally all other expenses reasonably and necessarily incurred for the manufactory of gas, and to receive equal shares of all the proceeds and profits thereof. And neither of the above-named parties shall have power to sell the whole or any part of his interest in the said gasworks, plant, or premises, without the consent of the other partner; and if either party wishes to sell the whole or any part of his interest in the said gasworks, he must give the other the option of purchasing from him; and if either party shall die, the surviving partner shall have power to claim, take and enjoy possession of the whole of the said gasworks, plant and premises, on payment to the heirs or assigns of the deceased partner the amount of capital invested by the said deceased which has not been realised by the profits of the investment. The above agreement shall come into force and take effect as soon as a bill, authorising the said John Warn Tuck to lay down the main gaspipes in the streets and light up the town of Maitland with gas, shall have passed the Legislature of the Colony of New South Wales and become law, and not sooner.

"Witness, &c.

"J. W. TUCK. (L. S.)

"R. W. VIVERS. (L. S.)"

The agreement having been executed, the app. and resp. in the course of the same day attended at the Commercial Bank, when the app. paid to the resp. 2000*l.* in part performance thereof. The resp. having refused to carry out the agreement, the app. filed a bill of complaint, praying for specific performance, an injunction against carrying on the gasworks otherwise than in copartnership with the app., and execution of a proper deed of copartnership.

To the above bill the resp. filed his answer on the 22nd Aug. 1860, admitting that on the 27th Sept. an agreement for partnership, and also for the purchase and sale of one moiety of the gasworks at Maitland, was entered into between himself and the app., but stating that its terms were different from those embodied in the written agreement. The answer alleged that the agreement entered into between the app. and the resp. was to the effect that the latter would receive the former as an equal partner and proprietor with himself in and of the West Maitland Gas Works, plant and appurtenances, and the manufactory of gas there to be carried on, upon condition that the app. should pay one-half the expenses which should have been incurred by the resp. in erecting the gas-house, providing the said works and plant, and establishing the manufactory, such expenses to include as well the cost, freight and commission on the gas-fittings then in use, as the outlay incurred by the resp. in the voyage which he had made to England, and also the costs of the gas Bill above referred to, denying that the agreement in question was for the purchase and sale of any part of the land on which the gasworks stood, or that the resp. ever agreed or intended that the app. should become proprietor of a moiety or any other portion of such land. The answer then proceeded as

follows:—"I admit that a written document, purporting to be a memorandum of the said agreement, was drawn up by the plt. on the same 27th day of Sept., and signed by the plt. and myself; but I cannot state, as to my knowledge, belief, or otherwise, whether such document was on the 20th day of Dec., or in fact, duly registered; and I say that no copy of the said document was given to me, and that I cannot state, as to my knowledge, belief, or otherwise, whether it was in the words and figures, or to the effect in the first paragraph of plt.'s bill in that behalf mentioned, or how otherwise; and I crave leave to refer to the said document when produced. But I say that I have great difficulty in reading, and did not read the said document before signing it, nor hear it read; and that I had no professional adviser to explain to me its legal bearing, and that, having at the time been drinking freely, I was not in a condition to understand it, even had it been read to me by the plt., which it was not. I signed it because the plt. assured me, and I fully believed, that it truly represented the agreement which had been verbally made between the plt. and myself. I do not know whether the memorandum of agreement set forth in the first paragraph of the plt.'s bill is or is not the document which I so signed; but if it is the document which I signed, then I say that in several important respects it does not truly express the agreement between me and the plt."

Evidence was given on both sides, and the primary judge in equity decreed specific performance, but on appeal, the court reversed the decrees, the majority of the court being Stephen, C. J., and Wise, J. The plt. then appealed to Her Majesty in Council.

The *Attorney-General* (Palmer) and *Wigram*, for the app., contended that the agreement having been duly executed, the onus lay on the resp. to show that its terms did not express what the parties meant. That there was no satisfactory evidence that the resp. when he signed the agreement was incapable from the effects of drink or otherwise of understanding what he was doing. There was nothing unfair, uncertain, or incapable of being carried into effect:

Marquis of Townsend v. Stangroom, 6 Ves. 333;

Griffith v. Spratley, 1 Cox, 383;

Collier v. Brown, 1 Cox, 428.

Sir H. Cairns, Q. C. and F. H. Bowring, for the resp., contended that the agreement was obtained by fraud and mistake, and was vague, uncertain and obscure, and therefore the app. ought to be left to his remedy at law:

Stuart v. London and North-Western Railway Company, 1 De G. M. & G. 721;

Lightfoot v. Heron, 3 Y. & C. Ex. 590;

Cragg v. Holme, 18 Ves. 14.

Lord Kingsdown.—The question in this case is not, whether an action can be maintained, or should be brought on the agreement in dispute (that of the 27th Sept. 1859), nor is it whether that agreement should be delivered up to be cancelled. Consistently with the decree under appeal, an action may be brought against the resp. by the app. for damages for the non-performance of the agreement, and it would have been quite consistent also with it that if the resp. had filed a bill for the purpose of having the agreement delivered up to be cancelled, that bill should have been dismissed. The question is only whether a court of equity shall decree a specific performance of it against the deft. The principles by which courts of equity are guided in cases of specific performance have long been established and are well known; but there is (so to speak) this addition to the great and leading authorities by which we are all more or less guided in controversies of this description—that of late years the deft. has been examinable as a witness for himself, and therefore when he is so examined, the practicable value of his statement in opposition to

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the plt. does not rest merely upon his answer, which may or may not be used by the plt.; but his allegations are to be read as those of a witness—a witness under a bias, no doubt—but possibly to be trusted, possibly to be believed, possibly a man whose testimony ought to be acted upon; and in this case the deft. has been examined and cross-examined as a witness. He states, in effect, that he did not understand the true nature and terms of the agreement as written, that he did not intend to bind himself by any such contract, and that the agreement, as prepared, is one highly disadvantageous to himself, and to a portion of his property not involved in the agreement. How then was the agreement obtained? The agreement was prepared and written by the plt., the signature of the deft. was obtained to it without the presence or advice of any professional man, and without any advice whatever. The agreement, as far as mere property is concerned, independently of any particular value, if any, to be derived from the circumstance of having the plt. as a partner is (perhaps it might be said on the very face of it, but certainly on the face of it combined with the evidence of Mr. Goodall and the evidence of the deft. himself) one much more favourable to the plt. than to the deft.; very favourable to the plt. and damaging to the deft. Their Lordships see no reason to distrust the evidence of Mr. Goodall, who appears to be a respectable and competent person, and who was not cross-examined; and whether his evidence be considered or be not considered, their Lordships think that the language of the agreement with respect to the property affected by it is vague and obscure, too vague and obscure to be safely acted on. In the mode of viewing it, upon which the plt. insists, Mr. Goodall declares specifically that it is highly disadvantageous to the property of the deft., their Lordships believe that statement. It is not the habit of a court of equity to decree the specific performance of an agreement more favourable to the plt. than to the deft., involving hardship upon the deft. and damage to his property, if he entered into it without advice or assistance, and there be reasonable ground for doubting whether he entered into it with a knowledge and understanding of its nature and its consequences. In these particulars the present agreement, in their Lordships' judgment, fails. The deft. had no adviser. The plt. drew the agreement and acted for himself. The deft. swears that he did not understand its terms, and that he did not mean what those terms import, whatever that may be. Their Lordships think that he thus swears with considerable probability of truth; and they are, upon the whole materials before them, satisfied that undue advantage was taken of a man, without professional or other advice, who did not understand what he was doing, to the great detriment of his property. Their Lordships come to the conclusion that the bill was properly dismissed, and they will therefore humbly advise Her Majesty that this appeal should be also dismissed with costs. *Order affirmed.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Monday, Dec. 7.

(Before the LORDS JUSTICES.)

JONES v. GREGORY.

Jurisdiction—Bill by heir to set aside a will—Receiver—Demurrer—Practice—Appeal—Signature of counsel.

The heir-at-law of a testator, whose will had been duly proved, filed a bill praying that so much of

the will as related to houses and lands at S. might be declared void for the purpose of passing real estate, and that it might be cancelled, and that a receiver of the property might be appointed, on the ground that such part of the will had been obtained by undue influence and misrepresentation, and had been made and executed when the testator was bed-ridden and imbecile:

Held (affirming the decision of Stuart, V.C.), that a demurrer for want of equity must be allowed.

A petition of rehearing on behalf of a pauper plt. may be presented with the signature of only one counsel.

This was an appeal from a decision of Stuart, V.C., allowing a demurrer for want of equity to the plt.'s bill, under the circumstances which fully appear in the previous report, 9 L. T. Rep. N. S. 369.

It is unnecessary here to make any fresh statement of the allegations of the bill. The plt. sued *in forma pauperis*, and on the 20th Nov.

George R. Harding applied on his behalf to the L. C. to allow his appeal petition to be set down for hearing upon the signature of only one counsel, and his Lordship granted leave accordingly.

On the 7th Dec. the appeal was heard before the Lords Justices, and it was supported by

George R. Harding, who contended that previously to the Statute of Frauds (29 Car. 2. c. 3), this court had decided upon the validity of wills, and that this jurisdiction, though it had fallen into desuetude, had never been abolished, or really ceased to exist; that the court could not waive, lose, or abrogate any jurisdiction which it ever possessed; that the recent statutes, 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42, compelled the court itself to try every question of fact incident to the relief sought; that all questions of fraud as to other instruments were decided by this court, and there were no reasons for making wills an exception; that the prayer for a receiver would alone maintain the bill, where it was shown that danger to the estate was imminent or probable. He referred to the following authorities:

On the question of jurisdiction in Chancery:

Munro Acta Cancellarie, 398, 410;

Herbert v. Lowe, Rep. in Ch. 12;

Maudy v. Maudy, Reps. in Ch. 66;

Welby v. Thornagh, Prec. in Ch. 123;

Goss v. Tracy, 1 P. Wms. 287;

Andrews v. Powys, 2 Bro. P. C. 504;

Kerrick v. Bransby, 7 Bro. P. C. 437;

Bennet v. Vade, 2 Atk. 324;

Webb v. Claverdon, 2 Atk. 424;

Barnesby v. Powell, 1 Ves. sen. 119;

Pemberton v. Pemberton, 13 Ves. 290;

Armitage v. Wadsworth, 1 Mad. 189;

Jones v. Jones, 3 Mer. 161;

Scailfe v. Scailfe, 4 Russ. 309;

Tatham v. Wright, 2 Russ. & Myl. 1;

Raworth v. Marriott, 1 Myl. & K. 643;

Middleton v. Sherburne, 4 Y. & C. Ex. 358;

Hopwood v. Earl of Derby, 1 K. & J. 255;

Boysse v. Rosborough, Kay, 71;

Boysse v. Colclough, 1 K. & J. 124;

Colclough v. Boysse, 6 H. of L. Cas. 1.

On the recent statutes, 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42:

Re Hooper, Baylis v. Watkins, 7 L. T. Rep. N. S. 843.

On the question of a receiver:

Lancashire v. Lancashire, 9 Beav. 120;

Bainbrigg v. Baddley, 3 M. & G. 413;

Montgomery v. Clarke, 2 Atk. 378;

Mordaunt v. Hooper, 1 Amb. 311;

Lloyd v. Pussingham, 16 Ves. 59;

Huguenin v. Buseley, 13 Ves. 105.

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Charles Hall (Bacon, Q. C. with him), for the demurrer, cited

Wright v. Wilkin, 4 D. & J. 141; s.c. 33 L. T. Rep. 277.

Harding was heard in reply.

Lord Justice TURNER said that it seemed to him that the order of the V. C. in this case, allowing the demurrer, was quite right. As far as he had understood the course of this court during a period of forty years, he had always considered that a bill of this description by the heir-at-law against the devisee did not lie, even on an allegation of fraud on the part of the devisee in obtaining the will. The argument on the present occasion had taken this shape: it was said that from the earliest times the jurisdiction existed, and therefore that it must exist still. But the mere fact of the jurisdiction having existed in early and unsettled times would not induce him to act on those authorities against later authorities which had regulated the law of the court since its jurisdiction had been well settled. He must therefore lay out of his consideration all the cases prior to those four cases which were cited in the argument of *Andrews v. Powys*, *Kerrick v. Bransby*, *Bennet v. Vade* and *Webb v. Claverdon*. He thought that those cases were all in affirmance of the doctrine that there was no jurisdiction in this court in cases of that description. The later authorities of *Armitage v. Wadsworth*, *Jones v. Jones* and *Wright v. Wilkin* all seemed to be strong authorities against sustaining such a bill as the present one; and, therefore, according to the modern state of the law, it seemed to him that the authorities were strong in favour of the proposition that the bill could not be maintained, even if he had a strong opinion in favour of the bill, which was certainly not the case. He was disposed to say in this case what Lord Eldon once said, that if the law was to be altered, it must be so, not by them, but by the H. of L. It had been argued that, because a devisee had a right to come to a court of equity to establish a will, as in the case of *Boyes v. Rosborough*, therefore the trustees had a correlative right to come to court against the will. Such, however, was not the case. There was no jurisdiction in a court of law to establish a will in favour of a devisee; but there was jurisdiction in a court of law to determine the validity of a will as against the heir. He did not think that the modern statutes applied to that case. He found nothing in Sir Hugh Cairns' Act to affect the question, and as to Mr. Rolt's Act, that case was clearly within the exception contained in the 4th section. The only mode in which the case could be brought within the jurisdiction was, that there might be, under certain circumstances, a jurisdiction to order a will to be delivered up to be cancelled. Such, however, was not the case here, for the will was a will of real and personal estate, and had been duly proved in the proper Ecclesiastical Court. The only argument by which the case could be brought within Mr. Rolt's Act was, that because there might be a jurisdiction to order an instrument to be delivered up to be cancelled, they must therefore decide whether that jurisdiction should be exercised, and must for that purpose decide all intermediate questions which were necessary to the decision of that question. But when they looked to the 4th section of the Act, they found it in these terms: "In all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease, or mortgage, whether mesne profits or damages shall or shall not also be sought in such suit, such relief only shall be given in equity as would have been proper according to the rules and practice of the court if this Act had not passed; and nothing in this Act shall make it

necessary for a court of equity to grant relief in any suit concerning any matter as to which a court of common law has concurrent jurisdiction if it should appear to the court that such matter has been improperly brought into equity, and that the same ought to be left to the sole determination of a court of common law." What, then, was the present suit? It was a suit to recover possession of land under a legal title. The allegation was, that the title was in the heir-at-law by reason of the will being fraudulent and void. There was nothing before them to extend the jurisdiction of the court to such a case, and it was incumbent on a party coming there for relief under that Act to show that such relief would have been proper, according to the rules and practice of the court, if Mr. Rolt's Act had not passed. The bill was not sustainable; and if the law was to be altered, it must be so by the H. of L.

Lord Justice KNIGHT BRUCE said that, except that he entertained some degree of doubt on one point that he would mention, he was also of opinion that the demurrer was rightly allowed. The doubt that he had was this, whether, considering the present state of the statute law, the allegation in the bill that the will was obtained by the direct fraud of the devisee, who was one of the defendants, was or was not sufficient to sustain the bill against the demurrer. On no other point did he entertain the least degree of doubt. On that he was not free from doubt, having regard to the present state of the law. The L. J.'s opinion, which was in favour of allowing the demurrer, was very probably right, and it of course disposed of the case.

Solicitor for the plaintiffs, *Chaffers*.

Solicitors for the defendants, *Gregory, Rowcliffe and Rowcliffe*.

Wednesday, Dec. 9.

(Before the LORDS JUSTICES.)

FAULKNER v. LLEWELIN.

Specific performance—Agreement for, &c.—"Fit for habitation."

This was an appeal by the defendant from a decree of Kindersley, V.C., reported 9 L. T. Rep. N. S. 251, by which his Honour declared that an agreement by the defendant to take a lease of a house, 35, Duke-street, St. James's, ought to be specifically performed, and that the house was, on the 17th Jan. 1861, "complete, finished and fit for habitation," and ordered that the plaintiff should execute to the defendant a lease for twenty-one years from that date, according to the terms of the agreement; that the defendant should execute a counterpart thereof, and that the lease should be settled in chambers. His Honour also ordered the defendant to pay the costs of lease and counterpart, together with costs of the suit. The facts are fully stated in the previous report.

The defendant appealed against this decree.

Baily, Q.C., *Hobhouse*, Q.C. and *George Simpson*, for the plaintiff, supported his Honour's decision.

Glassey, Q.C. and *Jolliffe* supported the appeal.

Without calling on the plaintiff's counsel to reply,

Their LORDSHIPS affirmed his Honour's decree, and dismissed the appeal with costs.

Solicitors for the plaintiff, *Miller and Son*.

Solicitors for the defendant, *Robinson and Tomlin*.

Dec. 10, 11 and 12.

(Before the LORDS JUSTICES.)

GEE v. GEE.

Practice—Infant's suit—Next friend—Conflicting interests.

A bill was filed on behalf of an infant by the husband of her cousin as next friend, for the protection of real and personal property to which she was

entitled as sole next of kin and heiress-at-law of her father. The father, besides having property of his own, was interested in the estate of his father, which had never been completely administered, and in this estate the wife of the next friend, as being another of the grandchildren of the infant's grandfather, was interested:

Held (differing from Romilly, M. R.), that there was here such a conflict of interests between the plt. and her next friend as rendered it proper that he should be removed and another next friend should be appointed in his stead.

This was a bill filed in the beginning of Oct. 1863, by Esther Gee, an infant, by the Rev. Robert Harries Jones, as her next friend, for accounts and administration of certain real and personal estate to which the plt. was entitled as heiress-at-law and sole next of kin of her father, George Gee deceased, and for the appointment of a proper guardian for her; and the present application was by motion, appealing against a decision of Romilly, M. R., who had refused to remove Mr. R. Harries Jones from being next friend, and had appointed two persons to be her guardians.

The young lady, the plt., was the only child of Mr. George Gee, and his wife, both of whom were dead before the bill was filed. The father died intestate in August last, having survived the mother of the infant, and from his death the plt. had remained under the care of a young lady, the daughter of Mrs. George Gee by a former husband, but who had assumed the surname of Gee, and was known as Miss Mary Anne Gee, and she was the app. in the present application.

George Gee was one of eight children of James Gee who had died in 1829, leaving the bulk of his property embarked in trade, and this trade had never been entirely wound-up, nor had his estate been completely administered up to the present time. In this estate George Gee, together with his brothers and sisters, was, under his father's will, interested, and one of the sisters (Sarah) became the wife of William Newton, and upon her marriage her share in James Gee's estate was settled upon certain trusts for the benefit of the children of the marriage; Sarah Newton had only one child, a daughter, who married the Rev. Robert Harries Jones, the next friend of the plt. in this suit. In addition to his interest under this will, George Gee was entitled to considerable real and personal estate of his own.

On the 8th Oct. 1863 the M. R. appointed Mary Ann Gee the elder, one of the daughters of James Gee, and Mr. George Hamilton, who had married Elizabeth Gee, another of his daughters, to be guardians of the infant plt. On the 2nd Nov. a motion was made on behalf of Mary Ann Gee the younger, the plt.'s half-sister, that Robert Harries Jones might be discharged from being next friend of the plt., and that Mary Ann Gee the elder and George Hamilton might be discharged from being her guardians, and that she (the applicant) and a Mr. James Gorten might be appointed guardians in their stead. The ground of this application as to the next friend was that Mr. R. H. Jones had through his wife interests under the estate of James Gee adverse to those of the infant plt.

Affidavits were filed on both sides as to the fitness of the parties appointed and proposed, but it is unnecessary to enter into any statement of their effect, inasmuch as their Lordships' decision upon the present occasion rested solely upon the nature of the interests of the parties.

The M. R. declined to make any order upon the motion, and Miss Mary Ann Gee, the half-sister of the plt., appealed.

Baggallay, Q. C. and Charles Hall supported the appeal.

Selwyn, Q. C. and Karlslake appeared for Mr. R. Harries Jones.

Hobhouse, Q. C. and Eddis for the two guardians appointed by his Honour.

Lord Justice KNIGHT BRUCE said, that not a single word had been said, nor could a word be properly said, against the respectability and character of any of the persons whose names had been mentioned in the course of this application. There was, however, a plain pecuniary interest in the next friend, in right of his wife and Mrs. Newton, his mother-in-law, which could not be said not to be adverse to the interest of the infant plt. Without entering into any other considerations—considerations which were entirely consistent with the respectability of the clergyman who had filed this bill as next friend—he was of opinion that it would be proper to remove that gentleman, and to appoint another next friend in his place.

Lord Justice TURNER was of the same opinion. Without any reflection upon any of the parties before the court, but having regard to nothing but the interests of the young lady, the plt., he was of opinion that both of their interests ought to be represented in the suit, and that therefore there ought to be a change of the next friend.

Their Lordships reserved their decision as to the appointment of new guardians, and further affidavits having been filed by some or all of the parties, they disposed of that question on the 22nd Dec., in their private room.

Dec. 3, 4, 5 and 21.

(Before the LORD CHANCELLOR (Westbury).)

THE LEATHER-CLOTH COMPANY (LIMITED) v. THE AMERICAN LEATHER-CLOTH COMPANY (LIMITED).

Trade-mark—Foundation of jurisdiction in equity not fraud but property—Effect of false representation by the plt.

The jurisdiction of the court to grant relief against the piracy of a trade-mark does not rest on the supposed fraud that is committed when one man holds out his own goods as the goods of another; it rests upon property, and upon the fact that an injunction is the only mode by which such property can be protected.

But it is necessary for the plt. to prove that he has an exclusive right to the trade-mark; and that the deft. has used the mark so as to prejudice him in his business. It is also essential that the plt. should not be guilty of any false representation.

Thus, where a firm of manufacturers "A. B. and Co.," using truly the stamp or mark of "A. B. and Co., makers," together with other representations, have sold the right to use their name and stamp to another firm of "C. D. and Co." (the stamp or mark not being a mere designation of the quality or shape of the article, but consisting of words containing representations which are no longer true), the purchasers will not be protected by a court of equity in the exclusive use of the name and mark.

This was an appeal from a decree of Wood, V. C., reported in 1 H. & M. 271; and also 8 L. T. Rep. N. S. 829, where the facts of the case will be found fully stated.

His Honour granted the plt. an injunction to restrain the defts. from selling their leather cloth as and for the cloth known as "Crockett's Leather Cloth," and from using for that purpose any trade-mark like, or which was a colourable imitation of, that of the plt.

Sir H. Cairns, Q. C. and Dickinson supported the decree on behalf of the plt. They cited the following cases:

Croft v. Day, 7 Beav. 84, 232;

Churton v. Douglas, Johns. 189;

Millington v. Fox, 3 M. & Cr. 336 ;

Sykes v. Sykes, 3 B. & Cr. 541 ;

Knott v. Morgan, 2 Keen, 213.

They contended that, as the successors in business of the Messrs. Crockett, they had a right to the use of their name, and of their trade-marks. The statements in the label were true and accurate at the outset, and having come to designate not the makers but the manufacturer, had no need to be changed on every devolution of the business. There was no fraud on the public. All that the patent consisted in, was the application of the tanning process to leather-cloth. Some of the cloths, it was true, were not tanned ; yet all were labelled "patented;" but there was no deception in this, inasmuch as any one by taking the cloth into his hand could see if it was tanned or not.

The LORD CHANCELLOR referred to *Partridge v. Meach*, How. App. Cases 599, cited in Law's Dig. of American Patent Cases, 688.

Rolt, Q.C. and *Fischer* were for the defendants.—The plaintiffs were disentitled to relief, in consequence of their own misrepresentations. Each of the statements comprised in their stamp was false in some particular ; and as for the statement that no one could be deceived, the fact was that when one side of the cloth was covered with the composition which was necessary to make it look like leather, no one could say by inspection whether that side was tanned or not. No one has a right to profit by the circulation of false statements, still less to be protected in the right to circulate them. They cited

Perry v. Truefitt, 6 Beav. 66 ;

Pidding v. Bow, 8 Sim. 477 ;

Thompson v. Crawshaw, 4 M. & Gr. 357.

Sir H. Cairns, Q.C. in reply.

Dec. 21.—THE LORD CHANCELLOR.—Upon a review of the numerous cases which have been decided in this court on the subject of trade-marks, there appears to be some uncertainty and want of precision in the language attributed to different judges, as to the ground on which a court of equity interferes to protect the enjoyment of a trade-mark, and also upon the question whether the right to use a trade-mark admits of being sold and transferred by one man to another. At law the remedy for piracy of a trade-mark is by an action on the case in the nature of a writ of deceit. This remedy is founded upon fraud, and it seems that originally an action was given not only to the trader whose mark had been pirated, but also to the buyer in the market, if he had been induced by fraud to buy goods of an inferior quality. In equity the right to give relief to the trader whose trade has been injured by the piracy appears to have been originally assumed by reason of the inadequacy of the remedy at law, and the necessity of protecting property of this description by injunction. But although the jurisdiction is now well settled, there is still current in several recent cases language which seems to me to give an inaccurate statement of the true ground on which it rests. In *Croft v. Day*, 7 Beav. 88, and in *Perry v. Truefitt*, 6 Beav. 73, the late Lord Langdale is reported to have used words which place the jurisdiction of this court to grant relief in cases of the piracy of a trade-mark entirely upon the ground of the fraud that is committed when one man sells his own goods as the goods of another ; and that learned judge is reported to have said : "I own it does not seem to me that a man can acquire a property merely in a name or mark ;" and, in like manner, the learned V. C., whose decision I am now reviewing, is reported to have said (1 H. & M. 287), "All these cases of trade-mark, therefore, turn not upon a question of property, but upon this—whether the act of the defendant is such as to hold out his goods as the goods of the plaintiff." But, with great respect, this is not quite an accurate statement. First, the goods of one

man may be sold as the goods of another without giving to that other person a right to complain, unless he sustains or is likely to sustain from the wrongful act some pecuniary loss or damage. Thus, in the case of *Clark v. Freeman*, 11 Beav. 112, the eminent physician, Sir James Clark, applied for an injunction to restrain a chemist from publishing and selling a quack medicine under the name of "Sir James Clark's Consumption Pills;" but the court refused to interfere, because it did not appear that Sir James Clark had sustained any pecuniary injury. Secondly, it is not requisite for the exercise of the jurisdiction that there should be fraud or imposition practised by the defendant at all. The court will grant relief, although the defendant has no intention of selling his own goods as the goods of the plaintiff, or of practising any fraud either on the plaintiff or the public. If the defendant adopts a mark in ignorance of the plaintiff's exclusive right to it, and without knowing that the symbols or words so adopted and used are current as a trade-mark in the market, his act, though innocently done, will be a sufficient ground for the interference of the court, as is plain from the decision of Lord Cottenham in the case of *Millington v. Fox*, to which I entirely assent, and from the learned V. C.'s own opinion in the case of *Welch v. Knott*, 4 K. & J. 747. Imposition upon the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. In the language of Lord Thurlow in *Webster v. Webster*, 3 Sw. 490 (n.), fraud upon the public is no ground for the plaintiff coming to this court. It is indeed true, that unless the mark used by the defendant be applied by him to goods of the same kind as the goods of the plaintiff, and it is in itself such that it might be, and was, mistaken in the market for the trade-mark of the plaintiff, this court will not interfere, because there is no invasion of the plaintiff's right ; and thus the mistake of the buyers in the market, under which they, in fact, take the defendant's goods as the goods of the plaintiff, that is to say, imposition on the public, becomes the test of the property in that trade-mark having been invaded and injured, but is not the ground on which the court rests its jurisdiction. The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade-mark which such other person has an exclusive right to use in connection with the sale of some commodity ; and if the plaintiff has an exclusive right so to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of a patent. I cannot, therefore, assent to the dictum that there is no property in a trade-mark. It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them, but the word "trade-mark" is the designation of marks or symbols when applied to a vendible commodity, and the exclusive right to make such use or application is rightly called property. The true principle therefore seems to be, that the jurisdiction of the court in the protection given to trade-marks rests upon property, and that the court interferes by injunction because that is the only mode by which such property can be effectually protected. The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right to property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity ; and, secondly, that this mark or symbol has been adopted or is used by the defendant so as to prejudice the plaintiff's custom and injure him in his trade or business. But

when the owner of a trade-mark applies for an injunction to restrain the deft. from injuring his property by making false representations to the public, it is essential that the plt. should not, in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plt. makes any material false statement in connection with the property which he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. The question then arises, what amounts to a material false representation? Supposing a partnership to have been formed a century ago under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of successive partnerships trading under the same original style, although the names of the present partners are wholly different from those in the original firm, is it an imposition on the public that such persons should continue to use the style or name of the original partnership? This question must be answered without any doubt in the negative; for it is competent by the law of England to a partnership to adopt any style or firm which does not involve a claim to incorporation, or the assumption of what belongs to others; and the practice of the trading community in this respect is so common and general, that no misleading of the public can result from it. But suppose an individual, or a firm, to have gained credit for a particular manufacture, and that the goods are marked or stamped in such a way as to denote that they are made by such person or firm, and that the stamp has gained currency and credit in the market and become of great value, could such person or firm, on ceasing to carry on business, sell and assign the right to use such name and mark to another firm carrying on the same business in a different place? Suppose a firm of A. B. and Company to have been clothiers in Wiltshire for fifty years, and that broad-cloth marked thus, "A. B. & Co., makers, Wilts," has obtained a great reputation in the market, and that A. B. and Co., on discontinuing business, sell and transfer the right to use their name and mark to a firm of C. D. and Co., who are clothiers in Yorkshire, would the latter be protected by a court of equity in their claim to the exclusive right to use the name and mark of A. B. and Co.? I am of opinion that no such protection could be given. It is true that the name or the style of the firm may by long usage become a mere trade-mark, and cease to convey any representation as to the fact of the person who makes or the place of manufacture; but where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it; or, in other words, the right to the exclusive use of it cannot be protected. The sale of an article stamped with a false statement is *pro tanto* an imposition upon the public; and therefore, in the case supposed, the plt. and the deft. would be both in *pari delicto*, which is consistent with the many decided cases. Further, property in a trade-mark is, as has already been observed, the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture, or vendible commodity; consequently the use of the same mark in connection with a different article is not an infringement of such right of property. If, therefore, the trade-mark includes in itself a clear and distinct description of the commodity to which it is affixed, it is not pirated by the use of a mark which, although in other respects similar, does not contain or give the same description, and which is impressed upon an article which is not of the nature or quality so described. These conclusions seem to follow immediately from the

very principle to which a plt. seeking protection for a trade-mark appeals. He desires to restrain the deft. from selling his own goods as the goods of another person; but if, by the use of the trade-mark in question, the plt. himself is representing and selling his goods as the goods of another, or if his trade-mark gives a false description of the article, he is violating the rule upon which he seeks relief against the deft. These observations seem to apply to the case now to be decided. The plt. are an English company, formed in 1857, with limited liability, for the purpose of making and selling an article called leather-cloth. They bought the business of an American company, which was formed for the purpose of carrying on this manufacture in New Jersey, in the United States of America, and at West Ham, in the county of Essex. The name of that company was "The Crockett International Leather-Cloth Company." The original inventors and manufacturers of this article, called leather-cloth, were a firm of "Crockett and Co.," in the United States of America; who, upon the formation of the International Company, ceased to carry on a separate business and became shareholders in that company, but have resumed business, and are manufacturers of leather-cloth in the United States. The International Company by its agents obtained in the month of Jan. 1856 an English patent for tanning the leather cloth; and having done so, they devised an elaborate label, to be attached to the goods manufactured by them; which being in a circular form had its circumference formed of the words "Crockett International Leather-Cloth Company, Newark," with the initials "N. J. U. S. A.," meaning New Jersey, United States of America, and also the words, "West Ham, Essex, England." These words and letters formed the periphery or outer rim of the label. Within the circle at the top is the word "Excellior," below which is an eagle with expanded wings, and beneath the eagle are united these words, "Crockett and Co.'s Tanned Leather-Cloth, Patented Jan. 24, 1856, J.R. and C.P. Crockett, manufacturers." The International Leather-Cloth Company carried on business as leather-cloth manufacturers both in the United States and in England until May 1857. They used the stamp or label which has been described as a trade-mark, affixing it to the goods which they manufactured. In May 1857 the plt.' company was incorporated, and the International Company sold to it and assigned to the plt. the business carried on by them at West Ham, together with the English letters patent, with full power and authority to use all and singular the trade-marks that had been used by the International Company in their business in England. From the time of this sale the plt. have carried on, and now carry on, at West Ham, the manufacture of leather-cloth, according to the process originally introduced by Crockett and Co.; and they have constantly used the trade-mark which has been described, stamping it on their goods of the first quality. In Aug. 1861 the defts. were incorporated for the purpose of carrying on the manufacture and sale of leather-cloth; and they have used as a trade-mark, on goods made by them of the first quality, a stamp or label which certainly appears to have been formed upon the model of the plt.' trade-mark. They do not make use of the word "patented," nor do they call their leather-cloth "tanned." But it is unnecessary to pursue the inquiry as to difference or identity, for I will assume, for the purpose of this decision, that there is so much designed similarity as would induce the court to grant an injunction if the plt.' title were free from objection. The V. C.'s words, as reported 1 H. & M. 289, are: "I hold that the plt., having purchased the business, are perfectly entitled to use the trade-mark formerly used by their vendors." Now the plt.' label or trade-mark contains the following assertions or representations:

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tions: first, that the articles so stamped are the goods of the Crockett International Leather-Cloth Company; secondly, that they have been made or manufactured by J. R. and C. P. Crockett; thirdly, that they are tanned leather-cloth; fourthly, that the articles are patented by the patent obtained in Jan. 1856; and, lastly, that they were made in the United States of America, or at West Ham, in England. Each of those statements or representations is untrue, when applied to the goods made and sold by the plts. Of those several untrue statements the most material are the false representations made by the plts.' trade-mark that every piece of cloth so stamped or branded is tanned and is included in the patent of Jan. 1856, which was a patent for tanning leather-cloth; whereas it is clear, upon the evidence, that the goods made and sold by the plts. are not tanned unless specially ordered to be so, and that, to the great bulk of the plts.' manufacture, the words "tanned" and "patented" are unduly applied. The V. C. is reported to have said on this point: "It seems to me that everybody who takes up an article of this kind knows whether it is tanned or not. Therefore, when it said 'tanned leather-cloth patented,' it cannot be made to represent that it is tanned." If those are the words of the V. C., his Honour means to say that any buyer of ordinary discernment would perceive that the cloth was not tanned, and therefore would not be deceived by the statement that it was. That is not, however, the fact; for the tanning might have been applied on that side only which was covered by the composition. But I cannot concede, as a rule either of morality or equity, that the plts. are not answerable for a falsehood, because it may be so gross and palpable that no one is likely to be deceived by it. If there be a wilfully false statement, I will not stop to inquire whether it be too gross to mislead. The V. C. put the case of Morrison's Pills, and concludes that the present manufacturer of that medicine, though not bearing the name of Morrison, would be protected in the exclusive use of the appellation; and rightly so, because the words "Morrison's Pills" have become the name of the thing sold, in the same manner as "James's Powder" is the name of a celebrated medicine invented by Dr. James nearly a century ago, and so the words Mackintosh, Brougham and Wellington are the designations of different articles. So, in the present case, the article made or sold by the plts. might be properly called and sold by them as "Crockett's leather-cloth," for that has become the proper designation of the manufacture. The V. C. is apprehensive that, if he refuses the plts. relief, he must hold that, where the name of a deceased partner is continued in the firm by his surviving partners, they would be guilty of a fraud upon the public. To continue the old style of a firm is a very different thing from making false representations with respect to a vendible commodity in order to give it greater value, and to create a greater demand for it in the market. The plts. impose upon the public by selling goods, which are in reality manufactured by themselves at West Ham, as being the goods of the Crockett International Leather-Cloth Company, and as having been manufactured by Messrs. Crockett, who were the original inventors and manufacturers; and further, they describe their untanned goods as being tanned, and protected by the patent which has not yet expired. Their request is to be protected, and therefore justified, in continuing to make these untrue statements to the public in order to secure a monopoly for their commodity. There is a homely phrase long current in this court, that a plt. must come into equity with clean hands; that is not so with the present plts., whose case is condemned by the principles to which they appeal. I must, therefore, with great respect, but without

hesitation, reverse the decree of the V.C., and dismiss the bill of the plts.; but, as I do not approve of the conduct of the defts., I dismiss it without costs. The deposit will be returned.

Solicitor for the plts., J. Murray.

Solicitors for the defts., Combe and Wainwright.

Nov. 2, 3, and Dec. 21.

(Before the LORD CHANCELLOR (Westbury).)

HALL v. BARROWS.

Trade-mark—Partnership assets—Goodwill of partnership—Valuation.

By partnership articles it was provided that, on the death of a partner, the survivor should have the option of taking the partnership stock, on paying to the personal representatives of the deceased partner the value of his share:

Held, that the goodwill of the business, and also a trade-mark which had been used by the partnership, ought to be included in the valuation.

The true ground of the jurisdiction of the court, in the protection of trade-marks, is property:

A trade-mark, consisting of the initials of the first manufacturers of the goods, may in the course of time become a mere mark of quality, without implying a guarantee that the goods are still manufactured by the same traders. Such a mark will be protected by the court on the ground of property, even in the absence of fraud. Such a mark is also valuable property of a partnership, and may be sold along with the partnership assets.

On a sale or valuation of partnership assets, the goodwill of the partnership ought to be included as a distinct subject of value, on the footing that the continuing partner, if he be not the purchaser, shall not be restrained from setting up the same business.

This was an appeal from a decision of the M. R., reported 8 L. T. Rep. N. S. 227.

From that report and the statements contained in his Lordship's judgment, the facts of the case fully appear.

The M. R. held in substance that, whilst the circumstances of the case rendered it expedient that a sale of the business should take place as prayed by the plts., the executors of a deceased partner, the trade-mark, which was a personal and not a local trade-mark, remained the sole property of the defts., the surviving partner, and was not to be included in the valuation.

The Attorney-General, Selwyn, Q. C. and Eddis, supported the appeal on behalf of the plts.—Their contention was, that the trade-mark followed the business and devolved with it; that it had ceased to be personal, and was now only used as a mark of a particular sort of manufacture, and hence that the use of the brand was part of the partnership assets. The trade-mark was, in fact, analogous to goodwill. The sale ought to be made of the whole business together, including the goodwill and the trade-mark, as a going concern. They cited

Motley v. Downman, 3 M. & C. 1;

Churton v. Douglas, Johns. 174;

Robertson v. Quiddington, 28 Beav. 529;

The Leather-Cloth Company v. The American Leather-Cloth Company, 1 H. & M. 271; 8 L. T. Rep. N. S. 829.

Ibbhouse, Q. C. and Fischer were for the defts.—Upon the construction of the articles of partnership, neither the goodwill nor the trade-mark were included in the provisions respecting sale:

Farr v. Pearce, 3 Madd. 74;

Hall v. Hall, 20 Beav. 139;

Wedderburn v. Wedderburn, 22 Beav. 84.

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The goodwill was, in fact, reserved to the deft., who had, by the articles, an option to purchase; and if not, in law, it formed no part of the partnership assets:

Crutwell v. Iye, 17 Ves. 335;

Cook v. Collingridge, Jac. 607;

Hammond v. Douglas, 5 Ves. 539.

A trade-mark is not property, although the owner of it may be protected against fraud:

Collins Company v. Brown, 3 K. & J. 423;

Leather-Cloth Company v. American Company (*ubi supra*);

Perry v. Truefitt, 6 Beav. 66;

Singleton v. Bolton, 3 Doug. 393.

[The LORD CHANCELLOR referred to *Millington v. Fox*, 3 M. & Cr. 338.]

The distinction between local and personal trade-marks has been recognised in the following cases:

Motley v. Downman (*ubi supra*);

Ex parte Thomas, 2 M. D. & D. 292;

Hopkins v. Hitchcock, 32 L. J., N. S., 154, C. P.; 8 L. T. Rep. N. S. 204.

They further cited

Southern v. How, Pop. 143;

Blanchard v. Uill, 2 Atk. 484;

Lewis v. Langdon, 7 Sim. 421;

Webster v. Webster, 3 Sw. 490;

Tudor's L. C. on Mer. Law, 313.

The Attorney-General, in reply, referred to

Smith v. Everett, 27 Beav. 446;

Mellersh v. Keen, 27 Beav. 236 (n.); 28 Beav. 453;

Cook v. Collingridge, 27 Beav. 456;

Bradbury v. Dickens, 27 Beav. 53.

His LORDSHIP reserved judgment.

Dec. 21.—The LORD CHANCELLOR.—By the articles of partnership between the deft. Mr. Barrows and the late Mr. Joseph Hall, dated the 3rd May 1847, it was, in effect, provided that in case either of the partners should die during the partnership, and should not nominate a son to succeed him, the surviving partner should have the option of taking to himself all the stock belonging to the partnership on paying to the personal representatives of the partner so dying the amount or value of the share of such deceased partner. It is clear that the word "stock" includes all that the articles declare should constitute the capital of the partnership, and which capital the articles state was to comprise the ironworks, with the houses, lands, mines, and premises adjoining and belonging to the partnership, including the machinery and apparatus attached thereto, and the stock-in-trade, implements, tools and other property belonging to the business. The partnership expired by effluxion of time on the 7th May 1858, but the business was carried on by the deft. and Mr. Hall down to the death of the latter in Jan. 1862, on the same terms and in the same manner as before, without any new articles or agreement. This bill has been filed by the executors of Mr. Hall for an account of the partnership dealings and transactions, and it prays that the partnership business, and all the stock, goodwill, property and effects thereof may be sold under the direction of the court. The M. R. has directed a sale of the ironworks business, goodwill and property of the partnership as a going concern, and he has appointed a manager to continue and conduct the business in the meantime. It was stated at the bar that this sale was directed as the best mode of ascertaining the value of the property, and that it was not intended to deprive the surviving partner of his right to take the share of the deceased partner—a right which he is desirous of exercising; but I cannot understand how a sale can be used merely for the purpose of ascertaining the value. If it be intended to make the surviving partner outbid every other offer, great and unjust exaction may be the result; and, on the other hand, if the object of the sale be known, *bona fide* bidders

will not be likely to attend, and the purpose of the sale will be entirely frustrated. Inasmuch, therefore, as the pta. are willing that the deft. shall buy the stock at a valuation, and as the deft. by his counsel has given an undertaking to the court that he will purchase all that the court shall find to be the stock of the partnership, at such prices as the court shall fix to be the value, I must direct that the value of the property shall be ascertained in chambers in the usual manner. But the deft. objects that the goodwill of the business, and also a certain trade-mark used by the partnership, ought not to be included in the valuation. The M. R. was of opinion that the goodwill must be included in the sale, but that the trade-mark could not be sold. The circumstances attending the trade-mark are these:—The ironworks in question were in the year 1836 carried on by the testator Joseph Hall, the deft. Barrows, and one Richard Bradley, in partnership, under the firm of Bradley, Barrows and Hall. In the year 1844 Bradley retired, and one John Joseph Bramah became a partner, and a new partnership was formed under the style of Bramah, Barrows and Hall. This continued till the death of Mr. Bramah in 1847, when a new partnership was formed under the style of Barrows and Hall. The business of these several partnerships was extensive, and the firm of Bradley, Barrows and Hall began by marking all or the greater part of the iron manufactured by them with a particular mark or brand, consisting of the letters B. B. H. and a crown, the letters being the initials of the partnership firm. The use of this trade-mark was continued by the two succeeding partnerships, and, as I collect, was used by the manager appointed by the court. The iron being of superior quality, the mark or brand has become well known in the market, and the right to use it is represented as now being of considerable value. The M. R. in his judgment has entered at some length upon the subject of trade-marks. If I understand him rightly, his Honour has divided trade-marks into local marks, i.e., marks which indicate that the articles branded were made at a particular place, and personal marks, i.e., marks which express that the article branded is made by a particular person or firm. The M. R. is of opinion that the right to use local trade-marks may be sold with the manufactory or works to which such marks refer; but that the right to use personal trade-marks ought not to be sold, because the use of them by any other person than the person denoted by the trade-mark would be a false representation to the public. But it must be borne in mind that a name, although originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote, or to be current as indicating, that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is either accepted in the market as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person. The case of *Millington v. Fox* affords an example of the manner in which the name of the original manufacturer, being branded on the article made, becomes in time a mere indication of the quality. In that case the word "Crowley" and the words "Crowley Millington" had been used for a great many years—the first by a person named Crowley, who invented a particular mode of manufacturing steel more than a century ago, and the words "Crowley Millington" by a firm of Crowley and Millington who succeeded him—as brands or marks on steel manufactured by them respectively. The bill was filed by two persons of the name of Millington, who

were descendants of the original Millington, and who used the same mode of manufacturing steel, and the same marks or brands of "Crowley" and "Crowley Millington." It appeared that the defts. had used the marks in ignorance of the existence of the plt.'s firm, and of the origin of the marks themselves, believing them to be marks used universally in the steel trade; but a perpetual injunction was granted on the ground that the plt. was entitled to the exclusive use of the marks in question. This case not only shows how the name of the first maker may become a mere sign of quality, but is very important as establishing the principle that the jurisdiction of this court in the protection of trade-marks rests on property, and that fraud in the deft. is not necessary for the exercise of that jurisdiction. In the present case it appears to me to be clear that the brand introduced by the original partnership in 1836, and which has ever since been used, consisting of the three initial letters B. B. H., surmounted by a crown, has become and now is a mere trade-mark or symbol, and is no longer recognised or passes current in the market, if it ever did so, as a guarantee or representation that the goods so marked are the manufacture of the original partnership of Bradley, Barrows and Hall. If it were not so, the firm of Hall and Barrows would not have been entitled to use those initials, which they had done as matter of right; and this case must be determined on the assumption that their partnership was so entitled. The distinction between a name and a trade-mark must be observed. It may be true that if a name impressed upon a vendible commodity passes current in the market, not as an *indicium* of quality, but simply as a statement or assurance that the commodity has been manufactured by a particular person, the court would not sell and transfer to another person the right to use the name simply and without addition; but if the court sold the business or manufacture carried on by the owner of the name, it would give to the purchaser the right to represent himself as the successor in business of the first maker, and in that character to use the name. But in the case before me it is clear that the letters which form the trade-mark in question have ceased to be the initials of the partnership firm since the beginning of the year 1847, when the new style of Barrows and Hall was adopted. How the new partnership of Barrows and Hall acquired the right of using the brand does not appear; but the mark must have been used by them and must have been current in the market as a brand of quality, and not as indicating that the iron was manufactured by the original firm. In fact, there is no evidence that the mark was ever current or accepted in the market as a representation of the persons who manufactured, or of the place of manufacture, or in any other manner than as a brand of quality. It is easy to see how the name of a manufacturer may become merely a sign of good quality. No doubt when, at the opening of the Bloomfield Ironworks by the original firm of Bradley, Barrows and Hall, in the year 1836, the iron made at the works was sent into the market branded with their initials, its quality attracted attention and gained credit and notoriety for the brand; and the excellence of the iron and the brand being thus associated, buyers would inquire for the iron so branded, and make purchases in the market, relying on the reputation of the brand without inquiring into its origin or its meaning. There is nothing in the answer or evidence to show that the iron marked with these initials has, or ever had, acquired its reputation in the market from the fact that it was believed to be the actual manufacture of one of the two original firms. If I were to adopt the distinction drawn by the M. R. between local and personal trade-marks, I should be more inclined to treat this mark as incident to the possession of the Bloom-

field Ironworks; for it has been used by the successive owners of those works, and seems to have been used by the last partnership in no other right. In this respect the present case resembles that of *Motley v. Downman*. But it is unnecessary to pursue this further; for I am of opinion that these initial letters, surmounted by a crown, have become, and are, a trade-mark properly so called, i. e. a brand which has reputation and currency in the market as a sign of quality; and that, as such, the trade-mark is a valuable property of the partnership, or an addition to the Bloomfield Works, and may be properly sold with the works, and properly included as a distinct subject of value in the valuation to the surviving partner. It must be recollected that the question before me is simply, whether the right to use the trade-mark can be sold along with the business and ironworks, so as to deprive the surviving partner of any right to use the mark in case he should set up a similar business. Nothing that I have said was intended to lead to the conclusion that the business and ironworks might be put up for sale by the court in one lot, and the right to use the trade-mark as a separate lot, and that one lot might be sold and transferred to one person, and the other to another. The case requires only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property, and might be sold with the business and works; and that, as it might be so sold, it must be included in the valuation to the surviving partner. It has been pressed upon me, on the part of the deft., that there is no property in a trade-mark, and that the right to relief is merely personal, founded on the fraud that is committed when one man sells his own goods as the goods of another. It is true that the cases contain expressions by eminent judges, that there is no property in a trade-mark, which must be understood to mean that there can be no right to the exclusive ownership of any symbol or mark universally in the abstract. Thus an ironfounder, who uses a particular mark for his manufactures in iron, could not restrain the use of the same mark when impressed upon cotton or woollen goods; for the property in a trade-mark consists in the exclusive right to the use of that mark as applied to some particular manufacture. Nor is it correct to say, that the right to relief is founded on the fraud of the deft., as appears by the case of *Millington v. Fox* already referred to. Imposition on the public is indeed necessary for the plt.'s title, but in this way only, that it is the test of the invasion by the deft. of the plt.'s right of property; for there is no injury done to the plt. if the mark used by the deft. be not such as may be mistaken, or is likely to be mistaken, by the public for the mark of the plt. But the true ground of the court's jurisdiction is property. The remaining question relates to the goodwill of the business. I agree with the M. R. that the goodwill ought to be included in any sale or valuation as a distinct subject of value, but I think it necessary that the direction to value the goodwill should be accompanied by a declaration defining what is meant by the "goodwill," at least negatively—that is to say, a declaration that the goodwill is to be valued upon the principle that the surviving partner, if he be not the purchaser, shall not be restrained from setting up the same description of business. No such restriction could be placed on the surviving partner if the sale were made to a stranger; but, even without any such restriction, there may be a subject of value denoted by the term "goodwill" that ought to be taken into account in making the valuation. The result therefore is, that I reverse the decree of the M. R.; and, inasmuch as the deft., the surviving partner, has by his counsel submitted and agreed to accept and take all the stock belonging to the partnership, according to the construction which the court

shall put upon the word "stock," I direct that the order for sale made by the M. R. be reversed. I declare that the words "stock belonging to the partnership" include and denote the partnership business and the ironworks, with all the houses, lands, mines and premises adjoining and belonging to the partnership, together with the machinery and apparatus attached thereto, and all the stock-in-trade, implements, tools, and other property belonging to the business; also that the exclusive right to use the trade-mark of the partnership is part of the property of the partnership, and ought to be included in the valuation; and that the goodwill of the business of the partnership ought also to be valued, and that the same is to be valued on the footing of the surviving partner being at liberty to set up and carry on the same business as that of the partnership. With these declarations, I refer it to the judge in chambers to make the valuation accordingly, as of a going concern, with all necessary directions. Let the deposit be returned, and the costs of the rehearing of all parties be costs in the cause.

Solicitors: for the plts., *Sharpe, Jackson and Co.*, agents for Ryland and Martineau, Birmingham; for the defts., *Combe and Wainwright*, agents for Coldicott and Canning, Dudley.

Nov. 16 and Dec. 21.

(Before the LORD CHANCELLOR (Westbury).)

THE EARL OF PORTARLINGTON V. DAMER.

Will—Construction—Priority of charges—Exoneration.

Testator devised his R. estate to D. in tail male, subject nevertheless and charged with the payment of certain annuities. He then directed that the residue of his estate should be considered and made a primary fund for the payment of his debts and the several legacies given by his will; and that "his R. estate, thereinafore devised, subject as aforesaid, to the said D. and the heirs male of his body," should not be liable to pay the debts and legacies, unless the residue should prove of insufficient value (which turned out to be the case):

Held, that the annuities were a charge upon the R. estate, in priority to, and not pari passu with, the debts and legacies.

Testator directed his trustees, out of the proceeds of the sale of his residuary real estate, to pay the legacies given by his will and every legacy to be given by any codicil thereto, unless a contrary direction should be expressed in such codicil. By a codicil he gave to B. an annuity, also a sum for the purchase of a house, and directed this to be done "out of his estates in Ireland." All the testator's estates, including the R. estate, were in Ireland:

Held, that the R. estate was not exonerated from the charge of this annuity.

The late Earl of Portarlington, the testator in this cause, by his will dated the 11th April 1844, after bequeathing certain legacies, devised and bequeathed his freehold estate, called or known by the name of the Roscrea estate in Ireland, to and to the use of Col. George Lionel Dawson Damer, and the heirs male of his body, but subject nevertheless and charged and chargeable with the payment of certain annuities therein mentioned, Testator then proceeded as follows: "And, I do hereby direct that the residue of my estates hereinafter devised shall be considered and made the primary fund for the payment of my debts, and the several legacies given by this my will, and that my Roscrea estate hereinafore devised, subject as aforesaid, to the said G. L. Dawson Damer, and the heirs male of his body, shall not be subject or liable to the payment of the said debts and legacies unless the said residue of

my estates hereinafter specifically bequeathed for those purposes shall prove of insufficient value."

Testator further devised the residue of his real estates in trust for sale, and declared the trusts of the proceeds, after payment of costs, charges and expenses, and of the annuities before mentioned, and of interest on debts carrying interest, and his funeral and testamentary expenses, and the interest on unpaid legacies as follows: "And do and shall in the next place pay and discharge the principal of all my just debts and the legacies given by this my will, in such order and course as they or he shall think fit, and every legacy or legacies to be given by any codicil or codicils hereto, unless a contrary direction shall be expressed in such codicil or codicils."

By a codicil to his said will, dated the 25th Dec. 1845, the testator bequeathed as follows:—"I give and bequeath to Ellen Whitaker Barley the sum of 300*l.* a-year for her life; also to be bought for her the house situate at 10, China-terrace, Kensington-road; this my last wish and testimony to be done for her after my decease out of my estates in Ireland."

Testator died on the 28th Dec. 1845.

The questions were two: first, whether, upon the construction of the first-mentioned devise, the residue being insufficient to pay debts and legacies, the legacies were chargeable *pari passu* with the annuities on the Roscrea estate, or whether the legacies were to be postponed to the annuities; secondly, whether the annuity given by the codicil was chargeable on the residuary real estate, or on the Roscrea estate, both being in Ireland.

Kindersley, V. C., before whom the cause was heard in April last, held, as to the second point, that the codicil must be construed with reference to the will and the intention of the testator, and that the annuity given by the codicil was chargeable in the same manner as legacies given by the will were chargeable, i.e., first upon the residuary real estate, and, failing that, upon the Roscrea estate. As to the first point, he held that the annuities given by the will must be first paid out of the Roscrea estate before any part of it could go to the debts and legacies.

From this decision the legatees under the will appealed.

Sir H. Cairns, Q. C., C. Barber and Bagshaw, appeared for the apps.—They contended, first, that the legatees and annuitants took *pari passu* out of the Roscrea estate. The annuities and the estate subject to the annuities were each equally specific legacies. The words "subject as aforesaid" were merely descriptive of what had been done by the testator before and were not intended to qualify the gift of the Roscrea estate. The court will not presume that it was the intention of the testator to exempt the annuities from the liability of contributing to the debts and legacies. Secondly, as to the legacy given by the codicil, the testator having charged the residue of his real estate generally, must be held to have exonerated his Roscrea estate. They referred to

Waring v. Ward, 7 Ves. 332;

Hemwood v. Overend, 1 Mer. 23;

Jackson v. Hamilton, 3 J. & Lat. 702; & a

Hamilton v. Jackson, 9 Ir. Eq. Rep. 430;

Creed v. Creed, 11 Cl. & Fin. 491;

Conron v. Conron, 7 H. of L. Cas. 168;

Mac-kell v. Farrington, 6 L. T. Rep. N. S. 807; and the cases there cited.

The *Attorney-General*, *Wickens*, *Young* and *Phoebe*, for the various resps., were not called upon.

Dec 21.—The LORD CHANCELLOR.—I have considered the arguments addressed to me on behalf of the apps., and am unable to entertain any doubt as to the conclusion to which I should arrive. The question arises in this way: The late Earl of Portarlington derived his Roscrea estate in tail male, subject to certain annuities.

He directed that the residue of his estates should be the primary fund for the payment of his debts and legacies, and that the Roscrea estate should not be subject to such debts and legacies unless the residue should prove of insufficient value. The question turns upon the particular expression in this devise, "my Roscrea estate hereinbefore devised, subject as aforesaid, to the said George Lionel Dawson Damer, and the heirs male of his body." The contest on the part of the legatees is to be allowed to have the legacies put upon an equal footing with the annuities, and for that purpose it has been ingeniously argued that the words "hereinbefore devised subject as aforesaid," which are added to the substantive "Roscrea estate," are to be taken, not as part of the description of the subject-matter, but as a narration, or as words of reference only to what has been previously done by the testator; and it is desired to take the substantive words "Roscrea estate" apart from the adjective, the annexed words, and to read the annexed words as if the word "which" had been inserted, and then to read them as if they had been "my Roscrea estate which I have hereinbefore devised subject as aforesaid." If that could be done the legacies would then be charged upon the Roscrea estate, as entirely as, and might come into competition with, the annuities. But I am unable to adopt that construction, and if I could, I do not think it would get rid of the effect of the words "subject as aforesaid." I take the words as meaning to describe that thing which Colonel Damer took by virtue of the devise, and what Colonel Damer took by virtue of the devise was the Roscrea estate burdened with the annuities. Therefore I am of opinion that the subject-matter which is charged with the legacies, in the contingency which has happened, is only the Roscrea estate burdened with the annuities. I consequently give effect to the words "subject as aforesaid," by making the legacies a charge upon the Roscrea estate, subject nevertheless to the antecedent and prior incumbent annuities. That is the interpretation which I think is nearest to the words of the will. Another point arises upon the codicil, whereby the testator bequeathed to Ellen Whitaker Barley the sum of 300*l.* a-year for her life, and directed a house to be bought for her, and further directed that to be done for her after his decease out of his estates in Ireland. I think that this annuity and the purchase-money of the house are legacies which rank with the legacies given by the will, and in like manner are charged upon the Roscrea estate subject to the annuities. The particular direction in the codicil is not, I think, sufficient to divert this legacy from the general gift of legacies which are made chargeable expressly on the Roscrea estate; therefore, I must affirm the decree of the V.C., and dismiss the petition of rehearing with costs.

Solicitors for the petitioners, *Palmer, Nettleship and Eland.*

ROLLS COURT.

Reported by H. R. Young, Esq., Barrister-at-Law.

Nov. 17 and 18.

MASON v. BROADBENT.

Mortgage—Interest—Arrears of—Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42.

*A mortgage, executed in 1848, contained a power of sale of the mortgaged property, followed by a declaration that the proceeds of the sale were to be applied in payment of a prior mortgage, and then "of the sum of 800*l.*, and interest thereon, or so much as should be then unpaid, and all accruing interest on the 800*l.*, at 5 per cent. per annum; and then in payment to other parties of a sum of*

*1150*l.*, and all interest thereon from the day of the date thereof, at the rate of 5 per cent. per annum," and the surplus proceeds of the sale were to be handed over to the mortgagor. The mortgaged property was sold in 1862. Upon the question, what arrears of unpaid interest were then payable under the deed?*

Held, that no trust was created for the payment of the interest on the mortgage-debt, and therefore no more than six years' arrears were payable.

The plts. in this suit were trustees of a deed by which the property of a deceased mortgagor was conveyed to them upon trust for his creditors. The deft. was the trustee of the mortgaged property, under a conveyance of it to him from the mortgagor. The property had been sold, and the question was, whether more than six years' arrears of interest were payable on the mortgage?

The facts of the case were shortly these:—

By an indenture of mortgage, dated the 1st June 1848, and made between James Tomlinson of the first part, the deft. Frederick Broadbent of the second part, Anna Smith Phipson of the third part, and twelve other parties of the fourth part; after reciting that James Tomlinson was indebted to Anna Smith Phipson in 800*l.*; and to the parties of the fourth part in 1150*l.*; James Tomlinson conveyed certain freehold premises and fixtures unto and to the use of Frederick Broadbent and his heirs, subject to a prior mortgage for 1700*l.*; but subject to the usual proviso for redemption on payment to Anna Smith Phipson of the sum of 800*l.*, and all interest thereon both arrears and accruing; and on payment to the parties of the fourth part of the sum of 1150*l.* and interest. A power of sale of the property was then given to Frederick Broadbent, on default being made in such payments. It was also declared that, out of the moneys which should arise from the sale, Frederick Broadbent should in the first place defray the expenses of the sale; that he should in the next place (unless the sale was made subject to the prior mortgage) pay all principal, interest and costs due thereupon; and out of the remainder of the money, pay to Anna Smith Phipson "the sum of 800*l.*, with the said arrears of interest, or so much as should be then unpaid, and all accruing interest on the said sum of 800*l.*, at the rate of 5 per cent. per annum; and should, after payment thereof, pay to the parties thereto of the fourth part the said sum of 1150*l.* and all interest thereon, from the day of the date thereof, at the rate of 5*l.* per cent. per annum," and should hand over the surplus to James Tomlinson. The indenture then contained a declaration that all moneys which should come to the hands of Frederick Broadbent, by virtue of that indenture, from the sale of the said premises, should be applied by him, first, in payment of costs, and then as follows: "In the next place, in payment to Anna Smith Phipson of the arrears of interest and all accruing interest due on the said sum of 800*l.*; and next place, in the payment to the parties to the indenture of the fourth part of the interest on the said sum of 1150*l.*," and then the surplus (if any) was to be accumulated towards payment of the principal sums.

The interest on the 1150*l.* was never paid. James Tomlinson died intestate in March 1862. On the 18th July 1862 all his property was conveyed by his heir-at-law and his administratrix to the plts. as trustees for the benefit of his creditors. In Nov. 1862 the mortgaged premises were sold by Frederick Broadbent for 3000*l.* The prior incumbrances were then paid, and, after satisfying the mortgage-debt of 1150*l.* and six years' arrears of interest thereon, there was a balance of about 745*l.*

Selwyn, Q.C. and *Horsley* appeared for the plts., and contended that, as there was no trust created by the indenture of mortgage for securing the payment of

the debt and interest, the case fell within the terms of the 3 & 4 Will. 4, c. 27, s. 42, and only six years' arrears of interest were payable. They cited

Lewis v. Duncombe, 29 Beav. 175; s.c. 3 L. T. Rep. N. S. 867;

Sinclair v. Jackson, 17 Beav. 405.

Cole, Q.C. and *Dryden* appeared for the deft., and insisted that the Act related only to suits by a mortgagee against the land mortgaged to him, while this was the case of a suit against a mortgagee, and related to the money, not to the land. There was clearly a trust in the indenture of mortgage for payment, after the sale of the property, of the whole interest "from the date of the deed."

Selwyn, Q.C. in reply.

The M. R. referred to

Hunter v. Nockolds, 1 M. & G. 640;

Cox v. Dalman, 2 De G. M. & G. 592.

The MASTER of the ROLLS.—The question in this case depends upon the effect of the 3 & 4 Will. 4, c. 27 (the Statute of Limitations), s. 42. Now it is well settled by the authorities bearing upon the subject-matter of that enactment, that unless a trust is created for the payment of interest in respect of any sum of money charged upon or payable out of any land, no arrears of the interest can be recovered but within six years after it shall have become due, or an acknowledgment shall have been given, in accordance with the provisions of the statute. I am of opinion that, in this case, no such trust has been created. This case therefore differs from those of *Hunter v. Nockolds*, *Lewis v. Duncombe*, and *Cox v. Dolman* in that respect; and, indeed, it was not contended, in the argument before me, that any trust could arise until the money produced by the sale got into the hands of the mortgagee. The peculiarity in the present case is this, that after the power of sale in the mortgage-deed, there is a trust in the first place to pay the costs, then to pay the principal and interest due under the prior mortgage, and then to pay the persons for whom Mr. Broadbent was trustee the sum of 1150*l.*, "and all interest thereon from the day of the date thereof at the rate of 5*l.* per cent." That, however, is not a trust for the payment of all the interest which should accrue due from the date of the mortgage-deed, but for payment only of so much as may then be actually due. If therefore six years' arrears alone are then due, those arrears only are to be paid. It would be a most monstrous and anomalous thing to say that on the day before the sale the mortgagee might redeem on payment of six years' arrears of interest, but that on the day after he could only redeem on payment of the whole interest from the date of the deed. That view of the case is confirmed by the declaration in the subsequent part of the mortgage-deed, as to the application of the moneys arising from the sale, viz., in the payment of interest, and the accumulation of the surplus. I am of opinion that this case comes within the principle of *Hunter v. Nockolds*, and that only six years' arrears of interest can now be retained. The question, however, was one which the deft. could not properly have avoided trying, and he must therefore have his costs.

Solicitors for the plts., *Emmet and Son*, for *Collis and Son*.

Wednesday, Nov. 18.

WILLIAMS v. WILLIAMS.

Will—Heir-at-law—Issue devisavit vel non—Trial before the court—Costs.

The true reason for granting an issue devisavit vel non to an heir-at-law of a testator is, that he may have an opportunity of cross-examining the witnesses against him, in open court; but, under the new practice of this court, a trial before it would,

perhaps, be the proper course to adopt in such a case.

The devisees under an alleged will instituted a suit to establish it against the heir-at-law of the testator.

The plts.' evidence proved the execution of a will; and traced the possession of it into the custody of the heir-at-law, or that of his wife. The heir-at-law and his wife denied the existence, or possession by them, or either of them, at any time, of any will of the testator, but the heir-at-law did not cross-examine the plts.' witnesses:

Held, that the plts. were entitled to the relief they sought, and that the deft. must pay the costs of the suit.

This suit was instituted by the widow and the second son of Robert Williams, the alleged testator in it, against Wm. Williams, his eldest son and heir-at-law. The object of the suit was to obtain a declaration that a will, which the plts. said the deceased had made in their favour; might be established.

The facts, as stated by the plts., were shortly these:—

In 1858 Robert Williams made a will devising and bequeathing all his real and personal estate to the plts., and appointing them executors thereof. The will was written out for the testator by one Francis Jones; and was signed by the testator in the presence of the said Francis Jones and one John Owen. The testator kept the will for some time after he signed it, but afterwards gave it to Robert Jones, his grandson, to keep for him, who put the will, for safe custody, in the box or trunk where he kept his clothes. In June 1860 Robert Jones took the trunk with him to Liverpool, where he lodged with the deft. When Robert Jones left Liverpool, he, at the deft.'s request, gave the will to the deft.'s wife, who delivered it to the deft. The testator died in Feb. 1861. Robert Jones swore that immediately after the death of the testator he wrote to the deft., and asked him to bring the will (which had been so left with the deft.'s wife as aforesaid) with him to the testator's funeral; that the deft. came to the funeral, but when there stated that he had not brought the will with him, as he had come away in a hurry, but that he would send it. Francis Jones swore that he had prepared the will; that it was made in favour of the plts., and that the testator signed it in his presence and in that of Owen, who also verified the testator's signature, and his own and Francis Jones's attestation; and other witnesses, on behalf of the plts., stated that the deft. had, at the funeral, and at other times, admitted that he or his wife had had possession of the will, but that he was afraid it had been put in the fire. The deft., by his answer, duly supported by affidavit, said that shortly before his father's death he told him he had not made a will, and did not intend to make one. He admitted that Robert Jones went to Liverpool in June 1860, and remained about twenty-three weeks at the deft.'s house; but he denied that he left any will with him or with his wife. He also denied that he ever admitted at the funeral, or at any other time, that there was any will made by his father, or that he or his wife had possession of it. The deft.'s wife also made an affidavit, in which she denied that Robert Jones had given her the will, or that either she or her husband ever had it in their possession.

Selwyn, Q.C. and *G. O. Morgan* appeared for the plts.—The deft. had not attempted to cross-examine the plts.' witnesses, and they relied therefore upon the evidence above stated in their behalf to show that they were entitled to the declaration they sought, without being compelled to proceed by way of an action at law. They cited

Hampden v. Hampden, 3 Bro. P. C. 550;

Dalston v. Coatsworth, 1 P. Wms. 731;

ROLLS.]

PONSARDIN v. PETO.

[ROLLS.]

Boyes v. Rossborough, 3 De G. M. & G. 817 ;
a. c. on app. 6 H. of L. Cas. 2 ; and a. c. 29
L. T. Rep. 27 ;
Woodroffe v. Wood, 1 Dick. 32 ;
Hayne v. Hayne, 1b. 18 ; and
25 & 26 Vict. c. 42.

H. F. Bristowe, for the deft., said, he claimed to have an issue *devisavit vel non*. The only reason why the deft. had not cross-examined the plts.' witnesses, was the expense to which he would have been put had he so done. But it must be remembered that the deft. and his wife denied upon oath the allegations made on the behalf of the plts. That being so, the right of the deft. as heir-at-law to the issue *devisavit vel non* was clear ; moreover he was not shown to have been guilty of any acquiescence in the plts.' claim, or of misconduct on his own part. He cited

Man v. Ricketts, 7 Beav. 93 ;

Tucker v. Sanger, 1 M. L. & Y. 425.

The MASTER of the ROLLS said :—I am of opinion in this case that the plts. are entitled to the relief they seek by their bill. I quite concur in the observation that, in the case of a contested will, the heir-at-law is entitled to an issue *devisavit vel non*, although, perhaps, under the new practice of this court, a trial before it would be the proper course. But then that is only the right of the heir-at-law when he himself has not occasioned the necessity for the trial ; otherwise, if this court is satisfied that he has occasioned the difficulty, it will not permit him to insist upon a right to the issue. If, however, the case is merely this, a statement that a certain person has made a will, and there is no imputation cast upon that person's heir-at-law, but the will cannot be found,—then the heir-at-law may put the devisee to prove the will before a jury. But if the heir-at-law has himself destroyed it, or if he has received it but fails to produce it when required to do so, then the presumption of law, which always arises against a person who keeps back evidence, so operates as to prevent him from obtaining the issue. The case of *Dalton v. Coatesworth* applies in the present instance, and the only substantial question is, whether the evidence as to the conduct of the deft. here is satisfactory or not ? It must always be remembered that, in cases of this sort, this court is bound to consider that, in the attempt to arrive at a conclusion before a jury, the whole property in question may be consumed in costs. If I were to direct a trial in this case, I should therefore order it to be had before me, either with or without a jury, and the proceedings would only differ in a technical sense from those in a cause where, issue being joined, it is considered desirable to cross-examine the witnesses. In fact, the true reason for granting an issue *devisavit vel non* to an heir-at-law, is that he may have an opportunity of cross-examining the witnesses on the other side in open court. I think that the granting of an issue to the heir in this case, to be tried before a jury in the country, would exhaust the whole of the estate. But what has the deft. done with regard to the plts.' witnesses ? He has thought fit not to cross-examine them. I must therefore take their testimony as it stands. The result of that is this : the preparation of an alleged will for the testator, and the execution of it by him, are proved. If the matter had rested there the heir-at-law would no doubt have been entitled to a trial ; but the evidence of Robert Jones traces a will into the possession of the deft. and his wife. How, under the circumstances, can I possibly disbelieve that evidence ? Especially, as several other persons have said that at the funeral, and at other times, the deft. has admitted that he had had possession of a will. I must hold that, upon the evidence in the case, this will is traced into the custody of the deft., or to that of his wife ; and it follows that, as he has neglected to produce it, I must decide against him. Being of that opinion,

I must direct the deft. to deliver up possession of the property to the plts., to execute all proper conveyances thereof to them, and to pay the costs of this suit.

Solicitor for the plts., *Eldred and Byrne*.

Solicitor for the deft. *Steward*.

Thursday, Dec. 10.

PONSARDIN v. PETO.

Injunction—Motion by mortgagees, not a party—Costs.

The plts. obtained an *ex parte* injunction to restrain the defts. (a duck company) from parting with certain wine, on the ground that it was fraudulently corked and marked, so as to resemble that of the plts. A prior *bona fide* mortgagee of the wine, who was no party to the suit, moved, with consent of all parties to it, for an order enabling him to withdraw the existing and substitute proper corks, at his own expense, and on payment of the defts.' charges to take possession of the wine :

Held, that he was entitled to the order moved for ; that he was not bound to pay the plts.' costs of the suit ; but that, as he had moved with consent of all parties to the suit, he must pay their costs of his motion.

This was a motion on behalf of a Mr. Uzielli, a *bona fide* mortgagee, without notice of any fraud, of certain wine lying in the London Docks. Mr. Uzielli was not a party to the suit ; but the motion was made in it with the consent of those who were.

The facts of the case were very shortly these :—

The plts. were the producers and shippers of certain champagne, known as "Veuve Clicquot." The defts. were the London Dock Company. The plts. had obtained an injunction, *ex parte*, to restrain the defts. "from parting with a quantity of wine which had been imported from France, and which was a spurious imitation of the plts.' champagne, and was corked with corks having a counterfeit of their trade-mark thereon." When the bill was filed, the plts. did not know in whose hands the warrants for the wine were, and the dock company were therefore the sole defts. It subsequently appeared that the warrants had been previously transferred to and were then in the possession of Mr. Uzielli, as security for an advance made by him on the wine, without any notice of the fraud, and in the belief that the wine in the docks was genuine. On proceeding to realise his security he discovered the existence of the suit ; and he now therefore moved, with the above-stated consent, for an order that, notwithstanding the injunction, the defts. might be at liberty to permit him to withdraw the corks and substitute proper corks at his own expense, and thereupon and on payment of their charges to deliver the wine to him.

The only disputed question was, whether Mr. Uzielli was liable to pay the plts.' costs of the suit ?

Hobhouse, Q. C. and *Lovell*, for Mr. Uzielli, contended that he had a charge on the wine which was prior to the plts.' thereon for their costs of the suit. He submitted to pay the costs, charges and expenses of the defts., if the order he moved for was made.

Selwyn, Q. C. and *Gardiner*, for the plts., insisted that, as all the parties to the suit had consented to Mr. Uzielli's motion, he was in the same position as if he had been originally a party ; and that being so, he ought to pay the plts. their costs of it. But for the injunction he might have sold the wine as genuine, when it was not. They cited

Burgess v. Hill, 26 Beav. 244 ; 32 L. T. Rep. 328.

Bagshaw appeared for the defts.

The MASTER of the ROLLS.—I think that Mr. Uzielli is entitled to the order he moves for ; but I think that he need not pay the plts.' costs of the suit.

The question is, whether they have a lien on the goods for those costs, in priority to Mr. Uzielli's for his money advanced before the institution of the suit? Where a person injures another by attempting to sell goods which he knows to be spurious, the person injured may stop him, and he will be compelled to pay the costs. But, in the present case, Mr. Uzielli had *bond fide* advanced money on the deposit of the dock warrants, which was a perfectly good security for money so advanced. If he had proceeded to sell the wine in question, the court would no doubt have restrained him from selling it with the spurious trade-marks upon it: but subject to his converting it, at his own expense, into *bond fide* goods, he clearly has a charge on it prior to that of the *plts.* for their costs of the suit. The order of the charges is this: first stands that of the dock company; second, that of Mr. Uzielli, for the amount advanced by him; and third, that of the *plts.* I think, however, that, as Mr. Uzielli was allowed to move as if he had originally been a party to the suit, he ought to pay the parties' costs of the motion.

Solicitors: *J. Ras*; *J. W. Nicholson*; *Ellis, Parker and Clarke*.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs.,
Barristers-at-Law.

Thursday, Nov. 5.

BRIDGWATER v. DE WINTON.

Exceptions to answer—Discovery from bankers as to third parties—Proof—Admission—

Where the defts. admit that the pl.'s bill is properly framed as to parties, they are not obliged to set out the documents upon which they found that admission.

Where the bill states that an account alleged to be settled was not settled, and that a certain sum was not due, and the interrogatory asks the question, it is not sufficient to refer generally to bills and notes, then held by a firm, upon which they had made advances.

Where bankers were asked by the pl. to set out all their dealings with third parties who were their customers, it was held the pl. was not entitled to this discovery.

Where the answer and the schedule do not correspond, the exception will be allowed.

Where the pl. is entitled to the benefit of securities held by a third party, he has a right to discovery as to what those securities are.

This case came on upon exceptions to the answer of the defts. The bill set out a mortgage of 7th Aug. 1852, for securing the payment of 300*l.* and interest, already advanced, and any other sum that might be advanced; and another mortgage of 1862, as a further charge for the sum of 1530*l.* The mortgagor died, and the heir denied the validity of the mortgages, on the ground of undue influence and pressure, and set forth at length certain business transactions between the deceased mortgagor and the mortgagees, and put certain interrogatories, to which fourteen exceptions were made, of which the following only were material:—

The first exception was to the answer to the following part of the third interrogatory, "Set forth a short particular statement of all deeds and instruments, proceedings and transactions between the aforesaid defts. and the said John Jeffreys de Winton and John Jones, or any of them; or between them or any them, and any other person or persons whereby the said indenture of mortgage and the moneys thereby secured have been transferred, assigned, or in anywise dealt with." The answer to this was an admission that under and by

virtue of certain deeds and instruments executed by them or their representatives, as well as the defts., the full benefit of the mortgage-deed of the 7th Aug. 1852, and the moneys thereby secured, had become vested in them, Henry Jones Evans, however, not claiming any beneficial interest in the mortgage-deed, or the moneys secured thereby, but they submitted they were not bound to set forth any particular statement of the deeds, instruments, proceedings and transactions between them or any of them, the said Henry Parry de Winton, and the said John Jeffreys de Winton and John Jones, or either of them, or any other persons or person, whereby the said indenture of mortgage and the moneys thereby secured had become vested in the said John Parry de Winton, and David Evans, John Evans and Wm. de Winton, as aforesaid.

It was contended that this answer was evasive, and gave no substantial discovery; that if the items were set out, a secret partnership would be shown. The defts. contended they were not bound to set out their title-deeds, and a second mortgagee had no right to call upon them to do so.

Charles Wood appeared in support of the exceptions.

Baily, Q.C. and *Eddis* for the defts.

The VICE-CHANCELLOR said, this exception was not sustainable. The bill alleged (and no doubt truly) that the mortgage was made to six persons, the four defts. and two others, one dead and the other retired from the partnership in which they were all bankers. The bill proceeded on that footing, and the fact was so. By virtue of various deeds the interest of these persons (retired and deceased) was vested in the surviving partners, who alone were made defts. on the record. The bill asked that an account might be taken of what was due to the four as mortgagees, and that what was found as the balance might be paid as the case might be, and that the four defts. might reconvey, so that these four were the only persons interested. As to the death and retirement, it was not stated in the bill as a matter of fact, but that the defts. alleged it, and admitted that they were the parties bound to reconvey. An exception was taken because the deeds by which the transfer of interest took place were not set out. It would be a most oppressive thing to parties to be obliged to set out documents with respect to matters not raised by the bill, which was filed on the footing that there was the retirement and death upon which the interest became vested in the defts. There was no ground for the exception.

The second and third exceptions were that the defts. had not answered the following parts of the seventh interrogatory: "Is it not the fact that no such sum as 5000*l.* was due from the said Wm. Bridgwater, deceased, to the said firm of Wilkins and Co. at the date of the said indenture, or how otherwise, and how do the defts. make out that such sum was then due? Is it not the fact that such amount was in the said indenture stated, and whether or not improperly so stated as a nominal amount, and how do the defts. make out the contrary?"

The answers to this and the other exceptions are sufficiently stated in the judgment of the V. C.

The VICE-CHANCELLOR was of opinion that this exception ought to be allowed. The mortgage-deed stated an account of the same date as the deed, as if it had been a written account settled between the parties, but the bill alleged that in fact no such account was settled at all, and that 5000*l.* was not due, and the interrogatory asked the question, and they answered as to their belief, not as a fact, that 5000*l.* was due at the date of the mortgage, and then came the material passage. Here were bankers, mortgagees, stating that although the deed recited that the account was settled and signed of the same date as the indenture, and that they knew 5000*l.* and upwards was due;

V.C. K.]

LAWSON v. STODDART.

[V.C. K.]

in fact it was not settled or signed, but oral in communication with Bridgwater, who assented to the statement that the 5000*l.* was due in the manner represented to him. Therefore it was not a true statement in the sense that the account was settled of even date. Naturally the *plt.* says, "How do you make out the 5000*l.*?" and they answered, "Partly bills, &c." They really said nothing, a mere suggestion of the belief that the sum was 5000*l.* If the question had turned as to whether on this interrogatory the *defts.* were bound to set out the whole of the account, he would have hesitated to allow the exception, but would have considered that the *plt.* should have asked something more specific than what was due on the balance of account; but he asked how Bridgwater was indebted to them in such a sum as to make up the 5000*l.*, and therefore the second exception must be allowed. As to the third, it was immaterial whether it was allowed or not, but the answer appeared to be sufficient, therefore it must be overruled.

The following was the fifth exception:—"For that the said *defts.* have not in manner aforesaid, in answer to the 17th of the said interrogatories, answered so much of the said 17th interrogatory as is in the words and figures following, 'Set forth a short statement of the terms and securities upon which the said firm of Messrs. Wilkins and Co. and the said John Evans respectively have lent and advanced to the said Abertillery Company, or the said Messrs. T. P. and D. Price, or either of them, or have given them or any of them credit for such moneys as they or he respectively have so lent, advanced, or given credit for from the 1st Jan. 1852, down to the decease of the said Wm. Bridgwater, deceased.'"

The VICE-CHANCELLOR said, that the *plt.*, being second mortgagee, filed a bill against the first, and a surmise being contained in the bill, alleging a partnership between bankers and another firm of coal merchants, positively and distinctly denied by the answer, the question was, whether the *plt.* had a right to say, "You shall set out all your dealings with that firm as their customers." That was a very serious question, for any bankers might have a bill filed against them by any one who chose to allege such and such dealings with third persons; it was impossible to allow that. The mode of allegation was shadowy, and it was clear to him that the *plt.* really did not believe, or had means of knowing anything about it, but it was a fishing interrogatory introduced and suggested by the ingenuity of counsel or solicitor. The firm having become bankrupt, there was no suggestion that Evans was liable; and for the protection, not only of bankers generally but of third persons who had no connection with the matters alleged, and to whom it might be extremely detrimental, the exception ought not to be allowed. It did not appear what benefit it would be to the *plt.* if the fact were ever established *alimda*, but let it be established in the account, the *defts.* might be examined to elicit it, otherwise it might be a gross injury to absent parties.

The thirteenth exception was that the *defts.* had not answered so much of the 51st interrogatory as follows: "Set forth a full, true and particular account of all securities given to the said Messrs. Wilkins and Co., or any person or persons on their behalf, or to the *def.* John Evans, in respect of all such sums and sum of money, as they the said Messrs. Price, or either of them, have been or are indebted to the said Messrs. Wilkins and Co., or to the said John Evans, at any time since the year 1850, and of the hereditaments, chattels, choses in action and other real and personal estate and effects comprised in such several securities, and of the dates of and parties to the tenour and effect of all and every the deeds, agreements and instruments in writing, by which such securities, and every of them, have been or are effected or evidenced."

The VICE-CHANCELLOR said that this exception must be allowed, inasmuch as the question was whether the *plt.* was entitled to know what securities Price and Co. held which the *plt.* might be entitled to. The costs would follow the usual course, the *defts.* paying those of the exceptions which were allowed, the *plt.* of those which were overruled, one being set off against the other. The *defts.* must have a month's time to amend.

Solicitor for the *plt.*, T. Clark, 2, Gray's-inn-square.

Solicitors for the *defts.*, Reece, Wilkins and Bligh.

Thursday, Dec. 10.

LAWSON v. STODDART.

Practice—Examination of witnesses—New summons—Expenses of witnesses.

Where a witness who had been partially examined did not attend on the day to which the examination had been adjourned, and no fresh adjournment was made, a new summons was necessary to compel his attendance for the purpose of completing the examination.

Faber moved in this suit that the examination of the *def.* as a witness for the *plt.* might be continued, it not having been completed on the day appointed for the purpose, and that the *def.* might be ordered to appear to be examined on a day fixed by the chief clerk, and that he should also pay the costs of the motion.

A summons had been taken out for the 10th July, on which occasion the witness had attended. An adjournment till the 20th July had then been made, but the witness did not attend, and no adjournment was made.

The 25th Nov. was afterwards fixed for the continuation of the examination, and a notice to that effect was served on the witness, and money for his expenses tendered, which he refused to accept as insufficient; he did not attend the examination.

The application was founded on the 14th rule of the 35th Consolidated Order.

Osborne, Q.C. and J. T. Humphrys, in opposing the motion, argued that no regular appointment had been made for the examination. The proper course was to issue a new summons for the purpose. On the question of witnesses' expenses they cited

Brocas v. Lloyd, 23 Beav. 129;

Clark v. Gill, 1 K. & J. 19;

Nokes v. Gibbon, 28 L. T. Rep. 262;

Davy v. Durrant, 24 Beav. 411.

Faber, in reply, maintained that a new summons was unnecessary.

The VICE-CHANCELLOR said, that the application proceeded upon the footing that the *def.*, who had been partially examined on the 10th July, ought to have attended on the 25th Nov. that his examination might be continued, and that he ought on this motion to be ordered to attend and to pay the costs of the application. The *def.*, on the other hand, said that he had not been summoned, and that he had not had a sufficient tender of money for expenses. The case raised two questions, firstly, whether the money tendered was a proper sum to be paid for his travelling expenses, &c., and there was also the question whether a new summons was necessary. There was nothing to be found about it in the rules and orders of the court, and he must therefore ascertain what the practice in chambers was in such cases. The matter must therefore stand over till he had done so. Both the *plt.* and *def.* were much to be pitied if the suit were to be conducted in the spirit in which the motion had been made and resisted; why should there be so much fighting on

so small a matter? It was the junior clerk in the outer office, not the chief clerk, who attended to these matters in chambers.

Dec. 11.—His HONOUR said that he had ascertained that a new summons was necessary.

Monday, Dec. 14.

BRANDON v. BRANDON.

Practice—New parties—Mortgage pendente lite—Supplemental order.

Where parties to an administration suit have, pendente lite, mortgaged their shares, the mortgagees may be made parties to the suit by a supplemental order under sect. 52 of 15 & 16 Vict. c. 86.

Hardy asked, on behalf of one of the plts. in this suit, that certain persons who had recently become mortgagees of the shares of some of the parties to this suit, instituted to administer the estate of Samuel Brandon, might be made parties to the suit by a supplemental order under the 52nd section of the 15 & 16 Vict. c. 86. The registrar, Mr. Rogers, had considered that it was open to doubt whether it was right and proper to bring mortgagees *pendente lite*, as mortgagees, before the court, and he had therefore desired that the matter might be mentioned to the V. C. Both the mortgagors and mortgagees acted by the same solicitor, and the mortgagors entirely concurred in the application. It would not entail any additional expense upon other parties. There was no one case in which a mortgagee of a share had not been a party to the suit. Under the old practice it was clear that mortgagees (*pendente lite*) might have filed a supplemental bill.

The VICE-CHANCELLOR, who had before suggested that the solicitor for the mortgagors might regard entirely the interest of the mortgagees, as being the same in the suit, said that he feared considerable additional expense would be incurred, as the mortgagees would have to be served on every occasion; but as it seemed in accordance with the usual practice, he would, subject to anything that Mr. Rogers (who was not then present) might suggest, make the order in the form required.

This was subsequently done.

V. C. STUART'S COURT.

Reported by JAMES R. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-Inn, Barristers-at-Law.

Friday, Nov. 20.

Re WILLS'S TRUSTS, and *Re* THE TRUSTEE ACT 1850.

Petition—Irrelevant matter—Next friend—Costs.

Where a married woman, having by her next friend petitioned for the appointment of new trustees of property to which she was entitled for her separate use, made in the affidavits filed in support statements and charges irrelevant to the subject of the petition, and where the resp., in answering those affidavits, made further charges of a still further irrelevant character:

The Court ordered that all the costs incurred by the resp. in answering the irrelevant charges made against him be paid by the next friend; and that all the costs incurred by the irrelevant matter introduced by the resp. into the case, other than that rebutting the statements made against him, should be paid by him.

This was a petition presented by a married woman, by her next friend, praying to have new trustees appointed of certain freehold premises to the income of which she was entitled for life for her separate use.

The petitioner charged her husband with cruelty and desertion, and affidavits were filed by the petitioner in support of such charges. The husband filed affidavits

not only in answer to the charges brought against him, but bringing counter charges of violence and abusive conduct against his wife.

Greene, Q. C. and Rudge supported the prayer of the petition, and asked that the resp. might be ordered to pay all the costs which had been necessarily incurred by his vexatious opposition.

Swanston, for the resp., contended that the charges made against him by the petitioner and repeated by the next friend in his affidavit, were scandalous and impertinent, and submitted that, as the costs were incurred by the petitioner's improper conduct and unfounded allegations, the next friend ought to pay them.

Greene, Q. C. was heard in reply.

The VICE-CHANCELLOR.—There can be no doubt of the impropriety in mixing up charges of misconduct on the part of the husband of the petitioner, who is entitled to the property for her separate use, in a petition merely for the appointment of new trustees. I have no doubt as to the right of the resp. to have taxed and allowed to him the costs of so much of the petition and so much of the statements in the affidavits filed on behalf of the petitioner, which contain charges of improper conduct against him, and which contain anything irrelevant, with a view to the appointment of new trustees, which was the sole purpose of this petition. I have no doubt as to the right of the resp. to answer the charges made against him, but he ought not to have entered into other charges which are more irrelevant, scandalous, and impertinent still, and which go to more than merely rebutting the charges which are made against his character. Therefore the order will be, that so much of the resp.'s costs as have been incurred in answering the charges made against his character be taxed by the master, and be paid by the next friend, and that the next friend do also pay all the costs of the petitioner which have been incurred in making the charges against the character of the resp. and all the costs incurred in answering the evidence of the resp. in reference to the allegations made against his character, but not the costs of answering the irrelevant matters or charges which were first introduced by the resp. in his affidavit. I direct that the petitioner be allowed no costs of any irrelevant matters. The only costs which must be paid out of the trust property as between solicitor and client are those which are incurred upon a petition for the appointment of new trustees, and the affidavits which are usually necessary and proper to bring the facts before the court in relation to such appointment. There must be a reference to chambers to appoint new trustees, and if it shall appear that the persons proposed are fit and proper persons, there let them be appointed, and let the trust property be vested in them. There must be liberty to apply, and generally, as to how the costs to be paid by the petitioner are to be raised.

Friday, Dec. 9.

SEALE v. HAYNE.

Heirlooms—What will constitute—Executor—Costs.

A casket containing diamonds was sent to the plt.'s father, accompanied by a letter to the effect that the diamonds were to be considered as heirlooms in the family, and were to be left to the eldest son and heir, after the death of his mother, as long as the family should continue.

On the death of the plt.'s mother (who survived her husband) one of her executors (the other having renounced) refused to deliver up the diamonds to the plt., the heir, and raised the question as to their forming part of the assets of the mother:

Held that, the diamonds formed no part of the assets of the mother, but belonged to the family as heirlooms, and ordered that the executor who raised the question should pay the costs.

This was a bill praying that certain diamonds might be decreed to be delivered up to the plt., Sir John Seale, Bart., of Mount Boone, Dartmouth; and it stated that in 1817 one John Seale (afterwards Sir John Seale) sent to the plt.'s father (Sir John Henry Seale, Bart.) a box containing various articles of considerable value, for many years the property of the Seale family, then the absolute property of the said last-mentioned John Seale. The diamonds included in the casket were a necklace, a pair of ear-rings, and one or more brooches, all uniform in character and setting, and forming, in fact, altogether a single set. At the same time the last-mentioned John Seale wrote and sent to the said Sir John Henry Seale a letter, announcing that the box had been sent off, and begging that it might not be opened before the morning of Christmas-day. The letter then proceeded thus:—

"It contains the following articles to be appropriated as hereafter mentioned. Two handsome embossed bowles of old plate, J. H. Seale, Esq. A casket of diamonds in a necklace, with ornaments, and a medal of the Princess Charlotte, a lock of her hair, 'undoubted.'"

"N.B.—This necklace is to be considered as an heirloom in the family, and is to be left to the eldest son, and his heir, after the death of his mother, as long as the family shall continue."

The box and its contents were duly received by the said Sir John Henry Seale, and were delivered by him to his wife. After his death his wife continued to hold the jewels all but the ear rings, which were handed to the wife of the present baronet. At the death of the widow of Sir J. H. Seale the other part of the jewels were in her possession. There was evidence to show the identity of the jewels, and that the dowager Lady Seale had stated the jewels were heirlooms.

Bacon, Q.C. and Wickens, for the plt., contended that the diamonds belonged to the plt. as heirlooms. There could be no question as to their being identical with those sent to the plt.'s father and referred to in the letter; the authenticity of which was beyond doubt.

Malins, Q.C. and H. Stevens, for the deft., one of the executors of the dowager Lady Seale, contended that the deft. could do no more than he had done. The deft. was the acting executor of his mother (the dowager Lady Seale), and as she had alleged that the jewels were her property, he could not, in justice to her creditors, do otherwise than raise the question for their benefit.

Druce appeared for the other executor, who had renounced.

The VICE-CHANCELLOR.—I have no doubt that these diamonds formed no part of the assets of the dowager Lady Seale. The person who takes a gift of chattels must take it subject to the conditions imposed by the donor. In this case it is clear that the diamonds were sent to the son to "go in the manner and on the terms mentioned in the letter." It is unnecessary to consider the right of any other person than that of Lady Seale, because if her right was displaced the deft.'s claim failed. In the case of *Clarke v. Lord Ormonde* Jac. 115, Lord Eldon said that heirlooms were rather favourites with the court; by which he meant that the court gave effect to this disposition of property of a particular kind. Lady Seale was never entitled to these jewels, and there must be a declaration that they never formed part of her assets, but are the property of the plt. The deft., who had raised this question, must pay the costs, and there would be no order as to the costs of the other executor, who had renounced.

Solicitors for the plt., *Gadsden and Flower*.

Solicitors for the deft., *Druce and Son; Hale and Tristram*.

V. C. WOOD'S COURT.

Reported by W. H. BENNETT and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Nov. 17 and 18.

SWAINE V. GREAT NORTHERN RAILWAY COMPANY.

Practice—Injunction—Legal right—Nuisance—
Acquiescence—25 & 26 Vict. c. 42.

The old rule that a plt. will not be allowed, after having acquiesced in an infringement of an alleged right, to restrain the continuance of the infringement, without having proved his right by a trial at law, is not altered by the Act 25 & 26 Vict. c. 42, giving this court a power to decide questions of legal rights.

This was a bill praying for an injunction to restrain the defts. from using a siding belonging to them at the Stevenage station, for the deposit or stacking of manure, so as to produce noxious vapours or stenches, or from permitting their trucks or waggons containing any such manure or offensive matter to remain on the siding, or from using the siding in such a manner as to interfere with the quiet and wholesome enjoyment by the plt. of his house (which was close to the siding), and also asking for an account and payment to the plt. of the damage sustained by him by reason of the wrongful acts of the defts. in so using their siding.

The plt. in 1856 was the owner of a house and land at Stevenage, and in 1858 the defts. began to make a siding to their railway upon land belonging to them, which abutted on a road leading to and immediately in front of the plt.'s house and premises. Some discussion took place between the plt. and the station-master at Stevenage at the time this siding was being made, and complaints were made by the former as to the position of a gateway leading from the siding into the road, but it did not appear that he made any inquiry as to the kind of traffic for which the siding was intended to be used, or raised any objection to its use for any purpose.

It seemed that the manure traffic, for which the siding was used from the first, and which at its commencement in 1859 was of no very great extent, and was then admitted by the plt. to have been no nuisance, increased rapidly, and was also carried on in such a way as to cause him much annoyance, the manure being of a more than usually offensive character, and being left either in the trucks or turned out on the siding for some days.

In Dec. 1861 the deft. first complained of the nuisance to the station-master at Stevenage, and again in April 1862 to the chief engineer of the railway company, treating the nuisance as occasional, but requesting that it should be abated. In answer to these complaints he obtained no redress, and in Nov. 1862 his solicitors formally applied to the company to remove the cause of complaint. Some correspondence took place thereupon, but no steps were taken by the company in compliance with the plt.'s wishes. The bill was filed on the 19th Jan. 1863.

Shortly after the filing of the bill the nuisance, to a great extent, abated. The plt. did not thereupon apply for an interlocutory injunction, and the cause now came on for hearing.

Willcock, Q.C. and Roxburgh, for the plt., submitted, first, that the evidence established the existence of a legal nuisance, so that they could not have failed to obtain damages in an action; secondly, that if so, the circumstances of the case entitled them to relief in equity. They cited

Com. Dig., "Action on the Case for Nuisance;"

Walter v. Selfe, 4 De G. & Sm. 315;

Pollock v. Lester, 11 Hare, 266;

Flight v. Thomas, 11 Ad. & El. 688.

As to the second point, this was not an interlocutory

application, and therefore the delay of the plt. in filing his bill ought not to prejudice him, since he had, in fact, taken proceedings as soon as the nuisance became substantially prejudicial to him. The operation of the Act 25 & 26 Vict. c. 42, was to relieve a plt. from the necessity of proving his right by an action for damages, by enabling this court to give complete relief.

Rolt, Q. C. and Stevens, for the defts., were not called on.

The VICE-CHANCELLOR said, that there were two classes of cases in which this court had interfered by injunction to assist a plt. in maintaining a legal right: first, under the old practice, when the court had not the power of sifting the whole case, a plt., by a bill *quia timet*, might, upon reasonable cause shown, obtain an injunction to restrain the infringement of an alleged legal right, by which he would have been injured, pending the trial of his right at law; secondly, where several actions of ejectment had been brought in which the deft. had been uniformly successful, the court interfered in his favour, on a bill of peace, to prevent any future action. It was clear that the present bill would not come under the second class. Now, as to the first of these classes, *Bateman v. Johnson*, Fita. 106, was an authority to show that this court would not interfere when a plt. had sufficient time to assert his right by an action. Here the plt. had ample time to try his right at law; he had not done so, but had preferred to come to this court for an injunction; the only question, therefore, was, whether the recent Act had so far altered the old practice as to entitle him to wait four or five years without taking any step to assert his right at law and then, for his own convenience merely, to apply to this court for an injunction. He thought that the power given by that Act to this court, in certain cases, to decide questions of legal right, was not intended to be used in the mode in which it was now sought to be applied. There was another objection, too, arising from the rule of the court, that it would not grant an injunction to restrain acts which a plt. had stood by and allowed to be done for a length of time, so that, by his acquiescence, the opposite party was placed in a worse position than he would otherwise have been in. In this case the plt. had built his house in 1856, the defts. had begun to construct their siding in 1858, and the plt., seeing this and knowing the nature of the traffic already carried on at a siding on the opposite side of the line, might reasonably be held to have been bound then to make inquiries as to what the siding was to be used for. He could not admit that a person was bound to wait till the actual commencement of a nuisance, remembering a case, often referred to by Lord Eldon, of a landowner standing by and seeing a mine opened near his land, it being evident that the mine could not be worked but by means of a road over that land; in such a case he would not be allowed to restrain the owner of the mine from attempting to acquire such right of way: (*Jackson v. Cator*, 5 Ves. 589.) Here the plt. had acquiesced in the nuisance down to 1860; he had begun to complain only in 1861; that was the time when he ought to have asserted his right; however, he took no active proceedings till the end of 1862, the traffic in the interval steadily increasing; then he came to this court, having allowed the defts. to make their siding, to expend money on it and on the necessary plant for working it, and without having proved his legal right, asked an injunction which would stop the whole traffic of the company. He could not think that such a transfer of jurisdiction came within the purpose of the recent Act. The bill must be dismissed, with costs.

Solicitors for plt., *Denton and Hall*; for defts., *Johnston, Farquhar and Leech*.

Monday, Nov. 23.

MIDDLETON v. GREENWOOD.

Contract—Specific performance—Equity of redemption—Mortgages—Practice—Form of decrees as to special damage—21 & 22 Vict. c. 27, s. 2.

- A. by contract agreed to grant a lease of a public-house to B. upon certain terms; in addition "the lessor, to make certain alterations now suggested and to make and form a spirit-vault, and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint new the outside of all the wood-work, as well as put the slates, chimney-pots and roofing in thorough repair."
- B. by his bill offered to waive the performance of the agreement so far as regarded any alterations not specifically mentioned therein:

Held, that he was entitled to a decree for specific performance, minus the waiver.

This was a bill filed for the specific performance of an agreement, the material parts of which were as follows: "Memorandum of agreement made this 26th May 1862, between George Greenwood, of, &c., and David Middleton, of, &c., whereby the said George Greenwood agrees to let, and the said David Middleton agrees to take, at the annual rent of 100*l.*, payment half-yearly from the day of entry, viz., on the 1st July next, on the 1st Jan. and 1st July for the full end and term of ten years from the said 1st July next, and upon the following terms and conditions:—all that inn or public-house situated at the top of George-street, in Wakefield-road, in Bradford, known as the Britannia Inn, with the outhouses, buildings, cottage, conveniences, and premises, as the same has been and is now in the occupation of Mr. Wm. Fox and his under-tenants. The taker to pay all rates, taxes and licences and all other outpayments, except property and income-tax, and keep and leave the premises in good and tenantable repair. The taker to make certain alterations now suggested, and to make and to form a spirit-vault and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint new the outside of all the wood-work, as well as put the slates, chimney-pots and roofing in thorough repair. All the trade fixtures, brewing-plant, ceilings, seatings and such things as are used for the trade of an innkeeper, to be taken at the expiration of the lease by the said Geo. Greenwood at a valuation, such valuation to be made in the usual form."

The agreement then went on to provide for the party to prepare the lease and other usual stipulations.

Possession was not given on the 1st July, as provided by the agreement, much delay taking place as to the valuations, and the deft. subsequently refused to return the draft of the lease which had been forwarded to deft.'s solicitor, or perform the agreement, on the ground principally that there were mortgages of the property whose acquiescence was submitted by him to be necessary, and that the terms of the proposal for a lease were misstated in the agreement.

The plt. thereupon filed his bill, stating the agreement, and offering to waive the performance of that part which was required to be done by the deft. and printed in italics, praying specific performance of it; "except so far as the performance thereof was thereby waived, and for that purpose to execute a lease to plt. in conformity with said agreement of the premises in such agreement mentioned, the plt. offering to accept such lease, and to execute, if necessary, a counterpart, and also to waive the performance by the deft. of said agreement so far as respected the alterations in and by the said agreement mentioned or referred to other than the making and forming of a spirit-vault, putting in of plate-glass windows, the painting the outside of all the wood-work, and the putting the slates, chimney-

pots and roofing in thorough repair. for payment of damages by deft. as the court might think fit to award by reason of the non-performance by the deft. of his said agreement otherwise than in the particulars the performance of which was thereby waived, such damages to be assessed as the court should direct; and for an injunction to restrain the letting of the premises.

The main facts were not disputed by deft.'s answer.

Rolt, Q. C. and Freeling, for the plt., contended that this was simply a case of conveyance, and not of title. The contract was specific. The deft. was bound to grant the lease; the difficulties which had arisen in doing so were of his own creating, and were totally unknown to plt. at the time of the contract. They cited

Soames v. Edge, John. 672 ;

Norris v. Jackson, 1 Jo. & H. 319 ;

Coglan v. Haslar, 2 Sch. & Lef. 160.

Daniel, Q. C. and Little, for deft., contended, that the mortgages should have been made parties. The contract to let was only by the owner of the equity of redemption, and such a contract could not be enforced.

The VICE-CHANCELLOR said it was a clear case for specific performance, and the decree must be in the usual form. The deft. had deliberately entered into the agreement, and although by his answer and subsequent evidence he had endeavoured to establish a case of uncertainty in the terms of the agreement as to the licences, and as to the period of possession, he had not displaced the plt.'s case as made by the bill. There must therefore be the usual decree for the performance of the agreement by the deft. with costs, with a reference to chambers to settle the terms of the lease if necessary. There must also be an inquiry as to damages as provided by the Act. There would be no necessity for any inquiry as to title.

Decree specific performance of the agreement, so far as same was not waived by plt., with costs. Reference to chambers to settle terms of lease. Inquire under what circumstances delivery of possession was delayed beyond the 1st July 1862, and what damages ought to be paid to plt. in respect of the nonperformance of the agreement, either as regards the nondelivery of possession, or as regards the making the spirit-vault, &c. (as in agreement), in case the same shall not be done by deft.

Solicitors: *W. Lancaster*, Bradford, for plt. ;
W. P. Roberts, Manchester, for deft.

Nov. 23 and Dec. 4.

KNOX v. GYE.

Practice—Pleading—Amendment.

A plt. will not be allowed to set up by amendment after proof a case for relief depending on matter collateral to the main point at issue, having failed on the main point; such collateral matter having been disclosed by the answer of the deft., and the plt. having had ample opportunity of amending his bill before the hearing.

This was a bill by Col. Knox seeking to establish a partnership between himself and the deft. in the adventure of undertaking the Royal Italian Opera, at Covent-garden, in the year 1851 and following years. The plt. alleged a verbal agreement between himself and the deft. to share equally in the profits of the adventure, in pursuance of which 10,000*l.* was borrowed from Messrs. Coutts and Co. on the joint and several bond of the plt. and deft. as the joint capital of the concern, the deft. being allowed a salary of 1500*l.* a year as manager of the business; that the plt. had repaid Messrs. Coutts 5000*l.* in respect of the sum so borrowed; that in 1853 Mr. Thistlethwayte had joined the adventure as partner, with an

additional capital of 12,000*l.* and that he (par. 29) "in the year 1854, being ordered on foreign service retired from the said partnership and a deed was executed between him and his said partners, the plt. and deft., and he assigned, or made over the said sum of 12,000*l.*, his share of the said partnership capital, to the plt. and deft. for their equal benefit." The bill prayed a dissolution of the alleged partnership and a winding-up under the direction of the court, and an account of what was due to the plt. "in respect of his share of the capital of the said partnership (including his share of the said sum of 12,000*l.*, brought into and left in the said concern by Thistlethwayte)."

It was alleged by the deft. that no partnership had ever subsisted between himself and the plt.; that the 5000*l.* had been advanced by the latter on the express terms that the plt. should submit to the loss of the whole, or any part of that sum if the concern should turn out to be unprofitable, but with a prospect of repayment of the capital out of any profits which might be made. It was admitted that Thistlethwayte came into the concern on the terms of having one-third of the profits; but no assignment of his share (as alleged in the bill) was made, although a draft to that effect had been drawn up at the time that he was going abroad. This draft (set out in the deft.'s answer), contained a recital that the plt., the deft. and Thistlethwayte were partners in the adventure on equal terms, and the deft., by his answer, stated that in consequence of that recital the plt. had refused to be a party to the assignment, and that Thistlethwayte thereupon executed a will of the 26th June 1854, bequeathing all his share in the partnership to the plt. and deft. in equal moieties, it being understood between the parties that his estate should, in the event of his death, be held harmless against any liabilities of the concern.

The plt. filed his bill on the 26th April 1861; on the 14th Sept. following the answer, setting forth the above facts as to Thistlethwayte's share, was filed, and a further answer on the 19th Dec., and which therefore became sufficient in Jan. 1862. The plt. did not at that time amend his bill, and the cause coming on for hearing, the V.C. decided that, though the plt. had failed to prove his case as to a partnership between himself and the deft., there might be some case for relief as to the share of Thistlethwayte. The plt. thereupon obtained special leave to move to amend his bill by striking out the allegation in paragraph 29, and stating in its place the will of Thistlethwayte, the probate of that will on the 6th Nov. 1863, and the terms of the understanding between the parties as set forth in the deft.'s answer.

This motion now came on for hearing, supported by an affidavit of the plt., stating that he first became aware of the fact that the will had been executed from the deft.'s answer; that he had applied, in Feb. 1863; for further time to amend, but that his application had, upon opposition, been dropped, as he found that a considerable time must elapse before he could obtain probate of the will; that he had applied to the deft. to produce the will for probate, but that, owing to various delays, he was not sworn executor until the 11th July, and the will was not finally proved till four days before the hearing of the cause.

It appeared that the deft. had offered to deliver the will upon the written authority of the plt.

Sir H. Cairns, Q. C., Giffard, Q. C. and Townsend in support of the motion, contended that the proposed amendment related to matter already in issue in the suit. That issue having been raised by the deft.'s answer, it was sufficient if probate was obtained before the cause came on to be heard. The relief asked was the same, and the plt. was not under these circumstances to be put to the expense of a fresh suit. They cited

Lord Darnley v. The London, Chatham and Dover Railway Company, 7 L. T. Rep. N. S. 590;

Filkin v. Hill, 4 Bro. P. C. 341;

Birdermann v. Seymour, 1 Beav. 594.

Roll, Q. C., Hobhouse, Q. C., and Martindale for the deft., that this was merely an attempt by the plt., after the main issue in the suit had been decided against him, to set up a new case on a point merely collateral, by amendment. There would be no economy in the course suggested, as it would be impossible to separate the evidence in the new case from that used on the whole of the original bill. The case for relief on the original bill was inconsistent with that now sought to be set up; the one resting the plt.'s title on an alleged assignment from Thistlethwayte, the other on the will. They cited

Gossip v. Wright, 11 W. R. 632:

Watts v. Hyde, 2 Ph. 406.

Sir H. Cairns, Q. C. in reply, contended that to proceed by supplemental bill would give two inconsistent records, one resting on the deed, the other on the will; the issue was simply whether or no the plt. was entitled to a moiety of Thistlethwayte's share in the partnership; the will had been pleaded, and it was sufficient if it were proved at any time before the hearing.

Dec. 4.—The VICE-CHANCELLOR said that so far as this bill sought to establish a partnership between the plt. and deft. he had already disposed of it, by dismissing the bill with costs up to the hearing. No additional costs had been incurred in consequence of the averment on the part of the deft. in one paragraph of his answer, "that under the circumstances nothing was due to the plt.;" that averment must be taken in reference to the subject-matter of the suit, the partnership. No doubt, upon the deft.'s view of the case, which he held to be the correct view, the plt. would be entitled to be repaid his advances out of any profits of the concern, and so far he was entitled to an account, nor had this right ever been denied by the deft., but admitted in the fullest manner; since, therefore, the plt. would have to submit to the penalty of paying all costs up to the hearing, it was only fair that he should have the alternative, an account in accordance with the deft.'s case. He did not think that this was a proper case for amendment. The plt. had had ample opportunity for amending his bill if he had applied in proper time; he had not chosen to do so, but now desired to amend by putting in issue a different state of transactions, viz., the fact of a will, and the date of his having obtained probate. As to the difficulty of obtaining probate, he could not see that the deft. was to blame. There was no obligation on him to come forward and prove the will, and as soon as an application was made to him to deliver it up, he had offered to comply; the offer was not accepted and the matter was proceeded with hostilely. Now, however, the plt. had shown his *bona fides* by undertaking the responsibility of proving the will; it was necessary to have an account with reference to profits, and it was most desirable that the case with respect to Thistlethwayte's share should be put in train of settlement. There was an additional reason for not allowing the amendment asked, independently of the plt.'s delay, viz., that there might be a defence to the new case which the deft. was not called on to raise now, but which he was entitled to the fullest opportunity of making out, if it should be necessary, and of bringing forward any circumstances which he might be advised to state if accounts were to be taken of the profits made by the concern. Under those circumstances the order on the decree and motion would be to declare that a contract of partnership did not at any time exist between the plt. and deft. in respect of the adventure in the bill mentioned,

but that the plt. should be repaid on demand any moneys he might have to pay in respect of the joint several bond of the 5th March 1852, out of the profits if any, in the hands of the deft. accruing from the said adventure, and that the plt. was now entitled to be repaid the sum of 5000*l.* paid by him (as stated in the bill) and to be indemnified against any future payment that he might have to make on such bond out of such profits, if any. Then, after ordering the plt. to pay the costs up to the hearing and the costs of the motion to amend, direct an inquiry in chambers what profits had been received by the deft. in respect of the advance of the 5th March 1852 up to the date of the chief clerk's certificate, allowing the deft. his salary of 1500*l.* and all just allowances, and after applying the profits of any one year, first in making good the loss of the previous year, an account of what profits have been received, and whether any remain sufficient to indemnify the plt. in respect of his advance of the 5000*l.* There would be liberty to amend by striking out par. 29 and inserting a charge of any other assignment by Thistlethwayte of his interest (as not to have two inconsistent records), and liberty to file a supplemental bill in order to raise such claim as he might be advised under the bequest made to him by the will of Thistlethwayte.

It was ultimately agreed that this bill should be filed within a given time, and that the inquiry into profits should not be proceeded with until further order.

Solicitor for plt., R. Southec, agent for H. Smith; for deft., Tamplin and Taylor.

Common Law Courts.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Wednesday, Nov. 25.

HALLETT v. DYNE.

Judgment registered—Charge on land—Compelling plt. to consent to entry on register in C. P. that plt. had taken deft. in execution on that judgment. Plt. obtained judgment in this court against deft., and registered it pursuant to 1 & 2 Vict. c. 110, s. 19, to charge deft.'s land. Plt. afterwards arrested deft. on a ca. sa. upon that judgment. Deft. then took the benefit of the Insolvent Debtors Act. After deft.'s discharge under the Insolvent Act, plt. re-registered his judgment, within five years of its being first registered. Deft. subsequently acquired land and immediately mortgaged it. The mortgage afterwards sold, pursuant to powers contained in his mortgage, but the purchaser refused to complete the purchase, in consequence of the entry and register of the judgment remaining which charged the property. The mortgagees applied to the plt. to consent to an entry being made after the entry of the judgment on the register in the book of the senior master of the Court of C. P., that the plt. took the person of the deft. in execution upon that judgment. Plt. declined, and This Court refused to order him to do so.

This was a rule (obtained by mortgagees of the estate of deft., an insolvent debtor) requiring the above-named plt. to show cause why he should not attend at the proper office, before the senior master of the Court of C. P., and consent to an entry being made on the register of judgments there, that he had caused the deft. to be taken in execution on his judgment there registered in the above-named action on payment to him of the costs of his attendance.

[Ex.]

HALLETT P. DYNE.

[Ex.]

The facts appeared to be these:—The plt. signed judgment against deft. in this suit in this court, on the 12th Nov. 1853, for 629*l.* 14*s.*, and costs 5*l.* 13*s.*, and on the same day registered it, pursuant to the 1 & 2 Vict. c. 110, with the senior master of the Court of C. P., so as to charge deft.'s land and premises. He afterwards issued a *fi. fa.* against deft.'s goods, and recovered 49*l.* 12*s.* On the 13th Jan. 1854 he caused deft. to be arrested on a *ca. sa.* issued upon that judgment, whereupon deft. took the benefit of the Insolvent Debtors Act, and on the 14th June 1854 obtained an order for his discharge when he had been in custody six months from the time of the vesting order, except as to the plt.'s and one other creditor's debts, and as to those two debts he was ordered to be discharged at the end of fifteen months from the date of the vesting order. Dft. was accordingly discharged from custody on the 4th May 1855.

On the 9th Nov. 1859 plt. caused his judgment to be re-registered. On the 14th Dec. 1861 deft. acquired some leasehold property, which he immediately mortgaged to one Daniel Rolls, who died in Sept. 1862, and letters of administration to his estate were granted to John Jenkins Rolls and Richard Rolls (the present applicants for this rule). They had signed a contract to sell the property pursuant to the powers of sale contained in the mortgage-deed, but in consequence of the plt.'s registered judgment still remaining on the register as unsatisfied, the purchaser declined to complete the purchase. The plt. refused to consent to such an entry being made as that asked. An application was made to Keating, J., at chambers, for an order similar to the rule, but he referred the parties to the court. The senior master of the Court of C. P. had been applied to, and he was willing to make such proper entry as the court might direct.

Prentice, for the plt., now showed cause against the rule.—This court has no power to make this rule absolute on the mere application of a third person who is no party to the suit. What right can a mortgagee have to compel the plt. to enter up satisfaction on his judgment against deft. to which the present applicant is a stranger, or that he has caused the deft. to be taken in execution upon the judgment? A third person not a party to the suit has no such right to interfere. First, it is submitted that these applicants cannot compel the plt. to consent to this entry; and secondly, that this motion should have been made, not to this court, but to the Court of C. P., as that is the court to control and direct its own officers. Even if the Court of Ex. had power to grant this application, it would not upon the present occasion exercise it. In *Wells v. Gibbs*, 4 Jur. 1176, Lord Langdale held, upon a somewhat similar application by a deft. to be either discharged from custody or that the memorandum made pursuant to 1 & 2 Vict. c. 110, and entered with the senior master of the C. P., should be vacated, that that (the Rolls) court had no jurisdiction over the officer of the C. P. to order him to vacate the memorandum. In *Lewis v. Dyson*, 21 L. J., Q. B., 194, Bail Court, the application was made by the assignees of the insolvent debtor; and Erle, J., there said, "If the master of the C. P. objected to the motion, I should hesitate to grant the rule." By sect. 13 of the 1 & 2 Vict. c. 110, a judgment entered up is to be a charge upon the deft.'s real estate; sect. 16, if the plt. takes the deft. in execution under the judgment before the property charged is converted into money, he forfeits the benefit of the charge; sect. 19 directs that no judgment shall affect any lands until it be duly entered in the book of the senior master of the Court of C. P. There is no power or discretion given by the Act for making entry in the master's book as to any satisfaction or discharge of the judg-

ment, and this court cannot order the master of the C. P. to make any entry in his book.

D. D. Keane contra, in support of the rule.—The Court of Q. B. has ordered such an entry to be made, and if that court could do so, this court can do it. *Lewis v. Dyson* is an express decision upon it. The rule made there was, that upon payment of the costs of the application and the plt.'s attorney's attendance before the senior master of the Court of C. P., he should consent to the master's making an entry in the book in which the judgment in the cause was registered, that after the entry of that judgment in that book the plt. took the person of the deft. in execution upon the said judgment. The mortgagees have contracted to sell this property, but cannot complete the sale, because there is this judgment remaining on the register to charge the property. The court is not now asked to order that there should be an entry made of satisfaction, but simply of the fact of the arrest. The 87th section of the 1 & 2 Vict. c. 110, provides that, before adjudication should be made with respect to such insolvent prisoner, the prisoner should execute a warrant of attorney to confess judgment for the amount of the debts in his schedule, and the court may permit execution to be taken out thereupon when the insolvent is of ability to pay, or is dead leaving assets. The plt.'s debt was in the schedule, and the insolvent ordered to be detained fifteen calendar months from the date of the vesting order for that debt; his afterwards re-registering his judgment in 1859 was a fraud by him upon the court. [*Pigott, B.*—How can we interfere with that?] The court will not drive the parties into a Chancery suit by refusing this application, when *Lewis v. Dyson* is a precedent for the rule being made absolute.

POLLOCK, C. B.—I think this rule should be discharged. I question if we have jurisdiction to interfere in the way asked; and if we had, I very much doubt whether, under the circumstances, we ought to do so. Why should we deprive the plt. of any right whatever which he may have by virtue of his judgment?

BRANWELL, B.—With all respect for the decision of the case decided in the Bail Court, of *Lewis v. Dyson*, I think we should discharge this rule. There is no provision made by the statute 1 & 2 Vict. c. 110, for any entry in the master's book of the satisfaction or otherwise of a judgment, so that, even if the debtor paid the debt, there is no provision made by the Act of Parliament for the entry of that fact upon the registry. Because the mortgagee of land acquired by the insolvent subsequently to his discharge has contracted to sell that land, we are asked to direct this special entry to be made in the register of judgments in the C. P.; but why are we to say that because of inconvenience to vendors such an entry as this should be made upon that register? Mr. Keane argued that any entry on the record of the plt.'s judgment would not answer the purpose; but I incline to doubt that, as his judgment is in fact substantially gone by virtue of the arrest. If an entry were made on our record of the plt.'s judgment, of the issuing the *ca. sa.*, the deft.'s person being arrested in consequence, and by a reference to the records of the Insolvent Debtors Court, the whole matter as to the effect of this judgment would appear, and if it has been satisfied, there are proper means of getting it shown; but I do not think the present applicants have any right to our directing the entry to be made.

CHANNELL, B.—I am also of opinion that this rule should be discharged. The plt.'s judgment obtained in this suit was the judgment of this court; but the registration of that judgment in the book of the senior master of the C. P. was under the 1 & 2 Vict. c. 110. That statute gives us no such power as is now asked. The senior master of the C. P. is the officer of that court, and the Court

[Ex.]

DELL v. KING.

[Ex.]

of C. P. alone, as it seems to me, should control the masters of their own court in that respect.

PIGOTT, B. concurred.

Rule discharged without costs.

Plt.'s attorney, Hallett; applicant's attorneys, Kingsford and Dorman.

April 29, May 4 and Dec. 7.

DELL v. KING.

Composition-deed—Unreasonable covenant—Bankruptcy Act.

A deed of composition made between deft. and several creditors "whose names and seals were affixed thereto and all other creditors" of the deft., and which was signed by a sufficient number of creditors to bind non-assenting parties, contained a covenant on the part of the creditors that "if any creditor should sue or molest the deft. or his estate in any manner unless and until default made by him in meeting at maturity the bills agreed to be taken in payment of the composition, the deft. should be thenceforth absolutely released and discharged from all debt, claim and demand of the creditor so contravening the covenant not to sue, &c., and the said deed should operate as a defeasance pleadable in law, or be otherwise set up as a defence to any action or suit, at law or in equity, theretofore or thereafter brought, instituted, or taken by or on behalf of such creditor."

In an action for debt by plt., a creditor who had not assented in writing to the deed, commenced previously to the execution of the deed, a plea setting up the above deed and covenant was

Held to furnish no defence to the plt.'s claim.

The covenant is unreasonable, and although the deed might have furnished a good defence as a composition deed if the clause objected to had not been in it, and although the clause is invalid, yet it cannot be rejected and the deed be held good without it.

A debtor has no right to make his creditor covenant, nor to subject him to the loss of his debt, if the latter thinks fit to contest the validity of the deed; as the creditor has a right to have a deed presented to him for execution which, when executed, will put no burden on him to which he ought not to be subjected: (Woods v. Foote, 7 L. T. Rep. N. S. 836, Ex. Ch.; Gardner v. Chapman, 7 C. B., N. S., 317; 29 L. J., 261, C. P.)

Seemly, that if the replication were the only step taken by plt. subsequently to the deed, it was not a "molesting" of the deft. in contravention of the covenant in the deed.

Demurrer.—This was an action for money payable for goods bargained and sold and goods sold and delivered, and for money due on accounts stated. Claim, 100l.

The action was commenced and the declaration delivered before the execution of the composition-deed mentioned in deft.'s plea.

Pleas:—1. Except as to 66l. 1s. 2d., never indebted as alleged. 2. As to the excepted 66l. 1s. 2d., that after the commencement of this suit, to wit, on 13th Feb. 1863, deft. made his deed dated 13th Feb. 1863 being a deed expressed to be made between deft. of first part, Jabez Withers second part, and the several persons, companies, and partnership firms whose names and seals were set and affixed in the schedule thereto, being respectively creditors of deft., and all other creditors of deft., third part, reciting that deft. had carried on the business of a draper and grocer, and being indebted to divers persons in divers sums of money, and being unable to pay the same in full, he on 27th Jan. 1863 called a meeting of his creditors and proposed to pay them a composition of 7s. 6d. in the pound upon the amount and in full

discharge of their respective debts, to be paid in two equal instalments of 3s. 9d. each at four calendar months and eight calendar months from 2nd Feb. 1863, and to be secured by the said Jabez Withers, and that the parties thereto of the third part, thereafter referred to as the said creditors, approved of the said proposal, and the several parties to the said deed had agreed to carry out the said proposal by the execution of the said deed, with such covenants and provisions as were thereinafter contained. And that in part performance of the said proposal deft. had accepted bills of exchange drawn upon him by Jabez Withers, or they had respectively signed joint and several promissory notes, dated respectively 2nd Feb. 1863, for the payment of the said creditors of the said two instalments of the said composition, at four and eight calendar months from 2nd Feb. 1863. And the said indenture witnessed that, in performance of the said agreement and in consideration of the premises, the said creditors did thereby severally, for themselves, and their respective heirs, executors and administrators and successors, covenant with deft., his executors and administrators, that unless and until default should be made in meeting any of the said bills of exchange or promissory notes at maturity, they the said creditors respectively would not nor should their respective heirs, executors, or administrators, partners, partner, or successors, sue, arrest, attach, or impede or molest the deft., his heirs, executors, or administrators' estate, or effects, in any manner howsoever or any pretence whatsoever. And further, that if any of them the said creditors, or any of their heirs, executors, or administrators, partners, or successors, should break or contravene the said covenant in any manner whatever, then and in such case, deft., his heirs, executors and administrators' estate and effects should be thenceforth absolutely released and discharged from all and singular the debts, claims and demands of the creditor or creditors, person or persons so breaking or contravening such covenant, and the said deed should and might accordingly operate as a defence pleadable in the law, or might be otherwise set up as a defence to any action or actions, suit or suits, or proceedings at law or in equity, theretofore or thereafter brought, instituted, or taken by or on behalf of such creditor or creditors, person or persons, or his, their, or any of their heirs, executors, administrators, partners, partner, or successors, for or in respect of such debts, claims and demands, or any of them. And it was thereby lastly agreed that the said deed was intended to be, and should so far as lawfully might be, operate as a composition-deed within the meaning of the Bankruptcy Act 1861 in that behalf. And deft. further says that a majority in number representing three-fourths in value of deft.'s creditors whose debts amounted to 100l. and upwards, in writing agreed to and approved of said deed, and the said deed was executed by deft. and said J. Withers respectively, and the execution thereof duly attested, &c., and the said deed was then and before plea duly registered as required by the Act. And deft. has always been ready and willing to deliver to plt. such securities as provided by the said deed, and before plea deft. within due time tendered and offered the same to plt., and plt. then refused to accept the same. And everything has been done and has happened to make the said deed binding upon plt. in respect of the matters therein pleaded to.

Replication.—1. Plt. joins issue on deft.'s plea. 2. Further, to plea 2 plt. says, the said supposed deed was and is in the words, letters and figures following (that is to say, setting out the deed *in totidem verbis*), the main difference between the deed as abstracted in the plea and as set out in the replication being that in the latter, in addition to the recital of deft. and Jabez Withers having signed bills of exchange and promissory notes, there is this further

recital, "and the said respective bills of exchange or promissory notes have been delivered to the said creditors respectively, as they do hereby respectively acknowledge;" and that, after the before-mentioned covenant, that the said deed should, in the event therein mentioned, operate as a defence, there is this further covenant by the said creditors severally for themselves, &c., with the said deft., his executors, &c. (without prejudice to the aforesaid covenant), "that if and when the said composition shall be fully paid to all the said creditors, then and in such case the said deft., his heirs, &c., shall be thenceforth absolutely relieved and discharged from all and singular the debts, claims and demands of the said creditors and their respective heirs, &c., and these presents shall and may accordingly thenceforth operate as a defence pleadable in bar to, or may be otherwise set up as a defence to any action or actions, suit or suits, or other proceedings at law or in equity theretofore or thereafter brought, instituted, or taken by or on behalf of the said creditors, or any of them, their or any of their heirs, &c., for or in respect of such debts, claims and demands, or any of them." Plt. says that he (the plt.) did not assent in writing to the said deed, or execute the same.

Demurrer to the further replication to second plea, and joinder in demurrer.

A matter marked to be argued is, that the deft. contends that the plea shows the deed to be binding on plt., although he did not execute or assent to it.

Deft.'s points.—That the deed set out in the replication is a good deed of composition under the Bankruptcy Act 1861, and prevents the plt. from proceeding with the action.

Plt.'s points:—1. That the further replication to the second plea is a sufficient answer thereto, as showing that the deed attempted to be set up in the said plea varies materially from the deed actually made, inasmuch as the deed set out in the replication contains an untrue recital that the bills or notes therein mentioned had been delivered to the respective creditors, as they did acknowledge. 2. That the second plea is bad in substance, on the ground that it contains no assignment, nor does it purport to assign the whole or any part of the property of the deft. for the benefit of his creditors. 3. Also, on the ground that the deed therein pleaded contains a provision declaring that any creditor whatever who sues or molests the deft. shall be thereby immediately deprived of and lose all benefit under the said deed, and that the deft. shall be thereby discharged and released, both in person and effects and estate, from the debts claimed or demanded of such creditor. 4. That the deed in the said plea pleaded is at any rate bad as a defence arising after action, since it would, if valid, deprive plt., who it is admitted has properly commenced his action, of his costs, for which the deed gives him no remedy. 5. That the deed, if it has any effect, has only that of a covenant not to sue for a limited time, and not that of a release.

Phipson, Q.C., for deft., supported the demurrer.—The question is, whether this case is distinguishable from *Oppenheimer v. Grieves*, 7 H. & N. 533; 31 L. J. 375, Ex. In the present case there was a molesting. The words of this covenant are different from and larger than those in *Oppenheimer v. Grieves*, where there was no covenant not to molest generally, but not to molest the creditor in his business. Here the deft. is not driven to allege a molesting in his affairs. The bringing an action and driving deft. to trial is a molesting, and the going on with the action is a continual molesting. *Le Bret v. Papillon*, 4 East, 502, and the observations of Lord Ellenborough there, are applicable. *Good v. Cheeseman*, 2 B. & Ad. 328, is also in point. [The Court intimated their opinion that, if the replication to the plea was the only step taken by plt. subsequently to the deed, it was not a molesting, and suggested to Phipson whether, if the

clauses as to not suing, &c. were struck out, the deed could be supported against the plt. MARTIN, B.—Consider whether the plea, if not good as a release, can be supported as an accord and satisfaction.] There is no reason why plt. should not be bound by a deed entered into by three-fourths of the creditors if it contains reasonable stipulations; and as in *Legg v. Chesborough*, 5 C. B., N. S., 741; 28 L. J. 209, C. P., the court may hold that the unreasonable clause does not apply to plt., and holds the deed good; *Macnaght v. Russell*, 1 H. & N. 611; 26 L. J., N. S., 192, Ex., shows that a deed may bind parties executing it as to unreasonable stipulations, and not those who do not execute it, and so not be wholly void. The plea is good, omitting the clauses objected to.

Inderwick, contra, for the plts.—The plea is bad:

Oppenheimer v. Grieves (*ubi sup.*);

Waller v. Adcock, 6 L. T. Rep. N. S. 583; 31 L. J. 380, Ex.

It is pleaded, not to the further maintenance, but in bar. But by *Oppenheimer v. Grieves*, deft. cannot plead it as a release. [WILDE, B.—I thought nothing was decided in that case, that it went off by arrangement.] Secondly, there has been no contravention of the covenant. If it be a plea of accord and satisfaction, it should have been to the further maintenance of the action, so that plt. might have confessed the plea and obtained his costs under rule 22, Trinity Term 1853: (1 Chit. Prac. 277.) Then also it should have appeared that the deed was good but the covenant is not reasonable: it does not enure equally for the benefit of the creditors; and, secondly, there was no assignment of all or any portion of the debtor's property. The deed should be equal in its provisions, which this is not:

Ex parte Morgan, 7 L. T. Rep. N. S. 729, L.C.; 32 L. J. 15, Bank.

Ex parte Rawlings, 7 L. T. Rep. N. S. 582, L.J.J.; 1b. 288, Bank.; 32 L. J. 27, Bank.

The deed should be a reasonable one for a man to sign; that was so before the Act, and it is the same now:

Woods v. Foote, 7 L. T. Rep. N. S. 836, Ex. Ch., 32 L. J. 199;

Gardner v. Chapman, 7 C. B., N. S., 317; 29 L. J. 261, C. P.,

in which latter case the judgment of Willes, J. is conclusive. The covenant here would disentitle the creditor from proving for his debt. He cited also *Gibbons v. Vouillon*, 8 C. B. 483, 19 L. J., N. S., 74, C. P.

Phipson, Q. C., in reply, distinguished *Gardner v. Chapman*. *Curr. adv. vult.*

Dec. 7.—POLLOCK, C. B. now delivered the judgment of the court (viz. Pollock, C.B., Martin and Bramwell, BB., (a) as follows:—In this case we are of opinion that the plt. is entitled to judgment. This was an action to recover a debt, and the plea was of a deed of composition under the Bankruptcy Act, signed by a sufficient number of creditors to bind non-assenting parties, creditors of the bankrupt, of whom the plt. was one, provided the objection to the deed, that it contained clauses by which the creditors covenanted not to sue the debtor until a certain time, and that, if any creditor did sue in contravention of the covenant, the deed might be pleaded as a release, were removed, and that such a deed was a good and valid deed, such as a creditor might be called upon to sign. It was argued for the plt. that the clause in the deed rendered the deed void; for the deft. it was argued that at the utmost the covenant was void, and the deed good. It was said that the covenant might be rejected and the deed would be a good composition-deed without it. We think that the deed would have

(a) Wilde, B. was appointed Judge Ordinary subsequently to the argument.

[Prob.]

LISTER AND OTHERS v. SMITH AND OTHERS.

[Prob.]

furnished a good defence on that ground, had the clause objected to not been in it; but although the clause would probably be invalid, it cannot be rejected. The debtor has no right to make his creditor so covenant, nor has he the right to subject him to a loss of his debt if he thinks fit to contest the validity of the deed. No such consequence follows in the case of bankruptcy. A creditor may sue the bankrupt, contesting the bankruptcy, and if he fails, he may still prove for his debt. We think these clauses invalid. But can they be rejected? We think not. The creditor has a right to have a deed presented to him for execution, which, when executed, will put no burden upon him to which he ought not to be subjected. Further, if the clause is not such as is authorised by the statute, and the bankrupt and his sureties lose the benefit of it, they may refuse to let the persons take the benefit under it for which they do not get any return. But the deed cannot be good or bad at the option of the debtor; and for these reasons we think the *pl.* is entitled to our judgment.

Plt.'s attorney, S. H. Perrin, 1, Lincoln's-inn-fields.
Def't.'s attorneys: Greville and Tucker, 28, St. Swithin's-lane.

COURT OF PROBATE.

Reported by Dr. SWABET, of Doctors'-commons.

Dec. 3 and 22.

(Before Sir J. P. WILDE and a Common Jury.)

LISTER AND OTHERS v. SMITH AND OTHERS.

Duly executed paper, testamentary on the face of it—Absence of animus testandi—Evidence.

A duly executed paper, testamentary on the face of it, is not entitled to probate if it is clearly proved, by parol evidence, that it was executed by the deceased without any intention that it should affect the disposition of his property after death. The Court of Probate, however, will not hold itself bound by the verdict of a jury to that effect, but will itself weigh the evidence on which such verdict was founded.

In this case the *plts.*, as executors, propounded a will of Ralph Wheeldon Smith, dated Oct. 1858, and a codicil thereto, dated 27th July 1860. Various parties were cited: (see 7 L. T. Rep. N. S. 219; s.c. 3 Sw. & Tr. 53.)

Macaulay, Q.C. and *Dr. Tristram* for the *plts.*
Hayes, Serjt. and *Hance*, for *Mrs. Julia Mason*, one of the parties cited, applied, with consent of the *plts.*, to amend the pleadings and record. They had been only within a day or two instructed on behalf of *Mrs. Julia Mason*, a daughter of deceased and one of the parties cited. It appeared that none of the other defts. intended to interfere; she was interested in having the alleged codicil rejected, and the only question she wished to raise was, whether the codicil of July 1860, which the executors felt themselves bound to bring forward, had been executed by the deceased with the intention that it should operate as a testamentary instrument.

This having been done, with consent of *plt.'s* counsel, the following facts were proved by the documents themselves, and the evidence of *Thomas Smith*, a brother of the deceased, and a *Mr. Green*, managing clerk to an attorney.

Julia Mason was a married daughter of deceased, and she took an interest under the will of Oct. 1858, as did the other children of the deceased. There was some dispute between *Mrs. Marshall*, the mother-in-law of *Mrs. Mason*, and the deceased, as to the title to some house property she occupied and for which he thought *Mrs. Marshall* ought to pay him rent. An agreement was drawn up,

which deceased wished *Mrs. Marshall* to sign; she refused, or in fact did not sign it. The deceased desired his brother to get a conditional codicil made with the view of compelling *Mrs. Marshall* to give up the house, or to come to his terms.

Mr. Green, to whom the brother came with her instructions said: "The condition, as far as I understood it, was that if *Mrs. Marshall* gave up the house the codicil was not to take effect; and if she refused then it was to take effect. I endeavoured to dissuade her from executing the codicil, but the notion was persisted in. I prepared it in an absolute form (revoking the benefit which *Mrs. Mason* took under the will, the notion seeming to have been that the *Masons*, being informed of the codicil, would use their influence with *Mrs. Marshall* to sign the agreement). I saw nothing more of it after I gave it to *Thos. Smith*."

Thomas Smith took the codicil, so prepared, to the deceased, who said, "I'll sign it and put it in your hands to take care of." Before he signed the codicil, *Thomas*, by his direction, wrote to *Mrs. Mason*. The codicil was read by deceased before its execution, and duly signed and attested. *Thomas* asked him whether, in the event of the agreement not being signed or complied with, he intended his daughter *Julia Mason*, and her children, to be deprived of all benefit under the will of 1858. Deceased said no, he had no intention to alter his will of 1858, but *Thomas* was to hold the codicil with the view of getting a settlement of the rent question. *Thomas* kept the codicil till compelled to give it up by subpoena from the court. The deceased died 3rd April 1861.

Hayes, Serjt. addressed the jury on behalf of *Mrs. Mason*.

Sir J. P. WILDE made the following remarks to the jury in summing-up.—The facts of the case lie in a very small compass, but the question is of great importance. It tends to make the wills of any of us very insecure, if a regularly executed document, purporting on the face of it to be testamentary, can be set aside by evidence of the sort you have just heard as to the intention of the testator that such a paper should have no testamentary effect; but I think I must leave it to you whether, upon the evidence, the deceased signed the codicil intending it to be an effective instrument, or whether he signed it as a mere sham. I must tell you that the presumption is that he intended it to be effective, and that the burden of proof is on those who say it is not.

The jury found by their verdict that the deceased did not sign the paper intending it to have any testamentary operation, and the court reserved any question as to the effect of this finding of fact upon the codicil and as to costs.

On 22nd Dec. *Dr. Tristram*, on behalf of the executors, moved, on the finding of the jury, for leave to take probate of the will, excluding the codicil. He cited various authorities in support of the motion: (see 1 Wms. Exors. 91, note 7, 5th edit.)

Sir J. P. WILDE.—The case has been very well argued, and the court is much indebted to *Dr. Tristram* for the authorities which he has collected. It is a most remarkable case, and one which since the trial has given me some anxiety. The question raised is whether a certain codicil is or is not entitled to probate. It is regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved before the jury that the testator wished one of his family to give up a house which she then occupied, and that to force her to do so, he made pretence of revoking by codicil a bequest which he had made by will in favour of this woman's daughter; and that the paper in question was made with that sole object, that the testator gave his attorney instru-

tions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all. Further, that the attorney pointed out the folly of executing such an instrument, and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator with express directions that he was not to part with it, and that it was in no event to operate, or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution. A codicil thus duly executed in point of form and attested by two witnesses has been directly impeached by parol testimony. It bears all the appearance on the face of it of a regular testamentary act; but on the evidence it has been found by the jury not to have been intended as such by the testator. The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument. And such no doubt is the law. There must be the *animus testandi*. In *Nichols v. Nichols*, 2 Phil. 180, the court refused probate to a will regularly executed, which was proved to have been intended only as a specimen of the brevity of expression of which a will was capable. And in *Travelyan v. Travelyan*, 1 Phil. 149, the court admitted evidence, and entertained the question whether the document was seriously intended or not. In both cases the court held that evidence was admissible of the *animus testandi*. And to the same effect is the authority of *Swinb.* pt. 1, s. 3; and of *Shep. Touch.* 404. The analogies of the common law point the same way. A deed delivered as an escrow, though regularly executed, is not binding. And in *Pym v. Campbell*, 6 KIL. & BL., the Q. B. held that a regular agreement signed by the party might be avoided by parol evidence that at the time of its signature it was understood that it should not operate unless a certain event happened. There can therefore be no doubt of the result in point of law if the fact is once established. But here I must remark that the court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury that their verdict recognises and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credibility. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the *animus* with which it was made. This weight it becomes the court to appreciate and to guard with jealousy the sanction of a solemn act. In the present case, however, the court finds the evidence so cogent that it is prepared to act on the finding of the jury, that the codicil was executed as a sham and a pretence, never seriously intended as a paper of testamentary operation. But I am far from saying that the court will in all cases repudiate a testamentary paper simply because a jury can be induced to find that it was not intended to operate as such. The character and nature of the evidence must be considered

as well as the result at which a jury have arrived, and the court must be satisfied that it is sufficiently cogent to its end. I pronounce against the title of this codicil to probate.

Hance, for Mrs. Julia Mason, asked that her costs of the successful opposition to the codicil should be paid out of the estate.

Sir J. P. WILDE.—I think that must be so.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABBY, of Doctors'-commons.

Thursday, Nov. 12.

(Before WILDE, J. O.)

HUDSON v. HUDSON.

Wife's petition for judicial separation—Adultery and cruelty—Evidence—Practice.

The wife petitioned for judicial separation, alleging cruelty and adultery, which the husband's answer traversed. The cause came on before the court itself, and, on objection taken to the admissibility of the petitioner's evidence as to cruelty, the Court ruled that on the issues as they stood it was inadmissible, but struck out the issue of adultery as an immaterial issue, the counsel for the husband not objecting.

This was the wife's petition for judicial separation. The petition alleged various acts of cruelty, and a charge of adultery with some woman unknown to the petitioner in May 1859. The husband appeared and traversed these charges. The case now came on for hearing before the Judge Ordinary.

Montagu Chambers, Q. C. and Dr. *Swabby* for the petitioner.

Dr. *Spinks* for the resp.

M. Chambers having stated the petitioner's case as to cruelty, proceeded to call her as a witness.

Dr. *Spinks* objected.—There is an allegation of adultery in this petition, which is traversed, and the citation calls on the resp. to answer the charge of adultery; it is therefore a suit by reason of adultery within the meaning of the 4th section of 14 & 15 Vict. c. 99, which excludes the parties "to any proceedings instituted in consequence of adultery" from being witnesses: (*Pyne v. Pyne*, 1 Swa. & Tr. 178.) The 22 & 23 Vict. c. 61, s. 6, only applies to the wife's petition for dissolution of marriage.

M. Chambers submitted that, as the petitioner could obtain the prayer of her petition on proof of the cruelty alone, on which she was a competent witness, the court would hear her as to that on the present state of the pleadings; or it would treat the issue of adultery as immaterial and strike it out.

WILDE, J. O.—I cannot think that there is any doubt as to the law applicable to the case as it now stands. The petitioner falls within the exception of the 14 & 15 Vict. c. 99, which generally enables parties to give evidence. But the real question seems to be one of cruelty, though the citation and one paragraph of the petition charges adultery. If there is nothing in the practice of the court which forbids it, I think the issue of adultery ought to be struck out, and the case proceeded with as one of cruelty merely, when the wife's evidence will be admissible. If necessary, the alteration must be taken into consideration on taxation of costs.

Dr. *Spinks*, on the part of the husband, admitted that this was the proper course to take in the circumstances of the present case.

Thursday, Dec. 17.

FITZGERALD v. FITZGERALD.

Admissibility of depositions of a deceased witness—Reasonable time for cross-examination—Practice.

The deposition of a deceased witness is admissible on condition, not only of its having been taken under the sanction of an oath, but also of sufficient notice having been given to the party against whom it is tendered to have enabled him to attend and cross-examine the witness. Where notice was given, about two p.m. on a Saturday, to resp.'s solicitor in London, that a witness was to be examined at Bath on Monday, under an order of the court, obtained by the petitioner:

Held, that the notice was insufficient to enable the resp.'s solicitor to attend and cross-examine, and that the evidence so taken without cross-examination was inadmissible.

This was the wife's petition for dissolution of marriage by reason of the husband's cruelty and adultery. The question was the admissibility of the depositions of a man of the name of Kelly, since dead, taken on oath under an order of the court dated 22nd Nov. 1862, made by virtue of the 47th section of the Divorce Act, on motion of counsel for the petitioner, a notice of such motion having been given to the resp.'s solicitor on the previous evening. The resp.'s solicitor had not instructed counsel on this motion. About two o'clock on the 22nd Nov. (Saturday) the resp.'s solicitor was served with a copy of the order, and a notice that it was intended on behalf of the petitioner to examine Kelly on Monday at Bath. No one attended at Bath on behalf of the resp., and the examination in chief of Kelly was proceeded with under the order.

Mr. Freshfield, resp.'s solicitor, was sworn and deposed to some of the above facts, and further stated that he had entered an appearance on the 11th Nov. 1862, for the resp.; that on the 15th Nov. he received notice of an examination of Kelly, described as of the *Bath and Cheltenham Gazette* office, but then in the Bath hospital, under an order of the court dated the 7th Nov.; that he wrote to petitioner's solicitor, objecting to such evidence being used; that on the 21st and 22nd Nov. he was without any instruction from his client for materials as to cross-examination, and did not know who Kelly, so described as above, might be, or what he was to speak to. Mr. Fitzgerald was in Ireland.

M. Chambers, Q.C. (Dr. Wamsey with him), in support of the admissibility of the evidence, cited Finney v. Beazley, 20 L.J.

The Queen's Advocate, Sir R. J. Phillimore (Huddleston, Q.C., and Dr. Spinks with him), contra, objected that the order was made before issue joined, and that the resp.'s solicitor had no time to prepare for cross-examination of Kelly.

WILDE, J.O.—The foundation of the admissibility of any evidence before a jury is that it should be on oath, and that the party against whom it is tendered should have had a reasonable opportunity of cross-examination. The rule has prevented the depositions even on oath of dying persons from being used as evidence. The order in this case was made by power given to the court by statute. It is said that such orders are never made before issue joined; that is no doubt the general rule, as stated in *Shaw v. Shaw*, 7 L. T. Rep. N. S. 254; 2 Sw. & Tr. 642; but subject to reasonable exceptions, as where the questions in the cause are well understood and a witness is dangerously ill. In this case I think the order is good; but the party against whom it was made should have had reasonable notice of cross-examination. I think nothing of Mr. Fitzgerald being in Ireland—when a man has appeared in a suit, it must be taken that he furnishes his solicitor with the neces-

sary information to conduct the cause; nor of the misdescription of Kelly, if it were a misdescription: the only question is, whether a reasonable time was given to admit of cross-examination. The proceedings on the first order were, I think, altogether irregular. On Friday, the 21st, notice was given to Mr. Freshfield that on the 22nd an order for the examination of Kelly would be applied for; that application was set opposed, and the order was made. At two o'clock on Saturday, notice was given that the witness would be examined on Monday at Bath. There is no particular time prescribed by the rules of the court as to summonses; the 3rd rule directs that the service must be one clear day at least before the summons is returnable, and before seven p.m.; on Saturday before two p.m. In the present case I think the notice did not allow a reasonable time for preparing a cross-examination.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqs.,
Barristers-at-Law.

Monday, Dec. 22.

(Before Mr. Commissioner HOLROYD.)

Ex parte MELLERSH, re GIBSON AND MONEY.24 & 25 Vict. c. 134, s. 153—*Proof—Dilapidation.*

M. demised to G., who subsequently entered into partnership with A., and in the partnership article it was stipulated that the firm should carry on business upon the demised premises, but that the premises should remain the sole property of G., who should be allowed the rent out of the partnership funds, and that all repairs should be at the expense of the partnership. G. and A. afterwards assigned all their estate and effects to trustees for the benefit of their creditors:

Held, that the firm was to be regarded as the under-tenants of G., the original lessee, and that M. had no claim as against the joint estate for dilapidations occurring during the partnership.

Proof. This was an application under the 153rd section of the B. A. 1861, on behalf of Messrs. Mellersh, bankers at Godalming, who claimed to prove for 1500*l.* against the joint estate of Gibson and Money, in respect of dilapidations under the following circumstances:—By indenture of lease, dated the 25th March 1861, Messrs. Mellersh demised to the bankrupt Gibson certain tanworks and other premises for a term of four years, and the lease contained a covenant that the lessee, his executors, administrators and assigns, should keep the premises in good and substantial repair.

By articles of partnership made the 11th Nov. 1860 between Gibson and Money, it was stipulated that they should carry on the business of tanners upon the premises comprised in the above lease, but that the premises should remain the sole property of Gibson, who should be allowed, out of the partnership funds, the yearly rent of 340*l.* for the use thereof, and that the premises should be insured and kept in repair at the expense of the partnership during its continuance, or until the dissolution thereof.

By an indenture dated the 16th Sept. 1863, and duly registered pursuant to the provisions of the B. A. 1861, Gibson and Money assigned all their estate and effects to trustees for the benefit of their creditors, and the trustees employed Gibson in the continuance of the trade upon the said demised premises.

The first quarter's rent was paid by a cheque drawn in the name of the firm upon the bankers of the firm. The next quarter's rent, due at Midsummer 1863, was paid by Money out of the partnership assets, and the subsequently accruing rent was paid by the trustees under the assignment by Gibson's cheque, which was

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handed to Messrs. Mellersh. The trustees never claimed any interest in the premises.

Marrough (solicitor), for Messrs. Mellersh, contended that although the legal estate in the demised premises was admitted to be in Gibson alone, yet that his clients were entitled in equity to rank as creditors against the joint estate in respect of dilapidations, inasmuch as the partnership had enjoyed the occupation of the premises and the rent had been paid out of the partnership assets. He cited

Ex parte Troup; and

Ex parte Hoare, re The Electric Telegraph Company of Ireland, 7 Jur. N. S. 901.

Linklater (solicitor), for the trustees under the assignment, was not called upon.

Mr. Commissioner HOLROYD expressed his opinion that the leasehold of the premises remained in Gibson, and that this firm was in the position of an under-tenant to him, and that consequently Messrs. Mellersh had no claim upon the joint estate.

Application refused.

Dec. 24, 26 and 31.

(Before Mr. Commissioner GOULBURN.)

Ex parte SPALDING, re A PETITION FOR ADJUDICATION.

Petition for adjudication—Service on non-trader abroad—Requisites for.

Before this court will give leave under the 70th section of the B. A. 1861 to a petitioning creditor to serve a copy of a petition for adjudication of bankruptcy against a debtor, a non-trader who is resident abroad, it must be satisfied that there is *prima facie* evidence of an act of bankruptcy.

The fact that the debtor was a trader in 1861, that he then discontinued his trade, left his place of business, but not his private residence, and went abroad, where he has resided ever since, a period of three years, whereby a creditor is delayed and defeated, is *prima facie* evidence of an act of bankruptcy within the meaning of the 70th section.

The court must be satisfied of the efforts to serve a copy of a petition for adjudication upon a debtor in strict accordance with the words of clause 3 of the 70th section of the Act of 1861, before it will order substituted service.

Quære, whether the court can order substituted service of a petition for adjudication upon a debtor resident abroad out of the jurisdiction.

It was stated in the affidavit of the petitioning creditor, that the debtor had gone abroad previously to May 1861, and had since then remained abroad, and that he was indebted to the petitioning creditor in the amount of 900*l.*, of which sum he had not been able to obtain payment.

By the 70th section of the B. A. 1863, it is enacted that if any person, "not being a trader, shall, with intent to defeat or delay his creditors, depart this realm, or being out of this realm, shall, with such intent, remain abroad, . . . such person shall be deemed to have thereby committed an act of bankruptcy, provided always, that before any adjudication in bankruptcy shall be made against the debtor under this section, the following rules shall be observed:

"1. A copy of the petition for adjudication shall be served personally on the debtor, either within the jurisdiction, or in such place or country, or within such limits abroad as the court shall, upon application for that purpose, direct.

"2. Such copy petition shall have indorsed thereon a memorandum in a form to be settled by a general order specifying the time within which the debtor is to appear on such petition; and such time shall, when the service is to be made abroad, be the

time which the court shall think reasonable, having regard to the place or country where the service is to be made:

"3. In no case shall the time for appearance be less than thirty days after service.

"4. If such personal service has not been effected, the court must be satisfied that every reasonable effort was made to effect the same, and that the attempts to serve such petition came to the knowledge of the debtor, and were defeated by his conduct."

The second General Order of Oct. 1861, being the rule referred to in the above section, is as follows:—"The memorandum required to be indorsed on a petition for adjudication of bankruptcy before any adjudication shall be made under sect. 70 of the B. A. 1861 shall be as follows:

"Take notice.—Within is a copy of a petition for adjudication of bankruptcy, verified by the oath of the petitioner, and under the seal of Her Majesty's Court of Bankruptcy in London [or for the district], filed in the said court against you the within-named E. F. The said court has ordered that you do appear on this petition on or before the expiration of days after the day of service thereof. The petition will be heard at the said court at , on the day of , at which time and place you are to appear by yourself or your solicitor on such petition.

"Dated the day of A. D.

(Seal of the court.)

Registrar.

"Solicitor in the matter of the within petition."

Roxburgh applied under the 70th section for leave to serve the debtor, who was resident in France.

Dec. 26.—Mr. Commissioner GOULBURN.—This is an application which involves a principle of the greatest public moment. Application was made to me on Christmas-eve for an order to serve a debtor who is residing abroad. The application was made under the 70th section of the B. A. 1861, and 2nd General Order of Oct. 1861, specifying within what time and limits the copy of the petition for adjudication should be served. When I questioned the sufficiency of the act of bankruptcy, I was told that it rested chiefly upon casual information and belief, and that upon such information and belief I ought at once to make the order. The learned counsel laid down a proposition so contrary to my views of the Act that I am anxious not to have it supposed that I yield to it for a moment. His contention was that under this Act of Parliament for making non-traders liable, the first process is service of the copy of the petition with the notice affixed, and he said that this may be done within the jurisdiction without any evidence whatever of an act of bankruptcy; that inasmuch as it may be done in England so it may be done abroad, within any limits the court may fix. I dissent wholly from this view, and am of opinion that evidence of the act of bankruptcy must be first given, I mean *prima facie* evidence, before a copy of the petition can be properly served. This Act, be it remembered makes for the first time non-traders subject to bankruptcy. The section sets out with the words, "if any person not being a trader, shall, with intent to defeat or delay his creditors, depart the realm, or being out of this realm shall, with such intent, remain abroad." But it is plain that mere absence is not sufficient. There must be the "intent," and the very first step the court must take is to have, as I have already said, *prima facie* evidence of an act of bankruptcy. The debtor must be deemed to have committed an act of bankruptcy before service of process. But the learned counsel likens this service of process to a bill in Chancery. I confess that I can see no resemblance whatever between the two. The Chancery process does not, like the process here, put a man in the *Gazette*. The objects and the results are dissimilar, and it is plain that the analogy will not hold for a moment. But the consequences which would result

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from the principle contended for would be most serious. Every one of us goes abroad, more especially gentlemen of the legal profession, and sometimes for a lengthened period. No one takes the precaution of paying all his debts before he goes away; but, according to the contention here, every creditor might call a gentleman back at any moment, for, according to that, it would be only necessary to show that the debtor had gone out of the realm and had taken the mail for Paris. Such a thing was never for a moment contemplated by the Legislature. There must be evidence of an intent to delay, and then, and not till then, the commissioner may make the order asked for. I now turn to the affidavit to see whether there is evidence to satisfy me of the intent to delay. I think there is. The debtor is not like a gentleman going abroad for pleasure, but is a retired trader, who left his place of business in 1861, and has remained abroad now for about three years. Any creditor may indeed think, or may swear, when a debtor goes abroad, that he is defeated and delayed thereby; but there is in this case the admitted fact that the debtor has been in France for three years; that his creditors have been thereby delayed, and I think that these facts are *prima facie* evidence under the statute of an act of bankruptcy. This affidavit is not sworn in as strong terms as I could have wished, but taking into account that this is not the case of a private gentleman, but of a retired tradesman, who quitted, not his private house, but his place of business, I think that the evidence is sufficient that he is abroad with intent to defeat and delay his creditors, and I therefore accede to the application, and make the order for service of process upon him.

Order accordingly.

Dec. 31.—Stanley (solicitor) applied for an order for substituted service, upon the affidavit of Mr. Sidney Chidley, who deposed that he could not effect personal service, and that he had good reason to believe the debtor was keeping out of the way.

Mr. Commissioner GOULBURN doubted whether he had jurisdiction to make the order asked for, but said that, before he would make the order, he must be satisfied not only that every reasonable effort had been made to effect personal service, but that, in the words of the Act of Parliament, the attempts to serve such petition were in the knowledge of the debtor, and were defeated by his conduct. In any case no further step can be taken at present, for, by the third clause of the 70th section, "in no case shall the time for appearance be less than thirty days after service."

Application refused.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Monday, Nov. 23.

ALDINGTON AND ANOTHER v. CHESHIRE.

Arbitration—Making submission a rule of court—Signature—17 & 18 Vict. c. 124, s. 16.

A submission to arbitration was signed by A., one of two pls., "for self and H." H. being the other plt. The deft. signed the submission and attended the arbitration. The award was in favour of the pls. The Court allowed the submission and the award to be made a rule of court on production of an affidavit that the plt. A. was authorised by the plt. H. to sign for him.

Needham moved to make a submission to arbitration a rule of court under sect. 17 of the C. L. P. A. 1854. The submission had been in writing and had been signed by the deft. and by the plt. Aldington "for self and John Hancocks," John Hancocks being the other plt. Hancocks had not

personally signed the submission. The deft. had attended in the course of the arbitration. It did not appear whether or not Hancocks had personally attended. The award was in favour of the pls. It was submitted that the deft. would not be injured if the court allowed the submission to be made a rule of court, because, if the award were irregular in consequence of the absence of the signature of Hancocks to the submission, the deft. could raise the objection by moving to set aside the award.

The Court directed that the submission should be made a rule of court on the production of an affidavit that Aldington was authorised by his co-plt. to sign for him.

Nov. 19 and 20.

VANQUELIN v. BOUARD.

Foreign judgment—Dones of universality of succession to a deceased person—Administration.

The plt., the widow of a French subject, was, according to the laws of France, donee of the universality of the real and personal estates belonging to the succession of her late husband and his rights and liabilities thereupon became vested in her and she became entitled to enforce those rights in her own name. She subsequently paid to the indorsee of bills drawn by the deceased and accepted by the deft. the amount due upon them, and recovered judgment against the deft. for the amount in a court of competent jurisdiction in France:

Held, on demurrer to a declaration setting out the fact, that the plt. was entitled to sue the deft. in England in her own name, without having first taken out administration in England to her deceased husband.

The judgment of a foreign court may be impeached in this country by an averment of any facts showing that the court was not a court of competent jurisdiction, but not by an averment of facts which might have been set up by way of defence in the foreign court and might have been tried and decided there.

Declaration.—First count. Reine Claudine Vanquelin by, &c., sues A. F. Bouard for that heretofore, to wit, in the year 1840, at Orleans, in the empire of France, one Jacques Vanquelin, being a French subject, and domiciled in the said empire, by three certain bills of exchange, directed to the deft. at Paris, required the deft. to pay to him, the said J. Vanquelin's order, at the several times therein mentioned, certain sums of money, amounting in the whole to the sum of 14,000 francs in money of the said empire, and the deft. in Paris accepted the said bills, and the said J. Vanquelin indorsed the said bills in France aforesaid to one Bolli, and the said bills arrived at maturity, and according to the laws of the said empire the deft. was under the primary obligation to honour and pay the amount of the said drafts, and the said J. Vanquelin was also liable as drawer of the same to pay and take up the same in case the deft. dishonoured the same, and the said bills were all dishonoured by the deft., and afterwards according to the laws of the said empire the said Bolli as the holder and indorsee of the said bills took proceedings in the Court of the Tribunal of Commerce of the department of the Seine, which was a court of competent jurisdiction in that behalf, against the deft. as acceptor, and the said J. Vanquelin as drawer of the said bills, in order to enforce payment thereof, and certain proceedings were thereupon duly had in the said court according to the laws of the said empire, and according to the practice and procedure of the said court, and a judgment of the said court was obtained by the said Bolli against the said J. Vanquelin and the deft., and by the said judgment it was

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adjudged and considered that the deft. and the said J. Vanquelin were indebted to the said Bolli jointly and severally in the said amount of the said bills, namely, 14,000 francs of money of the said empire, being equal to 560*l.* sterling money of Great Britain, together with interest at the rate of 6 per cent. per annum from the day of the maturity of each bill till judgment, and the deft. and the said J. Vanquelin were condemned to pay the said amount, together with costs, and thereupon according to the laws of the said empire, the said J. Vanquelin was, according to the said laws, under an obligation to satisfy the amount of the said judgment, being the said principal sums and interest, and also, further, to pay interest upon the amount of the said judgment at the said rate till payment, and also according to the said laws the deft. was liable to the said J. Vanquelin for the amount of the said bills, and in case the said J. Vanquelin paid the amount of the judgment to the said Bolli, the deft. would become liable to pay the said J. Vanquelin the amount of the said judgment, together with interest upon the same at the rate of 6 per cent. per annum until payment, and the said J. Vanquelin would become entitled to the benefit of the said judgment against deft., and would be substituted for the said Bolli in all his rights upon the same against the deft. and entitled to enforce the same for his own benefit against the deft., and the plt. says that afterwards, and whilst the said judgment was in full force and unsatisfied by either the deft. or the said J. Vanquelin, the said J. Vanquelin died within the said empire of France, and the plt. says that she was, in accordance with the laws of the said empire, the donee of the universality of the real and personal estates belonging to the succession of the said J. Vanquelin at his death, and thereby and according to the laws of the said empire, all rights, claims and causes of action, and also all liabilities and obligations of the said J. Vanquelin, vested in the plt. personally and absolutely, and the plt. became, according to the said laws, liable personally upon the said judgment, and also entitled personally, and in her own name, to sue for and enforce all the rights and claims of the said J. Vanquelin, and the plt. was, according to the said laws, substituted for and placed in the same position with respect to the deft. as regards the said bills of exchange and the said judgment thereon to all intents and purposes as the said J. Vanquelin had been in his lifetime, and the plt. says that afterwards, and whilst the said judgment was in full force and unsatisfied, and the plt. and deft. were both liable thereupon, the plt., in accordance with the laws, was obliged to pay, and did pay, the full amount of the said judgment, and all interest due thereon; and thereupon the said Bolli, according to the laws of the said empire, delivered to the plt. the said bills of exchange and the record of the said judgment, and the plt. then became and was, and still is, according to the laws of the said empire, entitled to the benefit of all the rights of the said Bolli upon the said judgment against the deft., and entitled to enforce the same against the deft., and to be substituted for the said Bolli in all his said rights against the deft. in respect of the said judgment, and the deft. became and was indebted and liable to pay to the plt. the amount so paid by the plt. upon the said judgment, together with 6 per cent. per annum interest thereupon until payment, and afterwards, and before this suit, the deft. having neglected and refused to pay to the plt. the said moneys so due from him to the plt. as aforesaid, the plt., in order to keep alive the said liability of the deft., and to prevent the same from being barred by lapse of time, and also in order to give effect to and enforce her said claim against the said deft. for the said moneys due upon the said judg-

ment, and the further interest due upon the same, took proceedings in the said court, namely, the Tribunal Civil of the First Instance of the department of the Seine, being a court of competent jurisdiction, in that behalf, and certain proceedings were thereupon had in the said court according to the laws of the said empire, and the practice and procedure of the said court against the deft. at the suit of the plt., and thereupon according to the practice and procedure of the said court, that is to say on the 2nd April 1862, by adjudication of the said court an injunction was made to the deft. in the name of law and justice, to pay within twenty-four hours to the plt. the several sums of money following: that is to say, first, 14,000 francs of money of the said empire, being the principal amount of the said bills of exchange; secondly, 17,640 francs of money of the said empire for interest upon the same at the rate of 6 per cent. per annum from the 2nd Feb. 1841 to the 2nd Feb. 1862; thirdly, the interest from the said 2nd Feb. 1862 until payment at the said rate; fourthly, 152 francs 60 cents. of money of the said empire for costs, and failing to do so, it was adjudged and notified to the deft. that he would be constrained to do so by all lawful means, and by arrest of his body, and all conditions precedent were performed, and all times elapsed, and all matters and things have been done and happened, necessary to entitle the plt. according to the laws of the said empire to be paid the said sums of money amounting in the whole to the equivalent in sterling money of Great Britain of 1285*l.* 10*s.* 10*d.*, which the deft. was so enjoined to pay to her as aforesaid, and the deft.'s liability to pay the same still was at the commencement of this suit, and still is, in full force and effect, and the deft. wholly refuses to pay the same or any part thereof, and the whole remains due and unpaid.

Second count.—For that heretofore, to wit, at Orleans, in the empire of France, one J. Vanquelin, by his three several bills of exchange now overdue, directed to the deft. at Paris, in the said empire, required the deft. to pay to him the said J. Vanquelin's several orders the three several sums of money following (that is to say): one bill for 5000 francs of the money of the said empire, another bill for 4000 francs of the said money, and a third bill for 5000 francs of the said money, amounting in the whole to 14,000 francs, being of the equivalent value of 560*l.* sterling money of Great Britain, at the several dates therein mentioned, and the deft. accepted the said bills, and the deft. thereupon became liable according to the laws of the said country to honour and pay the said drafts at maturity, and the deft. dishonoured the said drafts, and each of them, and thereupon, according to the laws of the said empire, the deft. became indebted to the said J. Vanquelin in the several amounts of the said bills, and liable to pay to him the said amounts of each, together with 6 per cent. interest thereon until payment, and afterwards, and before this suit, and whilst the whole of the said several principal sums of money due from the deft. to the said J. Vanquelin, together with the said interest, were due and wholly unpaid, and the deft.'s liability to pay the same and each of them was in full force and effect, the said J. Vanquelin died, and the plt. was, according to the law of the said empire, the donee of the universality of the personal and real estates belonging to the succession of the said J. Vanquelin, and thereupon became entitled to all debts, claims, and causes of action which the said J. Vanquelin was entitled to, and the same became, and were, according to the said laws, vested in the plt. personally and absolutely, in the same manner to all intents and purposes as they were vested in the said J. Vanquelin, and the plt. was and is entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the said

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J. Vanquelin upon the said several bills of exchange became vested in the plt., and the plt. became entitled to sue the deft. thereupon in her own name and in her own right. And the plt. says that the deft. has wholly refused or neglected to pay to her the amount of the said bills and interest, or any part thereof, and at the commencement of this suit the whole remained unpaid. And the deft. was justly indebted to the plt. in respect of the premises, and according to the said laws, in the sum of 31,990 francs in money of the said empire, for the principal of the said three bills of exchange and interest thereon, at the said rate, being equal to 1279l. 10s. 6d. sterling money of Great Britain, and deft. has neglected and refused to pay the same, or any part thereof.

First plea to the first count.—That though the said J. Vanquelin drew the said bills of exchange, yet he did not draw them at Orleans as alleged.

Eleventh plea to the first count.—That the sums of money alleged to be due by virtue of the said judgment and the said injunction, and under the circumstances in the said count mentioned, would, according to the laws of the said empire of France, form part of the succession of the said J. Vanquelin deceased, and be assets in the hands of the plt., as such donee of the universality of the real and personal estates belonging to the said succession of the said deceased to be administered, such donee being, according to the said laws, the representative of the said deceased in France, and entitled to the said sums of money in her said representative capacity, and not otherwise. And the deft. further says, that the plt. is not in this country the executor of the last will and testament of the said J. Vanquelin, deceased, or the administrator of the goods, chattels and credits which were of the said J. Vanquelin, deceased, at the time of his death.

Twelfth plea to first count.—That the judgment in the said count first mentioned was a judgment by default against the deft., for not appearing in the said proceedings in the said Court of the Tribunal of Commerce, and that, according to the law of France, the said judgment and the said injunction in the said count mentioned would become void and of no effect, as of course, as soon as the deft. entered an opposition to the said judgment in the said court in which the same was obtained.

Thirteenth plea to the first count.—That the said judgment of the said Court of the Tribunal of Commerce was a judgment by default for want of appearance by the deft., and that the said court was not a court of competent jurisdiction in that behalf as alleged, according to the laws of the said empire, because the deft. was not a trader when he accepted the said bills, and because the said bills falsely purport to have been drawn at Orleans, whereas the said bills were not drawn at Orleans, and that the said J. Vanquelin was not there domiciled at the time the said bills were so drawn as aforesaid.

Sixteenth plea to second count.—That the plt. is not in this country the executor of the last will and testament of the said J. Vanquelin deceased, or the administrator of the goods, chattels and credits which were of the said J. Vanquelin deceased at the time of his death.

Eighteenth plea to the first and second counts.—That the said J. Vanquelin deceased and the deft. in the said empire of France agreed to purchase for their joint benefit a certain debt due to one Madame de Querique, and charged upon certain property in France, at a certain price which was below the amount of the said debt, and it was agreed between them that the said deceased should advance the purchase-money, and that the deft. should accept the said bills in the said counts mentioned as a security to the said deceased in case the said debt should not realise the amount of the said purchase-money, and, except as aforesaid, there was

never any value or consideration for the deft.'s accepting the said bills, and the deft. says that the said deceased recovered and received a large sum of money in respect of the said debt, and retained the same, and that the part or share thereof belonging to the deft. and so retained by the said deceased, was more than sufficient to satisfy the claim of the said deceased in respect of the said judgment and bills of exchange.

The deft. demurred to both counts of the declaration, and the plt. demurred to the pleas set out above. The first plea was admitted to be bad by the deft.'s counsel. With respect to the other demurrers,

M. Smith, Q. C., for the plt., referred to

Story's Conflict of Laws, 2nd ed., s. 513;

Tyler v. Bell, 2 Myl. & Cr. 89;

Attorney-General v. Bowdren, 4 M. & W. 171;

1 Williams on Executors, 5th ed. 786.

Jush (Hodgson with him), for the deft., contended that it was necessary for the plt. to take out administration to her deceased husband in England before suing:

Whyte v. Rose, 3 Q. B. 506;

Ord v. Fenwick, 3 East, 104. *Cur. adv. vult.*

Nov. 20.—*ERLE, C. J.*—In this case many questions were raised with reference to the French law. The foundation of the litigation against the deft. as the acceptor of a bill of exchange lies on that bill of exchange. The deceased Vanquelin was the drawer of the bill, and the deft. was the acceptor, and Bolli the indorsee brought an action against the drawer and the acceptor jointly in the courts of France, and had judgment against them both. Then Vanquelin the drawer died, and the present plt., his widow, became donee of the universality of the succession to her husband, and she says this entitled her to all the property and all the rights of her deceased husband, and subjected her to all his liabilities at the time when he died; that she has all the property and all the rights of her deceased husband in her own right; and she says that afterwards she was compelled to pay Bolli, the holder of the bill, the principal and interest due upon the bill, and the costs of the judgment against her husband, and thereupon Bolli handed over the bill to her, and she became entitled by the French law to all the rights that Bolli had against the deft. as the acceptor of this bill, and she now sues the deft. in his capacity of acceptor of the bill. She goes on to allege that she afterwards took proceedings in the tribunal in the department of the Seine, and there it was adjudicated that she might have execution against the deft. for the principal and interest due upon the bill, and the costs of the former judgment and the subsequent interest, and the costs of that application to the tribunal of the department of the Seine. That is the substance of the first count. Then the second count is that she, upon the death of her husband, being the donee of the universality of his succession, in her own right took possession of the bill, and therefore became the holder of the bill of which the deft. was the acceptor, and she demands payment of it. There is a demurrer to the first count of the declaration, and the ground of the demurrer is that the plt. sues in her representative capacity, the title on which she depends being a title that accrued by reason of the death of her husband, and that she cannot therefore enforce payment without having taken out administration in this country. Now the allegation in the declaration is, that being donee of the universality of succession according to the law of France, she is entitled to all the rights and all the property of the deceased absolutely in her own right, and not in her representative capacity. I am of opinion that, if it were necessary to stand upon that averment, it must be taken to be true, and that she sues on a right given her by the law of France. All

the parties to the matter were domiciled in France, and her right according to the law of France would give her a *locus standi* in her personal capacity and not in her representative capacity. But it is not necessary to stand upon that ground in respect of the first count, because she paid what was due under the judgment to the holder of the bill, after the death of her husband, out of the assets in her hands. That in this country would give the representative a right to sue in his own person, being in respect of matters happening after the death of the deceased. Although what was recovered might be assets, and although what was done might have been done in respect of liabilities of the deceased, in many cases the executor or administrator has the right to sue either in his representative or in his own personal capacity. The cause of action here is chiefly founded on what was done by the present plt. after the death of her husband. There is the further answer to the demurrer to the first count, that the plt.'s rights were confirmed by the second judgment, or second adjudication of the department of the Seine, entitling her to execution against the deft. It seems to me, on the first count, there is, upon the grounds I have mentioned, an abundant answer to the objections made, without resorting to all the averments upon the record, and standing merely upon the averment that as donee of the universality of the succession the plt. is entitled in her own right personally to enforce all the rights which her husband had. In respect to the demurrer to the second count, it is clear that the plt. took the bill on the death of her husband, and unless there was some special averment on the record it would be necessary to aver that she had taken out administration; but there is an averment on the record in respect of the property that belonged to the deceased, which it seems to me ought to be construed according to the law of France, to the effect that she is entitled to sue in her own right upon the bills of exchange, because the being the donee of the universality of the succession gives her a right different from that which an executor or administrator would take. I am therefore of opinion that the plt. is entitled to our judgment upon the demurrers to both counts of the declaration. Then follow a number of pleas, and, with regard to the first of those which says that the bill was not drawn in Orleans, that is clearly bad on demurrer. The eleventh plea is to the first count, and alleges that the money claimed in the first count would be assets in the plt.'s hands. What I have said about the right of the plt. to maintain an action upon the first count after the death of her husband, and about the right of the plt. in respect of the second adjudication in the department of the Seine, is an answer to that plea, and entitles the plt. to judgment upon the demurrer to that plea. The twelfth plea to the first count is an allegation by the deft. that the first judgment was a judgment by default, and would become void as of course if the deft. entered an appearance. The judgment of a foreign court is valid and may be enforced by action here; and although it is subject to the contingency of being set aside if the deft. takes a certain course, it is valid until defeated. According to the plea the deft. might, by entering an opposition, get that judgment set aside; but until that is done the plt. has a right to insist upon it. In the thirteenth plea the deft. says, that the judgment of that court ought not to bind him, because it was a judgment of a court not of competent jurisdiction, for two reasons which are specified. But according to this plea the court had jurisdiction over the person of the deft. and over the subject-matter. If the deft. was not a trader and not resident in the district where it was proper that this suit should be entertained, and those were matters that would have furnished a defence for him in the court below, they are not matters that can be tried here. It is quite con-

sistent with that view, that if he had set up in effect in France that he was not a trader, they would have adjudicated that he was a trader. The definition of a trader in the French law may be perfectly different from the definition of a trader in the English law. If the adjudication be taken to be, that he was a trader within the meaning of the French law, and it be tried by a jury here whether he was a trader or not, the verdict of the jury may be quite consistent with the evidence, and yet owing to the difference of the definition of a trader, the foreign judgment may be wrongfully impeached. The grounds upon which a foreign judgment may be impeached have been considered repeatedly, and the law is laid down, in the case of *The Bank of Australia v. Nias*, 17 Q. B. 717, that all matters which constitute a defence that might have been tried in the foreign court cannot be brought forward here for the purpose of impeaching the validity of the judgment. The sixteenth plea to the second count alleges that the plt. was not executrix. For the reasons which I have stated in speaking of the demurrer to the second count of the declaration, I think that this plea is bad. The eighteenth plea states facts which show that the bills were accommodation bills, and that the deceased was abundantly compensated for the moneys which he advanced. As between the original parties to the bill, I think that this plea discloses a valid defence, and it is an answer to the second count of the declaration, but not to the first, which alleges that the plt. paid the money due upon the bills after her husband's death, and obtained a judgment in her favour against the deft. after her husband's death. The plea is pleaded to both counts, and the demurrer to the plea must be taken to be several. There will therefore be judgment for the plt. in respect of all the demurrers except as to the eighteenth plea; and as to so much of the demurrer to that plea as relates to the first count, there will be judgment for the plt., and as to so much as relates to the second count judgment for the deft.

WILLIAMS, J.—I am of the same opinion. With respect to the first count, I think that our judgment on the demurrer ought to be for the plt.; and in so holding, I do not consider that the court have in any way departed from or diminished the effect of the rule which has long been established by a series of cases, both at law and in equity, upon this subject. That rule I take to be this: that in a suit in any court in this country, whether at law or in equity, in respect of the personal rights or property of a deceased person, the plt. must appear to have obtained probate or administration in the proper court in this country. That rule has been established by many decisions in this country, and particularly by the cases of *Tyler v. Bell*, and *Price v. Dewhurst*, 4 M. & C. 81; and it has been recognised in the judgment of the Ex. Ch. in *Whyte v. Rose*, cited in the course of the argument. The rule so established by the English decisions has also been recognised in the United States of America, as appears from a note by M. Troubat, in his edition of *Williams on Executors*, stating, however, that the rule does not apply unless the plt. sues in right of a deceased person. Applying those principles to the first count of the declaration, it seems to me to be very plain that the right which the plt. seeks to enforce by the first count is not a right which existed in the deceased, or formed part of his estate at his death; but is a right that the plt. herself has acquired by law since the death. It is a right derived from the payment made by plt. in ease of the deft., and from the judgment obtained by the plt. since the death of the deceased. The rights that she seeks to enforce by the first count are not rights that ever were vested in or formed part of the estate of the deceased, but they are rights which the plt. has herself acquired, and which she herself has a right to assert and maintain in her own name. These considerations, however, do not

apply to the second count; and as to that, I have felt considerable difficulty. My Lord and my brother Keating have come to the conclusion that this count is capable of being construed in a way to which I shall presently advert. I do not feel myself justified in differing from them, though I have some doubts whether that construction is the proper one. There is no doubt that by the law of this country it has long been established that the property which a man originally takes as executor may become his own in consequence of subsequent acts done by him. That was established as early as the case of *Merchant v. Driver*, 1 Wms. Saun. 306, 307, where it is said, "If an administrator pay with his own money the debts of the intestate, in such order as the law appoints, to the value of all the goods, he may lawfully dispose of the goods as he pleases." By so doing he becomes entitled to the goods, he pays for them with his own money, and is in the same position as anybody else would be who had purchased them. Now the second count of the present declaration contains an averment that the plt. was in accordance with the laws of the empire the donee of the universality of the real and personal estates belonging to the succession of the said Vanquelin at his death, and thereby, and according to the laws of the said empire, all rights claims and causes of action, and also all liabilities and obligations of the said Vanquelin, vested in the plt. personally, and the plt. became, according to the laws of France, liable personally upon the said judgment. Now the construction which the court puts upon that count is that it appears that the plt. by some course of conduct and proceeding which is not particularised in the declaration, and need not be particularised, has by the law of France become herself the owner of this property. I had a strong opinion that this was only a disguised averment seeking to get rid of the rule requiring administration by an indefinite mode of stating that the plt. is the personal representative of the deceased in a way not according to the ordinary rule respecting personal representatives, and in truth that it amounted to no more than a statement that she was the personal representative. The construction of my Lord and my brother Keating treats this allegation as amounting to an averment that according to the law of France the plt. had by reason of the liability she had undergone become personally and individually the holder of these rights, and if so, she has the power of enforcing the law in her individual character without clothing herself with the title of personal representative. With respect to all the observations made upon the pleas by my Lord, I fully agree with him, and I need not repeat them.

KEATING, J.—I am entirely of the same opinion upon the first count, and, with reference to that, I entirely agree in the observations made by my Lord. Upon the second count it is not to be supposed that there is any difference of opinion between any of the members of the court as to the principle which should govern the question whether or not administration in this country must be taken out by a foreigner. There is no doubt that the principles laid down by my brother Williams have been established, and we do not intend, in the slightest degree, to shake them. I agree with my Lord in thinking that this second count does sufficiently show, upon the face of it, that, according to the laws of France, and by those laws as stated in the declaration, the plt. was entitled in France to this succession, and to sue in her own name and in her own right. It seems to me that that is alleged with sufficient distinctness upon this second count, and by the demurrer admitted to be so according to the laws of France. I also entirely agree in what has been said in reference to the pleas. At first I was, I confess, disposed to think that the thirteenth plea presented a considerable difficulty; but I think the distinction taken at the

bar is a well-founded distinction. There can be no doubt that a foreign judgment is impeachable if it can be shown by extrinsic facts that the court had no jurisdiction; but it is equally true and well established that a foreign judgment cannot be impeached by a denial of any facts which could have been tried by the foreign court. We must assume that the facts mentioned in the plea were tried by the court in France. We cannot retry them here according to the laws and customs of this country. I think, also, that this plea is very loosely framed, and does not contain a sufficiently distinct allegation that these facts would, according to the law of France, have deprived the court of jurisdiction.

Judgment for the plt. upon all the demurrers except so much of the demurrer to the 18th plea as related to the second count of the declaration; upon which, judgment for the deft.

Attorneys for the plt., *Flux and Argles*.
Attorneys for the deft., *Cotterill and Sons*.

Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Saturday, Dec. 12.

(Present.—The Right Hon. Lord CHELMSFORD, Lord KINGSDOWN and Sir J. T. COLERIDGE.)

THE MODERATION.

Ship—Collision—Sailing in opposite directions—Burden of proof—Affirmative evidence—Carrying lights.

Where two English vessels, the D. schooner and the M. barque, were approaching in opposite directions nearly end-on, and a collision occurred in a dark night off Sicily:

Held, whether the D. had seen the course of the M. or not—in other words, whether the M. carried lights or not—it was the duty of the D., seeing the M. on her starboard bow, not to port her helm, but to keep her course. And the M., seeing the D. on her starboard bow, D. having her green light visible, ought not to have ported; but having done so, the M. was alone to blame.

This was an appeal from a decree of the Court of Admiralty in a cause of collision between the schooner *Deesse* and the barque *Moderation*. The *Moderation* ran stem on into the starboard bow of the *Deesse* off Sicily. The circumstances are thus stated and commented on in part of his address to the Trinity Masters by the learned judge.

Dr. LUSHINGTON.—It appears to me, upon the best consideration I can give this case, our decision must mainly depend upon the fact whether or not the *Moderation* carried lights, and for the reasons which I am now about to state to you. I apprehend it appears, both from the pleadings and the evidence, that the *Deesse*, the schooner proceeding in this cause, was so meeting the *Moderation* that, unless some particular cause intervened, it was the duty of the *Deesse* to have ported her helm. It is admitted on all hands that that was not done. I say, from the pleadings and evidence, and in the first instance I will direct your attention to the petition on the part of the *Deesse*, and subsequently to the evidence which has been given according to the petition. The *Deesse* was sailing on an east-south-east course, close-hauled on the port tack, with the wind from the north-east, when a vessel, without any light visible, was made out at the distance of about half-a-mile, and about from half a point to a point on the starboard bow of the *Deesse*; and owing to her not having any light exhibited, she

was supposed to be going the same way as the *Deesse*. Now, I cite this at the present moment merely for the purpose of showing to you the direction in which the two vessels were meeting; it was very nearly end-on, according to this statement; and according to the statement on the other side, the vessels were approaching each other in opposite directions, so that both statements agree that the vessels were approaching each other not quite end-on, but nearly end-on. With regard to the evidence, the *Moderation* states that the *Deesse* was about half a point on the port bow, whilst the evidence of the *Deesse*, rather differing from the petition, states that the *Moderation* was approaching from a point to a point and a half on the starboard bow of the *Deesse*; but I think, from such statements, you will apprehend it comes to this, that unless some peculiar circumstances occurred, these being two English vessels meeting each other in opposite directions, it was the duty of both vessels to port, and so avoid a collision. Now, if this be so, it lies upon the *Deesse* to show that some reason intervened which rendered it impracticable for her, without incurring immediate danger, to obey the directions contained in the statute, and satisfactorily to account for her having starboarded her helm instead of having ported it. Now, her mode of accounting for it is this: she states, in the first instance, that it was impossible for her to see this vessel at an earlier period, inasmuch as she carried no lights; therefore the question arises immediately, whether the *Moderation* did or did not carry lights. (The evidence in detail was then stated.)

(After consultation.)—We are of opinion that the burden of proving that the *Moderation* carried lights was upon her, and we think that the evidence produced is not sufficient to prove the affirmative, though the helmsman might have seen the shadow of the lights. We are more inclined to this opinion, because other witnesses might have been called to prove the fact in question. We think that the *Moderation*, after seeing the green light, was not justified in porting her helm at so late a period. We consider that the mate of the *Deesse* was greatly to blame in leaving the deck until relieved, but the evidence does not show that the collision is attributable to such negligence. We attribute this collision to the *Moderation* having improperly ported her helm, and we think it was not caused by what was done on board the *Deesse*. That is a judgment for the *Deesse*. We think that the affirmative is not proved, but we think that the collision was occasioned by the *Moderation* having improperly ported her helm, and was not occasioned by anything having been done or omitted to be done on the part of the *Deesse*.

The *Moderation* appealed against this decree.

The *Queen's Advocate* and *Brett*, Q. C., for the app., contended that the decree was wrong, for it assumed the burden was on the *Moderation* to prove she had proper lights, whereas the burden lay on the *Deesse* to prove the contrary; moreover, that the *Deesse*, by starboarding instead of porting when the *Moderation* ported, contributed to the accident.

Dr. Deane, Q. C. and *E. Clarkson*, for the resp.

Lord CHELMSFORD.—In this appeal, in a suit for recovery of damages in respect of a collision brought by the owner of the schooner *Deesse* against the owner of the barque *Moderation*, the app. the owner of the *Moderation* offered two grounds of objection to the judgment against him: first, that the learned judge of the Court of Admiralty declined to decide a question essential to the proper determination of the suit; second, that his judgment proceeded upon a ground which was not raised upon the pleadings. The app.'s case is, that just before the collision the vessels were sailing in opposite directions in such a relative position that the rule prescribed by the 296th section of the

Merchant Shipping Act applied, and both vessels were bound to put their helms to port, "unless the circumstances of the case were such as to render a departure from the rule necessary;" that the resp. does not allege the existence of any such circumstances, but attempts to excuse the non-compliance with the rule by reason of the *Moderation* not having any lights exhibited, in consequence of which it could not be known which way she was proceeding; that the question whether the *Moderation* carried lights or not at the time of the collision was therefore the vital question in the cause which the judge was bound to decide one way or the other. In one sense it is undoubtedly true that the question of lights would be an essential one to determine; for, if the *Deesse* was bound to have ported her helm and could only excuse herself for not doing so by the absence of lights on the *Moderation*, the finding that the *Moderation* had lights would of course have been decisive of the case against the *Deesse*. But, on the other hand, if the *Deesse* was not bound to have ported her helm, the case would not have turned upon the question of lights, although the *Deesse* might have attempted to excuse herself for a supposed error by the assertion of a fact which was not proved. In any view of the case the question of light was certainly an important one, and evidence was properly adduced upon it on both sides. The app. insists that his evidence being affirmative ought to be more regarded than that of the resp., which is only negative. But negative evidence sometimes approaches very nearly to that of a positive character, as in the present case, where the witnesses were on board the *Moderation* after the collision, when the lights were said to have been burning, and state that they saw none. In the app.'s affirmative evidence the helmsman ought not to be reckoned, because, although he states positively enough that he saw the lights, and it was suggested that though the lights themselves might be screened from his view where he stood at the helm, yet that he might see them reflected upon the atmosphere, their Lordships are told by their nautical advisers that this is not at all probable. The learned judge of the Court of Admiralty might well be warranted therefore in preferring the negative evidence of the resp. to the single affirmative witness of the app. But it is objected that the learned judge improperly shifted the onus of proof, and threw upon the app. the duty of proving that the *Moderation* carried lights instead of requiring the resp. to prove that she had no lights. This, however, seems to be inaccurate. In his summing up the learned judge distinctly told his assessors that it lay upon the *Deesse* to show the reason which rendered it impracticable for her to obey the directions of the statute, the only reason alleged being the absence of lights on the *Moderation*. When the learned judge, therefore, after the whole of the evidence had been considered, used the words, "We are of opinion that the burden of proving that the *Moderation* carried lights was upon her," he must have meant that the negative evidence of the resp. had thrown upon the app. the necessity of offering affirmative proof, and that he had satisfactorily discharged himself of the obligation. This view of the meaning of the learned judge will serve to dispose of the objection of his not having decided the question of lights, because it necessarily involves an opinion upon the point. But the learned judge was not bound to determine the question of lights at all, if, in his judgment, the case could be decided without any reference to it. And such was his opinion, for he considered that the *Moderation* was solely to blame, because she was not justified in porting her helm at so late a period after seeing the green light of the *Deesse*. To this, however, the app. objects that such a case as this is never suggested by the resp. upon his

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NESBITT V. BERRIDGE.

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petition. But their Lordships think that there is no ground for this objection. The resp., in the third article of his petition, says that the *Moderation* was first seen upon the *Deesse's* starboard bow (which of course was that upon which the *Deesse's* green light would be seen from the *Moderation*), and that the *Moderation* afterwards, under a port-helm, ran into and struck her on her starboard bow. This is not like a case where the injury is alleged to have taken place in a manner totally different from that which is afterwards proved; for here the manner in which the collision was produced is described, not specifically indeed, but in general terms, and it was substantially proved. The turning point in this case is, the question upon which side the vessels were first seen from each other? The evidence of the resp. is very strong to show that the *Moderation* was first seen on the starboard side of the *Deesse*. On the part of the app. one witness states that they first saw the red and not the green lights of the *Deesse* from the *Moderation*; but in this he is at variance with the app.'s own preliminary account, which states that both the red and the green lights of the *Deesse* were first seen. Their Lordships are satisfied upon the evidence that the *Moderation* must have seen the green light of the *Deesse* in the first instance, and before she ported; and if so, the whole case may be disposed of upon a very short ground. Whether the *Deesse* had seen the course of the *Moderation* or not, or, in other words, whether the *Moderation* carried lights or not, it was the duty of the *Deesse*, seeing the *Moderation* on her starboard bow, not to port her helm, but to keep her course, which she did; she was, therefore (apart altogether from the question of lights) entirely right. The *Moderation*, seeing the *Deesse* on her starboard bow, ought not to have ported, and is therefore alone to blame, and their Lordships will recommend to Her Majesty that the judgment be affirmed with costs.

Decree affirmed.

App.'s proctors, *Dyke and Stokes*.Resp.'s proctors, *Toller and Sons*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Nov. 14 and 16.

(Before the LORD CHANCELLOR (Westbury).)

NESBITT V. BERRIDGE.

Mortgage of policy of assurance—Substituted policy—Right to proceeds of policy.

Plt. having mortgaged his interest in a sum of stock and two policies of assurance, sold the equity of redemption, together with a reversionary life-interest in two other sums of stock, to a purchaser, under pressure of circumstances, at an under-value. The two policies dropped, and an assignee of the purchaser, without the plt.'s concurrence, substituted for them another policy on the plt.'s life in the same office, and assigned the same to the mortgagee, who agreed to accept it in lieu of the original security. Afterwards the assignee of the purchaser paid off the mortgage and continued to pay the premiums.

Plt. filed a bill to set aside the sale, and a judgment was obtained in his favour, but pending the litigation, he died, and the policy money becoming payable, was received by the assignee of the purchaser.

The M. R. was of opinion that the policy moneys belonged to the person who, without being under any obligation to pay the same, had done so at his own risk:

Held (reversing the above decision), that the equity which had been established to exist as against the original policy extended to the policies which had been substituted for it, and that the plt.'s representatives were entitled to the proceeds.

This was an appeal from part of a decree made by the M. R.

The suit was instituted for the purpose of setting aside a sale by the plt. Joseph Ray Nesbitt, of the equity of redemption in a sum of consols, and in two life policies, and of a reversionary life-interest in two other sums of stock.

The original mortgage was made by the plt. in 1855 to a Miss Jackson, to secure 800*l.*, and comprised a sum of 3978*l.* Consols, and two policies of assurance, one for 700*l.* and the other for 200*l.*, which the plt. had effected on his own life. The sale in question was made when, as the plt. alleged, he was in very embarrassed circumstances, and in great distress. He was at this time between thirty-five and forty years of age, and on the 10th Dec. 1856 he entered into an agreement to sell the above equity of redemption and the reversionary life-interests to one Kisch, the articulated clerk of a solicitor, Mr. Daniel, for 75*l.* Before the agreement was carried into effect Kisch sold the property to Charles Bunyard for 125*l.*, and an assignment was executed by the plt. to Bunyard. Bunyard shortly afterwards, in Jan. 1857, effected a policy for 1200*l.* on the plt.'s life, with the same office as that with which the two former had been effected by the plt., and then mortgaged it to Miss Jackson in lieu of the two former policies, which had dropped.

By an indenture dated the 21st March 1857, Bunyard assigned all his interest in the above property to Miss Rogers, afterwards Mrs. Berridge, for 550*l.*

Mrs. Berridge afterwards paid off the mortgage to Miss Jackson, and kept up the 1200*l.* policy at her own expense.

The bill was filed against Mrs. Berridge, Kisch, Bunyard and Cave (a person through whose instrumentality the sale to Mrs. Berridge appeared to have been made), charging the three last-named persons with fraud, and praying that the assignment to Mrs. Berridge might stand as a security only for such sums as had been actually paid to the plt. with interest, giving credit for the dividends which had been received for the transfer of the property; that the agreement between the plt. and Kisch might be delivered up, and that the defts. might pay the costs of the suit.

Pending the litigation the plt. died, and Mrs. Berridge received the proceeds of the 1200*l.* policy. The original bill did not pray relief with regard to this policy, but after the plt.'s death a supplemental bill was filed by the representative claiming this as part of his estate.

The M. R. made a decree in favour of the plt., declaring that the transaction could not stand; but he thought the costs of Mrs. Berridge, occasioned by making Kisch, Bunyard and Cave parties, ought to be allowed to her. With regard to the premiums on the policy, his Honour considered that, as Mr. Nesbitt could not have been compelled to pay them, and Mrs. Berridge had thought fit to do so at her own expense, she was entitled to retain the policy moneys. His Honour likewise thought that the original bill was demurrable by the three defts., Kisch, Bunyard and Cave, notwithstanding the charges of fraud which it contained, and his Honour, in dismissing the original bill against them, allowed costs to neither of these three defts. He likewise dismissed the supplemental bill with costs against all the defts.: (see the report, 8 L. T. Rep. N. S. 76.)

From the latter portions of the decree the plt.'s representative appealed.

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CROFT v. GRAHAM.

[CHAN.]

Selwyn, Q.C. and *Birkbeck* supported the appeal.—They contended that the plt.'s right to the policy was consequential upon the M. R.'s decree. The policy had been substituted for the two former policies for 700*l.* and 200*l.*, and was subject to the same equities as those which affected them. In fact the premiums had been paid out of the income of Nesbitt's property. Miss Jackson had entered into receipt of the dividends, she was therefore a mortgagee in possession and a trustee for the owner of the equity of redemption. Being so, the trust would extend to, and attach upon, the substituted property. It was true Nesbitt was not a party to the arrangement between Bunyard and Miss Jackson, but that did not prevent the original trust from attaching to the substituted property.

Hobhouse, Q.C. and *Dickinson*, for Mr. and Mrs. Berridge, argued that Miss Jackson could not have been compelled to keep up the premiums on the policy of 1200*l.*; that was a transaction between herself and Bunyard, with which the plts. had nothing to do. The jurisdiction of the court did not extend, beyond setting aside the transaction, to deal with property thus situated, unless it could be held, which it was submitted it could not, that this substituted property was impressed with the same trusts as the original policy.

In the course of the argument the plts. sought to read the answers of the three dismissed defs. to the original bill as evidence, such answers having been made affidavits in the cause, notwithstanding that they did not seek to retain them as defs. to the suit. This was objected to, and the plt. in justification cited

Lord v. Colvin, 3 Drewry, 222;
15 & 16 Vict. c. 86, s. 31.

The LORD CHANCELLOR ruled that such a course of proceeding was inadmissible. If the answers were read, the defs. must be treated as parties to the suit.

Birkbeck, in reply, said that the objection, in order to be valid, should have been taken by demurrer, or by motion to take the bill off the file. He cited

Walford v. Pemberton, 13 Sim. 441;
Ranger v. The Great Western Railway Company,
13 Sim. 368.

The LORD CHANCELLOR said, that the purchase-money, even if the whole were attributed to the reversionary portion of the property sold, had been shown to be clearly inadequate, and thought that the defs.' counsel had exercised a wise discretion in not attempting to disturb that part of the decree which set aside the sale of the reversion on the ground of under-value. The principal question raised by the appeal was that of the right of the plt. in the supplemental suit, as the representative of Nesbitt, to the policy for 1200*l.* The original transaction was the mortgage of the life-interest of Nesbitt to Miss Jackson. These mortgages contained covenants to pay the premiums on the two policies effected for 700*l.* and 200*l.*, and further provided that in default of payment, and if Miss Jackson should enter into the receipt of the dividends of the consols, it should be competent to her to retain the premiums and to keep up the policies. It appeared that she had kept up the policies till the transfer to Bunyard, who was a sub-purchaser from Kisch, and in right of that equity of redemption first effected a new policy for 1200*l.*, and then applied to Miss Jackson to permit this policy to be substituted for the original two. This he did in his supposed right as assignee. Miss Jackson assented, and agreed that this policy should take the place of the two original policies, and be substituted for them; and thus the policy for 1200*l.* became *ipso facto* subject to the same equity of redemption as the antecedent policies. But the equity of redemption was still the property of Nesbitt, for nothing in equity had passed to Bunyard. Whatever therefore was done by Bunyard must be

taken as having been done for and on behalf of the real owner of the equity of redemption. The new policy was therefore impressed with a trust for the real owner of the equity of redemption. The M. R., considering that rights and duties were correlative, had concluded that, as Miss Jackson was under no obligation to keep up the original policy, Nesbitt's representative had no right to redeem the substituted policy. But this was too narrow a ground of decision. Nesbitt, in his lifetime, and the representative of Nesbitt now, had a right to claim the benefit of whatever had been done with respect to the equity of redemption, he being admitted to the original right of Nesbitt. He therefore was entitled to redeem the substituted policy, in the same way as he could have redeemed the original policies. That part therefore of the decree of the M. R. must be reversed, and there would be a declaration that the policy for 1200*l.* was part of the equity of redemption, and belonged to the representative of Nesbitt by reason of the assignment of the equity of redemption having been declared invalid. That portion of the decree which dismissed the supplemental bill with costs must consequently be reversed; but inasmuch as Kisch, Cave and Bunyard had been improperly made parties to that suit, and improper charges had been introduced, that part of the decree which gave special directions as to costs must also be varied. No costs could be given to the plt.

Solicitors: for the plt., *T. H. Waller*; for the defts., *T. M. Cleobury*.

Dec. 12 and 14.

(Before the LORDS JUSTICES.)

CROFT v. GRAHAM.

Bill discounting—Securities—Settled accounts—Interest.

The plt., a young man at the University, during his minority and soon afterwards, procured advances at various high rates of interest from the deft., a money lender, for which he gave bills of exchange. Subsequently the deft. sent to the plt. a written paper purporting to be a full account, but which was in fact nothing more than a list of the bills of exchange, and the plt. sent a letter in reply, in which he stated that everything was settled between them as regarded all transactions and liabilities up to that date. Various fresh transactions then took place between the parties on the footing of the alleged accounts, and arrangements were made for a mortgage to be executed by the plt., in the course of which the plt. signed an acknowledgment that a further statement was "an account settled between them and referred to in the indenture of mortgage." The present bill was then filed, praying that the plt. might be declared chargeable only for such sums as had been actually advanced:

Held (affirming the decision of Stuart, V.C.), that as the two parties had never been on equal terms, these acknowledgments were of no avail, and that the securities could stand only for the sums advanced, with interest at 5 per cent.

This was an appeal by the deft. from a decree of Stuart, V.C., reported 9 L. T. Rep. N. S. 112, where a sufficient statement of the circumstances will be found.

Freeman (with whom was *Bacon, Q.C.*) supported the decree on behalf of the plt.

Malins, Q.C. and *Cracknell* supported the appeal.

The following authorities were referred to:

White v. Cameron, 6 Dowl. 36;

Mason v. Riddle, 8 Dowl. 207.

Lord Justice KNIGHT BRUCE said:—The decree in this cause was plainly a matter of course, unless the laws of the country are to be altered to meet this particular case. As we before intimated, there is no

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material fact in dispute between the parties from the beginning to the end of the case. Pecuniary dealings take place between the deft. and the plt., who was a young and extravagant Oxonian, and who was the eldest or the only son of a gentleman of landed property, entitled to estates in remainder or reversion on his father's death, although they do not appear to be very large estates. The whole income allowed to this young gentleman was under 200*l.* a-year, which income does not suffice for him, and before his majority he is introduced, or he introduces himself, to the deft., a money-lender; transactions between them take place during plt.'s minority; these are in some manner closed, an interval of peace and tranquillity then takes place, and after that these fresh transactions arise. In the course of these transactions certain securities are given; the two parties are not for a moment on equal terms; one was to all intents and purposes throughout in the power of the other. It would be a departure from all the rules and principles which have been established here for centuries, if this statement of account were allowed to stand for more than the amount actually advanced, with allowance of interest after a reasonable rate. In the present case 5 per cent. has been allowed, and with that rate I do not find fault; but that the security should stand for more than the amount actually advanced with interest, is a thing not capable of being supported by any rational person. There appear to be some omissions in the decree, which would have been corrected at once by the V. C., if his attention had been called to them; but that might have been all done without coming here. I am surprised (speaking most respectfully) at some of the arguments which have been addressed to us.

Lord Justice TURNER said:—I am entirely of the same view. I do not see how the V. C. could have made any other decree unless the law of the court had been altered, and I am quite satisfied that the law has not been altered. *Appeal dismissed with costs.*

Solicitors for the deft. appealing, *G. E. Mead.*

Solicitors for the plt., *Paule and Lovesey.*

Monday, Dec. 21.

(Before the LORD CHANCELLOR (Westbury).)

YOUNG v. FERNIE.

Practice—Chancery Regulation Act 1862—Patent cases.

The Chancery Regulation Act 1862 lays down a rule that in future all questions of fact brought before the court are to be determined by the court itself; the exception contained in the Act operates only by way of permission, and in order to bring a case within the exception the court must be satisfied that the administration of justice will be more conveniently exercised and promoted by sending the matter to be tried at law.

This suit was instituted by Mr. James Young and two other persons against Ebenezer Waugh Fernie, William Carter and Joseph Robinson, for the purpose of restraining the defts. from infringing a patent of which the plt. claimed to be the proprietors.

The bill was filed on the 8th Sept. 1862.

The cause came on for hearing before his Honour Stuart, V.C., on the 5th Nov. last, when his Honour having thought that the case was a proper one to be tried before a jury, after considerable discussion, decided, in exercise of the discretion reposed in him by the 2nd section of the Chancery Regulation Act 1862 (25 & 26 Vict. c. 42), and having regard to the state of business in his own court, that the questions of the validity of the patent, and of the fact of infringement, should be tried by a special jury in the Court of C. P.

It appeared that, on the 13th Nov., before the order was drawn up, the plt.'s solicitor wrote to the solicitor of

the defts., to say he had been instructed to accept the V. C.'s order without appealing, and he had therefore left it to be engrossed, and had obtained an affidavit for passing it. On the 16th the order was passed; and on the 11th Dec. the plt.'s solicitor wrote, saying that as the issue would be in the form of the draft writ of summons, he had forwarded the latter for approval, and the same was duly received by the defts. On the following day, however, the plt.'s solicitor again wrote to say, he had been premature in sending the draft issue; that it had since come to his knowledge that the L. C. had decided that he had jurisdiction to try cases with a jury, and he therefore felt it incumbent on him to endeavour to prevail upon his Lordship to try the questions of fact before a jury. To this the defts. refused to agree, and the plt. now appealed from the V. C.'s order.

Sir *H. Cairns*, Q. C., *E. K. Karlslake* and *Lewson* supported the appeal.—They contended that the plt. had a right, under the Chancery Regulation Act, to have the case disposed of in Chancery. The power which still remained to the court of sending issues to be tried at law ought to be used only on extraordinary occasions; as, for example, where a view of the property, or models of extraordinary size, made it more convenient that the trial should be had in the country. They referred to *Davenport v. Jepson*, before Wood, V. C., and observed that a similar course had been adopted by the M. R.

Sir *F. Kelly*, Q. C. and *W. W. Mackeson*, contra, argued, first, that the plt. had deprived himself, by his own acts, of his right to appeal; secondly, he was doing more than appealing from the V.C.'s decision—he was seeking to remove the cause from the V.C.'s court, where he had elected to have it heard. The V.C. had had the whole merits of the case before him, and, in exercise of his undisputed discretion, had determined in favour of a trial at law. It was not merely in consequence of the state of business in his court, but it was from the nature of the case, and the variety and complexity of the questions involved, that his Honour came to the conclusion to which he arrived. The question was, would the Court of Appeal take the question out of the hands of the L. C. J., and interfere with his Honour's decision?

The LORD CHANCELLOR (without calling for a reply).—I will first deal with the objection that has been taken, and which has been put as if the plt.'s solicitor had contracted himself out of the right to have this order reheard, or as if his conduct and acquiescence had occasioned so great an amount of inconvenience to the other side as to render it highly inexpedient that the order should be allowed to be reheard. I cannot look at the case as warranting either of these two conclusions. The representation made by the plt.'s solicitor, that he did not mean to apply to the court for a rehearing of the order, was a mere voluntary representation. It did not amount to anything like an agreement. What was done by the parties in the interval was neither so considerable, nor have the things done been so unprofitable for the future hearing of the question in this cause as to warrant me in refusing to rehear this order. I construe the statute in this manner, that it gives a rule for the future, that these matters shall be heard and determined in this court. The proviso operates only by way of exception to the rule; and in order to bring a case within the proviso, the court must be satisfied that the administration of justice in the particular suit will be more conveniently exercised and promoted by directing an action at law to issue, than by retaining the inquiry in this court. Now, in all patent cases, and particularly in this, having regard to the questions at issue, I do not think anything more inconvenient can be suggested than that, where mixed questions of law and fact are

bound up together, and are scarcely capable of being separated, an attempt should be made to cut such a case in two, and send one half of it to a jury at common law, reserving the other half for the consideration of this court. It is impossible that any satisfactory conclusion can be arrived at by that means, without a great number of proceedings and shiftings to and fro, and without expenses being incurred from misapprehensions which would have been avoided if the Court of Ch. had kept the whole proceeding in its own hands. A few days ago I had to determine on a patent case, which if it had been sent to law upon an issue, could not have been tried without great expense and a great waste of time and money. The case was ultimately decided upon a short question of law arising *in limine* on the specification. Nothing therefore can be more to be deprecated than dividing a patent case, and sending these issues to be tried at law. I was desirous of seeing whether there were any circumstances brought before the V. C. to warrant that learned judge in concluding that the case should be brought within the exception; but it is clear that nothing of the kind was made to appear to the court. All, therefore, that I have before me is a case in which it is quite clear there will be mingled questions of law and fact, which ought to be concluded and heard before some one tribunal, and which it is proposed to deal with in this inconvenient mode of dividing the hearing. I think the convenience of justice and of the parties on both sides will be best consulted by my annulling this order. It will be for the parties to determine whether, the order being discharged, the cause shall go back to the V. C. to be heard before him in conformity with the statute, or whether they prefer that this court shall take it. If the parties will be satisfied, I will gladly take the trial, but this I cannot and ought not to do without the assent of the parties, and unless that assent be given I must reverse the order and direct the cause to be heard before the V. C. If the cause is heard before me, in any form in which the court may pronounce a decree, there will be an opportunity of its being reheard; and if any question should arise before me, and I should desire the assistance of two or three common law judges, there will be an opportunity of obtaining that tribunal.

Sir H. Cairns, on behalf of the plt., submitted to have the cause heard by his Lordship.

The LORD CHANCELLOR (addressing Sir F. Kelly). If you assent to the proposal of the plt., let the trial be before me; if not, I reverse the V. C.'s order, and make an order in conformity with the notice of motion in the court below.

The order was, that the thereafter mentioned questions of fact be tried by a special jury before his Honour V. C. Stuart, viz., 1. Was the plt. James Young the true and first inventor of the patent? 2. Was the said invention new? 3. Did the specification describe and ascertain the nature of the invention? 4. Had the defts. infringed the patent? The plts. to deliver particulars of the breaches, &c. (with usual directions.)

Solicitors for the plt. J. Henry Johnson; for the defts., Tuke and Valpy. _____

Dec. 5 and 21 and Jan. 12.

(Before the LORD CHANCELLOR (Westbury).)

MORTIMER v. PICTON.

Settlements—Power to vary securities—Statutory powers—22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, ss. 10, 11 and 12—General Order of 1st Feb. 1861—Duties of trustees—Costs.

A jointress was entitled to an annuity of 500*l.*, originally charged upon hereditaments which had been sold and were now represented by a sum of Consols.,

the dividends of which were insufficient to pay the annuity; and the trustees of the fund were empowered to invest the same in some or one of the parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England or Wales, and to vary securities. One of the trustees refusing to consent to any change of security being made, with the view of obtaining a larger income:

The Court (reversing the decision of the M. R.) ordered the fund standing in Consols to be sold and invested in East India Stock.

The powers of investment conferred upon trustees by the above statutes and general order, are, in the absence of provisions to the contrary, to be read into settlements as if they had been expressly contained therein.

Observations on the duties of trustees.

This bill was filed by Mrs. Mortimer, widow, under the following circumstances:—

By the marriage-settlement of Mr. and Mrs. Mortimer, dated the 25th Oct. 1831, after reciting that in the treaty for the marriage it was agreed that Edward Horlock Mortimer should settle on his intended wife, in case she should survive him, "one clear annual sum of 500*l.*, to be issuing out of the hereditaments thereafter described," for her life for her jointure and in lieu of dower, E. H. Mortimer appointed and directed that certain hereditaments, of which he was then in possession as tenant for life, and over which he had a power of jointuring, should, in the event of the marriage, from and immediately after his decease, remain and be to the use of the defts. (John Picton and Charles Mortimer and their heirs, during the life of the plt., upon trust to receive the rents, issues and profits, and by and out of the same to pay to the plt. and her assigns "one annual sum of 500*l.* clear of all deductions" for her jointure and in lieu of dower, &c., and as to the surplus of the said rents, upon trust to pay the same unto such person or persons as should be entitled to the reversion of the said hereditaments. The deed contained a power of entry and distress "when and as often as it should happen that the said annual sum of 500*l.*, or any quarterly payment thereof, should be in arrear or unpaid;" and also a power in the same events to enter and take possession, such possession, when taken, to be without impeachment of waste.

The deed also contained a covenant by E. H. Mortimer with the trustees to do all such further acts and assurances for the further and better or more satisfactorily appointing, assigning and confirming the said hereditaments unto the use and upon the trusts aforesaid as should be reasonably advised or required.

In 1834 E. H. Mortimer became entitled to the reversion in the above hereditaments expectant on his own life-estate, and subject to the jointure; and by a deed dated the 10th June 1843, to which Mr. and Mrs. Mortimer and the trustees were parties (and which was acknowledged by Mrs. Mortimer), after reciting that part of the above hereditaments were subject to a mortgage of 1500*l.*, and that the hereditaments thereafter described being mortgaged in part as aforesaid, were considered by the plt. to be an insufficient security for the payment of the annuity of 500*l.*, and that at her request and for the purpose of more effectually securing payment of the same, the said E. H. Mortimer had agreed to appoint and convey all the said hereditaments, and that the plt. had agreed to join in such conveyance; the hereditaments comprised in the deed of settlement were appointed and assured by E. H. Mortimer and the plt., discharged from the said annuity of 500*l.*, to the use of the said John Picton and Charles Mortimer, upon trust, within three calendar months, at the request in writing of the said E. H. Mortimer, to join and concur with him in

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raising by mortgage such sums as should be sufficient to purchase in an assurance office approved by the plt. for her life an annuity of 500*l.* to be paid to her in the event of her surviving the said E. H. Mortimer; and in case such sum should not be raised within three calendar months, on trust to sell the hereditaments and hold the purchase-moneys upon the trusts declared by an indenture of even date. It was provided, that in case a competent sum should be raised and applied in the purchase of the said annuity, the equity of redemption should be considered as the absolute property of E. H. Mortimer, his heirs and assigns; but that nothing should prejudice the right of the plt. to her annuity.

By the deed of even date, referred to and made between the same parties, it was provided that the trustees should stand possessed of the purchase-moneys upon trust to lay out and invest "the whole, if not more than sufficient," but if more than sufficient, then a sufficient part thereof, "in the purchase of a competent share or shares" of Consols, to produce "a clear yearly income of 600*l.*; or if the said moneys should not be equal to purchase a sufficient amount of such stock to produce such yearly income as aforesaid, then that they should invest the whole of the said moneys in or upon some or one of the parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England and Wales (but not in Ireland)," with power to vary such securities; and should pay the interest, &c. of the said trust-moneys, stocks, funds and securities to the said E. H. Mortimer for life, and after his decease "should pay such interest, dividends and annual produce, when and as the same should become payable, or permit the same to be received by the plt. and her assigns in case she should survive the said E. H. Mortimer, from time to time during her life, *in lieu and full satisfaction of the annual sum of 500*l.* secured to her by the said settlement.*"

By a deed of the 6th Nov. 1846, indorsed on the last, after reciting that the power to mortgage was not exercised, and that the property had been sold, and out of the proceeds the mortgage-debt of 1500*l.* had been paid, and the residue laid out in the purchase of consols, it was declared that the debts, the said John Picton, Charles Mortimer, and John Bates and Edmund Mortimer (in whose four names the stock was standing) were possessed of the same on the trusts of the within written indenture.

The hereditaments comprised in the settlement were now represented by a sum of 12,365*l.* 13*s.* 8*d.* Consols.

E. H. Mortimer died in 1858, having received the income during his life. In the year 1850 he had sold his reversionary interest, expectant on the death of the plt., in 4766*l.* 12*s.* 8*d.* Consols, part of the above, to a reversionary interest society.

After his death the plt. made application for the payment of the annuity, and ultimately, in July 1862, filed this bill against the four trustees, the executors of her late husband, and the trustees of the reversionary interest society, alleging that the fact of the mortgage for 1500*l.* was in the year 1831, and long afterwards, unknown to her, and praying that the trusts of the marriage-settlement, and of the deeds of the 10th June 1843, might be carried into execution under the decree of the court.

The primary object of the bill was to obtain a declaration that the plt. was entitled to a lien upon the capital sum of stock to the extent of the difference of the dividends (now 370*l.*) and the 500*l.* a-year, and for payment of the arrears.

The case came on to be heard before the M. R., who, on the 8th May last, delivered the following judgment:—

The MASTER of the ROLLS.—In this case I am sorry that I am obliged to decide against the plt. upon

the construction of the instrument. Certainly it appears to me a hard case, and one in which events have turned out unfavourably for her, and very contrary to her expectations, but upon the facts of the case I am clear, that upon the construction of the instrument she is not entitled to have the arrears of her jointure raised out of the *corpus* of the fund. The state of the case is this. By her marriage-settlement, which took place in Oct. 1831, she had a jointure of 500*l.* a-year given to her in this way. Her husband, who is tenant for life of the estate, had the power to appoint the whole of the estate to trustees for the benefit of the wife during the life of the wife for the purpose of raising 500*l.* a-year. Now, it is very justly observed that the extent of the beneficial interest cannot exceed the extent of the estate given to the trustees. In an ordinary case undoubtedly a jointure to a wife is secured by a term, or is secured by conveyance of real estate; but in this case the husband had no power to give more than an estate during the life of his wife. And, accordingly, that is what he did; it was to secure a jointure of 500*l.* a-year: to the extent to which that estate would secure 500*l.* a-year, and the arrears of it, he would be entitled to go, but cannot go beyond it. It is to be observed, which I mention in this place before I state other reasons, that he gave to his wife (of course it was a contract for value by the marriage of the plt.) something which was beyond his power. He gave powers of distress and entry, which were quite within his power; but he directed that when she entered into possession such occupation of the land should be "without impeachment of waste," which he had no power to give. I concur with Mr. Southgate in the opinion, that as very shortly afterwards, I think a few years—in 1834 I believe—he became entitled to the fee-simple of the estate, that the contract would have to be made good out of any subsequent interest he acquired in the estate. If she had entered she would be entitled to cut timber and work minerals. But no such question arises; and I am of opinion I cannot extend it to another thing, and say that by reason of that some other contract was intended. Upon examination of the first deed it appears that nothing more was intended than to give the trustees an estate for her life for the purpose of raising 500*l.* a-year. It appears that this was a property in the neighbourhood of a manufacturing district, and was producing at this time upwards of 600*l.* a-year, and it would therefore have been, if it had so continued, a very ample security; but subsequently it was found necessary to sell the property from various causes. The husband had got into difficulty and was separated from the plt. Upon the 10th June 1843 two deeds were executed, by one of which she agreed to convey the property discharged of her jointure, and in the other it was agreed that certain property should be sold, and the money invested for the purpose of securing this annuity to her. The former deed recites that hers was an insufficient security, and the latter deed directs that the money arising from the sale shall be invested in the names of the trustees of the settlement, who were to pay the interest, dividends, and annual produce when and as the same should become payable, or permit the same to be received by the plt. and her assigns, in case she should survive the husband, during her life, *in lieu and full satisfaction of the annual sum of 500*l.* secured to her by the settlement, and subject to the trusts aforesaid.* Now, there might have been some question, I think, whether this was not a mere substitution of the income of the stock for the estate which the husband would be entitled to raise, even if it had been of larger amount. But it is quite clear that, according to that, she would have been entitled to nothing but the dividends. The subsequent clause says that, if there should be any excess beyond what

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should be equal to the jointure, the surplus was to be in trust for the husband. Therefore, it is clear she was entitled to nothing more than the interest amounting to 500*l.* I cannot, upon that construction of the deed, come to any other conclusion. The case cited to me, which at first struck me strongly, and which was urged by Mr. Southgate (*Arundell v. Arundell*, 1 M. & K. 316), in which there were certain words in a deed analogous, if not precisely similar to these, and in which they were held not to confine the interest of the widow to the mere interest or dividend, but to entitle her to have the arrears, proceeded upon this ground, that the original contract was, that the jointure was a charge upon the *corpus* of the fund. The L. C. states that that, together with some recitals in the deed, was the sole reason why the words of the deed itself in their *prima facie* import were to be controlled so as to give her a right to come upon the *corpus* of the fund. But that case, when it is carefully examined and the reasons for the judgment weighed, does not amount to any authority upon which this court can proceed. Now, undoubtedly, this has been very unfortunate, because the estate which produced about 600*l.* a-year or upwards has only produced something more than 12,000*l.* Consols, and therefore the lady does not get above 370*l.* a-year, or about that amount. But I regret that, upon the construction of the deed, it is impossible to say that she is not bound by the express words of the deed, which appear to be analogous upon this point, and in accordance with the previous contract, although there was an intention to give her a better security, and it was believed at the time that the estate would sell for what would produce in Consols a larger sum. Now, upon this part of the case, I was much pressed to take this step—to alter the investment, and instead of investing it in Consols, invest it in Bank Stock or in East India Stock, so as to increase the income. I should have been willing to do that if there had been no reversioner before the court, or if those before the court had assented; but I find the husband has sold about 4000*l.* of the reversionary estate, and has died insolvent, and his executors object to do anything to diminish the capital of the fund. I am of opinion, in that state of circumstances, that this court has not the power to invest in any other security. All I could do, which I should be very willing to do, is this—I would allow it to be invested in some stock of which the dividends are paid by the Governor and Company of the Bank of England, provided the plt. gives security to the satisfaction of the court, that what remains after her death would be sufficient to produce the same amount of consols as now exists. Further than that I cannot go. It is quite clear that this is a suit for the administration of the estate, and the costs of all parties must come out of the trust-fund.

From this decision the plt. appealed.

The Attorney-General (Sir R. Palmer), Q. C., Southgate, Q. C. and Waller supported the appeal on behalf of Mrs. Mortimer.—The proviso in the marriage-settlement that Mrs. Mortimer should be unimpeachable of waste, was beyond the power of the testator at the time; but when Mr. Mortimer came into possession in 1834, this security became valid and binding as against the *corpus* of the estate, to the extent of cutting timber and working minerals. Mr. Mortimer had covenanted for further assurance; and this covenant would run with the land: (*King v. Jones*, 5 Taunt. 418.) Then, according to the construction of the deeds of June 1843, there was a general purpose manifest, notwithstanding some expressions to the contrary, that the annuity should be charged on the whole fund. Secondly, Mrs. Mortimer's security under the marriage-settlement was at all events paramount to that of the 1500*l.* mortgage, an incumbrance

created by Mr. Mortimer himself: (Sugd. V. & P. 14th edit. 613, p. 19.) Thirdly, the court is empowered under the recent statutes, 22 & 23 Vict. c. 35, s. 32, and 23 & 24 Vict. c. 38, ss. 10, 11 and 12, followed by the General Order of the 1st Feb. 1861, to change the fund from its present state of investment into Bank Stock or India Stock, and thus secure 500*l.* a-year to the plt.

Freeling appeared for the trustees, three of whom, including one of the trustees of the marriage-settlement, joined in an answer, insisting that, under the deed of the 10th June 1843, they ought not to make good the plt.'s annuity out of the capital of the fund, but that they were willing to change the securities in which they had authority to invest, in order to produce a larger income, if any such could be found.

The other trustee submitted, by his answer, to act under the direction of the court, but refused to consent, out of court, to any change of securities. He had been served with notice of appeal, but did not appear.

Salwyn, Q. C. and *Schomberg*, for the executors of Mr. Mortimer, resisted the plt.'s right to any relief, and denied the jurisdiction of the court to compel the trustees to vary the securities. Mrs. Mortimer was a consenting party to the transaction of 1843. It was expressed to be undertaken for her benefit, and she agreed to take the interest in lieu of the 500*l.* The true construction of the deed was, that Mrs. Mortimer was to take an income not exceeding 500*l.* The court would not take away a discretion vested in trustees, and compel them to act upon their statutory powers, in direct opposition to their own wishes; at least, the court would so deal with the fund as to consult the interests of all parties.

Rasch appeared for the reversionary interest society, and submitted that it was greatly for the convenience of the office that the fund, when it fell in, should be found in the same state of investment as when it was purchased.

The LORD CHANCELLOR (after observing that the trustees of the society could not, as a matter of right, say more than their assignors might have said), added, that, as between the trustees and the parties claiming under Mr. Mortimer, he would certainly save the question as to whether the trustees, whatever the form of investment might be, were not entitled to have the thing that they bought specifically given to them; but he could not allow the society to interfere with the exercise of the power of the settlement touching investment, reading, as he did, the clause of the Act of Parliament into the settlement, as a power given to the trustees. Three modes of settlement had been suggested, and the question really was for the good sense of the parties to determine which of the three modes was the best. Mortgage was attended with some peril, and was attended of course with a bill of costs, and led to a good deal of expense upon the transfer. Bank Stock was attended with some little uncertainty, because they were depending upon the profits of a trading corporation. East India Stock was open to the difficulty which Mr. Schomberg had stated, that it was liable to be redeemed in 1874. His Lordship said he would leave the choice to the good sense of the parties, and added: I shall declare—I should like to do it with your consent, but I shall not hesitate, subject to any argument you may think proper to present, to declare—that the power is to be read as one of the powers of the settlement, because I am exceedingly opposed to anything like a disposition on the part of the court to cling to its old traditions and to its narrow-minded views with regard to investments, throwing obstructions in the way of carrying into effect the provisions which the Legislature has thought fit, prudent and right to enact.

The Attorney-General said he would not press for a decision on the two former points.

CHAN.]

MORTIMER v. PICTON.

[CHAN.]

THE LORD CHANCELLOR.—If it can be done in a prudent manner, I hold it entirely to be the duty of the trustees, having a large power in their hands enabling them to select a variety of investments, to take the fund and put it in the investment that will best enable them to answer the purposes of the trust. Proceeding upon the principle that the court is bound to put into the settlement the parliamentary power, and not to raise any difficulty in the way of carrying out the object of the Legislature, I shall undoubtedly direct this to be done as against all parties, but I would rather have it done with the concurrence of all parties, because then it is sure to be done with more economy and more despatch.

Dec. 21.—The cause came on again to-day.

The *Attorney-General* asked that the investment might be in Old East India Stock.

Selwyn, Q.C. opposed, and contended that the Legislature never could have meant to interfere with the terms of a written contract.

THE LORD CHANCELLOR.—I am fully impressed with the necessity for the greatest caution on the part of the court in exercising this power. I can never be ready to listen to an application to have it put in force merely for the purpose of augmenting the income of the tenant for life. But possibly the intention of the Legislature was—at all events, a useful purpose to which the enactment may be rendered subservient is—that where the condition of a trust-fund is such that the income of it in its present state of investment cannot answer its obligations or its primary purpose, the court should then be ready to exercise the parliamentary powers, in order that it may enable the trustees to perform that duty, which it was the principal object of the settlement that they should perform. Now the circumstances of the present case are very peculiar, but they appear to me to throw upon the trustees—and if upon the trustees, then also upon the court—the obligation of exercising every power in order to accomplish, if possible, what was the chief and principal intention, which probably I shall not wrongly designate as the contract of the parties—contract in the sense of pecuniary liability it is not; but it is that which Lord Thurlow was in the habit of denominating “the good faith and honour” of the settlement. This lady was entitled to an income of 500*l.* a-year, which was to arise by way of rent-charge out of an estate which, by reason of antecedent incumbrances, was inadequate for the purpose. In the year 1843 (in consequence of that being so) a new arrangement was made, an arrangement which was in a great degree for the benefit of the husband. The wife became a party to this arrangement by contract with her husband, through the medium of the statutory power. The great object of this new arrangement was to give to this lady some better means of ensuring to her the 500*l.* a-year. That purpose is distinctly marked in the recitals of the deed, and pervades the whole arrangement. Unfortunately it is not so expressed that I can follow her right into the capital; but it is so stamped on the whole transaction, that it becomes the duty of the trustees so to dispose of their fund as to accomplish, if possible, the chief end of the whole arrangement, viz., to secure to her the payment of this annuity. Now the powers conveyed to the trustees by the settlement were the sole powers then known to the law. They had the power of selecting investments in Government or real securities. But it is not going too far to say that, having put this money into Government securities, when they found that the dividends arising therefrom would not answer the primary duty or object of the settlement, it became a moral obligation upon them to endeavour, if possible, to improve the investment within the limits of the settlement. Now, the Legislature, in its wisdom, has provided for a case of this nature by

enlarging the power of trustees. For what purpose was that enlargement of power given? It was given no doubt in the expectation that the power in proper cases would be exercised. But what case can be more proper for the exercise of the power than one where you find the chief object of the whole trust defeated altogether by the insufficiency of the investment? Now, matters frequently come before the court, in which the court is required to place itself in the situation of the trustee. I have been told correctly that it is the duty of the trustees, and therefore of the court, to consult the interest of all parties. I admit that, if there were no pressure upon me to act, I should not be induced to act merely that I might give an additional advantage to one party when it is attended with the risk of future injury to others. But when I am in this situation of difficulty, that I cannot fulfil the first purpose of the trust by reason of the insufficiency of the investment, is it not a case in which I have a right to have recourse to the parliamentary power? But then, with respect to a particular stock, which has been suggested, it is urged upon me that the investment in it is exposed almost to the certainty of being a very short and merely temporary investment, in consequence of the power given to the Government of redeeming East India Stock. It is indeed possible that power may be exercised, but it is by no means a certain thing. It is a contingency undoubtedly which I incur when I direct, if I do direct, that to be the investment. I am therefore in this difficulty: how am I to perpetuate the injury done to the *plt.*, which is certain, which is present, which will continue during her life, and from which there will be no means whatever of escaping, because I ought not to incur the possible chance of some loss being sustained by the parties who are to take after the death of the annuitant? I should not be unwilling to make an order, and to incur that risk falling upon the parties, if it is called for by the special circumstances of the case. But the course I mean to adopt is this, that inasmuch as no immediate benefit will result from directing an investment to be made to-day, and inasmuch as there may be some prospect of the parties being sincerely desirous to do what prudence dictates, if they know what I mean to do, if they do not discharge the application, I shall direct this matter to stand over till the second day of next term, expressing my expectation that the solicitors of the several parties will endeavour to find, if possible, some security by way of mortgage. In the meantime I shall expect that their efforts will be sincerely directed to that end. If upon the second day of next term I find that no progress has been made, I shall then consider whether the difference in the income between the dividends of East India Stock and the dividends of Bank Stock ought to induce me to prefer one to the other; and if I should be of that opinion I shall not hesitate to direct the conversion of this fund into East India Stock. Let the matter stand till the second day of next term, in order that if possible some security may be found.

Jan. 12.—The matter again coming on to day,

The *Attorney-General* stated, that as no proposals for an investment in mortgage securities had come from the other side, the *plt.* now prayed his Lordship to make an order for conversion of the fund into one of the two stocks above mentioned.

THE LORD CHANCELLOR said he should decide in favour of East India Stock, and ordered the investment to be made accordingly; but without prejudice to the right of the purchasers of the reversion to have the fund restored to them in specie. He would give the trustees one set of costs, and make no order as to the costs of the single trustees who had taken upon himself to oppose the charge of investment.

Solicitor for the plt., *Edward Stinton*.
Solicitors for the defts., *R. and C. H. Hodgson*;
Torr, Janeway and Tagart, agents for *Vassall* and
Parr, Bristol; *Mead and Daubeny*, agents for *Bush*
and *Ray*, Bristol.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Thursday, Nov. 26.

COWGILL v. RHODES.

Will—Practice—Bill by heir-at-law—Issue devisavit vel non or action a law—25 & 26 Vict. c. 42.

It is not a matter of course now for this court to grant an issue at law, devisavit vel non, to the heir-at-law of a testator. In all such cases the court looks at the will in question; considers the evidence on both sides, and exercises its discretion in the matter: for an heir-at-law can now (since the 25 & 26 Vict. c. 42) examine and cross-examine witnesses here, in open court, and, if he chooses, before a jury.

Where, therefore, the heir-at-law of an alleged testator filed a bill in this court for the administration of his estate and for an issue devisavit vel non, or an action at law, to try the validity of his will, and this court was satisfied that the evidence already adduced in support of the will outweighed that which was brought or could be brought against it:

Held, that the bill must be dismissed, and with costs.

The facts of this case were shortly these:—

Mr. John Cowgill died on the 11th March 1856. The plt. Mr. Brian Booth Cowgill was his heir-at-law. The defts. were the trustees of a will, which they contended that Mr. John Cowgill had duly executed on the 25th March 1853.

By the alleged will Mr. John Cowgill devised and bequeathed all his real and personal estates to the defts. Isaac Rhodes and William Cowgill, upon certain trusts, after payment of his debts and funeral and testamentary expenses, to pay the income of the property to Mr. John Cowgill's wife for her life, for the maintenance of herself and his children; and after her death to call in and convert the corpus and principal of his estates, and to divide the same equally among the children.

The alleged will was signed by Mr. John Cowgill, in the presence of, and was duly attested by, Mr. Samuel Rhodes, Edward Wilkinson and Sarah Rhodes.

The bill prayed a decree for the administration of the real and personal estate of Mr. John Cowgill; that an issue *devisavit vel non* might be directed to be tried, or an action brought at law, to ascertain whether the alleged will was a valid one; and that if the defts. (the trustees of the alleged will) should improperly maintain the validity of it, they might pay the costs of the suit.

The right of the plt. to the relief he prayed, so far as related to the issue *devisavit vel non* and the action, depended entirely upon the evidence in the suit. The nature and effect of that evidence on both sides, and of the arguments, will sufficiently appear from the judgment of the M. R. *infra*.

Hobhouse, Q.C. and E. E. Kay appeared for the plt., and stated that he had not cross-examined the defts.' witnesses, as the expense of so doing was very great.

Selwyn, Q.C. and W. Barber for the defts. the trustees of the alleged will.

Griffith for other parties.

Hobhouse, Q.C. in reply.

The following authorities were cited in the argument:

Hampden v. Hampden, 3 Br. P. C. 551;
Dalton v. Coatesworth, 1 P. Wms. 731;
Williams v. Williams, ante, p. 566.

The MASTER of the ROLLS.—The question in this suit relates to the validity of an alleged will. The bill is filed by the heir-at-law of the alleged testator, and it asks that an issue *devisavit vel non*, or an action at law, may be directed to ascertain whether the will is or is not a valid one. It also asks for the administration of the testator's estate. It is by no means a matter of course now for this court to grant an issue *devisavit vel non* to the heir-at-law of a testator. In the case of *Williams v. Williams*, which was recently before me, many cases upon the question were referred to, in which this court has refused to accede to such an application on the part of an heir-at-law. In those cases the possession of the will was traced to the heir-at-law. In *Williams v. Williams* it was proved to have been in that of the wife of the heir-at-law. Still, notwithstanding that the court will in all such cases exercise its discretion in the matter; and it must also be remembered that an heir-at-law can now have his witnesses examined, and he can cross-examine those of the other side here in open court, and if he thinks proper, before a jury here. The question then is, whether, if he does not adopt that course, he is entitled to an issue *devisavit vel non*, or to the action which he wishes? In such cases as these everything depends upon the evidence in them, and the court will always look at the alleged instrument. As to that, there is here no doubt that it was executed on the 25th March 1853. But the plt. says that when Mr. John Cowgill so executed the will he was of unsound mind and in *extremis*. That question is one of evidence as to the facts. I have looked at the will itself; and upon the face of it, I am of opinion that a more proper one could not have been made. [His Honour then read the terms of the will as above stated, and continued:] It was executed on the 25th March 1853, a day which was somewhat remarkable for this fact, that it was both Lady-day and Good Friday. I mention that, because it is, in my opinion, of great assistance to us in examining and weighing the accuracy of the statements made by the witnesses in the case. Assuming that the date of the will is correctly stated, let us now then proceed to consider the evidence, and in so doing: I will first take that which is adduced in support of the will. Isaac Rhodes is the principal witness as to that. He swears that Mr. John Cowgill had, for three weeks before the will was executed, been residing in deponent's house, in a state of weakness indeed, but not arising (as it was alleged on the other side) from intoxication; that Mr. John Cowgill expressed a wish that his will should be made, and he accordingly requested one Lofthouse, a person who lived in the neighbourhood, to be sent for to make it. Lofthouse came, prepared the will, and read the same over to the testator, who had then nearly recovered from his illness and was sitting in a chair; and thereupon the testator signed it in the presence of the deponent, of Lofthouse, and of the three attesting witnesses whose names are subscribed to it. Those statements are corroborated by the evidence of Lofthouse, of the three attesting witnesses and of Mary Rhodes, who was also present at the time of the signature of the will. All those persons and other witnesses also state that there is no ground for supposing that the deceased at the time when he made his will was deranged in his mind by reason of delirium tremens, or of any other cause. I think there were no fewer than nine witnesses, who all depose to some part or other of that side of the case. In short, all the witnesses swear to the due execution of the will on the day named. They say, moreover, that it was twice attested and signed. Such then being the case made in

support of the alleged will, I think any evidence to rebut it ought to be, and must be, of the most overwhelming character. Well then, now let us take the evidence upon which the will is impeached. The plt.'s case is, generally, this: he says that the day before the signature of the will Mr. John Cowgill went from his home at Chillingworth to Bradford, where he was found in a state of intoxication; that in that condition he was taken to the house of Mr. Isaac Rhodes, and that whilst there, and at a time when he was suffering from *delirium tremens*, his signature to the will (which had been previously prepared by or under the direction of Mr. Isaac Rhodes) was obtained. In support of those allegations a number of persons made affidavits to prove the general drunken habits of Mr. John Cowgill; and, in particular, his widow swore that the day before the signature of the will she accompanied her husband (who was then in a state of intoxication) to a public-house called "The Manor House," at Bradford, where they met the defts. Mr. Isaac Rhodes and Mr. William Cowgill; that she had to return to Chillingworth to attend to the public-house kept by her and her husband, and to be with her children (one of whom was an infant of tender years); that she left her husband with Mr. Isaac Rhodes and Mr. William Cowgill, the former promising to take him home to his house, and to take care of him; that her husband stayed at the house of the deft. Mr. Isaac Rhodes over the following Friday—which was Good Friday—and was brought home on Saturday afternoon in a cab in a state of mental derangement, produced by a severe attack of *delirium tremens*; and that when she accompanied her husband to Bradford on the 24th March he was in such a state from continued intemperance as that he was not capable either of making his will, or of doing any act that required the exercise of thought and judgment. Similar statements as to Mr. John Cowgill's general habits and capacity were also made by four of the children, who were, it appears, at the time when the will was made, of the respective ages of eighteen, sixteen, twelve and ten. I should here add, that Mr. Isaac Rhodes in his evidence denies the statement of the widow as to her husband having been brought to him the day before the will was signed in a state of intoxication, as stated. Taking then that evidence in support of the plt.'s case, to what does it virtually amount? Only to this—that on the Saturday after the will was signed, the deceased was brought home in a cab in a fit of *delirium tremens*, and that he did not know what he was about. It is, however, a well known fact, that that disease comes on very rapidly, and he might well have known what he was doing on the Friday. He was evidently not in a bad state of mind arising from *delirium tremens* on the Thursday. The rest of the plt.'s evidence, in like manner, goes to show the generally drunken habits of Mr. John Cowgill; but upon that evidence, compared with what is adduced on the part of the defts., there can, I think, be no doubt how the question of the validity of the will ought to be, and would be determined on an issue. The plt. indeed did not cross-examine the defts.' witnesses, and he insisted that he ought to have had an opportunity of so doing. But why did he not cross-examine them? He said he was too poor to pay the expenses of bringing them to town. Still I think he might, if he had chosen, have cross-examined them in this cause, and even assuming the question of expense to be as stated, I should not, I think, be justified in allowing the parties to this suit to be burdened with that expense merely for the purpose of cross-examining the defts.' witnesses. I have found, from my own experience of this class of cases, that such a proceeding seldom results in very much good. Moreover, I cannot say that if I were to allow the plt. now to cross-examine the defts.' witnesses before me, or in this

cause, I think my opinion of the case would be at all shaken. Upon the whole, therefore, I must decide that the bill in this suit, so far as it aims at the impeachment of the will of Mr. John Cowgill, must be dismissed, and with costs.

Solicitors for the plt., *Sharp, Jackson and Parker.*
Solicitors for the defts., *Richards and Walker.*

Thursday, Dec. 3.

CHORLEY v. LOVELAND.

*Will—Construction—Raising and payment of legacy—
"Become entitled."*

*The words "become entitled" mean, primâ facie,
"entitled in possession."*

A testator, by his will, devised the T. estate to trustees, in trust for successive tenants for life; but charged it with legacies of unequal amount in favour of two of his grandsons; such legacies to be paid as and when the grandsons attained twenty-one, with power to the trustees to advance the whole or part of the legacies for the benefit of the legatees.

The will then provided that in case both or either of the grandsons should die before attaining twenty-one, "or in case either of them should become entitled, under the provisions of the will, to an estate or interest for his life in the T. estate, then the legacies lastly thereinbefore provided for them or him respectively (or so much thereof as might not have been advanced as thereinbefore mentioned) should not be raised or paid or payable, but should sink into the said T. estate, which should thenceforth be discharged therefrom respectively."

The second tenant for life of the T. estate, who had no legacy bequeathed to him by the will, died, leaving his father the first tenant for life of the estate. The third tenant for life of it, who was one of the above-mentioned grandsons of the testator, and a brother of the second tenant for life, attained twenty-one in his father's lifetime:

Held, that he was entitled to his legacy absolutely; and to have it raised and paid to him.

The bill in this suit was filed by a Mr. William Parramore Chorley against the trustees of the will of his father, and it prayed that a legacy of 250*l.* might be raised and paid to the plt.

The facts of the case were shortly these:—

William Chorley, the testator, by his will dated the 31st May 1853, devised a certain farm and hereditaments, called Triscombe, subject to a charge of 1000*l.* hereinafter specified, to trustees upon trust for his son Francis for life, and then upon trust for his grandson Robert, the eldest son of Francis, for life; then upon trust for the first and other sons of Robert in succession in tail male, and in default of such issue, upon trust for his grandson William Parramore, the second son of Francis, for life; then upon trust for the first and other sons of William in tail male, and in default of such issue upon trust for his grandson Francis, the third son of the aforesaid Francis for life; and then upon trust for the first and other sons of Francis in tail male, with divers other trusts over in remainder. The trusts of the 1000*l.* charged upon Triscombe were as to the sum of 250*l.*, part thereof, to apply the income for the maintenance and education of the testator's grandson William until he should attain the age of twenty-one, and when and so soon as he should attain that age, upon trust by the mortgage of Triscombe (in case the 250*l.* should not have been sooner raised) to raise the same, and pay it to William upon his attaining the age of twenty-one years. And as to the sum of 750*l.*, residue of the aforesaid sum of 1000*l.* and the interest thereof, the trusts were the same as the foregoing, but declared in favour of the testator's grandson Francis. The trustees had power

to apply the whole or any part of such legacies of 250*l.* and 750*l.* for the advancement of William and Francis, before their legacies became vested. The will then contained the following proviso: "Provided also, and I hereby will and declare, that in case both or either of them my said grandsons William Parramore Chorley and Francis Chorley the younger shall die before attaining the said age of twenty-one years, or in case either of them shall become entitled, under the provisions of this my will, to an estate or interest for his life in the said farm and hereditaments called Triscombe, then and in either of such events, and immediately thereupon, the legacies or legacy lastly hereinbefore provided for them or him respectively, or so much of such legacies respectively as may not have been paid under the power of advancement lastly hereinbefore contained, shall not be raised or paid or payable, but shall sink into the said farm and hereditaments called Triscombe, which shall thenceforth be discharged therefrom respectively." No legacy was bequeathed to the testator's grandson Robert.

The testator died in April 1857; and on his death his son Francis entered into possession of Triscombe. Robert died in June 1858, a bachelor, leaving William Parramore Chorley entitled to Triscombe, as tenant for life in remainder, subject to the life-estate therein of his father.

William Parramore Chorley attained the age of twenty-one years, and instituted this suit for the before-mentioned purpose.

The decision of the case rested upon the construction of the above-stated proviso.

T. H. Terrell appeared for the plt., and contended that, as he had attained the age of twenty-one years during the lifetime of the existing tenant for life of Triscombe, that was to say, "before the plt. had become entitled, under the provisions of the will, to an estate or interest for his life in Triscombe," he was entitled to the legacy of 250*l.* absolutely.

W. M. James, Q.C. and *Rowcliffe* appeared for the trustees, and insisted that the general intention apparent on the face of the will showed that the testator meant, if either a second or third son of Francis should become entitled in possession to the farm and hereditaments called Triscombe, such second or third son so becoming entitled was not to have the legacy. That view was supported by the fact of no legacy having been bequeathed to Robert, who was the eldest son of Francis and, at the death of the testator, the first tenant for life in remainder of Triscombe. They cited, *M'Oubrey v. Jones*, 2 K. & J. 684.

Lonsdale appeared for Francis Chorley, the tenant for life of Triscombe.

T. H. Terrell in reply.

The MASTER of the ROLLS.—The question in this case is, whether the plt. is entitled to have a legacy of 250*l.* bequeathed to him by his grandfather, raised and paid out of a farm and hereditaments called Triscombe? The question arises from a proviso in the will of Mr. William Chorley, who died in 1857. By the will Triscombe was devised upon certain trusts as follows: [His Honour referred to the devise of Triscombe, as above stated.] The trustees were empowered to advance the legacies. Then followed the proviso which has created the doubt in this case. [His Honour read it, as above stated, and continued:] Now, no doubt, *prima facie* the words "become entitled" mean become entitled in possession; but then it was said the general intention apparent on the face of the will contradicted that; especially because the will excluded Robert, the eldest son of Francis Chorley (the first tenant for life of Triscombe), from any pecuniary benefit under the will, giving him only a life-interest in remainder in the devised estate. I must say, however, that I cannot arrive at that conclusion. It is true that there is no legacy given to Robert; but the legacies to

the other two grandsons are not equal, and are given to them at twenty-one, with a power to the trustees to advance for their benefit either the whole or any part of their legacies. I am of opinion that the words of the proviso must be read in their ordinary and common sense, and that therefore the expression "become entitled" means "become entitled in possession," and I will make a declaration that the plt. is entitled to have his legacy raised and paid accordingly.

Solicitor for the plt., *Bastard*.

Solicitors for the defts., *Gregory and Rowcliffes*.

Wednesday, Dec. 16.

CROXON v. LEVER.

Practice—*Infant*—*Decree for immediate foreclosure absolute against*.

Where mortgaged property was clearly not worth the money advanced upon it, the Court, at the hearing of a foreclosure suit, made an immediate decree for foreclosure absolute against the infant heir of the mortgagor, the mortgages paying the infant's costs.

This was a motion for a decree. The suit was a foreclosure one, by the mortgagees against the widow and the infant heir of the mortgagor. The mortgaged property was clearly not worth the amount advanced upon it.

Everitt appeared for the plt., and after referring to the evidence as to the value of the property, said it would be useless to attempt a sale of it. The plt. was ready and willing to pay the costs of the infant heir, as between solicitor and client, and as the widow consented to the decree now moved for, and it would be for the infant's benefit, he asked for an immediate foreclosure decree absolute against the infant deft.:

Seton on Decrees, 685.

F. C. J. Millar, for the defts., did not oppose the motion.

The MASTER of the ROLLS.—I think the evidence is sufficient. The plt. undertaking to pay the infant's costs, and the widow not opposing, the decree may be made. It must state that it is for the benefit of the infant; according to the form mentioned in Seton on Decrees.

Solicitor for all parties, *Hammond*.

Friday, Dec. 18.

Re MORSHHEAD.

The Defence Act 1842 (the 5 & 6 Vict. c. 94), s. 26; the 22 & 23 Vict. c. 21, s. 8; and the Defence Act 1860 (the 23 & 24 Vict. c. 112), ss. 20 and 21—Fund in court—Petition—Payment to trustees—Service of petition.

Where the Secretary of State for War had paid money into court for lands taken by him, under the powers and for the purposes of the Defence Act 1860, the Court, on the petition of the trustees of a complicated will under which the lands had been originally held, ordered payment of the money to them; and without service of the petition upon the Secretary of State for War.

Mrs. Elizabeth Morshhead, by her will, dated in 1846, charged certain real estates in Devonshire with sums amounting in all to upwards of 13,500*l.* in favour of a mortgagee, and of some of her children and grandchildren; and directed those sums to be raised in a particular manner, and at certain specified times. She also charged the property with a life annuity of 100*l.* for a daughter, and a like annuity of 50*l.* for a son, to be paid as in the will was also mentioned. She declared that those sums and annuities should be primary charges upon the estates, which she then duly appointed to trustees for a term of 2000 years upon the trusts declared by her will. She then appointed

certain other real estates in the same county to the same trustees for a term of 2500 years, as an auxiliary fund for the payment of the aforesaid charges. Subject to those two terms, trusts and charges, all the estates were devised to P. A. Morshead for life, with remainder to his sons successively in tail male, with divers remainders over. The will contained full powers for the trustees to sell the estates, and to give receipts for the purchase-money.

The testatrix died without having revoked or altered her will.

Under the powers conferred by the Defence Act 1860 upon the Secretary of State for War, he had recently taken a portion of the estates which formed the auxiliary fund for the payment of the various charges continued and created by the will, and had paid into court a sum of 25,000*l.*, with interest, and 30*l.* for costs as the purchase and compensation moneys for the property taken by him.

The trustees of the terms of 2000 years and 2500 years, the tenant for life, and the first tenant in tail of the estates (who was an infant), now presented a petition praying that the whole of the funds in court might be paid out to the trustees, upon the trusts of Mrs. Morshead's will. The petition had not been served upon any one.

Two questions were raised in the case: the first, Whether it was necessary to serve the Secretary of State for War with the petition? and the second,

Whether the whole funds could be paid to the trustees?

The answers to those questions depended upon the construction of the following statutes and clauses of them:

By the Defence Act 1842 (5 & 6 Vict. c. 94), s. 26, amended by the 22 & 23 Vict. c. 21, s. 8, the Court of Ch. is empowered "to make and pronounce such orders and directions for paying the said money or any part of the same, or for placing out such part thereof as shall be principal in the public funds or upon Government or real securities, and for payment of the dividends or interest thereof, or any part thereof, to the respective persons entitled to receive the same, or for laying out the principal or any part thereof in the purchase of other lands or hereditaments to be conveyed and settled to, for and upon the same uses, trusts, intents, or purposes as the said messuages, buildings, castles, forts, liues, or other fortifications, manors, lands, tenements, or hereditaments so purchased or taken, stood settled at the time of the payment of such money as aforesaid, or as near thereto as the same can be done, or otherwise concerning the disposition of the said money or any part thereof, and the interest of the same or any part thereof, for the benefit of the person and persons entitled to and interested in the same respectively, or for appointing any person or persons to be a trustee or trustees for all or for any of such purposes as the said court shall think just and reasonable."

By the 23 & 24 Vict. c. 112, s. 20, it is provided (*inter alia*) "that any compensation payable for or in respect of any lands or any interest therein taken from or holden by any corporation or person not having independently of this Act and the Defence Act 1842 (as amended as aforesaid) power to agree as to the amount of such compensation, or to sell and convey such lands or such interest, shall be paid and applied in manner by the sections numbered twenty-five to thirty of the Defence Act 1842 (and with regard to England), as amended by the 22 & 23 Vict. c. 21, s. 8 (above mentioned), as if the said sections expressly extended to the said compensation: And by sect. 21 of the same statute, it is provided that, where any compensation is required to be paid into the Bank of England or Ireland under that Act, there shall be added thereto a sum of 30*l.* as

an equivalent for the expenses consequent upon such payment, and upon such compensation, with such additional sum (which shall be deemed part of such compensation), being so paid, the said Secretary of State shall be discharged from all liability in respect thereof, and the Court of Ch. may allot to any tenant for life, or for any other partial or qualified estate, in respect of any expenses of investment incurred by him, any portion of such compensation which the court may deem just."

Selwyn, Q.C. and Rowcliffe appeared for the petitioners, and relied upon the Defence Act 1860, s. 21, as an authority to show that service of the petition upon the Secretary of State for War was unnecessary. They also stated that Stuart, V.C., and Wood, V.C. had taken that view in chambers.

The MASTER of the ROLLS.—I think that it is not necessary to serve the Secretary of State with the petition.

Selwyn, Q.C. then relied upon the Defence Act 1842, s. 26, to show that the court had jurisdiction to order the fund to be paid out to the trustees. The expenses of distributing the fund, if left in court, would be very great, in consequence of the various charges and directions as to it which the testatrix had inserted in her will; but, as the trustees were appointed by her, and with full powers to act under the will, the court would not object to their having the administration of the fund.

Dec. 18.—The MASTER of the ROLLS, having taken time to consider the second question, and to confer with the other judges thereupon, said:—Mr. Selwyn, I have made inquiries in this case with respect to the jurisdiction of this court under the Defence Acts, and I have myself carefully examined those Acts. I cannot find that the precise case which is now before me has yet arisen in any other branches of the court; but I am inclined to think that the order should be made upon the petition. [Selwyn, Q.C. cited *Re Sadler's Will* (Wood, V.C., 27th June 1863), not reported.] Upon the authority of that case, Mr. Selwyn, you may take your order.

Solicitors: Gregory and Rowcliffe.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs.
Barristers-at-Law.

Nov. 24 and 25.

THE OFFICIAL MANAGER OF THE BRITISH PROVIDENT LIFE AND FIRE ASSURANCE SOCIETY v. NORTON AND OTHERS.

Mortgage by company to director—Refunding payment out of court.

Where a minute of a general meeting of shareholders of a company stated generally that the financial position of the company had been laid before the meeting by its solicitor, the court refused to infer from that statement alone that the meeting had given such a sanction to a mortgage to one of its directors of moneys due to the company, as is necessary, under the 29th section of 7 & 8 Vict. c. 110, to establish the validity of a transaction of that nature. The court, however, refused to order the representatives of the mortgagee to refund what had been received under the security, but decided that the winding-up was the proper proceeding to deal with that question.

The court has no jurisdiction to make an order in one suit for the payment out of court of a sum of money paid into the credit of another suit.

This was a bill filed by the official manager of the British Provident Life and Fire Assurance Society against William Hebler Norton, Mary Jones, widow and Joseph Hudson, the two latter being the execu-

tor and executrix of John Jones, deceased, and the object of the suit was to set aside certain deeds, being a mortgage, and a deed of trust made by the society to John Jones, who had been one of its directors, and also to obtain the repayment of the sum of 1673*l.* 5*s.* 5*d.* received by his executors under those deeds, and the transfer to the plt. of a sum of 2069*l.* 12*s.* 11*d.* then in court standing to the credit of a suit instituted by Norton, who was Jones's trustee, to enforce the same mortgage security.

By an agreement, dated the 8th March 1859, the British Provident Life and Fire Assurance Society (which had been dissolved, and was then being wound-up), and the British Nation Life Assurance Association mutually covenanted and agreed that the life assurance, life endowment assurance, and life annuity business and, the life and endowment policies and all premiums and payments to accrue and be made thereon together with the agents, agencies, life branches and connections and the goodwill of the said society should, with the registered name and title thereof, so far as the same could be legally and practically effected, be assigned and transferred to the said association on and from the 31st March then next.

The assignment and transfer of the business of the society to the association, according to the terms and conditions of the agreement, was duly ratified and confirmed by two extraordinary general meetings of the society and association, respectively held on the 12th March 1859, and the 23rd of the same month.

On the 7th Nov. 1859 John Jones, being then a director of the society, paid to one R. B. Oakley the sum of 1000*l.* at the request and on behalf of the society; on the 9th Feb. 1860 Jones also advanced to the society the sum of 2000*l.* on the security of a bond given by the association, which was afterwards paid by the association, and he concurred with four other directors in making two joint promissory notes, for 900*l.* each, dated 7th Nov. 1859, payable to Oakley or order, one of these notes being payable fourteen months after date. In July 1860 the directors of the society agreed to give Jones a charge upon the moneys payable under the agreement of the 8th March 1859, for the moneys which had been then advanced by him for the use of the society, and for further advances to be made by him, and this agreement was carried into effect by two indentures dated the 5th July 1860. The debt W. H. Norton was intended to be a trustee for Jones for the purpose of the arrangement.

By another deed of even date, Norton declared himself a trustee for Jones of the said mortgage security.

On the 13th Feb. 1861 the association paid to Norton the sum of 1673*l.* 5*s.* 5*d.*

In March 1861 the society was wound-up under an order of the court.

On the 4th Jan. 1862 Norton filed a bill against the association and the society for moneys due to him, and 2069*l.* 12*s.* 11*d.*, the balance due from the association under the agreement of March 1859 was paid into court by the association to the credit of that cause in full satisfaction of their liabilities under the agreement of March 1859, and on the 30th March 1862 a decree was made by consent, and further proceedings in that suit were ordered to be stayed.

The bill in the present suit charged that the recital of the advance of 5000*l.* either by Jones or Norton to the society was untrue; that the society had no power, under their deed of settlement or otherwise, to mortgage their property for securing existing debts, and that the terms of the deeds of 5th July 1860 never received the assent of a general meeting. The bill prayed that it might be declared that the indentures of the 5th July 1860 were void, or at all events that they did not create any valid charge in favour of Jones upon the moneys payable by virtue

of the agreement of the 8th March 1859, and that by virtue of such indentures the debt Norton became a trustee of the moneys assigned by the firstly stated indentures for the society; it also prayed for a transfer to the plt. of the 2069*l.* 12*s.* 11*d.*, which had been paid into court in the former suit, and a repayment out of Jones's assets of the sum of 1673*l.* 5*s.* 5*d.* paid by the association to Norton as Jones's trustee, and, if it should appear that the two deeds did create a valid charge, that then an account might be taken, and that the debts might be ordered to pay the costs of the suit.

The debts by their answers denied the allegation that the 5000*l.* had never been advanced, and claimed to stand as creditors in respect of it.

After the case had been opened, there was discovered, upon examining the books of the society, a minute of a meeting purporting to have been held on the 7th Jan. 1861, at which the solicitor to the society laid before the meeting its financial position, and reported that a petition to wind-up had been presented, and also that there was a proposal for a compromise, and that, unless they let the order to wind-up go, it was desirable that the shareholders should respond to a call. The minute, however, had not the signature of the chairman attached to it.

Osborne, Q.C. and E. K. Karslake appeared for the plt.

Baily, Q.C. and Lawson, for the executors, took no part in the argument.

Glasse, Q.C. and G. L. Russell for Norton.

Osborne, Q.C. in reply.

The following authorities were referred to:

Teversham v. Cameron Coal Company, 3 De G. & Sm. 296;

National Patent Steam Fuel Company, Baker's case, 1 Dr. & Sm. 55; 1 L. T. Rep. N. S. 526;

Murray's Executors case, 5 De G. M. & G. 746;

Troupe's case, 29 Beav. 353;

Power's case, 30 Beav. 225;

Lane's case, ante p. 461;

Grady's case, 8 L. T. Rep. N. S. 98;

53 Geo. 3, c. 141, s. 4;

Bythewood & Jarm. Conv. 331.

The VICE-CHANCELLOR said, that he considered the plt. to be entitled to a part of the relief which he had asked for, though not to the whole of it. So far as related to the mortgage to Jones of the money payable by the British Nation Association, he was entitled by reason of the provisions of sect. 29 of 7 & 8 Vict. c. 110; but, on the other hand, the court ought not in that suit and at that stage of the question between the parties, to make any declaration with regard to the 1673*l.* 5*s.* 5*d.* which had been actually received by Jones's representatives. (The Vice-Chancellor then referred to the deeds of July 1860, and mentioned the circumstances under which they had been executed.) There was nothing legally wrong in that transaction, although it might be said that it was for the benefit of Jones, as between him and the society, and beyond all doubt he was at that time, and continued till his death to be, a director; and the 29th section was express, that any contract or dealing between a director and the society, unless and until it had been sanctioned and confirmed at the next general meeting by the majority of the votes of shareholders present, should be void. Unless, therefore, there was direct or presumptive evidence sufficiently strong to lead to the conclusion that this had been done, that contract would be of no force or effect. Direct evidence there was none. Was there sufficient to constitute presumptive evidence? It was said that, on the principles laid down by the L. C. in *Lane's* and *Grady's* cases, there was sufficient ground to presume that such sanction had been given. The bill alleged

that the transaction was void under the 29th section. Each of the defts. had put in a voluntary answer, and they contained no suggestion or allusion as to the fact being thus challenged, but they did say that they were informed that no such meeting had been held subsequently. The cause coming on, and the books of the society being in evidence, and there being no affidavit on the subject, it came out, for the first time, from a minute-book, that there had been a meeting on the 17th Jan. 1861, while the transaction had occurred in July 1860. This minute was not signed by the chairman, probably because it was a mere minute which could not be signed till approved of at the next meeting, and no meeting ever took place again. But there was a minute carefully and fairly prepared, not a slovenly entry, and there was no mention of this transaction, or loan, or security. The nearest approach to a mention of it was, that the solicitor laid before the meeting the financial position of the society, and stated that there was a petition to wind-up, a proposal for a compromise, &c. and that unless they let the order to wind-up go, it was desirable that the shareholders should respond to a call. Supposing, however, that the financial statement represented the sums owing, and the assets of the company, as his Honour thought it might have done, no inference could be drawn from that fact that Norton had lent 5000*l.* and that the society had made an assignment to him of all their interest under the agreement of March 1859. To draw such an inference would be contrary to every authority on the subject. Adopting entirely the principle laid down in *Lane's* case, there, upon the facts before him, the L. C. thought there was sufficient evidence of the fact that 3000*l.* had been paid by Lane, and annuities purchased by him on the other side, there being entries of such items in the balance sheet, and that was a just conclusion that these facts were brought to the attention of the meeting, and that they must be taken to have approved of it. Assuming in the present case that the meeting took place, and that this was a complete minute, only imperfect by reason of the omission of the signature of the chairman, he felt satisfied that if this case had come before the L. C., after having decided as he had in *Lane's* case, upon the principle there laid down, he would have decided that in the present instance there was not sufficient evidence to presume that the meeting had sanctioned the transaction in question. As his Honour was of opinion that the deed was within the operation of the 29th section, and that it had not received the confirmation of a subsequent meeting, he held it to be of no effect. As to the refunding of the 1673*l.* 5*s.* 5*d.* the court could make no such order. Jones was entitled to be paid by the society all that he had advanced, which had been properly applied to the purposes of the society, although the mortgage-deed could not stand as a security for the money; and he was entitled to be repaid the 1000*l.*, not because they had agreed to give him a security, but because, if this transaction had never existed, he would have been entitled to it. Moreover, the present suit was not the proper proceeding in which to dispose of that question, because the proceedings in the winding-up were going on, in which Jones, or those representing him, would be entitled to the benefit of all sums advanced to the society, and any other moneys, as claims, and he was or might be liable to calls, and, therefore, although the 1673*l.* 5*s.* 5*d.* had been received under the deed, it ought not, in accordance with the principle laid down in *Baker's* case, to be ordered to be refunded in the present stage of the proceedings. It was said that the call to be made was so large that it would absorb all his claim; that might or might not be so, but that matter would be disposed of at the winding-up, and he knew as a fact that Jones had advanced large sums, and that his representatives had

received the 1673*l.* 5*s.* 6*d.*; all other surmises on that question were merely speculative. As to the Accountant-General transferring the 2069*l.* 12*s.* 11*d.* which was in court in the other suit, the court had no jurisdiction over it in the present suit. It almost appeared to follow, indeed, that the money belonged to the official manager, and it was competent for him to make such application in that suit as he might be advised, assuming, as might fairly be assumed, that he was entitled to it. The costs were to be costs in the winding-up.

Solicitors, *W. J. Scott*, Skinner-street, Snow-hill; and *Norton and Elam*, New-street, Bishopsgate-street.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WENLOW, Esqrs., of Lincoln's-Inn, Barristers-at-Law.

Nov. 17, 18 and 19.

VICKERS v. BELL.

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Validity of guarantee—Bodily and mental capacity—Solicitor—Executor—Party—Costs.

Where an instrument of guarantee was signed by a man who was blind and deaf, but it was shown that the contents were fully submitted to his consideration by persons around him who could communicate with him by means of his fingers; it appearing, further, that an alteration was made in the instrument in consequence of a rational and properly expressed wish of his, and the allegation that the signature had been obtained by fraud and misrepresentation having totally failed, the guarantee was upheld against its estate.

Testator having named four persons to be his executors, two only of them proved the will, leave being given to the other two to come in and prove. One of them, a solicitor, who had neither renounced nor disclaimed, but who had stated himself to be acting as solicitor to the executors, was made a party to a creditors' suit. He disclaimed the trusts by his answer, and maintained that he was not a proper party:

Held, that if not a necessary, he was not an improper, party to the suit:

Held, further, inasmuch as the great bulk of the evidence in support of the case of fraud which failed had been voluntarily brought forward by this deft. on behalf of himself and the other defts., that, although he had requested it might not be read on his behalf at the hearing, he was not relieved from paying (with the other defts.) the costs of the suit, other than those of a common creditors' suit.

The bill in the first of these suits was filed by Mr. Vickers, a solicitor, of Bridgnorth, as a creditor of Captain Charles William Bell, late of Richmond, Surrey, deceased, for the purpose of enforcing a guarantee, dated the 2nd Jan. 1854, which was in the following terms:—

"To Mr. Henry Vickers, Bridgnorth.

"In consideration of your undertaking the conduct of the affairs of my daughter's husband, the Rev. Charles Edmund Fewtrell Wyde, in order to assist him in reinstating himself and family in their former estate and position, I, the undersigned, Charles William Bell, guarantee the payment of your charges relative to all business in which you may be employed respecting Mr. Fewtrell Wyde's affairs, provided always that I shall not be called on to pay the above costs and expenses, or any part thereof, previously to the 1st day of January 1855. And I, the undersigned Charles Edmund Fewtrell Wyde, hereby undertake to pay such charges.—Dated this 2nd day of January 1854.

"CHAS. W. BELL.

"C. E. FEWRELL WYDE.

"Witness, ISABELLA PLACE.

"Jan. 2, 1854."

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The question in the case was, whether this guarantee was a valid charge on the estate of Captain Bell for the sum of 2000*l*. 13*s*. 11*d*., being the amount of the plt.'s costs in the litigation comprised in the guarantee, and that question depended on whether Captain Bell, at the time he executed this guarantee, was in such a state of health as to enable him to enter into any valid contract.

Captain Bell had been a captain in the service of the East India Company, and his daughter had married Mr. Fawtrel Wyld in the year 1853. Captain Bell was and had been for some years previously completely blind and deaf, but, as the bill alleged, was perfectly able to hold a ready communication with his wife and daughter by means of his fingers, and, as the bill alleged, was perfectly able to transact business. The defts., on the other hand, contended that at the time he executed this instrument he was quite unable to understand what he was doing in consequence of an apoplectic fit which he had had recently. Mr. Wyld died in the year 1859, insolvent.

The case made by the defts. was substantially set forth in the eighth paragraph of the answer to the original bill. Mrs. Wyld, Captain Bell's daughter, deposed as follows:—"On the 31st Dec. 1853, I and Charles Wyld were in the same room with Captain Bell, who was totally deaf and blind, and in a state of great prostration both of mind and body. No one else was then present. I was in the habit of communicating with the said Charles Bell through the medium of his fingers, and upon the occasion to which I am now alluding the said Charles Wyld gave me a memorandum in writing (the guarantee in question) then unsigned. When Charles Wyld gave it to me he said, 'I want your father to sign this, tell him to do it.' I thereupon communicated to Charles Bell, 'Charles wants you to sign this paper.' Charles Bell objected on the ground that he was not in a fit state to be troubled with business. Charles Wyld then said, 'It is a mere legal form, read it to him.' I then read the said guarantee to Charles Bell through the medium of his fingers, who upon my concluding it said, 'I do not understand it, send it to my solicitor.' Charles Wyld thereupon became very angry, and said, 'What nonsense, there is no occasion, it's a mere form, you'll never hear any more about it.' At the request of Charles Wyld, I communicated what he had to Charles Bell, who thereupon signed the guarantee, saying at the same time, 'Well, Charles, I sign it because you ask me, and you say I shall hear nothing more about it, but I don't know what I am signing,' or to that effect. The aforesaid communications from me to the said Charles Bell were effected by the means hereinbefore mentioned." In paragraph 12, Mrs. Wyld deposed that Captain Bell did not comprehend the meaning of the said guarantee when read over, and as evidence thereof she said it was the habit of Captain Bell to repeat with his mouth the words communicated through the medium of his fingers, but he did not do so on this occasion.

Another part of the case arose in this way. Capt. Bell died in March 1857, having by his will and codicil appointed as his trustees and executors his widow Elizabeth Bell, the Rev. William Brown, Robert Smith, of Richmond, solicitor, and his daughter Mrs. Wyld. The will was proved by Mrs. Bell and Mrs. Wyld only, power being reserved to Mr. Brown and Mr. Smith to come in and prove. The original bill was filed against Mrs. Bell and Mrs. Wyld, and also against Smith, alleging that he had acted as executor.

Mr. Smith, in partnership with his son, was the solicitor of Capt. Bell. After Capt. Bell's death, Mrs. Wyld informed Mr. Smith that her father had signed some paper, and his firm, upon hearing of it, wrote to the plt.'s solicitor, on the 26th Nov. 1858, to this

effect:—"Mrs. Bell informs us that this undertaking was obtained by fraud and misrepresentation, and was never read over or explained to him (the testator), he being completely deaf and blind, as you know, and at the time of signing it slowly recovering from a fit of apoplexy." By his answer Mr. Smith denied that he had ever acted as executor or trustee. He admitted that his firm wrote to the plt.'s solicitor on the 7th April 1857 as follows:—"Dear Sir,—The executors of the will of the late Capt. Bell are his widow and daughter and one Mr. Robert Smith. The will has been proved, but we have not yet received the probate. We act for the executors." Mr. Smith had not renounced probate, or disclaimed by deed; but by his answer he disclaimed all the trusts of the will. By a voluntary affidavit he supported the case of fraud and misrepresentation. (See the observations in his Honour's judgment below.)

The cross-suit was filed by Mrs. Bell and Mrs. Wyld against Mr. Vickers, to have the guarantee given up to be cancelled.

Malins, Q.C., Greene, Q.C. and E. F. Smith appeared for the plt. They cited

Love v. Jolliffe, 1 Wm. Bl. 365;

Cummins v. Cummins, 3 J. & Lat. 64, 91;

Long v. Symes, 3 Hagg. 771;

20 & 21 Vict. c. 77, s. 64.

Bacon, Q.C. and Speed were for the defts. Mrs. Bell and Mrs. Wyld.—The points are, first, whether he was competent to transact matters of business such as this; and, secondly, if competent, whether the document was properly explained to him, and he intended to bind himself by it. They disclaimed the case of fraud and misrepresentation made against the plt., but denied that he was in a competent state of mind. It was further contended that by this guarantee, supposing it, for argument's sake, to be good, the testator only undertook to pay the debts already contracted by Mr. Wyld. At that time no bill of costs had been delivered to Wyld or his solicitor, and no liability had, in fact, been incurred. No bill had ever been delivered to Wyld, and this failure to comply with the requisition of the Attorneys and Solicitors Act, sect. 37, was fatal to the plt.'s claim.

Druce appeared for Mr. Smith. He referred to

Dyson v. Morris, 1 Hare, 413;

Davies v. Williams, 1 Sim. 5;

Strickland v. Strickland, 12 Sim. 463,

and contended that he was not only not a necessary, but not a proper party, inasmuch as he had neither acted in the trusts, nor received assets: he desired to be permitted to put in no evidence; and asked to be dismissed with costs.

The VICE-CHANCELLOR.—The question in this cause is, whether the plt. has shown himself to be entitled to relief as plt. in a creditor's suit, against the legal personal representatives of the testator Captain Bell. The plt.'s claim against the estate is upon an instrument of guarantee dated the 2nd Jan. 1854. From the contents of that instrument, if proved as a valid instrument, the plt.'s right to a decree would be perfectly clear. He comes upon that instrument seeking relief; and if the instrument were proved to be a valid instrument, the relief to which he would obviously be entitled would be in the shape of a declaration that he is entitled to the benefit of that instrument as against the estate of the testator. The great length of time consumed in the hearing of this cause has been occasioned by the defence set up by the defts., the executors of the testator, who have insisted that the instrument was an invalid instrument; that it was obtained by fraud and misrepresentation; and that it was executed by the testator at a time when he was incapable of transacting or understanding matters of business. A great deal of evidence has been laid before the court on that subject, and the result of it

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is, that the case of fraud, misrepresentation and incapacity totally fails, and fails upon documentary evidence created by one of the defts. herself. The sort of case made as to the incapacity was, that it was an incapacity proceeding from disease, beginning with an apoplectic or epileptic seizure—for it is called both—on the 18th Nov. 1853, which is said to have continued till the subsequent month of March. The evidence is clear as to the apoplectic seizure; but as to the seizure having occasioned a degree of mental incapacity, which existed at the time when this instrument is said to have been executed, the evidence totally fails. There is abundant evidence to show that, before the time when the document was executed, at or about the very day on which it was executed, and during a whole month and more afterwards, those very persons who come forward now—some as defts., some as witnesses—concurred in transactions of business with the testator, which wholly falsify the pretence of incapacity set up on the pleadings, and totally falsify the pretence of fraud and misrepresentation in the sense in which that defence is put upon the files of the court. That there has been foul fraud and misrepresentation in this case is perfectly clear. The situation of the testator was singular. He was blind and deaf to a degree which required a mode of communication to be adopted with him by means of his fingers through persons accustomed to communicate with him in that manner. This obviously exposed the testator to have frauds committed upon him, and imposed upon those who conducted his affairs an extraordinary duty in the way of honesty and caution. The person who principally communicated with the testator on matters of business was his daughter, Mrs. Wyld, one of the defts. Of her skill and the testator's confidence in her skill, and of the decisive proof of the testator's capacity to understand what was so communicated to him, there is abundant evidence. A letter of the 11th Dec., in the handwriting of Mrs. Wyld, affords irrefragable evidence, from the intrinsic contents of the letter, joined with the other evidence in the cause, that this instrument of guarantee was submitted to the testator's consideration, that he wished an alteration made in it, and that the alteration was so made in consequence of the rational and proper wish of the testator. Having been so made, it is no part of the case of the defts. that the testator did not sign the instrument. Their case is, that fraud and misrepresentation were used to obtain his signature. It is needless to trace the question of fraud and misrepresentation any further than as applies to the question to be decided in this cause. I have already said that it totally fails; and failing, the plt. is entitled to a declaration to the effect that, as against the estate of the testator, he is entitled to the benefit of this instrument, and that must be followed by the usual decree in a creditor's suit. One of the defts., Mr. Robert Smith, the confidential solicitor of the testator, who seems to have prepared, and whose son and clerk attested the execution, of the testator's will in which Mr. Smith is named as an executor, is joined as a co-deft. in this suit. The will has been proved by the widow and the daughter of the testator only; power having been reserved to Mr. Smith and another gentleman, who is not made a deft., to come in and prove. There can be no doubt that, for certain purposes, probate enures for the benefit of all the executors. Mr. Smith's counsel has argued, and cited authorities to show, that Mr. Smith was not a necessary party, and that he is not a proper party to the suit. In order to judge of the question as to whether or not he is a proper party, the principle on which it is to be viewed is perfectly plain. At any moment Mr. Smith may come in and claim that probate, the right to which has been reserved to him by the decree of the Probate Court. If he had come

in and proved, and had not been made a party to the suit, the proper decree to be made against the representatives of the testator—giving against his estate the benefit of this guarantee—would have been a decree made in the absence of Mr. Smith, without hearing what Mr. Smith would have had to urge upon it, and would have raised a question whether he were bound by it at all. It is one thing to say that an executor who has not proved is not a necessary party to a suit; it is quite another thing to say that he is not a proper party. That is one view of the aspect of the case as to Mr. Smith being a party, and as to the effect of the decree as entitling the plt. to relief against Mr. Smith in his character of executor named in the will, and with an inchoate right. The question of Mr. Smith being a necessary party must be judged of by the allegations in the bill, by what appears upon the pleadings, and by the evidence in the cause. Another view of the case which must be taken is this. The bill avers that Mr. Smith has acted as executor and trustee. I think there is no specific averment that he has possessed himself of assets, but the averment that he has acted as executor and trustee is an averment capable of proof. It has been laid down by the greatest judges that a very slight act is sufficient to show the acceptance of the office of executor. In the present case, the averment being that he has acted as executor, anything tending to show that he has possessed himself of assets or intermeddled with the affairs of the testator would be enough, when shown, to justify the plt. in requiring the court to make a decree which, binding Mr. Smith as an executor as to the validity of this document, would make it impossible for him, while the decree was unreversed, to question that decree as binding upon him as executor. The inquiry as to what the nature of his conduct has been would be justified by very small circumstances. Hearing that amongst other documents there was the banker's book of the executors, I asked to see it. I find in it an entry of money coming from the hands of Mr. Smith. That must be assets. No doubt Mr. Druce has offered at the bar a verbal explanation of that; but the question is, whether, if the plt. has made him a deft. and the plt. asks a decree, the court is justified in shutting out from the plt. the means of investigating the nature of that transaction of which a verbal explanation has been given. My opinion is, upon the whole, that, in this case, where Mr. Smith's right to come in to prove has been preserved by the very decree which grants the probate, where the evidence shows that the firm of which he was a partner, being asked to name the executors, said that he was an executor, it would be much too strong a thing for the court to say that Mr. Smith is to be treated as a person improperly made a deft., because there is not yet full and distinct evidence as to what he has done in the way of dealing with the property of the testator, an entry of his dealing with which is found in the executor's pass-book. Therefore I cannot come to the conclusion that Mr. Smith has been improperly made a party to this suit; nor can I dismiss the bill against him with costs, as his counsel has urged. The costs are the material consideration. In this case great expense has been occasioned by voluminous evidence taken necessarily at a great expenditure of money, and produced before the court at a great consumption of the public time, and I find Mr. Smith an active person in taking that evidence. I find that the evidence was taken on behalf of all the defts., including him, and I think properly so taken under the circumstances of the case. I also find that he, not by deposition but by voluntary affidavit, comes forward as the champion of the case of fraud and misrepresentation, which has been, I think, fraudulently brought forward. It is a case in which, not only does the proof of the fraud and misrepresentation fail, not only is it disproved by docu-

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mentary evidence under the hand of one of those who make it; but it has been brought before the court by the voluntary affidavit of Mr. Smith, which has been made evidence in the cause. In his affidavit of the 2nd May he says: "Although my said letter was addressed to the said Charles William Bell, I knew at the time that, in consequence of his infirmity and his then recent illness, he was not in a condition to transact matters of business." This is said by the solicitor who continued corresponding with the testator on matters of business, and a few days afterwards received his cheque for 1800*l*. Some one must pay the costs of this litigation, and all that I have to consider is, whether the two first-named defts., the widow and the daughter, should alone bear the costs, or whether Mr. Smith, the executor, who is made a deft. to the cause, and who has had the evidence taken on his behalf, as well as of the others, should not share the burden of them, although he has made an attempt to repudiate the evidence at the bar, and begs it may be said that he has not read it, after it has been all read to the court as taken on his behalf. I cannot in conscience relieve this gentleman from the costs of this suit, and the decree will be for all the defts. to pay the costs of the suit, or rather all the costs of the suit except so far as it is a common creditors' suit. The cross-bill will be dismissed with costs. I have not come to the conclusion that Mr. Smith should pay the costs without feeling that, as solicitor, his situation was one that eminently required the consideration of the court. But I have endeavoured to explain why I think, after giving all due consideration to the circumstances in which the solicitor was placed, his conduct has not been such as to enable me to say that he should not bear the costs of the suit. The declaration will be according to the first paragraph of the prayer of the amended bill, and then there will be the common decree in a creditors' suit.

Solicitor, *John Philpot*, agent for *Vickers*, Bridgworth; for the defts., *Kempson and Trollope*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Thursday, Dec. 10.

WALSHAM v. STANTON.

Practice—Production of documents—Report of accountant—Privileged communications.

All communications between the solicitor, or a person acting pro hac vice as his clerk, and the client, in the course of and with reference to the suit, are privileged, and generally all documents which might expose to the opposite party the course of defence intended to be taken.

Therefore the court will not order the production of drafts of pleadings and briefs used by counsel, or of a report of an accountant acting under the direction of the solicitor of the party to a suit, containing extracts from, and comments on, accounts.

This was a summons, adjourned into court, for the production of certain documents in the suit, consisting of, first, drafts of pleadings, affidavits, &c.; secondly, briefs of counsel used by them in the progress of the suit; thirdly, a report prepared by an accountant under the direction of the solicitor from the books of the Carron Company, defts. in the suit. The facts of the case will be found at length in the report of the arguments upon demurrer (8 L. T. Rep. N. S. 633.). It may be remembered that the object of the bill was to recover from the representatives of H. Stainton, forty shares in the Carron Company, upon an allegation that they had been fraudulently purchased by him.

The Carron Company and their manager, W. Dawson, had been made defts. as claiming a lien on these shares, and as refusing to assent to the transfer of them to the plt.

On the summons for the production of documents the plt. had amongst other things required to look into the accounts of the company for the purpose of ascertaining "the sums improperly withdrawn" from the capital by H. Stainton. In the course of the proceedings on the summons Dawson put in an affidavit setting forth those documents which he declined to produce, as to some of them, on the ground that they were confidential communications between the agents of the company and their legal advisers, and as to others, as having been "confidentially prepared on behalf of the company by their legal advisers, or under their direction, as to part of such communications and documents, for the purposes of litigation then subsisting between the company and the representatives of H. Stainton with reference to the frauds of H. Stainton" which were in question in the present suit.

Giffard, Q.C. and *Eddie*, for the plt., contended that they would have been entitled to see the books of the company, and that, as to the report of the accountant and the extracts made by him, there was nothing to show that they were intended to form the basis of the deft.'s case, or if they were so, that they were actually or by implication the work of the solicitor. They cited

The London Gaslight Company v. The Vestry of Chelsea, 5 Jur. N. S. 469; 2 L. T. Rep. N. S. 217.

Lafone v. Falkland Islands Company, 4 K. & J. 34;

Roll, Q.C. and *Cotton* maintained that the documents under the third head (as to which alone there was any serious contention) were prepared by a person acting as agent for, and therefore whose communications were equally privileged as those of a solicitor; assuming this, if they were merely extracts of certain items from the accounts, their collection and juxtaposition would give a key to the defence; but they were more than this, viz., extracts with the comments of the privileged agent, and might so be compared to the notes of evidence intended to be proffered in an action. They referred to

Curling v. Perring, 2 My. & K. 380;

Steele v. Stewart, 1 Phill. 471.

Giffard, in reply, urged that the onus lay on the defts. to show that these communications were privileged, and that their affidavit on the summons had not done this.

The VICE-CHANCELLOR said, that the principle in this case was very well defined, that where work was to be done not immediately within the province of a solicitor, he might employ an expert, in this case an accountant, the result of whose labours would be as much privileged as those of the solicitor himself; in such a case the expert was, *pro hac vice*, the clerk of the solicitor. It was necessary, therefore, only to look at the affidavit in support of the objection, and to see that it corresponded to the description of the documents in the schedule. As to the drafts of pleadings, their substance had been published in the cause—the matter contained in them was open to any one to inspect—but to produce the drafts themselves with the alterations made in the course of their preparation would indicate the course of defence intended to be taken, and so far they were privileged communications. As to counsel's briefs, so far as they were copies of the proceedings, they were also open to inspection; but as to the observations intended for counsel's use, and their marginal notes, and even interlineations, tending to point out those parts of the case on which the deft. might rely, those also ought to be protected. As to the documents under the third head, the cases cited

(*Steele v. Stewart* and *Curling v. Perring*) fully supported the proposition that such documents, when prepared by the agent of a solicitor, were entitled to the same protection as when prepared by the solicitor himself, and that, as between the solicitor or other legal advisers, there must be a perfect liberty of communication. Here it was sworn that the report of the accountant was to serve as part of the instructions for the answer; it was only necessary to swear generally that the document was of a nature to be privileged, and for the court to find, upon looking at the schedule, as it was entitled to do, that it bore out the statements in evidence. He thought that this was the case here, and that therefore this latter class of documents was entitled to protection. If the general rule were not maintained, it would be impossible to have that free communication between parties and their legal advisers which was essential to the conduct of a suit, for such communications could not be carried on orally throughout, and there would be a continual uncertainty, to the prejudice of the party, as to what was privileged and what was not. The order, therefore, would be, that none of these documents be produced, except such briefs of counsel of which no account was given elsewhere, and in such, excluding all notes, instructions, or observations.

Solicitors for plt., *Tatham and Proctor*.

Solicitors for defts., *Freshfield and Newman*.

Dec. 8, 9 and 11.

GOODRICKE v. TAYLOR.

Bankrupt—Act of bankruptcy—Assignment of trader's property—Fraud.

Shortly before committing a formal act of bankruptcy, a trader mortgaged to bankers the house in which he carried on his business, stock-in-trade and furniture therein of very small value, and book-debts, about 100l., as a security for payment of 1050l., with power of sale after seven days' default. He was at the same time liable as a surety for an insolvent firm to the extent of 2000l.:

Held, that such mortgage was an act of bankruptcy, being substantially an assignment of all the trader's available assets, and void as against the assignees under the bankruptcy.

This was a bill filed by the assignees of a bankrupt, Thos. Wilson, a saddler, at Claverley, in Shropshire, praying that a mortgage made by him shortly before his bankruptcy might be set aside and declared void as against the assignees.

Thos. Wilson was declared bankrupt on the 6th July 1861.

On the previous 30th April 1861, under pressure of threats on the part of John Wilson, a creditor, he had entered into an agreement whereby he was to execute a mortgage of a freehold house in which he then lived and carried on his business to secure debts owing to said John Wilson, and to one Taylor, another creditor, from a firm of Perry and Wilson, who, it subsequently turned out, were insolvent. It was thereby stipulated that the mortgage-deed should contain "all the usual clauses and covenants" and "a power of sale."

On the 6th May he executed such mortgage to John Wilson and Taylor by assignment of his said house to them, which was alleged to be of the value of about 900l., upon trust to permit the bankrupt to occupy it until default, and if he should make default for seven days in payment of principal and interest, to sell.

The other material facts of the case are fully stated in the V. C.'s judgment.

Sir H. Cairns, Q. C. and E. K. Karlslake, for the plt., the assignees, contended that the bankrupt executed the conveyance voluntarily, and to secure

a debt for which he was not in fact liable; and secondly, that the mortgage was an assignment of the whole of the bankrupt's property, so as to disable him from further carrying on his business as a trader. They cited

Ex parte Bailey, 3 De G. M. & G. 534;

Ex parte Bland, 6 De G. M. & G. 756;

Sanger v. Wilkins, 19 Beav. 626;

Carr v. Burdiss, 1 C. M. & R. 443.

Rolt, Q. C. and G. N. Colt, for the defts., the representatives of John Wilson (who had died after the filing of the bill), contended that the assignment was not voluntary, but executed under legal pressure, and that it did not convey the whole of the stock-in-trade, book-debts, &c. They cited

Twynn's case, 3 Rep. 83; s. c. 1 Smith's L. Cas. 19;

Bannatyne v. Leader, 10 Sim. 350;

Van Castell v. Booker, 2 Ex. Rep. 691;

Hartshorne v. Sladden, 2 Bos. & P. 582;

Brown v. Kimpton, 19 L. J., N. S., 159, C. P.;

Johnson v. Fessendenmeyer, 25 Beav. 88; s. c. on appeal, 3 De G. & Jo. 13.

Karlslake, in reply, referred to

Smith v. Cannon, 2 El. & B. 35.

THE VICE-CHANCELLOR said:—This bill is filed by the assignees of a bankrupt, Thomas Wilson, to set aside a certain security which was taken by the late deft. John Wilson, and by the present deft. Mr. Taylor, upon a considerable portion of the property of the bankrupt. It is sought to be set aside under the 67th clause of the B. A., which clause, as is well known, branches out into two distinct principles in investigations of this description, namely, in the one case in which there is an assignment of a part only of the bankrupt's property made voluntarily, and I cannot say without pressure, but made voluntarily—offered as it were by him spontaneously—in which case, although it be only a portion of his property that is dealt with, yet it comes within the provisions of the Act as being a fraudulent preference of a particular character. The other branch of the case is, where substantially the whole of his estate and effects is parted with, so that the necessary consequence is immediate bankruptcy, if the assignment or dealing with the property be sustained. I before expressed my opinion upon the question as to the first branch of the case; because it did appear to me that the evidence was much too strong for the parties here to contend for a moment that there had not been pressure, and pressure of the strongest description, with reference to the obtaining of this security. Therefore I do not take this species of fraud entirely into consideration; but the much more serious question in this case was, whether or not the security could possibly stand, regard being had to what the assignment is, and its necessary operation on the condition of the bankrupt as to the further carrying on of his trade. One must not be misled in cases of this kind by suggestions of general principle with regard to what may or may not be the case when such and such a security is taken from a bankrupt. The case is one depending upon its particular circumstances, and those circumstances have to be made the subject of consideration. The only principle which I need refer to as established is this, that if there is what Lord Mansfield rather powerfully called, in his peculiar language, "an assignment of the man's solvency," then he holds it to be within the operation of the bankrupt law, and you have to see whether, when you take it out of his estate, he is solvent or not; and also whether it is an assignment of his trade which makes it impossible that he could carry on his business if this security were carried into effect. Lord Mansfield illustrates it by saying "where he assigns the whole of his furniture," that was one class of

cases illustrating his observation, and that very class of case did occur in one of the cases referred to by the Lords Justices, in their judgment in *Re Bailey* (namely the early case, *Power v. Walker*, in *Man. & Gr.*), where an innkeeper assigned the whole of his furniture, but did not assign his stock-in-trade, liquors, &c., or book-debts. There the judge directed the jury at the trial that this, in his judgment, would amount to an act of bankruptcy. That was not affirmed or disaffirmed at the subsequent hearing, but it does not appear to have been disputed or quarrelled with, the furniture being in that case a part of the stock-in-trade necessarily; as an innkeeper he could not, of course, carry on his business with unfurnished rooms. Now the case may be brought to a simple statement on the undisputed facts and the consideration of what the circumstances really are, when one has to consider whether it was probable in any way, or even possible, for this man, if this security had been carried into full effect, at any time to have continued for one instant in his business. The case is this: he originally owes nothing himself; but unfortunately for him, he has a son who becomes considerably embarrassed in trade, and at the early period of this history the son had borrowed money of his bankers from time to time. It appears that in 1860 there was as much as 2000*l.* due to the bankers, Sir Francis Goodricke and Co., and the mode of dealing with that 2000*l.* was, that the bankrupt's son John Evans Wilson and Thomas Farmer Perry and John Perry (the father of Thomas Farmer Perry) and the bankrupt, all of them made a joint and several promissory note for 2000*l.* That note was from time to time renewed, and at the date of the assignment in question there was a current note of the 13th March 1861 then running for 2000*l.* payable at three months, and which would therefore become due in the middle of June. The assignment which I have to consider was made in April of the same year, 1861. This being the situation of these four persons, of course the bankrupt was liable upon the note for the 2000*l.* as principal, and not merely as surety. As between himself and his son, he was surety no doubt; but, as between himself and the creditors, he was liable as principal for the whole debt of 2000*l.* Then the next thing we find in the transaction is this: as regards the deceased John Wilson a debt of 450*l.* was alleged, which was on these terms. He had a joint and several note from Perry and John Evans Wilson and Perry's father for an advance of 400*l.*, and he subsequently obtained the bankrupt's signature to that note. The question has been made, whether that was a valid or an invalid transaction, or whether it constituted, or did not constitute, a good debt. For the present purpose I assume it to be a good debt. Then, he having that debt of 400*l.*, and Taylor having also a good debt of 650*l.* in respect of certain timber which had been sold, Taylor being the agent to Davenport, and having sold Davenport's timber, and having made himself responsible to Davenport, and so having become the creditor of the firm of Perry and Wilson, Taylor obtains a note which is only a note from Perry and Wilson, and I think the father of Perry, but not the bankrupt. In that state of circumstances it comes to the knowledge of Taylor and of John Wilson that Perry and Wilson are in very bad circumstances, and it appears that they afterwards become bankrupts also. [The V.C. here read parts of the evidence establishing this fact.] Now we have it that both Taylor and Wilson well knew that Perry and Wilson were largely embarrassed, that many writs were out against them, that they had given accommodation bills, that they had become burdened with the 1000*l.* which they had borrowed, and that they had become liable for 2000*l.* more to their bankers, knowing what the state of Perry and Wilson was, and knowing that they owed this 2000*l.* to Holyoake and Co., they proceed

to give the security in question. [The V.C. here read passages from the debt's answer to show that it was very obvious that they did know these embarrassments.] Now the circumstances which are known are these: It is known that the bankrupt was liable upon a joint and several promissory note of Perry and Wilson and Perry. Of Perry, the father's, solvency there is no evidence one way or the other. Nobody has suggested that he was solvent or likely to pay anything at all. As to Perry and Wilson it was perfectly well known to Messrs. Taylor and John Wilson that they were embarrassed, that they had these writs out against them, and that they could not make this payment; who then could? There remained only the bankrupt upon whom the note must inevitably come. They were aware of the fact that it must become due in two months from that time; and therefore one part of the argument of the debt's counsel fails entirely in the way in which it was put. He said: "Here is a man simply giving security—it is not for a debt that he originally owes himself; there are others who are primarily liable, or whom he might ask to pay the debt first, and therefore you are not to assume it to stand at all in the position of a debt due from the bankrupt himself by whom the security is given." I apprehend at this moment it must be taken to be perfectly within the knowledge of those two who were taking the security that the bankrupt was liable for this 2000*l.*, that it was impossible that Perry and Wilson could pay it; that it must fall on him. There was no idea suggested that Wilson the father was in a capacity to make the payment, and therefore I must hold them to have been aware of this large bill against the bankrupt becoming due in this period of time. Then it was said by the debt's solicitor, if this is put in an abstract point of view it is easy to argue that a man cannot give security for a debt which is primarily his own, when he reserves to himself all his stock-in-trade and all his speculations are going forward, which may or may not turn out ill, but which at the time are not in such a state that the business can be carried on, and he says, is it to be assumed that he is not to be allowed to give a security of this description? The answer to that is this: here is a man who is supposed to be in the position of a simple security for the debt of Perry and Wilson, though undoubtedly at the present moment he is primarily liable as between himself and the creditors, and was so from the first; but at this time it has become a patent fact that Perry and Wilson cannot pay the debt. He has this burden lying upon him, and he parts with everything, including his shop, and leaves himself with absurdly small assets. The court has held that the security for an antecedent debt is a strong indication of what is called fraud within the bankrupt laws. The man gets nothing to help him to carry on his business. It is obvious that Perry and Wilson could not pay the 2000*l.* They knew that Thomas Wilson must pay it, and that therefore care must be taken to have the whole of his property before that debt could come upon it. Then comes the form of the deed, which is not by any means to be overlooked. An agreement is taken for a mortgage, "with the usual clauses." Certainly, I never saw in any mortgage an earlier period fixed than a year. In a common mortgage you make the principal money payable at the end of a year; you make the interest payable at the most quarterly, generally half-yearly, and in default of payment of principal and interest you give the power of sale; but this agreement being for a mortgage with the usual clauses, the condition is only for "seven days after demand." It is intended to pounce down upon the property the moment another creditor is coming upon him, the moment they see the trade is about to close and the shop to be shut up they come down upon

him with the mortgage at once, and he is in the condition I have described. The only real question is, did he or did he not know that Parry and Wilson were not in a condition to pay the debt, so that the debt would be clearly and manifestly, in all senses, a debt that the bankrupt would be called upon to pay within that limit of time? I think, if you look at the evidence, there can be little doubt about that, because you must not take what is said to a man in order to wheedle him out of a security to be the man's own belief who says it. It must be rational belief upon all the facts he knew. I cannot dive into his mind in order to know how his mind may be formed with reference to the conclusions that may be found in it, but if the state of things is such as to lead any person of ordinary intelligence to a certain conclusion, that must be the conclusion he should come to. The bankrupt must be taken to know, as other parties did know, the position he was in, as to being liable to pay this 2000*l.* to the bank at the time. He must also be taken to have known his own concerns, that when he parted with his property from the possession of which he obtained credit with the world, they would insist immediately upon the security being enforced. I think it does not go in the slightest degree beyond the authorities which were referred to by Knight Bruce, L. J., from M. & G., and the other authorities in cases of this description, that it is an assignment of the whole property in this sense, that it is the whole of the available property with which the business could be carried on.

Minutes of decree: Declaration as prayed by the bill. The mortgage-deed to be delivered up to be cancelled and a reconveyance executed, to be settled in chambers (if necessary). Injunction to restrain the sale of the property in the meantime. Defts. to pay costs of suit. The representatives of the late deft. Wilson to admit assets to pay them. Liberty to apply.

Solicitors: Hancock, Saunders and Hawksford for plts.

Church, Prior and Brigg, agents for Gordon and Nicholls, for defts.

Saturday, Dec. 12.

Ex parte THE BISHOP OF LONDON.

Apportionment Acts—Dividends on stock.

In the case of an accumulation of dividends on a sum of stock, the produce of lands belonging to an ecclesiastical corporation, a part of such accumulation having accrued during the incumbency of the late incumbent, there will be no apportionment of such dividends, the whole being payable to the existing incumbent.

This was a petition on behalf of the Bishop of London for the payment out of court of a sum of money which represented an accumulation of dividends on stock the produce of certain lands taken by public companies belonging to the see at the time of the passing of the Apportionment Act of 11 Geo. 2, c. 19.

The dividends had been accumulating since July 1856. The late bishop resigned his office on the 30th Sept. 1856, when the petitioner succeeded him.

Osborne Morgan, for the petitioner, contended that the older Apportionment Act, 11 Geo. 2, c. 19, did not apply to such a case as the present, nor did sect. 2 of the present Act, 4 & 5 Will. 4, c. 22, and that the whole accumulation therefore should be paid to the present bishop without any apportionment of the dividends which had accrued during the incumbency of the late bishop. He cited *Re Longworth's Estate*, 1 K. & J., and the clauses of the above-mentioned Acts.

The VICE-CHANCELLOR, after referring to the Acts of Parliament, made the order as prayed.

Order accordingly.

Saturday, Dec. 19.

HUBBARD v. HUBBARD.

Practice—Suit for partition—Share of infant—Cost of suit—Sale of infant's share.

A suit having been instituted for the sale, or in the alternative the partition, of an estate, one of the parties entitled to a share of which is an infant, where the costs of all parties entitled in the suit are payable out of the estate:

The Court will usually order a sale of the whole notwithstanding the infancy of one of the parties entitled.

This was a bill setting forth the title of the plaintiffs one-fifth each of real estate at Stratford, Essex, the defts., one of whom was an infant, being severally entitled to the remaining three-fifths, and praying a declaration that the costs of the infant deft. of and incident to the suit were properly chargeable on her share, for a sale of the entirety of the estate, and payment of the costs of all parties out of their respective shares, or in the alternative a partition. The property consisted of small houses, and an offer for its purchase at a sum of 2500*l.* had recently been made, and evidence was given that from the deteriorating nature of the property and the amount offered for it, it would be highly beneficial for all parties if a sale were made; that, however, could not be done, owing to the infancy of one of the defts., without the assistance of the court.

Amplett, Q. C. and J. T. Hopwood referred to

Thackeray v. Parker, 8 L. T. Rep. N. S. 602;

Cox v. Cox, 3 K. & J. 554;

Davies v. Turvey, 8 L. T. Rep. N. S. 378.

The court would order the sale of an infant's share for payment of costs of a suit, and had in several recent cases applied this rule, where it had been shown to be for the advantage of all parties, by ordering a sale of an entire estate to which infants were in part entitled, in lieu of partition.

Everitt, for the infants, did not oppose the sale.

The VICE-CHANCELLOR said that the cases cited seemed to justify him in making the decree prayed. There would be a declaration in the terms of the prayer, and a sale ordered. The costs of suit of the infant would be taxed separately and paid out of her share; the costs of the sale to come out of the gross purchase-money.

Solicitor for all parties, O. Beadles.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.
Barristers-at-Law.

HILARY TERM 1864.

Monday, Jan. 11.

ADAMS v. GRAHAM AND HAMBER.

Bill of sale—Statement of occupation of maker in the affidavit—17 & 18 Vict. c. 36.

The maker of a bill of sale occupied a private house, and lived there as a private gentleman, but it also appeared that he was employed as a buyer of silks for a firm in London:

Held, that it was not sufficient to describe him in the accompanying affidavit for the purpose of registering the bill of sale merely as a gentleman living at his private residence, but that his occupation as a buyer of silks should be stated also.

Trover for the conversion, and detinue for the retention of goods.

Plea, not possessed. (The other pleas are immaterial).

At the trial before Blackburn, J., in London, it ap-

peared that the plt. claimed title to the goods under a bill of sale made by James Roberts Veale, a bankrupt, of whom the deft. Graham was the official assignee and the deft. Hamber the trade assignee. The goods had been taken possession of by the defts. as being in the order and disposition of the bankrupt at the time of his bankruptcy with the consent of the owner. The residence and occupation of James Roberts Veale were stated in the affidavit required by the Bills of Sale Act, 17 & 18 Vict. c. 36, to be 25, Bernard-street, Russell-square, gentleman; and it was proved at the trial that he was living in a private house, 25, Bernard-street, Russell-square, but was a buyer of silks and a traveller for Candy and Co., warehousemen, of the City of London. The verdict passed for the plt. with leave reserved to the defts. to enter the verdict for them on the ground (among others not now material) of the insufficiency of the statement of the residence and occupation of the maker of the bill of sale in the affidavit.

A rule nisi was accordingly obtained in Easter Term last.

M. Smith and Beasley showed cause.—The description in the bill of sale of the address and occupation was sufficient. It was a true description of the maker at the residence he occupied, for there he was living as a private gentleman, whatever he may have done elsewhere. [BLACKBURN, J.—He had a well-known occupation as a buyer for a wholesale house (an occupation I have heard proved a hundred times), an occupation as well known as a book-keeper or a gentleman's servant.] A buyer of silks is no more an occupation within the meaning of the Act than a buyer of pictures is.

Pickard v. Bretts, 5 H. & N. 9;

Foulger v. Taylor, 5 H. & N. 202;

Beales v. Tennant, 29 L. J. 188, Q. B.;

Sutton v. Bath, 3 H. & N. 382;

London and Westminster Loan Company v.

Chace, 31 L. J. 314, C. P.

[COCKBURN, C. J.—The case of *Allen v. Thompson*, 1 H. & N. 15, is against you.]

O'Malley, Q. C. and *Holl*, for the official assignee, and *Coleridge*, Q. C. and *Beresford*, for the trade assignee, were not called upon to support the rule.

COCKBURN, C. J.—In point of fact the maker of this bill of sale had an occupation. The statute says that a bill of sale, as against all assignees of the bankrupt or insolvent maker and others specified, shall be null and void unless the bill of sale shall, with an affidavit giving (among other things) a description of the residence and occupation of the maker, be filed in the Q. B. Here it was proved that the maker was a buyer of silks and a traveller for the firm of Candy and Co., and that is not stated in the affidavit, as required by the statute. It is impossible to get over that difficulty, and the rule will therefore be made absolute.

The rest of the Court concurring,

Rule absolute.

Attorney for the plt., *T. Binns*.

Attorneys for the official assignee, *Aldridge and Bromley*.

Attorney for the trade assignee, *Elmelia*.

Tuesday, Jan. 12.

LACY v. RHYS.

Copyright—Dramatic piece—Assignment of copyright and acting right—Registration—3 & 4 Will. 4, c. 15—5 & 6 Vict. c. 45, s. 22.

By the 3 & 4 Will. 4, c. 15 (an Act to amend the laws relating to dramatic and literary property) it is enacted that the author of any dramatic piece or his assignee shall have as his own property

the sole liberty of representing or causing to be represented the same, and a penalty is imposed upon any one violating this provision. By the 5 & 6 Vict. c. 45 (an Act to amend the laws of copyright), it is by sect. 22 enacted that no assignment of the copyright of any book containing a dramatic piece shall be holden to convey the right of representing or performing such dramatic piece, unless an entry in the registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment.

The plt. was the assignee of a dramatic piece, the assignment being of "the whole copyright and acting right without reservation." Upon an action brought by him against the deft. for penalties under the 3 & 4 Will. 4, c. 15:

Held, that the assignment need not be registered pursuant to sect. 22 of the 5 & 6 Vict. c. 45.

This was a rule calling upon the plt. to show cause why the verdict for him should not be set aside and a verdict entered for the deft., or why a nonsuit should not be entered on the ground that the registration required by sect. 22 of the 5 & 6 Vict. c. 45, had not been proved at the trial.

The action was brought to recover six penalties of 2l. each for performing a dramatic piece called "The Roll of the Drum," without the consent of the plt., who was the proprietor of the same, and had the sole liberty of representing and causing it to be represented.

It appeared from the facts that the author of the piece in question was a Mr. Thomas Egerton Wilks, and that after his decease his administrator assigned the said piece with "the whole copyright and acting right, without reservation," to the plt.

By the 3 & 4 Will. 4, c. 15 (an Act to amend the laws relating to dramatic literary property), it is by sect. 1 enacted that the author of any dramatic piece, or his assignee, shall have as his own property the sole liberty of representing or causing to be represented the same; and, by sect. 2, it is enacted, "that if any person shall, during the continuance of such sole liberty, cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, any such production, he shall be liable for each representation to the payment of an amount not less than 40s., or, &c., together with double costs of suit."

By the 5 & 6 Vict. c. 45 (an Act to amend the law of copyright), it is by sect. 22 enacted, "that no assignment of the copyright of any book consisting of, or containing a dramatic piece or musical composition, shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment wherein shall be expressed the intention of the parties that such right should pass by such assignment."

In the present case no entry of the assignment had been made in the registry-book, and upon the trial it was contended for the deft. that for want of such registration the right to exclusive representation of the said piece did not pass by the assignment to the plt. A verdict was returned for the plt., leave being given to the deft. to move the present rule.

M. Williams and Day now showed cause, and contended that, as the assignment was of the whole copyright and acting right without reservation, registration was not necessary, and that the 22nd section of 5 & 6 Vict. c. 45 does not apply, that section being intended merely to meet the decision in the case of *Cumberland v. Planché*, 1 A. & E. 580, in which it was held that the assignee of a dramatic piece had the sole right to represent it, and which section, therefore, reserved to the author of a dramatic piece the right to represent it, notwithstanding he had assigned

Q. B.]

WISHART V. FOWLER.

[Q. B.]

the copyright, unless he registered it and expressed therein the intention to pass the right to represent it; that there is nothing in the Act that makes registration necessary to the validity of an assignment of the right of representing a piece, and therefore such an assignment cannot require registration, merely because the copyright is also assigned.

Russell v. Smith, 12 Q. B. 217.

They referred also to

Sects. 2 and 24 of 5 & 6 Vict. c. 45.

H. T. Cole, Turner and Stevenson in support of the rule, argued that the 22nd section is imperative in such a case, and that the assignment not being registered, the right to represent the piece did not pass by it.

COCKBURN, C.J.—I am of opinion that the rule should be discharged. It appears to me that the 22nd section of the 5 & 6 Vict. c. 45 has no application to the present case, because there is an assignment not only of the copyright, but of the right of representation, and that section has reference only to assignments of copyright, the section being intended to correct a former decision, in which it was held that an assignment of a copyright includes also the right of representation, and it says, therefore, that such an assignment shall not carry such a right unless there is a registration setting it out. But here there is an assignment of the right of representation as well as the right to the copyright. It appears to me, therefore, that the 22nd section is not applicable. This is not a proceeding under the 5 & 6 Vict., but under the 3 & 4 Will. 4, c. 15, which gives the penalties for which the action is brought. I think, therefore, that the verdict for the plt. must stand.

CROMPTON, J.—I am of the same opinion. The question is upon the effect of the 22nd section of the 5 & 6 Vict. c. 45, and we are to consider whether there was any necessity for registration. It was conceded upon the argument that an assignment only of the right to represent would not require registration. Now the meaning of the 22nd section has been clearly pointed out, and it refers to the state of the law as shown in the case of *Cumberland v. Planché*, in which it was held that an assignment of the copyright carried with it the right to represent the dramatic composition. That being so, the section engrafts a qualification upon the doctrine that an assignment of the copyright shall not do so unless there is a registration. But there is nothing to require the registration of an assignment of the right of representation itself, and the case for the deft. was gone when it was admitted that an assignment of a right to represent need not be registered.

BLACKBURN, J.—I am of the same opinion. The word "copyright" in the 5 & 6 Vict. is defined by sect. 2 to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied," and does not therefore include the right to represent. Now, the question is, what is the meaning of the 22nd section? To ascertain that we must see what was the state of the law at the time it was passed. Now, it was decided in *Cumberland v. Planché*, that an assignment of the copyright gave the assignee a right to represent the piece; and it was to alter this that the section was enacted. It is admitted on the part of the deft. that an assignment merely of the right of representation would not require registration, and the argument on his behalf must be, that because there is added to the acting right, an assignment of the copyright, the assignment of such acting right is void.

MELLOR, J.—The 22nd section of the Act of Vict. merely amends the defect in the old law, as shown to exist in the decision in *Cumberland v. Planché*, and it provides, therefore, that a general assignment of the copyright shall not include an assignment of the

right to represent the piece unless it is registered. But this does not in any way require that an actual assignment of the right to represent should be registered.

Rule discharged.

Attorneys for plt., *Lewis and Lewis.*

Attorney for deft., *T. Hale.*

WISHART V. FOWLER.

Composition-deed—Registration of—Extension of time for— 24 & 25 Vict. c. 134, s. 194.

By the 24 & 25 Vict. c. 134, the Bankruptcy Act 1861, it is by sect. 194 enacted, that every deed by which a debtor, not being a bankrupt, conveys his estate and effects for the benefit of his creditors, "shall within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence."

Held, 1. That the extension of time for registering the deed may be granted after the expiration of the twenty-eight days. 2. That a second application may be made for such extension after a previous refusal.

This was a rule to enter a verdict for the plt., and the question involved was whether or not a deed of assignment was receivable in evidence under the following circumstances:—

By sect. 194 of the 24 & 25 Vict. c. 134 (The Bankruptcy Act 1861), it is enacted, that every deed by which a debtor, not being a bankrupt, conveys his estate and effects for the benefit of his creditors, "shall within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence."

It appeared that the deed in question was executed by the debtor on the 26th Jan., and by the trustees on the following day; that on the 23rd Feb. following, an application was made to Mr. Commissioner Goulburn; but, as there was no affidavit, the commissioner refused to permit it to be registered, and he refused to enlarge the time for registration; that upon the 25th Feb. an application was made to Mr. Commissioner Holroyd to permit it to be registered on or before the 2nd March, to which he assented, and it was registered accordingly. At the trial this deed was offered in evidence, but was objected to as not having been registered within the twenty-eight days, and being rejected, a verdict was entered for the plt., subject to this motion.

Barnard and T. James now showed cause, and contended first, that the deed could not be given in evidence on account of its not being registered within the twenty-eight days; second, that the permission given to the commissioner under the section must be exercised before the expiration of the twenty-eight days; and that when one commissioner has refused permission another cannot give it.

Honyman in support of the rule, contended that the registration was good, for that the commissioners under the section were not bound to give their permission before the expiration of the twenty-eight days. He referred to a case (not reported), of *de Adamson* before the L. C. on the 18th Feb. 1863, in which such permission was given, also to

Lord Ward v. Lumley, 5 H. & N. 657.

COCKBURN, C.J.—We think the authorities quoted sufficiently strong, independently of our own views, to make this rule absolute. It could not have been the intention of the Legislature that the commissioner should not have a discretion to take all the circumstances into his consideration when asked to enlarge

the time. The authority of the case of *Lord Ward v. Lumley* upon similar words, in another Act of Parliament, is very strong.

BLACKBURN, J.—There is nothing in the section to show that a second application may not be made after the first has been refused. No doubt, in listening to a second application, the first should be taken into consideration; but there may be very good reason for refusing the first and granting the second. Then need the application be made within the twenty-eight days? I think not. There may be many reasons why the application could not have been made within that time.

MELLOR, J. concurred.

Rule absolute.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

HILARY TERM 1864.

Monday, Jan. 11.

CAWTHRON v. TRICKETT.

Bill of lading—Demurrage—Right of master to recover.

By the terms of a bill of lading, a ship was "to take her regular turn in unloading" at the port of discharge. On the arrival of the ship the consignee refused to accept and unload the cargo, in consequence of some dispute between himself and the consignor, and the ship was kept several days without being unloaded:

Held, that the bill of lading was a contract between the master and the consignor, and that A., who was master and part owner, was entitled to recover damages from the consignor for his breach of contract in not allowing the ship to unload in her regular turn, according to the terms of the bill of lading, and that for this purpose it was not necessary that he should join his co-owner as a party to the action.

This was an action tried before Mr. Secondary Potter, in August last, when a verdict was found for the plt. for 14*l*. The plt. was master and part owner of the ship *Providence*, and the declaration contained two counts, the first on the contract set out in the bill of lading, assigning as breaches that the goods were not received and taken and unloaded from the said ship by the said J. S. A. (the consignee of the deft.), or by any other person within reasonable time, whereby the said ship was detained, &c. The second count was the common count for demurrage. The first four pleas traversed the averments in the first count, and the fifth plea was to the second count, never indebted.

The bill of lading was in the following terms:—
"Shipped in good order and well conditioned, by Samuel Trickett, in and upon the good ship the *Providence*, whereof James Cawthron is master for this present voyage, and now lying at Leeds and bound for Maidstone; that is to say, sixty-four (64) tons of stone, described in the margin, and to be delivered in the like good order and well conditioned at the aforesaid port of Maidstone (all and every the dangers and accidents of the seas and navigation of what nature or kind soever excepted), unto Samuel Trickett, at his wharf, at Isle of Dogs, or in the Pool, or to his order or assignee as may be required, viz., to John S. Ancomb, mason, Maidstone, the vessel to take her regular turn in unloading, he or they paying freight for the said stone as customary, at the rate of 13*s*. per ton as per accustomed measurement.—In witness, &c.

"Pro SAMUEL TRICKETT.

"Jno. E. READON.

"Leeds, dated April 27, 1863."

The ship having duly arrived at Maidstone on the 8th May, the consignee refused to receive the cargo, as there was some misunderstanding between him and the

deft. On the 13th May the plt.'s attorney wrote to the deft., giving him notice that the plt. would claim demurrage at 2*l*. per day from that day. On the 18th May the plt. commenced discharging his cargo and finished on the 20th.

The plt. owned one-third of the vessel and another person the remaining two-thirds, and there was an arrangement between them that the plt. was to work the vessel and pay all outgoings except repairs, and was to pay to his co-owner one-third of the net profits.

Shaw having obtained a rule last term, calling on the plt. to show cause why the verdict should not be set aside and a new trial had, on the ground that the plt., who was master and co-owner only, could not sue alone for the detention of the ship,

D. D. Keane now showed cause.—The plt. was master and co-owner, on the principle of what is called "clear thirds;" that is, he owns one-third of the ship and his co-owner two-thirds, and he is to work the ship and pay to his co-owner one-third of the net profits. The rule is laid down in *Browncker v. Scott*, 4 Taunt. 1; *Evans v. Forster*, 1 B. & Ad. 118, that the master cannot sue the consignee for demurrage unless there is something in the bill of lading which shows that he is liable for demurrage as well as freight. [WILLES, J.—As the vessel, by the terms of the bill of lading, was to be unloaded in her regular turn, those cases would be in your favour.] Here the master was not allowed to take his regular turn. The master had the whole management of the ship, and was to pay all dues and expenses, and he must be considered as the employer of the ship for the voyage: (Story on Agency, s. 393.) The rule that the master cannot sue does not apply here. [WILLES, J.—It is more like the case of tenants in common than agency, where one takes the other as tenant of his share.] (*Shields v. Davis*, 6 Taunt. 65.) The plt. has a greater interest than the mere interest of a master in freight:

Story on Agency, s. 36.

Shaw in support.—There is nothing in the bill of lading which makes demurrage payable. That she shall take her regular turn in unloading is a mere direction that would be put in all charter-parties. [ERLE, C. J.—The bill of lading is a contract between the shipowner and the freighter.] (*Domett v. Beckford*, 5 B. & Ad. 521.) The contract to unload does not arise from the bill of lading, but arises as soon as the goods are put on board. [ERLE, C. J.—You undertook that the ship should take her regular turn, and then you would not let her do so, but kept her out in the harbour; would not that be a breach of contract?] I submit that it would not. There is nothing more in the bill of lading in this case than in all the cases where the consignor has been held not to be liable for demurrage; in all cases there must be some express stipulation as to the destination of the ship, and this is merely a direction. Then the plt. cannot recover unless the other part owner is joined. If the ship had been let to the plt. for a stipulated sum the case would be different, but here the other owner has an interest in the profits.

Chappell v. Comfort, 4 L. J., N. S., 58, C. P.

ERLE, C. J.—I am of opinion that this rule should be discharged. This was an action by the plt., who was master and part owner of the ship, against the consignor of the bill of lading, and it seems to me that there was that in the bill of lading which amounted to a contract by the shipper that the ship should take her regular turn in unloading. The action is for detention, and there was evidence that if the ship had been allowed to take her regular turn this delay would not have occurred. It seems to me that there is a confusion of ideas in arguing that because the consignee might not be liable under an implied contract they would not be liable under this express

contract. The contract is contained in the bill of lading, and is made between the plt. and deft.; the deft. has not complied with the terms of that contract, and therefore I think the plt. is entitled to recover, and that this rule should be discharged.

WILLIAMS, J. concurred.

WILLES, J.—I am of the same opinion. When you examine the cases that have been referred to, they are actions by the master against the consignee for delay in getting out the cargo, but there was no express contract. This is an action by the master against the consignor on the bill of lading, and it seems to me clear that this is an action of contract.

KEATING, J. concurred.

Rule discharged.

ARCHES COURT OF CANTERBURY.

Reported by Dr. SWABET, of Doctors'-commons.

Nov. 5 and Dec. 18.

(Before the Right Hon. S. LUSHINGTON, D.C.L., Dean.)

GOUGH AND CARTWRIGHT v. JONES.

Church-rate—Original and district parishes—Voluntary relinquishment of fees—8 & 9 Vict. c. 70, s. 10—Restoration of church—Alterations and additions—Principles applicable thereto when forming an item in a rate—Costs.

The consolidated chapelry of Holy Trinity, Leaton, was constituted by order in council, bearing date the 26th March 1860, of parts of the three parishes of St. Mary, Shrewsbury, Preston Gubbals and Fitz. From and after March 1860, an incumbent of Leaton took to his own use the whole of the fees (usually called surplice fees) arising throughout the whole of the consolidated chapelry, without any claim thereto being made by or on behalf of the incumbents of the original parishes. The order in council made no mention of the fees; there was no evidence of any relinquishment of the fees recorded in writing, nor of any relinquishment (except by the incumbent of St. Mary's) by word of mouth; it did not appear that the incumbents of the other parishes knew of their rights in respect of such fees:

Held, that the court must presume such knowledge, and that the de facto acquiescence by the incumbents of the original parishes in the fees being taken by the incumbent of Leaton amounted to a voluntary relinquishment, so as to satisfy the terms of the 8 & 9 Vict. c. 70, s. 10.

Where a rate has been made to meet the expenses of the repair or alteration of a church, on objection being taken to such rate as excessive and illegal by reason of the nature of such repairs or alterations, the burden of proving the legal character of such repairs or alterations will lie on the churchwardens, unless a faculty has been granted.

There is a difference between the repairs which an ecclesiastical court would compel a parish to make and the repairs and alterations for which it would hold a rate sanctioned by a majority of the vestry to be valid.

By repairs, the court understands restoration of the fabric to its original state, and it is doubtful whether in any circumstances the court would refuse to uphold a rate made by a majority of the vestry for such repairs only.

The cost of alterations and additions may, in certain circumstances, be properly met by a rate made by a majority of the vestry; but, in considering whether such a rate were excessive, the court would be bound to take into consideration all the circumstances of the parish.

In the present case the Court held, on the evidence, that the work done was restoration only, pronounced

for the rate, and condemned the deft. in costs, for though he had a right to try the validity of a rate of which his own share was 14s., and had raised a legal question of some nicety, and there was conflicting evidence as to restoration or alterations in the work done, the Court

Held, that there was no reason why the parish should be put to the cost of sustaining such a rate.

This was a case of church-rate in the parish of St. Mary, Shrewsbury; the case was before the court on the admission of the libel: (7 L. T. Rep. N. S. 566.)

It now came before the court for final argument. The points raised were, first, whether part of the original parish of St. Mary, now forming part of the district of Leaton, was exempt, by reason of Leaton being a separate and distinct parish for ecclesiastical purposes under the Church Building Acts, from church-rate in St. Mary's, and therefore properly omitted in such rate; secondly, whether the work done to the church, towards the expense of which the rate was levied, was excessive and illegal alteration and addition so as to vitiate the rate.

The case was argued by Dr. Robertson and Dr. Tristram in support of the rate; by Dr. Doane, Q. C. and C. J. Foster in opposition thereto.

Cur. adv. vcll.

Dec. 18.—The DEAN of the ARCHES delivered judgment as follows:—It appears that the Church of St. Mary, Shrewsbury, is a very ancient church. It matters not to inquire minutely into the age of the edifice, or how much is of greater antiquity than the rest. The present dispute arises from the work done to the four broach windows at the base of the spire. It appears from the evidence that they were repaired in 1811. Mr. Lloyd, the incumbent of the parish, who has paid great attention to the church, especially as connected with its architecture, deposes to those repairs having been done in the most inferior manner, and out of keeping with the architectural character of the church. In 1852 there was a storm which seriously damaged the tower and spire, and loosened the windows so much that they were supported by wooden props. For the repairs necessary to be done there was a public subscription, and also rates made. The broach windows were left undone; the other work was finished in 1856. At this period, the funds being exhausted, all further works were suspended, and the division of the parish into several districts appears to have been one cause. On the 24th May 1861, after the division had been completed, the rate now in dispute was made, and the item objected to is 100*l.* to complete the broach windows. It appears from Mr. Lloyd's evidence that this rate was made for the purpose of raising money towards the completion, and not for the whole work, which was subsequently contracted for for 250*l.*; consequently, the fair way of viewing this case is to consider whether the whole work was fit and proper to be done, this being only a component part. The rate is at 3*d.* in the pound. The question in this case is whether a church-rate for the parish of St. Mary Shrewsbury of 3*d.* in the pound made by a majority of vestry on the 24th May 1861 is a valid rate. It has been contended that the rate is invalid on two grounds: first, that a certain district called Leaton was liable to be assessed to the rate and has been omitted—if this objection be legally established, the rate is invalid, for a rate omitting to charge a considerable number of persons liable by law to be rated cannot be a fair and equal rate; secondly, that the object for which the rate was made was not sanctioned by law; that the expenses to be defrayed out of it were not legal expenses, not such repairs as the law allows, but extravagant and unnecessary alterations. Leaton was constituted a parish by taking parts from

three other parishes, viz., from St. Mary Shrewsbury, Preston Gubbalds and Fitz. This was done in the year 1860. From that time the incumbent appointed to the new church of Leaton has received for himself all the surplice fees arising within the total limits of his new parish, which of course includes what were formerly portions of the parishes of St. Mary, Preston Gubbalds and Fitz. The incumbents of the old parishes were entitled to receive such portions of the fees during their respective incumbencies. It is alleged that they have relinquished them to the new incumbent. There is no trace of any formal instrument to that effect. Mr. Lloyd, the incumbent of St. Mary's, deposes that the fees were voluntarily relinquished by him, not by any instrument in writing, but, as he says, in answer to inquiries made by the patron; he was aware that he was entitled to the fees while he remained incumbent. The incumbents of Preston Gubbalds and Fitz do not appear to have any distinct notion of their rights; their impression appears to have been that when they consented to give up certain portions of their parishes the fees arising from such portions were also ceded as a sort of accessory. The most important fact, however, is that from the formation of the district the three incumbents have as a matter of fact not received these fees, but have quietly acquiesced in their being received by the incumbent of Leaton. In this most slovenly manner has this business been conducted. I certainly should have imagined that it was the duty of some official (I refer to no one in particular) to take care that the consent of the three incumbents was properly taken in writing and duly recorded in the Bishop's Registry or some other office. In this state of things, the first question is, have these incumbents legally relinquished the fees in such a manner as to satisfy the statutory requisitions? The question is, how fees may be relinquished so that the incumbent may be barred from reasserting his right? It is important here, from one of its incidental consequences, if one of those consequences may be that Leaton remains liable to be assessed to the church-rate of St. Mary's. On what principle the relinquishment of fees should affect church-rates I do not discern, but for the purpose of this case I will assume the law to be, that there must have been a relinquishment of fees, a voluntary relinquishment, to use the words of the statute 8 & 9 Vict. c. 70, s. 10, and that this effect, namely, the alteration as to church-rate, is wrought by the 19 & 20 Vict. c. 104, s. 14. If then a voluntary relinquishment of fees is necessary for the constitution of a separate and distinct parish, and consequently to such separate and distinct parish raising church-rates for its own church and being exempt from church-rates for the parish to which it formerly belonged, what is it that constitutes a voluntary relinquishment of fees? Or perhaps the question would be better put in these words: What constitutes legal evidence of a voluntary relinquishment of fees? Must such consent be given in writing? No doubt all common prudence and care would require that such relinquishment should be expressed in writing. In all matters, save ecclesiastical, such common prudence and care would be expected. But there is no such consent in writing in this case, and I must of course presume that if such consent in writing had been so given, those who conduct the suit would have produced it, or have shown that diligent search had been made in the records of the Ecclesiastical Commissioners and otherwise, but in vain. I must conclude therefore that no such consent was given in writing. There is no intimation of such consent in writing to be found in the evidence. Then does the law imperatively require consent in writing? The statute does not do so in words, does it by implication? I cannot find any expression from which I can draw such a conclusion. I am not aware that it can be maintained as a legal proposi-

tion that all such consents should be in writing. There is a case in the C. P. somewhat analogous, and to which I will now refer (*Roberts v. Watkins*, 14 Scott, 592.) I think the present case may fairly fall within the principle laid down in the case cited. But then the question remains behind, is there sufficient evidence of a relinquishment of the fees *de facto*? Except in the case of Mr. Lloyd there is no sufficient evidence of any specific act of relinquishment. Then the only evidence is that as a matter of fact the fees have been taken by the incumbent of Leaton, and no demand made on behalf of the incumbents of the three parishes out of which the chapelry has been formed. This absence of demand dates from March 1860. Is this *de facto* relinquishment sufficient to satisfy the law? A non-assertion of a lawful claim. I must admit that this is not very satisfactory evidence; but is it sufficient legal evidence? It must be assumed that the incumbents of the old parishes knew their legal rights; I think this a legal presumption, and if so, the non-exercise of their rights is, I conceive, evidence of relinquishment, such as may be contemplated by the statute; voluntary relinquishment, from which would flow the consequence that the chapelry became a distinct parish. On the whole, I have come to the conclusion that this objection to the rate cannot be sustained. I must now with respect to the second objection enter upon an important inquiry, though I do not think, for the purpose of this case, one of much difficulty. The inquiry is to what extent a majority of vestry can bind the minority by a compulsory rate as to repairs and alterations. This inquiry necessarily gives rise to another; namely, whether a faculty has been applied for and granted? In the present case I have no information as to this, as I think, very important matter. I say very important matter, because on the application for the grant of a faculty, the propriety of such grant, if opposed, may be fully discussed; then is the proper occasion for the ordinary to exercise his discretion whether the repairs were needed and proper; whether the alterations, if any, were required, and such as the law would sanction. If no opposition is made, the law would presume that the faculty was properly granted. I am not told whether on the present occasion a faculty was applied for, nor whether a faculty was granted. I cannot presume a faculty. I must, therefore, conclude there was none. A grievous act of imprudence in my opinion on the part of the churchwardens in a case of such extensive and expensive repairs, and more especially for this reason, that the neglect to obtain a faculty throws upon the churchwardens the whole burden of proof that the rate was required for legal purposes. I must, however, observe, on the other hand, that the absence of a faculty was not either pleaded or urged in argument. The result then is that the burden of proof is thrown on the churchwardens; they have no right to complain of this. It is their own laches, or that of their predecessors, for which they must be legally responsible. The churchwardens, therefore, must prove that the rate was made for purposes allowed by law. I will consider the facts of this case presently, but first address my attention to the law generally as it relates to repairs and alterations. There is in my opinion a difference between the repairs which the Ecclesiastical Court would, so far as its authority extends, compel to be done, and the repairs and alterations which, if sanctioned by a large majority of vestry, it would hold to be justly covered by a church-rate, and uphold the rate accordingly. I think that the Ecclesiastical Court has a wide discretion in these matters, of the same kind, though perhaps not to the same extent, as it exercises in the granting of a faculty, either before the work is done or a confirmatory faculty

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[ARCHER.]

afterwards. The court ought to take a view of all the circumstances of the parish, for I think it quite evident that that which is fitting and right to be done in a large and wealthy town parish, would be quite out of place in a small country parish. The question naturally is divided into two heads: repairs and alterations, and additions. First as to repairs, the principle I take to be restoration to the original state; that is the general rule as laid down by Sir John Nicholl, as high an authority on these questions as could be cited. This is the general rule. I do not say there may not be exceptions which would induce the court to hesitate as to granting a faculty, such as decay of the parish and extreme poverty of the ratepayers; but if a rate to defray the expenses of restoration, and restoration only, was granted by a majority of the parishioners, I have very great doubt whether in any case the court ought to abstain from enforcing it. So much for restoration; now as to alteration. Here I think the court is invested with some discretionary power. With respect to alterations, much I think would depend on the description of the alteration. That a majority of vestry could make a valid rate to defray the expense of some alterations cannot, I think, be doubted; it is every day's practice. In some cases even restoration could not be conveniently effected without some alteration. Alterations, the substitution of new for old, and even in some cases additions may in my opinion be the subject of church-rates; as for instance, the erection of a gallery where it was clearly wanted. But all these matters are subject to limitations and to a consideration of the circumstances of the parish. Be it remembered, that I am speaking of a rate made by a majority of the parish; that my present observations do not extend to any case where a rate has not been so made. They apply only to the case of a rate made. It is upon these principles I must try the validity of the rate with respect to the second question. It is true that the burden of proof lies upon the churchwardens, and from that principle I do not wish to depart; but the most convenient mode of considering the case with reference to these pleadings will be to advert, in the first instance, to the allegation given in on the part of the defendants. I will state, in as few words as I can, the essential parts of that allegation. The first article alleges that the church of St. Mary, Shrewsbury, is an ancient church having four broach windows at the base of the spire thereof; that the design in architecture was plain Gothic; that the four windows have been altered from the original design, and are now ornamental Gothic, with rich pinnacles; that the four windows, at the time of the making of the rate (in order to complete the same according to the previous design) might have been executed for 48*l.*; that the cost of two of the four windows has been 125*l.*, the greater part having been expended in new and elaborate pinnacles; and so on. The fourth article pleads that the present church-rate is excessive; that the moneys received on account of the rate are 203*l.* 7*s.*, the amount expended 143*l.* 2*s.* 10*d.* only. The substance of the allegation is, that there has been an extravagant expenditure with respect to these windows, and that, instead of being restored according to the original design, new and ornamental work has been grafted thereon; that such expenditure is extravagant and illegal. Now before inquiring whether if the allegations were proved the consequence of illegality and extravagance would follow, it is expedient to consider the fact, or in other words whether the allegation is substantiated by the evidence. We need not travel into the particulars of the responsive allegation; there are many details which need not detain the court; substantially the contents of that allegation are that the averments contained in the defendants' allegation are untrue, and that the work done and to be paid for out of the rate is restoration, and

not the introduction of new and ornamental work. Such is the issue of fact which I have to try, the rate having been made as is proved by a large majority of the parish. I now proceed to an examination of the evidence, for it is by the evidence I must be governed, as of course I cannot undertake to form my opinion of my own as to the architectural questions raised in this disquisition. First, as to the evidence in support of the opposition to the rate; the evidence to show that the work done is not restoration according to the original design, and in keeping therewith; but the introduction of new ornaments, and, on that account, extravagant and excessive. Mr. Bidlake is the most important witness on that side; he is an architect of the age of thirty-three years, in practice on his own account for fourteen years, namely, from the age of nineteen. I mean no disrespect to this gentleman when I observe that his time of life is scarcely consistent with any extensive experience in many works of importance. The witness states that he has no sufficient recollection of the said lights (that is, the four broach windows) prior to the alterations which have lately been made. From actual comparison, therefore, he has no means of forming an opinion. His *modus concludendi*, as I understand him, are these: he looks at the fabric as it is, and on architectural principles judges what the original design and work was, and then he says what has been done is not in accordance with the original design, but is extraneous ornament. It is to be recollected that the subject-matter of the present inquiry is confined to the four broach windows which are in the lower part of the spire of this ancient church. Mr. Bidlake deposes, in very strong terms, to his opinion that these windows are not repaired according to the ancient style, and he censures them as extravagant and unnecessary. For confirmation of that opinion he refers to a sketch of the church annexed to these proceedings. The next witness is Mr. John Cross, who is a mason and builder. It seems that he was employed as such mason and builder in the years 1857-8, in the repairs of the chancel, the expense of which repairs were to be defrayed by the trustees of the grammar-school, and he states that he made a narrow examination of these broach windows, expecting that the work would be put up to tender; and he expresses his opinion that the work is most admirably executed as regards finish and detail—a great deal too much so for the position in which the work is placed; that it has nothing to do with restoration, and that it is an entirely new style; and he further states that he is quite satisfied that it is an entire deviation from the original design, and is altogether at variance with the original style of the architecture of the church and spire. Now, this is very strong language, and a very positive opinion—perhaps rather more strong and more positive than any experienced architect would venture to express upon a question not without difficulty—the conformity of the new with the ancient state of things—and I must declare my doubt whether the experience as a mason and builder would altogether warrant the delivery of so very strong and decided an opinion. I cannot but think that the knowledge of architecture, to be gained only by much study and practice, and so imperatively necessary in a case like this, cannot be predicated of this witness; and I think it right to observe that, for this and other reasons clearly appearing in the evidence of the case, there is not much reliance to be placed upon the evidence of this witness. Mr. Pountney Smith, the architect employed, has been examined: he has been intimately acquainted with the church at least from 1853, for in that year he deposes to having made a careful examination thereof for the purpose of estimating the necessary repairs—repairs, as he positively deposes, for the purpose of restoration to its ancient state—and he describes the materials he

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had for forming his judgment, partly from the remains of the ancient work, partly from reasoning from the general style of the building, the best materials which from the effect of time and weather could be obtained. His testimony, as respects the question before me, is very decided, that the work was restoration according to the original design. I cannot think it necessary to enter into a minute examination of the evidence of Mr. Lloyd, except to observe that he confirms Mr. Smith in every important particular. There is, however, one piece of evidence to which I must advert, that of Price, the vestry clerk; he deposes to the fact that a report was received from Mr. Gilbert Scott, adopted by the vestry, and a rate made for the repairs in conformity with the report of Mr. Gilbert Scott. I have not the report before me, therefore of its contents I can say nothing; but I have the facts that the repairs were done according to the plan and estimate of Mr. Smith, that Mr. Gilbert Scott did make a report which was adopted, and the work ordered accordingly. I apprehend the necessary deduction from these premises is, that Mr. Scott approved of what Mr. Smith recommended. It is also to be borne in mind that the plan underwent examination before the vestry, and was fully approved by them, approved by a large majority of those who are to bear the burden such as it is. Now, looking at all these facts and circumstances—that the church in question is an ancient church, a peculiar and admired fabric, that the parish of St. Mary is a part of the great and important town of Shrewsbury, where it cannot be supposed that the rate in question of 3d. in the pound could operate as a heavy burden—I say, under these circumstances, and admitting the evidence to be in some degree conflicting, still I think that the preponderance is greatly in favour of the proposition that the work done is restoration, and not crude and unnecessary novelty. I think that, under these circumstances, the large majority of vestry testifies the general feeling of the parishioners, and proves to me that the rate is neither excessive nor onerous. Upon all these grounds I pronounce for the validity of the rate. The question of costs is now to be disposed of. It has been contended on behalf of the deft. that a difficult question of law has been mooted in this case, and further that the question as to restoration or not was one deserving great consideration. The deft. is called upon to pay the sum of about 14s.; no doubt he has a right to contest the validity of the rate, but if on that account he thinks fit to raise a question of law ultimately decided against him, I am at a loss to understand why such a circumstance should render it incumbent on me to depart from the general rule, I may almost say the universal rule, that in questions of church-rate costs should follow the result. I can see no sufficient reason why upon that account the parish should be put to the expense of defending this suit, and with regard to the second point, I think the evidence is clearly against the deft. so as to furnish no excuse whatever for the expensive litigation. I must condemn the deft. in costs.

Nelson and Son proctors for plt.

Crosse for defts.

TERMINUM.—In *Lister v. Smith and others* (Probate Court), page 578 ante, 2nd column, lines 9 and 10, for “and if she refused then it was to take effect,” read “and if she refused, then it was not to take effect.” The statement of Mr. Green as to the instructions given was of great importance in establishing the absence of testamentary intention.—*REP.*

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs.,
Barristers-at-Law.

Wednesday, Dec. 16.

(Before Mr. Commissioner GOULBURN.)

Ex parte THE ASSIGNEES, &C., re TOWSEY.

Private sitting—Who entitled to attend—Witness—Right of counsel—Practice.

If the court see good reason to apprehend that the object of a private sitting may be defeated by the presence of a gentleman who is solicitor both for the bankrupt and the witness, it may order him to withdraw.

Strictly, a witness has no right to be attended by counsel. If objection be made to a question put to a witness at a private examination, the proper course is for the witness to retire until the propriety of putting the question is discussed and settled.

Any question which may be considered necessary during the examination, by way of explanation, should at the end of the examination be submitted to the court, who will exercise its discretion upon the point.

Sargood, for the assignees, applied to the court for direction under these circumstances:—A private examination was going forward relating to the estate of the bankrupt. The same solicitor who had appeared for the bankrupt on a previous day now appeared for the witness under examination, and was instructing his counsel. That solicitor had refused to leave the room. He therefore asked the commissioner to order him to retire.

Griffiths, on behalf of the witness, submitted that the court would not order that counsel for a witness under examination should be separated from the solicitor who instructed him, and whose presence was absolutely necessary in order to put counsel from time to time in possession of information without which he could not efficiently discharge his duty to his client.

Mr. Commissioner GOULBURN.—If the court appoint a private sitting, and it sees good reason to apprehend that the object of that meeting may be defeated by the presence of a gentleman who is both solicitor for the bankrupt and for the witness, it may order such person to withdraw.

Sargood further objected that the counsel for the witness asserted his right to put certain questions to his client then under examination. He was not aware of any such right, and prayed the direction of the court upon the point.

Griffiths.—The questions put were only to give the witness an opportunity of explaining previous answers.

THE COMMISSIONER.—Strictly speaking, upon such an occasion, a witness has no right to be attended by counsel at all, but courtesy permits it. If counsel object to a question, the proper course is for the witness to withdraw until it be argued and settled whether or not such question may be put. Should any question be in the opinion of counsel for a witness necessary by way of explanation, the proper course is, when the examination of the witness is terminated, to submit such question to the court, who will direct it to be answered or not, as it may seem just and expedient. The practice has been long settled, although the rule has been, I admit, somewhat relaxed in modern practice.

Dec. 10 and 21.

(Before Mr. Commissioner GOULBURN.)

Ex parte COBBOLD, re HEAD.

Reputed ownership—Furniture—Furniture—Sub-tenant. Furniture of which the bankrupt was in possession for six years prior to and at the time of the bankruptcy, for which he has never paid any rent,

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is in his reputed ownership and passes to his assignees.

But furniture, the possession of which was with a sub-tenant of the bankrupt at the time of the bankruptcy, is not in the order and disposition of the bankrupt within the meaning of the 125th section of the Consolidation Act 1849.

SPECIAL CASE.

Reputed ownership. Mr. Cobbold was the owner of an hotel at Walton-on-the-Naze, the tenant to which died prior to Jan. 1858, and upon his death the furniture and moveable effects in the hotel were valued to Mr. Cobbold at 150*l.* 6*s.* 6*d.*, and the fixtures at 24*l.* 2*s.* 5*d.*, making together 174*l.* 8*s.* 11*d.*, which Mr. Cobbold paid to the executors of the deceased tenant.

By deed under seal, dated the 8th Jan. 1858, Mr. Cobbold demised the hotel and premises to the bankrupt as from the 25th March following, as tenant from year to year, at the rent of 20*l.* per annum; and it was also agreed that Head should "use and enjoy in and upon the said messuage and premises and not elsewhere," the furniture, fixtures and other effects which had been valued to Mr. Cobbold and specified in the schedules during such time as Head should continue to occupy the same, and that he should pay to Mr. Cobbold for the use of the fixtures 1*l.* 16*s.*, and for the furniture and household effects 15*l.* per annum in addition to the yearly rent of 20*l.* And it was also agreed that Head should purchase the fixtures and other effects at the amount of the valuation on or before the 29th Sept. 1859, and that upon payment of any portion of such valuation, an amount equal to 10*l.* per cent. upon the amount paid should be deducted from the rent, and that when half the amount of the valuation should be paid, the rent for the furniture should be only at the rate of 5*l.* per cent. per annum on the unpaid balance.

By an indenture dated May 5, 1859, Mr. Cobbold demised to Head, at the rent of 28*l.* a-year, a private house unfurnished adjoining the hotel, which Head thereupon furnished. Head did not perform the agreement to purchase the fixtures and furniture in the hotel, nor did he pay any portion of the valuation for the furniture and fixtures down to the time of his bankruptcy. In Nov. 1862 Head being largely indebted to Mr. Cobbold for goods sold and delivered, and also for arrears of rent, money lent and interest thereon, and having added a considerable quantity of furniture in the hotel to that which he had hired from Mr. Cobbold, requested the latter to purchase that furniture at a valuation, as well as the furniture in the private house, to give him credit for the amount of the valuation in reduction of his debt, and to enter into a new arrangement with him as to the hiring and trade of the hotel. Mr. Cobbold having assented to this arrangement, the additional furniture in the hotel and that in the private house were valued to him at 139*l.* 12*s.* 9*d.*

By an agreement dated the 22nd Nov. 1862, reciting the agreement of the 8th Jan. 1858, and that Mr. Cobbold had added other furniture and effects, and that it had been arranged that Head should hire the same, together with the first-mentioned furniture, he agreed to pay an additional rent of 6*l.* 10*s.*, making together with the rent 15*l.*, the annual rent of 21*l.* 10*s.*, for the furniture, fixtures, and other effects then upon the said premises and the adjoining house, and enumerated in the schedule, leave the furniture in good condition, and to supply any articles that might be lost or destroyed.

By indenture of 8th Dec. 1862 Mr. Cobbold demised to Head the hotel then in his occupation, from the 29th Nov. then last, for one year, at the rent of 70*l.*, and thenceforth until one of the parties should give three calendar months' notice; and Head entered into the usual tenant's covenants, with a proviso for determining the tenancy in case of breach of covenant or his bank-

ruptcy or insolvency. Head underlet the private house furnished, and his sub-tenant was in possession at the time of Head's bankruptcy, which occurred in Sept. 25, 1863. Head had paid no rent either for the hotel or the furniture under either of the leases or agreements, and he was indebted to Mr. Cobbold at the time of his bankruptcy in upwards of 600*l.* after giving credit for 139*l.* 12*s.* 9*d.*, the amount of the valuation of the additional furniture purchased by him in Nov. 1862. Mr. Cobbold at once gave notice to the messenger of the court, claiming the furniture both in the hotel and in the private house as his property.

It was also stated to be a well-known custom in that part of the country and elsewhere that fixtures and furniture in hotels and private houses, especially at the seaside, are let at rentals with the houses.

The question was, whether, under the circumstances above described, the furniture in the hotel and the private house, or any part thereof, was in the order and disposition of the bankrupt at the time of his bankruptcy.

Bagley for Mr. Cobbold.

Jones (solicitor) for the assignees.

Mr. Commissioner GOULBURN.—The question arises under the 125th section of the Consolidation Act 1849, which provides "that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." A portion of the property in dispute here consists of fixtures, and it is quite clear that fixtures are not the subject of the statute. The case which settled this question was *Ex parte Barclay, re Gasson*, 5 De G. M. & G. 403. It was there held that ordinary house and trade fixtures are not in the order and disposition of the bankrupt within the meaning of the 125th section of the Act of 1849. Lord Cranworth distinctly laid it down that the "object of that clause is to prevent persons from enabling traders to obtain credit from an appearance of wealth which was not real," and that the clause "did not apply to cases where the possession is in the ordinary course of business, and where it cannot reasonably induce persons to give credit." There is another very important case upon this subject, and that is *Ex parte Reynal*, 2 M. D. & D. 443. It was the case of the Vauxhall-gardens, in which my brother Holroyd, in a most able judgment, dealt fully with the point. The question there was, whether tenant and trade fixtures, which could be removed without injury to the freehold, passed to the mortgagees or to the assignees as part of the bankrupt's personal estate and effects, or as being in his order and disposition at the time of the bankruptcy. It was there held that the fixtures were not so to be considered. Upon the principle laid down in the above cases I am of opinion that the fixtures in the hotel and the fixtures in the private house, as well as the furniture in the private house, belong to Mr. Cobbold, the furniture in the private house because it was not in the order and disposition of the bankrupt, but was at the time of the bankruptcy in the possession of a sub-tenant: (*Hornley v. Miller*, 32 L. T. Rep. 125; a.c. 28 L. J. 99, Q. B.) The most important point for my consideration now is, to whom the furniture in the hotel belongs, whether to the assignees or to Mr. Cobbold. This is a question which is ordinarily left to the verdict of a jury, and I must suppose myself in the position of a jury to decide it. The case of *Hickinbotham v. Groves*, 2 C. & P. 492, is in point. That was the case of an hotel in Dover-street, Piccadilly, magnificently furnished. The case was not in

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principle dissimilar to the present. The rent of the hotel was 400*l.* a-year, and the rent of the furniture 600*l.* a-year. The deed relating to the furniture provided that the occupier should be at liberty to purchase the goods, as was the case here. The lease of the hotel contained a covenant that it should be void in case a commission of bankruptcy should issue. The lessee became insolvent, and a commission was sued out against him. The judge in that case thus put the question as regarded the furniture to the jury: "If you think he was held out to the world as the reputed owner of the furniture, and obtained credit from the possession of it, I am of opinion in point of law that it passes to the assignees." The fact of there being private contracts between the parties did not help the real owner. In that case the goods were in the apparent ownership of the bankrupt for two years. The case now before me is stronger still, for the furniture has been in the possession of the bankrupt for six years, and he never paid any rent for it. From first to last the furniture was allowed to remain in the possession of Head without his ever paying a farthing for it. To all the world he was the apparent owner of the property. My award will therefore be, that the fixtures in the hotel, and the fixtures and furniture in the private house, belong to Mr. Cobbold, and that the furniture in the hotel passes to the assignees. — Ordered accordingly.

Tuesday, Jan. 5.

(Before Mr. Commissioner GOULBURN.)

Ex parte HITCHING, re ARCHER.

24 & 25 Vict. c. 134, s. 114—Sale of copyholds—Vesting order—Practice.

The court will make an order under the 114th section of the B. A. 1861 to vest copyhold property belonging to the bankrupt, and sold by the assignees under the bankruptcy, in the purchaser, upon an affidavit made by a competent person that the property has realised a "fair and adequate value."

Order to vest copyholds. The bankrupt, who had obtained his order of discharge, was, at the time of his bankruptcy, entitled to certain copyhold property, which was sold by the creditors' assignee, and this was an application to vest it in the purchaser.

The 114th section of the B. A. 1861 enacts that "the court shall have power to dispose for the benefit of the creditors of any estate or interest, at law or in equity, which at adjudication or afterwards before order of discharge, a bankrupt has in any copyhold or customary land, and to make an order vesting the land or such estate or interest as the bankrupt has therein in such person and in such manner as the court shall think fit."

Morgan appeared in support of the application. [The Commissioner.—The 209th section of the Consolidation Act 1849, which regulated such transfers, has been repealed, but the 210th section of the same Act remains unrepealed. The latter section and the 114th section of the Act of 1861 must be read and construed together, although the word "such" in the 210th section of the Consolidation Act seems to refer to the preceding and repealed section. Is there any form of order or any case upon the subject under the new Act? Yes. A form of the order sought is to be found in *Doria* and *Macrae's Law and Practice of Bankruptcy*, 551. The application was based upon an affidavit of the auctioneer, who deposed that the property in question had been sold by public auction at a fair and proper value.

Mr. Commissioner GOULBURN.—I observe that the affidavit of the auctioneer has the words "fair and proper value," and not "fair and adequate," as the form to which my attention is called contains. I think the form of order in *Messrs. Doria and Macrae's book*

seems to be correctly and judiciously drawn, and I wish it to be strictly followed. If you produce an affidavit stating that the property has realised a fair and adequate value, I will sign the order.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON,
Esqrs., Barristers-at-Law.

Nov. 10, 11 and 12, and Dec. 9 and 16.

EASTWOOD v. LEVERS.

Building society—Allottees—Notice of plan—Restrictive covenants—Acquiescence—Injunction—Parties—Damages—21 & 22 Vict. c. 27.

Each allottee or purchaser from a certain building society entered into restrictive covenants with the trustees to whom the estate was conveyed, and who were the conveying parties to him, and it was covenanted that these covenants were to endure for the benefit of those entitled under conveyances to be made by the trustees, and that the trustees should be deemed trustees of the covenants for the benefit of those claiming under conveyances already made by them. Every allottee or purchaser had notice of the scheme of the society, and of the regulations, provisions and restrictions under which alone he could build upon his lot. With this notice plt. and deflt. became allottees or purchasers. The deflt. soon after built a large hotel, which was completed before the bill was filed, but later he began erecting stables, with a large "midden," or receptacle for manure, &c., in front of the plt.'s lots. The bill alleged the breaches of covenants complained of, and prayed for the plt. the benefit of the covenants entered into by the deflt. with the trustees, or their allottees or purchasers; for an injunction against building in violation of those covenants and the plan; that the buildings already so erected might be pulled down, and damages might be awarded to the plt. The V. C. at the hearing decreed that the only proper buildings were such as had been approved by the covenantees; he directed the demolition of buildings raised after the filing of the bill, and restrained the deflt. from using the stables otherwise than as general outbuildings. The deflt. appealed, and it was alleged that the trustees had sanctioned deviations from the general plan, and that the plt. had himself not strictly observed it:

Held, that, even if the deflt. was not bound by the general plan, the plt. had an equity against him by force of the covenants he entered into with the trustees in the conveyance to him; that a deviation sanctioned by the trustees in breach of their duty could not displace the plt.'s equity under that covenant:

That the plt. must be taken to have acquiesced, inasmuch as the hotel itself was built before bill filed, and he must have known that stables, &c. were an indispensable adjunct to it.

The injunction was on this ground dissolved, and the decree directing demolition was discharged.

The Act 21 & 22 Vict. c. 27, is not confined to cases in which damages can be recovered at law, and on the plt.'s expressing his desire to prosecute the suit for damages, it was sent back to the V. C.; but inasmuch as the trustees at least, and possibly all the other allottees and purchasers, were necessary parties, leave was given to amend the bill.

This was an appeal by the deflt. from a decree of the V. C. of the county palatine of Lancaster.

The case stated by the bill was to this effect: that a building society at Liverpool sometime since purchased

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an estate, took a conveyance of the estate to their trustees, and laid it out into streets and divided it into plots according to a plan prepared under the direction of the committee of the society. According to this plan several of the plots were to front the turnpike-road leading from Liverpool to Prescott, and lots 3 to 72 were to front a street called Fairfield-street, and all the houses built on those lots were to have their fronts facing Fairfield-street. Members of the society and those purchasing from them, including the deft., were, it was not disputed, fully aware of the existence of the plan before any plot was conveyed to them by the trustees of the society, and they, including the deft., took their conveyances subject thereto. The plan was circulated among the members and allottees, and a printed form of restrictions to be inserted in the conveyances to the allottees or purchasers was also made public to all persons having transactions with the society as purchasers or allottees of land, as well as to others. The plt., W. Eastwood the younger, had purchased the plots Nos. 66, 67, 68 and 69 on the plan from a member of the society who had contracted with the trustees for the purchase thereof, and by a deed dated the 7th March 1860 these plots were conveyed by the trustees of the society, under the direction of the vendor, to the plt., William Eastwood the elder, who was alleged to have advanced money to W. Eastwood the younger, to uses in bar of dower; and it was thereby covenanted that not more than four dwelling-houses or dwelling-houses and shops, and the outbuildings thereto, and no other outbuildings whatsoever, should be erected on the piece of land, and the front of each house should stand back five yards from Fairfield-street; that the houses should be semi-detached in pairs, and placed in the situations marked on the plan, except so far as that provision should be modified by the consent in writing of the covenantees, or of their surveyor. Then there were provisions about the height of the dwelling-houses: that no house was to be commenced until a ground plan and elevation drawing thereof should have been submitted to and approved in writing by the covenantees or their surveyor; that the houses should be built in accordance with the elevation so submitted and approved; that the walls between the houses at the northern and southern extremities of the land were to be party-walls; that Eastwood the elder would fence in certain portions of the land, and fence in the land in front of Fairfield-street with iron palisades and a stone plinth, to the satisfaction of the surveyor for the time being of the covenantees, uniformly with the other houses in the said street; that the land should be fenced off with substantial stone or brick walls, which were to be again party-walls, and the expenses to be paid in the manner which is mentioned; that Eastwood the elder should pay the expense of repairing those walls; that no building or erection on the land should be used as a pigstye, slaughter-house, or house for melting tallow, and that no noisy or noxious or offensive trade or business, or any business or occupation that should be a nuisance to the owners or occupiers of the adjacent premises or dwelling-houses thereon, should be carried on on the land; and, lastly, that the covenantees should be deemed to be trustees of the covenants for the benefit of the persons for the time being claiming under any conveyances already made by the parties. The bill went on to state that Eastwood the younger, relying upon the understanding that all the said purchasers of the plots of land forming the estate would build in accordance with the plan and restrictive covenants laid down, at his own expense erected on lots 66 to 69 inclusive detached or semi-detached dwelling-houses, in accordance with plans submitted to the surveyor and approved of by him at that time, and that those dwelling-houses were in every respect in compliance with the plans and

covenants as to the mode of building as retitled in the deed of conveyance to Eastwood the elder; that deft. had become an allottee of certain parts of the land of the lots 26 to 36, both inclusive; that all those lots fronted to Fairfield-street, and were situated on the east side thereof, lots 30, 31 and 32 being directly opposite lots 67 and 68, on the west side of the street, which had been conveyed for the benefit of the plts., or one of them. The lots No. 30 and 31 were conveyed by the trustees by deeds to different persons, and had since become vested in the deft., who had, on the plot of land numbered 31, commenced and was proceeding to erect a brick wall of the height of 11 feet, which was arched over, and leading to the back of the hotel, and to the stables which he had caused to be erected and built on the plots of land numbered 29 and 30, directly opposite the front windows of the dwelling-house which the plt. William Eastwood the younger had built on the plot of land numbered 66 on the plan, and that between the stable and the front of the land facing the street, where there ought to be a stone plinth and iron palisades, and within five yards of the front of Fairfield-street, the deft. was proceeding to erect a large brick building, with a blank wall facing Fairfield-street, the height of which was to be 12 feet, to be used as a midden for manure, and also that in front to the street the deft. had erected a yard wall 2 feet 4 inches in width, and 8 feet high, and had placed and fixed stone gate posts of the height of 6 feet on the plot of land numbered 30, from which the deft. was about to place wooden doors leading to and directly abutting on Fairfield-street aforesaid. Then the bill alleged that, in consequence of that, the plts. had complained, and some of the owners of lots were about to leave the premises.

The bill, in its 10th paragraph, then stated that the deft. Lever recently built on the plots of land comprised in lots 33, 34, 35 and 36, a large hotel facing the turnpike-road, and not to Fairfield-street, in contravention of the restrictive covenants entered into by him with the trustees of the society, and then that the deft. was proceeding to erect on the plots of land comprised in lots 29, 30, 31 and 32, a stable, brick walls and other buildings, including a brick midden, with a blank wall facing Fairfield-street aforesaid, for the reception of manure, contrary to the plan and restrictive covenants entered into by allottees, or purchasers of plots of land from original allottees of the society. The bill charged that the restrictive covenants were entered into for the protection of all persons who should become owners of lots, and that the deft. was throughout aware of their intention and effect, and of the regulations and scheme of the society.

The bill prayed that the plt. might have the benefit of the covenants entered into by the deft. Lever with the trustees or their allottees or purchasers; that the deft. might be restrained by injunction from proceeding with or permitting to continue and remain the erections and buildings on the plots of land numbered 26 to 36, both inclusive, on the plan fronting Fairfield-street, or on any portion thereof, so far as the same erections and buildings were in contravention of the restrictions contained in the plan and the covenants contained in the deed of conveyance, or the restrictions and covenants contained in the deed or deeds of conveyance to the deft., and that the deft. might be ordered to pull down the brick midden erected on plots numbered 29 and 30 and all other erections and buildings erected by him on that or any other plot of land on the Prescott-lane estate, which were not in compliance with the plan and restrictive covenants contained in the deed or deeds of conveyance or any of them, and that none of such buildings might be permitted to remain in future; and that the deft. might make satisfaction in damages to be

assessed by this court for all damages the plts. or either of them had sustained, or might sustain, in consequence of the deft. having erected the buildings and walls or other erections on the plots of land numbered 26 to 36 both inclusive.

Upon the bill being filed, the plts. at once applied for an injunction, but the learned V. C. directed the application to stand over until the hearing of the cause. The cause was heard, and his Honour made this decree:—"The court declares that, having regard to the covenants and restrictions in the bill mentioned, the only buildings proper to be erected on the lands forming the lots 29, 30 and 31 of the same estate are dwelling-houses or dwelling-houses and shops, or the outbuildings thereto, of which the ground-plans and elevations have been previously submitted to and approved of by the covenantees of the society or their surveyor; and further, that any houses so to be erected on such lots ought to be semi-detached in pairs and placed in the situation marked on the plan or plans, except so far, if at all, as such provision may have been modified by the consent in writing of the covenantees; that all such houses ought to be built in all respects in accordance with the elevation drawing thereof submitted to and approved of by the covenantees or their surveyor as aforesaid; and that the deft. was not entitled to erect, and is not entitled to maintain, that portion of the buildings erected by him on part of the Prescott-lane estate, which extends at right angles from the front of the stables erected by the deft. as aforesaid up to Fairfield-street." (The decree proceeded to order the deft. to pull down and remove the buildings complained of except the outside walls, and it declared that the stables might be used only as general outbuildings to the dwelling-house, and it restrained the deft. from putting them to any other use.)

The defts. now appealed against this decree.

The *Attorney-General*, *Turner* and *Bardwell* supported the appeal.

Amphlett, Q.C. and *Little* supported his Honour's judgment.

The cases referred to were

Roper v. Williams, T. & R. 18;

The Duke of Bedford v. The Trustees of the British Museum, 2 Myl. & K. 552;

Tulk v. Moxhay, 2 Phil. 774;

Child v. Douglas, Kay, 560, 575;

Whitman v. Gibson, 9 Sim. 196.

The arguments relied on are stated in the judgment of *Turner*, L. J. below.

The *Attorney-General* having replied, judgment was reserved until the 9th Dec., when

Lord Justice KNIGHT BRUCE said:—"The main question in this cause is, whether on the ground of contract, not on the ground of nuisance, or alleged or apprehended nuisance, but, I repeat, on the ground of merely contract, the plts. are entitled to the interference of this court against the deft. for the purpose of restraining him from building on his own land, unless in a particular mode, and using his own land for a particular object, or in a particular manner. There is also a question whether the plts. are entitled to recover in the suit damages against the deft. for having broken, as he is alleged to have broken, the contract made, against a breach of which the injunction was sought. The alleged contract contended to bind the deft. consists of a covenant, in which the deft. or his predecessors in title enter with certain trustees, namely, three gentlemen named Malcolm, Rourke and Pierce, of whom two, at least, I believe are living in England, but all are absent from this record. The learned V.C. of the County Palatine of Lancaster has pronounced a decree to some extent in favour of the plts., granting an injunction but not giving damages. With deference to his Honour, however, I acknowledge it to be my impression that, at the hearing of the cause, one of two

courses should have been taken, namely, that the cause should have been directed to stand over for the purpose of adding Mr. Malcolm, Mr. Rourke and Mr. Pierce, the three covenantees, or the survivors of them, as parties, plts. or defts., and also making the suit capable of binding others, which in its present state it does not effect; or that the bill should have been dismissed for want of equity. There is not any sufficient ground or reason, as I apprehend, alleged by the bill or apparent on it, or shown by the evidence, for seeking relief upon a record so constituted as the present record was at the hearing, and still is in point of parties; and even if there were no other objections in the plt.'s way, I apprehend that, as the record stands, the trustees are not nor can be bound by any decree or order made or to be made in the suit; and as to persons who besides the plt. and deft. are interested in the performance of the covenants—I mean purchasers of other plots of the land originally sold, or those who represent them—they also are not before the court upon this bill as filed on the plt.'s behalf. The decree ought, I apprehend, to be discharged. Should liberty, however, be given to add parties by amendment or by supplement? I apprehend so: although at present the materials before us appear to me to show so much delay in instituting the suit and works of such a nature done by the deft. before its commencement, as to render the interference of the court against him by way of injunction at the plt.'s suit not the proper course, even if the body of covenants taken together is not of such a character as, independently of delay and acquiescence, to exclude any remedy by injunction under them. [His Lordship here read the 10th paragraph of the bill already stated, and continued thus:] The hotel could not have been built in a very short time. The building seems to have been in course of construction for some months before the suit, and must have been deemed likely to require appendages. It appears to me, however, at present that the deft. cannot be sued at law on the covenants upon which the bill proceeds, and that it may be the duty of this court to inquire what, if any, damages the plts. have sustained by the deft.'s acts in contravention of the covenants, and to provide for the payment of the amount of them, if any. The case should therefore, I conceive, go back to the county palatine, and if the suit is to proceed, the other purchasers or those holding their rights should, I think, as well as the surviving trustees, be in some manner represented on the record.

Lord Justice TURNER, after stating the facts to the effect already set forth, said:—"Upon this appeal several points have been insisted on by the deft. in supporting it. First, that the deft. is not bound by the general plan mentioned in the bill, and can be affected only by the covenants contained in the deed of conveyance, and that the plts. are not entitled to sue the deft. upon those covenants; secondly, that assuming the deft. to be bound by the general plan, that plan has been so far deviated from with the sanction of the trustees that it cannot now be enforced against the deft.; thirdly, that the plts. have not themselves observed the covenants which they are seeking to enforce; fourthly, that the plts. have so far acquiesced in the buildings and works complained of by the bill that they have disentitled themselves to any relief in equity; and, fifthly, that the suit was defective for want of parties. As to the first of these points I am not satisfied, having regard to the case of *Squire v. Campbell*, so much relied on, that the deft. ought to be held bound by the general plan; but without reference to the question whether he is so bound or not, I think that the plts. in this case have an equity against him by force of the covenant entered into with the trustees, of which he had notice, that the covenants in the deeds of conveyance should be held by the trustees for the benefit of all the allottees and pur-

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chasers. And as to the second point, I think that the covenant last referred to furnishes an answer to this point also. Breaches of duty on the part of the trustees could not, as I apprehend, displace the equity created in favour of the plts. by force of this covenant. The authorities on which the deft. relied as to the point do not, I think, apply to such a case as the present. As to the third point, I do not think that the deft. has established any such case of breach of covenant on the part of the plts. as can disentitle them to enforce the covenant on his part, whatever other remedy he may be entitled to in that respect. The case, therefore, so far as the merits are concerned, seems to me to rest upon the point of acquiescence. Now it is admitted by the bill that the building adapted for an hotel was completely finished long before this bill was filed, and we cannot, I think, impute to the plts. ignorance that such a building would almost of necessity require a stable to be attached to it. Then the evidence shows that the stable in question was also erected before the filing of this bill, and that the plts. saw it from day to day in the course of its being erected. They allowed it to proceed, suffered the deft. to expend money upon it, and made no protest against it. It is said indeed that they had told the deft. that they should stand upon their strict rights, but this was before the stable was commenced, and cannot justify the plts. if they conceive that they had the rights they insist upon (and there is no allegation in the bill that they were ignorant of their rights), for having slept upon them. Under these circumstances, with all respect to the learned V. C., I cannot think that the injunction as to the stables ought to have been granted. It is said, however, that whatever degree of acquiescence there may have been as to the stables, there has been none as to the wall and erections between the stables and the street complained of by this bill. I do not find, however, that the bill complains of these works as they were ultimately finished; what is complained of by the bill is, that it was intended to erect a midden; but although this may originally have been intended (and I am by no means satisfied that it was not), the evidence seems to me to prove clearly that this intention had been abandoned before this bill was filed. Unless, therefore, the plts. were entitled to insist that nothing whatever should be built between the stables and the street, there was not, as it seems to me, at the time when this bill was filed, any ground to call upon the court for its interference as to these erections. They cannot, I think, be considered otherwise than as incidents to the stable, the completion of a plan already begun, and in part finished; and the plts. having debarred themselves by acquiescence from any right to call for the interference of the court by way of injunction as to the proposed work, cannot, I think, be entitled to claim such interference as to its accessories. The wall of which we are now speaking is in fact one of the boundary walls of the stable-yard, and there is no complaint by the bill, nor do I see any reasonable ground on which complaint could have been made, of the henhouse connected with it. These observations apply also to the other wall complained of by this bill. It is in fact no more than a supporting wall to the wall forming the opposite boundary of the stable-yard. Upon the ground of acquiescence, therefore, again speaking with all possible respect of the opinion of the V. C., my opinion is that this decree cannot be maintained as to these erections; but although the plts. are not, as I think, for the reasons above stated, entitled to the relief by way of injunction sought by this bill, it does not, I think, follow that they may not be entitled to damages for such injury (if any) as may have been done to their property by the deft. having built otherwise than in conformity with the covenant. Sir Hugh Cairns' Act of 21 & 22 Vict. c. 27, as I read

it, empower courts of equity to give damages in such cases. It is not, as I think, confined to cases in which the plts. could recover damages at law, and I think, therefore, the plts. bringing proper parties before the court are entitled, if they think fit, to prosecute the suit in that respect. I am satisfied, however, that for this purpose the trustees, and possibly other persons, ought to be made parties to the suit. If, therefore, the plts. desire to go on with the suit with a view to recover damages, I think the proper order to be made upon this appeal will be, that the cause stand over, with liberty to amend by adding parties; but if the plts. are satisfied to let the matter rest as to damages, I think the bill should be dismissed without costs.

Counsel for the resps. desiring time to consider which course they should adopt, the cause was ordered to be in the paper to be spoken to on that day week, and on

Dec. 16, the plts. elected to proceed with the cause for the recovery of damages, and the cause was remitted to the Court of the County Palatine, with leave to amend the bill by making it one by the Messrs. Eastwood on behalf of themselves and all other persons interested under the covenants, and by adding the trustees as defts. The costs paid to the plts. were ordered to be returned within fourteen days.

Solicitors for the deft. appealing, *Sole, Turner and Hardwick.*

Solicitor for the plts, *Elly of Liverpool.*

Nov. 9, 18 and 20, and Dec. 9.

(Before the LORDS JUSTICES.)

JOHNSON v. WYATT.

Injunction—Light and air—Acquiescence—Damages
—21 & 22 Vict. c. 27—25 & 26 Vict. c. 42.

The plts. and the deft. occupied adjoining houses, and the deft. intending to erect a glass room as a photographic studio on a portion of his premises, called on the plts. and informed them of his design, saying that he had a contract and plans for the erection, and pointing out the situation, but after dark, on a spring evening. The plts. made no objection, under the impression, as they alleged, that the building was to be on a different part of the deft.'s premises; they, however, never asked to see the plans nor made further inquiries.

Eleven days after, the deft. commenced his preparations, and eight days after that his actual building. Twelve days after that commencement the plts. wrote requiring the deft. to desist, and threatening proceedings in Chancery, and in another week, when the building was nearly finished, the bill was filed praying an injunction:

Held (dissenting from the judgment of Wood, V.C.), that there was here no such acquiescence as would deprive the plts. of their right to relief.

As the refusal of an injunction at the hearing of a cause amounts to a declaration that a right is absolutely and for ever lost, a much stronger case of acquiescence must be established at the hearing, to induce the court to refuse the injunction, than is required upon an interlocutory application.

Their Lordships, however, dismissed the bill on the ground that the plts. had sustained no substantial injury.

In a case of nuisance, where the plt. would probably recover damages at law, quare, whether this court will grant an injunction if the damages would be trifling and inconsiderable.

Per Turner, L. J.:—Although under the 25 & 26 Vict. c. 42, the court is not absolutely bound to ascertain the question of damages, yet the 21 & 22 Vict. c. 27, gives a jurisdiction as to damages, which, in cir-

circumstances like those of the present case, the court ought to exercise.

But the plts. had failed to show any title to damages; and

The bill was dismissed, but without costs.

This was an appeal by the plts. from a decision of Wood, V.C., who had dismissed their bill with costs, under the following circumstances:—The plts. were two widow ladies, Mrs. Johnson and Mrs. Burke, of whom the former was the lessee, and the latter the sub-lessee, of the house and premises No. 10, North Audley-street, Grosvenor-square, under the Marquis of Westminster, and the house was in the occupation of Mrs. Burke. The deft., Mr. Wyatt, had lately become the occupier of No. 9 in the same street, which adjoined the plts.' house, and the plts.' premises at the back were bounded on one side by outbuildings in the occupation of the deft., part of which consisted of an erection of two storeys in height, and the other part of one storey in height. The deft. was a photographic artist, and in the spring of this year he proposed to raise upon the top of the two-storeyed building a glass room for the purposes of his profession. He therefore called at the plts.' house on the evening of the 28th March 1863, after dark, and had an interview with Mr. Burke, the son of one of the plts., who was residing in the house with his mother, and he then informed that gentleman of his intention. According to the evidence, Mr. Burke and the deft. proceeded into one of the rooms at the back of No. 10, and the deft. then pointed out to Mr. Burke the site of the proposed erection, and described its character to him; but while the deft. insisted that he had accurately described the site and character of the studio, Mr. Burke alleged that the deft. told him that the proposed building was to be raised upon that part of the existing outbuildings which was only one storey high. In this belief Mr. Burke admitted that he made no objection to the proposal, but was satisfied with the deft.'s statement, and required no further description of the building. The deft. alleged that he also informed Mr. Burke that he had entered into a contract with a builder, who had prepared a plan; but Mr. Burke did not ask to see it.

Nothing further passed between the parties, and on the 8th April the deft. introduced workmen into his premises for the purposes of preparing his outbuildings to support the intended addition; but it was not until the 16th that the actual building was begun. By the 24th considerable progress had been made, and it was not until that day, as the plts. asserted, that they became aware that the glass house was being erected on the top of the higher building, and not of the lower. On the 28th April Mr. Burke wrote a letter to the deft. remonstrating with him on his proceedings, and telling him that unless the building upon the two-storeyed part was at once abandoned, the plts. would be obliged to apply to this court for an injunction to restrain him from building. The deft., however, proceeded with his works, and by the time when the present bill was filed, on the 5th May, the photographic studio was almost completed. The prayer of the bill will be found below in the judgment of Turner, L. J.

A great deal of evidence on the subject of the diminution of light and air was gone into on both sides, but as usual in such cases it was conflicting. The evidence upon this subject, and its general result, appear from their Lordships' judgment. The evidence to show acquiescence by the plts. has been sufficiently referred to already, but it did not appear that any part of the deft.'s proceedings was known to the plts. Mrs. Johnson until just before the institution of the suit.

The plts. moved for an injunction in the terms of their prayer, and when the motion was heard it was arranged that it should stand over to be treated as a

motion for a June last, W. counsel) did the acquiescence there had been deft.; that deft.'s statement derive from a window when he might the contract, already prepared any remonstrations remonstrate days, and the days. In fact said: "From May 1863, I work at N erecting the said that the and his Honour negligence is completed, they had a fore, properly his Honour their remedy air, his Honour the plts. might siding the built, he should light. But other course costs, because coming here

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section of the statute and the cases referred to. The plts. were bound by their own negligence, which was in no way attributable to the conduct of the def't., who several days before his works were commenced himself called on the plts. to inform them of his designs. At all events, the injury was very trifling in degree, and the court would not interfere by injunction; and where the court thought an injunction could not properly be granted, it would direct no inquiry as to damages, unless it should be shown that substantial damages would probably be awarded. The plts. might still proceed at law for damages.

Willcock, Q.C., in reply, contended that, if it appeared that any damages, however small, had been sustained, this court itself must ascertain the amount, and not leave the parties to proceedings at law:

21 & 22 Vict. c. 27;

The Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), s. 1;

Baylis v. Watkins, re Hooper, 7 L. T. Rep. N. S. 843.

At the conclusion of the arguments the Court asked whether, if it should be deemed desirable by the judges, either side would object to the employment of an architect or surveyor to report upon the erection under the 42nd section of the Masters in Chancery Abolition Act (15 & 16 Vict. c. 80).

Willcock, Q.C., on the part of the plts., consented, but

Daniel, Q.C. said, that his client was most desirous of avoiding all additional expense, and submitted that there were sufficient materials to enable the court to decide the question.

Judgment was reserved until the 17th Dec., when

Lord Justice TURNER said:—The plts. in this suit, the lessees of the house No. 10, North Audley-street, have filed this bill for an injunction to restrain the def't., the lessee of No. 9 in the same street, the adjoining house on the south side, from proceeding with the erection or building of a glass house intended to be used for photographic purposes, on the summit of a two-storied building at the back of and belonging to the house No. 9, or otherwise using the two storied building "for the purpose of constructing thereon any other erection or building, or otherwise from proceeding with any works upon or in connection with the said outbuilding and back premises, so or in such manner as to obstruct or diminish the access of light or air to the windows of the back of the house, No. 10, North Audley-street aforesaid, or any of such windows and the said out-offices, or as to otherwise injure or interfere with the healthy or comfortable use or enjoyment or market value of the said house and out-offices; and that the def't. may also be restrained from continuing or allowing to continue so much of the said erection or building as shall have been constructed, or any erection or building in connection therewith, in such a state, and from making use of the same as a photographic workshop, or otherwise, so as to produce the effects hereinbefore mentioned, or either of them." Then the bill also prays, in addition to the said injunction, "that the plts. respectively may be awarded damages in respect of the injury suffered and the expense incurred by them in consequence of the def't.'s conduct in the matter herein complained of; and that the def't. may be decreed to pay to the plts. respectively such sums as the def't. may be declared bound to pay as aforesaid." Upon the hearing of the cause the V.C. Sir Wm. P. Wood dismissed the bill with costs upon the ground of the plts.' having debarred themselves of any title to relief by having permitted the def't. to go on with the building, which in fact was nearly completed before the bill was filed. The plts. have appealed from the decree dismissing the bill, and we have now to dispose of the appeal. My learned brother and I are agreed in opinion that this decree cannot be maintained upon the ground on

which the V.C. has proceeded. That there was sufficient acquiescence to justify the court in refusing to grant the injunction upon an interlocutory application, cannot, I think, be doubted; but I apprehend that, to justify the court in refusing to interfere at the hearing of a cause, there must be a much stronger case of acquiescence than is required upon an interlocutory application, for at the hearing of a cause it is the duty of the court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost. This case, therefore, must, in my opinion, be disposed of on the merits; and the first question on the merits must be, whether the injunction ought to be granted either to the full extent of the prayer or to any more limited extent. This question depends, I think, upon the degree in which the light and air coming to the plts.' house is or will be obstructed by the erection in question. It is scarcely necessary to say that this court would certainly not interfere by way of injunction in a case in which no damages could be recovered at law. Perhaps it may be said that this court would not so interfere in a case in which, although damages might be recoverable at law, the amount to be recovered would be trifling and inconsiderable; but as this is a question on which, as applying to cases of nuisance, there has not been an unanimity of opinion in the court, I leave that point untouched. I think that, at all events, a plt. coming to this court for its interference in a case of this nature, is bound to show that the obstruction to the light and air which he calls upon the court to prevent is such as will render the house occupied by him, if not of less value, less fit, or at least substantially less comfortable, for the purposes of occupation. How then does this case stand upon the evidence as to these points? I think it clear upon the evidence that, if the plt.'s case can be sustained at all as to any of these points, it can only be with reference to the windows of the bedrooms on the second and third floors, and the staircase window between those floors; but looking to the whole of the evidence before us, and not to that on the part of the plts. only, I think that, even with respect to these windows, the plts. have failed to establish a case on any of these points entitling them to call for the interposition of this court by way of injunction. First, as to the light and air. These windows are in a lateral position with reference to the proposed erection. There is light and air coming to them from other quarters than over the two-storied building. I do not find any evidence on the part of the plts. that there will not be light and air coming to them from those other quarters sufficient for all ordinary purposes of domestic comfort and enjoyment, and so far as the access of air may be obstructed, the obstruction will, as I collect from the evidence, be casual and temporary only, depending on the direction of the wind. Secondly, as to the effect of the proposed erection on the value of the house, it is to be observed that these windows are merely the upper windows at the back, and it is remarkable that, although most of the plts.' witnesses say that the house will be diminished in value by the proposed erection, scarcely any of them (I believe only one, or at most two of them) refer this diminution in value to the alleged diminution of light and air. That the windows of the house may be overlooked and its comparative privacy destroyed, and its value thus diminished by the proposed erection (circumstances to which some of the plts.' witnesses refer), are matters with which, as I apprehend, we have nothing to do. I think, therefore, that the plts.' case for the injunction wholly fails. Then, as to the question of damages. Upon the best consideration which I have been able to give to the Chancery Regulation Act 1862 (25 & 26 Vict. c. 42, Mr. Roll's Act), I am not satisfied that, under

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the provisions of that Act, we are absolutely bound to enter into this part of the case, for I much doubt whether the question as to the plts.' right to damages ought to be considered as being, within the meaning of the Act, a question of law or fact cognisable in a court of common law, on which the plts.' title to relief in equity depends; but Sir Hugh Cairns Act (21 & 22 Vict. c. 27) has, I think, given us jurisdiction to entertain this question of damages; and having regard to the spirit and intention of the latter Act (the Chancery Regulation Act), I think that, having this jurisdiction, we ought under the circumstances of this case to exercise it. I have therefore considered the question of damages, and looked into several cases at law upon the subject: (*Back v. Stacey*, 2 Car. & P. 465; *Parker v. Smith*, 5 Car. & P. 438; *Pringle v. Warnham*, 7 Car. & P. 377; and *Wells v. Ody*, in the same volume, p. 410.) Upon the authority of those cases my opinion is, that the plts. have not established a sufficient case to entitle them to any damages, and that their case fails on this point also. Upon the whole, therefore, I think that this bill has been properly dismissed, although not upon the ground on which the V. C. proceeded; but I think that under the circumstances of the case the bill should have been dismissed without costs, and that there should be no costs of the appeal.

Lord Justice KNIGHT BRUCE said:—In this case, but for a recent statute, the contents of which I had not at the hearing fully and accurately recollected, until the argument for the plts.—the apps. here—had proceeded some way, I should probably have thought it better that, without dismissing the bill for the present at least, the cause should stand over, with liberty to the plts., or either of them, to sue the deft. at law, and with liberty to apply; but we must have regard to the present state of the statute law. With unaffected deference to the learned judge from whose court the suit comes, my impression is, that a case of acquiescence or of laches has, upon the whole evidence, not been established against either of the two plts., whose bill was filed on the 5th May last. If, therefore, the addition to the deft.'s house, against which complaint was made, is a nuisance to the plts.' house or to the plts. in respect of their house, they are, as I consider, entitled to relief here. On the materials before us here, I am of opinion that it is not shown to be a nuisance to them or to their house, either as to air or light. If, therefore, the case is to rest as it is, the bill should, I think, remain dismissed; but I should have been willing, had my learned brother been willing, if asked by the plts., to allow the parties to examine or re-examine witnesses orally here, on the question of nuisance, with a view to granting or refusing finally, so far as we are concerned, an injunction. The L. J., however, being of opinion that the bill ought to remain dismissed without any such option as I have mentioned, so it will be; and he, I need not say, is very likely to be right. The bill standing dismissed, I agree with him in thinking that the deft. should neither receive nor pay any costs previous or subsequent to the appeal.

Solicitors for the plts. the apps., *Poole and Gamlen*, agents for *Darvill and Poulton*, Windsor.

Solicitor for the deft. the resp., *Herbert*.

Nov. 21, 23, and Dec. 22.

(Before the LORDS JUSTICES.)

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Bankruptcy—Sale by assignees—Purchase by solicitor—Bankruptcy annulled by fraud—Suit by bankrupt to set aside sale—Right to sue.

The plt. was adjudged bankrupt in July 1856. He was then entitled to a life-interest in real estate and to a policy of assurance on his own life, and in December this property was sold by auction by the

assignees, and was bought by the deft. R., the surveyor and auctioneer employed. The deft. S. was the solicitor for the assignees in the sale, and he advanced the purchase-money to R.; the conveyance was made to S. subject to redemption by R. on paying the sum advanced with interest. In March 1860 the plt. made a composition with his creditors, and soon after an order was obtained by him annulling the adjudication and dismissing the petition for adjudication. The plt. afterwards filed this bill to set aside the sale on the ground of undervalue and the relation in which the solicitor and auctioneer stood to the estate at the time. It was shown that the plt. had obtained the composition and the consequent annulment of the adjudication by fraud in concealing from his creditors considerable property to which he was entitled; and further, that he had by deed before the annulment expressly confirmed all sales made by the assignees. Under these circumstances

Stuart, V. C. held, that as the composition had been obtained by fraud, the plt. had no title to sue, and that any right to have the sale set aside which might exist ensured to the benefit of the creditors, and he dismissed the bill. But, upon appeal, it was

Held, that this court could not consider the circumstances under which, and the means by which, the order annulling the bankruptcy had been obtained; that it must be treated here as a valid order; that it prevented the assignees from suing; that it restored to the plt. his property; that the composition-deed did not prevent the plt. from suing; and that, as the purchase by the solicitor and auctioneer was undoubtedly fraudulent and void, it must be set aside in the present suit. But the decree was expressly to declare that it was so set aside without prejudice to the rights of the assignees or of creditors, as against the plt., to the benefit which might arise from setting aside the sale.

The debts were ordered to pay to the plt. 100l. on account of the costs.

This was an appeal by the plt. against an order of V. C. Stuart, who in March 1863 dismissed the bill, but without costs, on the ground that, as the composition, and consequently the annulment of the plt.'s adjudication as a bankrupt, had been founded on an arrangement which was not made *bonâ fide* on the plt.'s part, but was entered into by the creditors in ignorance that he had suppressed the existence of considerable property to which he was entitled at the date of the composition-deed, there was no right in him to prosecute a suit in which the interests of the creditors were wholly unrepresented.

The circumstances are very fully stated in the previous report of the case at 8 L. T. Rep. N. S. 143, and a statement of them was also made by Knight Bruce, L.J. in delivering judgment; they are therefore not repeated here, but it ought to be mentioned that soon after his Honour's decision the former assignees, whose functions had of course been terminated by the order of May 1860 annulling the adjudication, petitioned the Court of Bankruptcy to direct an inquiry into the alleged concealment by the plt. of property belonging to him, which concealment was first brought to their knowledge by his cross-examination before the V. C. The learned commissioner directed such an inquiry, and the plt. appealed against it to the L. C., who discharged the order, considering that, as the certificate of the bankrupt had been refused in June 1858 for false statements in his examination and for other fraudulent conduct, the assignees and creditors must have had notice that the bankrupt was not a trustworthy witness, and therefore could not properly have relied upon his subsequent statements of the property

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belonging to him when the deed of composition was executed.

Malins, Q. C. and *Herbert Smith* appeared for the plt. appealing.—They contended that the purchase by the solicitor and auctioneer employed in the sale was utterly bad, and such as according to all the principles and practice of this court must, if properly impeached, be set aside:

- Hatch v. Hatch*, 9 Ves. 292;
Gresley v. Mousley, 4 De G. & Jon. 78; s. c. 33 L. T. Rep. 154;
Stump v. Gaby, 2 De G. M. & G. 623;
Ex parte James, 8 Ves. 337;
Ex parte Reynolds, 5 Ves. 707;
Ex parte Buge, 4 Madd. 459;
Ex parte Bennett, 10 Ves. 381;
Ex parte Morgan, 12 Ves. 4;
Gibbs v. Daniel, 8 L. T. Rep. N. S. 374;
Bailey v. Watkins, 6 Bli. 275 (n.);
Pooley v. Quilter, 2 De G. & Jon. 327; s. c. 31 L. T. Rep. 64;
O'Brien v. Lewis, 7 L. T. Rep. N. S. 734; s. c. on appeal, 8 L. T. Rep. N. S. 179.

Then in whom was the right to impeach it now vested? It could not be in the assignees, for there were none; they were discharged by the order annulling the bankruptcy; none of the creditors came forward to sue, and it was impossible for the plt. to bring them before the court; beyond these the plt. was the only person interested, and upon the supersession of the bankruptcy the estate and all right over it passed back again to him:

- Wearing v. Ellis*, 6 De G. M. & G. 596; and several cases there cited;
Charman v. Charman, 14 Ves. 580;
Banks v. Scott, 5 Madd. 493.

The order annulling the bankruptcy was one subsisting and valid; this court could not consider the grounds upon which or the circumstances under which it was made, but must take the order as it stood. There was no objection taken in the answer to the present plt.'s right to sue by reason of his misconduct, and even allowing that that misconduct had been of the grossest kind and clearly proved, it could not deprive him of his civil rights: (*Sharp v. Taylor*, 2 Ph. 801.) The deed dated 14th March 1860 was one to which the defts. were not parties, and though it professed to confirm all sales made by the assignees and all acts done by them, that ratification was only for the protection of the assignees, and was only intended to prevent the impeachment of such sales and acts by reason of the adjudication having been superseded. Lastly, until the bankruptcy was annulled the plt. could not sue; that was done in May 1860, and the bill was filed in July 1861.

Bacon, Q. C. and *Marten* for the defts. *Sworder*, and *Hobhouse, Q. C.*, *Waller* and *Newbon* (of the common law bar), for the defts. *Ree*, supported the decision of the V. C.—They contended that, but for the order in bankruptcy in May 1860, the plt. had no possible right to sue, and as that order had been obtained by fraud, this court would not assist him, even assuming that otherwise he would have the right:

The Earl of Bandon v. Beecher, 3 Cl. & Fin. 479;

Price v. Dewhurst, 8 Sim. 279.

The right to sue was in the assignees or the creditors on the annulling of the bankruptcy, and was not of such a nature as to be assignable by them:

- 32 Hen. 8, c. 9;
Underwood v. Lord Courtoyn, 2 Sch. & Lef. 41;
Spragg v. Binkes, 5 Ves. 583;
Froesser v. Edmonds, 1 Y. & Coll. 481;
Rudge v. Weedon, 4 De G. & J. 216; s. c. 33 L. T. Rep. 214;
Roll v. Hopkinson, 3 De G. & J. 177.

Again, the deed of composition and the consequent order were both expressly declared to be without prejudice to the acts done and the sales made by the assignees; and indeed, without such a reservation, the court would not have made the order:

Ex parte Smith, Buck, 262 (n.);

Towgood v. Hankey, Buck, 65.

But, at all events, the fact of that reservation being in both the deed and the order, prevented the bankrupt himself from suing; and, though the defts. were not parties to the deed, they were entitled to the benefit of it under the Act 8 & 9 Vict. c. 106, s. 5. Lastly, the plt. had admitted, in his cross-examination, that he was intimate with the defts. *Ree*; that he knew *Ree* had bought the property at the sale, and the price he had given, and that he had never, in any way, objected. The plt. had for several years acquiesced in the purchase, and must be held barred by that acquiescence.

Herbert Smith replied, urging that none of the grounds relied on by the defts. displaced the contention of the plt.; that the purchases by them were fraudulent and void in this court, and that the order annulling the bankruptcy re-vested in the plt. all his estate, property and previous rights. But the authorities

Wearing v. Ellis (*ubi ante*), and

Stump v. Gaby (*ubi ante*),

showed that a right to set aside a voidable sale was assignable.

Their Lordships reserved judgment until the 22nd Dec., when

Lord Justice KNIGHT BRUCE said:—*Samuel Adams* was, in July 1856, adjudicated a bankrupt. His affairs seem not to have been within a very narrow or limited compass. His property, among other particulars, comprised a life interest in a real estate called Cannons, in Hertfordshire, worth several hundred pounds per annum, and comprised also a policy of insurance on his life. This life-interest and this policy were, in Dec. 1856, contracted, by the assignees under the bankruptcy, to be sold; that is to say, were then sold by them by public auction to Mr. *Ree*, one of the defts. in this cause, an auctioneer, who had, in some way, been employed by the assignees—an employment, whatever it was, which the other facts of the case render, I think, immaterial. The sale was completed in the year 1857. Mr. *Ree*, though nominally and apparently the sole bidder and sole contractor and sole purchaser, did, in fact, contract for the life-interest and the policy, and bought them on the account of himself and the other defts. Mr. *Sworder*; they were together interested in the transaction, and from the beginning and throughout were (to borrow an expression used by Mr. *Sworder* on the subject) “partners in the matter,” and they seem to have so continued; but Mr. *Sworder*, before and at the time of the auction, and thenceforth, to and at the time of the completion of the sale and afterwards, was one of the solicitors under the bankruptcy to the assignees. At the foot of the first page of the particulars and conditions of sale, printed and used for the purpose of the auction in Dec. 1856, is this statement: “May be viewed by permission of the tenants, and printed particulars had at the place of sale, of Messrs. Longmore, Sworder and Longmore, solicitors; Mr. Jackson and Mr. Medcalf, Hertford; of Messrs. *Ree* and Sons, Ware; and in London of Messrs. Lawrance, Plews and Beyer, solicitors, and Plews and Wall,” who were auctioneers. Messrs. *Ree* and Sons, and Messrs. Longmore, Sworder and Longmore, there mentioned, include the defts. The 3rd condition of sale is this:—“Each person shall pay to the auctioneer immediately after the sale a deposit of 20 per cent. in part of the purchase-money, and sign an agreement for payment of the remainder on the 26th Dec. next, at the office of

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Messrs. Longmore, Sworder and Longmore, Hertford." And the 5th condition was in these terms:—"All objections and requisitions which any purchaser has to make shall be delivered in writing to the vendor's solicitors within twenty-one days from the receipt of the abstract, and none afterwards delivered shall be of any avail; and if any objection or requisition shall be so delivered which the vendors shall be unable or unwilling to remove or comply with, they shall be at liberty (notwithstanding any attempt to remove or comply with the same) to rescind the contract, on returning the deposit, without interest or costs." Of course, if the assignees had, while they continued assignees under the bankruptcy, contested the sale, and sought to set it aside before or after its completion, whether the price was high or low, or neither (though I may observe in passing that it seems to have been, in fact, not a high price), they would plainly have been entitled to succeed in that contention. They did not make the attempt; but these things happened: fraudulent conduct on the part of the bankrupt towards the body of his creditors or some of them was proved, and his certificate was consequently, in the month of June 1858 (though he had passed his last examination), refused. Mr. Adams, however, desiring neither to pay his creditors in full nor to remain an uncertificated bankrupt, procured one of his friends or acquaintances to offer a sum of 500*l.* to the creditors under the bankruptcy, as a consideration for allowing the bankruptcy to be superseded and annulled, under, I think, the 230th section of the statute 12 & 13 Vict. c. 106. The offer was accepted, and accordingly, in May 1860, an order in the bankruptcy was made to this effect: "Upon application this day made to me by the above-named bankrupt, and upon reading an order of this court, bearing date the 25th July 1856, whereby the said bankrupt was adjudged bankrupt; also by certificate bearing date this day, made in pursuance of the general rules and orders of this court, relating to compositions after bankruptcy; also a certificate dated the 23rd Feb. last, of the payment into the Bank of England, by the said Samuel Adams, of the sum of 500*l.* in pursuance of his proposal; also an indenture of release and indemnity to the assignees bearing date this day (a), and made between the said bankrupt of the one part, and William Whitmore, John Green Elsey and Joseph Lawrence, assignees of the estate, &c., of the said Samuel Adams, of the other part, and which indenture has been executed by the said bankrupt, and Mr. Lawrence, solicitor to the assignees, appearing and consenting to this order: it is hereby ordered that the said adjudication of bankruptcy be, and that the same is hereby annulled, and that the petition for adjudication be, and that the same is hereby dismissed; but this order is expressly without prejudice to any sale made, or any other act, matter, or thing done by the assignees or otherwise, under the said adjudication, and also without prejudice to the right of the creditors to receive the said sum of 500*l.* and any other sum in the hands of the official assignee, by way of dividend or composition on their said debts." But that order had been preceded by a deed connected with the offer and the intention to procure the bankruptcy to be annulled—a deed dated 14th March 1860, and executed by Samuel Adams; and, so far as it is material to state it, it was to this effect: it was made between the plt. of the one part, and the assignees, whose names have been already mentioned, of the other part. It recited the adjudication and the due appointment of the assignees; that the bankrupt had passed his last examination, and being desirous of offering to his creditors

a composition in respect of their debts, that he had, on the 6th Jan. 1860, called a meeting of his creditors under the B. L. C. A. 1849 (s. 230), and had then made an offer of composition, which nine-tenths in number and value of his creditors had accepted, and that such acceptance had been duly confirmed at a second meeting on the 10th Feb.; that by such offer the plt. and one James Mason proposed to pay to the creditors 500*l.* in full satisfaction of all debts, claims and demands under the bankruptcy; that an order dated the 10th Feb. was made in bankruptcy that the plt. and Mason should be at liberty within fourteen days to pay to the official assignee the said sum of 500*l.*; that the said sum had been accordingly paid; that since the adjudication the assignees had in that character made various sales of the real estates, chattels real, and personal estate and effects of the plt., and had brought, defended and compromised divers actions and suits in relation to the estate, and done various other acts; that it had been agreed upon that to protect and indemnify them, their heirs, executors and administrators, estates and effects, "and all persons claiming under them" against loss or liability on account of any such acts done or authorised to be done by them, and in order to ratify and confirm all such acts the plt. should execute that indenture, and that it was intended to apply to the commissioner to annul the adjudication and to dismiss the petition for adjudication; and it was witnessed that the plt. "ratified and confirmed all and singular the sales, purchases, contracts," and other acts entered into, authorised, or sanctioned by the assignees in relation to the estate and effects of the plt. And the plt. declared that every such "sale, purchase, contract," and act should thenceforth be as binding on him as if the said bankruptcy had not taken place. And it was further witnessed that the plt. thereby acquitted and released the assignees against all actions, suits and demands which were or might be set up on account of any "sale, purchase, contract" or act done, authorised or sanctioned by the assignees, and he covenanted to indemnify them against all consequences of their said sales, contracts, or acts. And, further, that if the bankruptcy should be annulled, he would make, execute and perfect all acts, deeds and conveyances for confirming or corroborating this indenture, and all or any of its clauses or provisions, and the transactions, matters and things to which the same related. This deed is mentioned in the order of May 1860, though by a wrong date. The order of May 1860 has not been discharged or varied, but remains in force, and the bankruptcy has ever since that order been and now remains superseded and annulled; and the probability or improbability that the order of May 1860 will be discharged or varied, or that the bankruptcy will be set up again, is, I think, for every present purpose, immaterial. After the order of May 1860, namely, in July 1861, the bill in this suit was filed by Samuel Adams, the late bankrupt, as the sole plt., its object being to set aside the sale; and the main question before us really is not as to the merits of the purchase (which are none), but whether the plt. is a person capable of suing; not whether the sale can, if properly questioned, stand, but whether Samuel Adams can properly question it. The depts. contend that, independently of the confirmations contained in the deed and order of 1860 the suit is not competent to the present plt., but that if it were so the order and deed of 1860 are fatal to it. I apprehend, however, that plainly if the bankruptcy had not been superseded or annulled, but had remained now in force, the assignees would have been before and in 1861, and would be now, entitled to sue the two depts. successfully for the purpose of setting aside the contract and sale of 1856 and 1857, and regaining for the bankrupt's estate the life-interest and policy sold, regaining them (that is

(a) This was an error in the order; the date of the deed was really the 14th March 1860, and its effect is stated below by the L. J.

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of course) on the usual terms of account and so forth; and I am of opinion that in the actual circumstances a good title to do so was at the time of filing the present bill, and is, vested in the plt., whatever and how-ever censurable his conduct may have been towards his creditors; though whether the plt. will be able to retain against the creditors under the bankruptcy what he shall recover in this suit may be questionable. That is a point as to which I do not pronounce or intimate any opinion favourable or unfavourable to the plt., but with which the debts seem to me to have, for any purpose of the present litigation, nothing to do. The confirmation of the assignees' sale and transactions which took place in March and May 1860, may have been and may be material as between Mr. Adams on the one hand and the assignees and creditors under the bankruptcy in those characters on the other; but they were, as to the debts, matters *inter alios*, and not, as I conceive, intended to prevent, defeat, or prejudice, nor had they in my opinion the effect of preventing, defeating, or prejudicing, the claim made by Mr. Adams in this suit which may possibly be (though I do not say it will be) less for his benefit than for that of the creditors under his bankruptcy in that character. It has been argued that the order of May 1860 annulling the bankruptcy was obtained by fraud. That, I apprehend, is not so in any sense material at present. It may be that the order was an erroneous decision, though I do not say so; it may be that the bankrupt at the time of obtaining the order was aware of facts not disclosed to the learned commissioner who made the order, which, if they had been disclosed to him, would have induced him to decline making any such order (though I do not assert that the bankrupt was so); but in my judgment the order is not by such means made void, though it may be liable to be attacked successfully. As I have said, it has not been successfully attacked, and it is, I conceive, in full force. Assuming that the bankrupt, by omitting, before obtaining the order, to state to the assignees and to the commissioner these undisclosed facts, acted improperly; assuming suppression and falsehood on the bankrupt's part upon the occasion of obtaining the order, I still think that for every present purpose, independently of any difficulty in the debts' way, from the state of the pleadings, we are bound to regard the order as valid. It has been said also that the plt. knew of Mr. Swarder's interest in the purchase from a time preceding its completion. That also I apprehend to be wholly immaterial, the bankruptcy not having been annulled before 1860. I consider that we ought now to set aside, with the usual directions, the plainly improper and censurable purchase which the suit impeaches; and whatever may have been the demerits of the late bankrupt towards the body of his creditors under the bankruptcy or any of them, or however untrustworthy he may be as a witness, I conceive that public policy and private justice require that at least a portion of his costs of the litigation should fall on the debts, who should, in my opinion, unless they prefer a taxation, pay the plt. 100*l.* for his costs of the suit to the present time. The form of our decree will require attention: it should, declare that the sale in question cannot stand; and accounts and inquiries must be directed for the purpose of ascertaining the amount to be, on that footing, paid by the plt. to the debts, or by the debts to the plt., who should be credited with the 100*l.* (unless the debts shall prefer a taxation) for his costs of the suit to this time. In other respects the cause should stand for further consideration; but the decree ought to be declared to be without prejudice to the question whether the creditors under the late bankruptcy, or the late assignees on their behalf, are or will be, as between themselves and

the plt., entitled to claim the benefit, if any, to arise from setting aside the sale.

Lord Justice TURNER said:—My learned brother has gone so much at large into this case, and I so fully agree in what has been said by him, that I have very little to add. That the purchase in question in this suit could not have been upheld against the assignees admits, I think, of no doubt whatever. The real question therefore that we have to consider seems to me to be, whether it can be upheld against the plt. the late bankrupt, when the title of the assignees to impeach it has been removed by the bankruptcy having been annulled. It was said in the first place, on the part of the debts, that the plt., the late bankrupt, procured his bankruptcy to be annulled by fraud and misrepresentation; but this point does not appear to me to be open upon the pleadings, and even if it were, I do not think we could act upon it. An order annulling the bankruptcy is in force, and so long as it remains in force we are bound in this jurisdiction to treat it as valid. That this order was made and the bankruptcy annulled without prejudice to the sales made and the acts done by the assignees under the fiat does not alter the case. This provision would, of course, prevent the titles of purchasers from being impeached on the ground of the bankruptcy having been annulled, but it could not, as I apprehend, protect them from impeachment on other grounds. Then it was said that the plt. was not entitled to impeach these purchases by reason of the provisions contained in the deed of the 14th March 1860 entered into by him with the assignees; but that does not seem to me to furnish the debts with any valid ground of objection to this suit, for the debts are no parties to the deed, and it was quite competent to the assignees to waive the provisions of it as between them and the plt. Nor, indeed, am I prepared to say that, if the circumstances of the case had been such as to render it necessary for the plt. to use the names of the assignees in this suit, he would not have been well entitled to do so, indemnifying them. Again, it was said for the debts, that the plt. was no more than a purchaser from the assignees of the right which they had to set aside these purchases, and it was insisted that there can be no valid transfer of a right of this nature. But, even assuming that there could be no valid transfer by the assignees of their right to impeach these purchases (which, under the circumstances of this case, I am by no means prepared to admit), I think that, by virtue of the order annulling the bankruptcy, the plt. became entitled to recover back his property on any other sufficient ground than that of the bankruptcy being annulled; and that he is, therefore, well entitled to recover in this suit, the purchase from the assignees having been fraudulent and void. Some argument was also attempted to be raised, on the part of the debts, on the ground of the plt. having, at the time when the purchases were made, or very soon afterwards, been aware that the debts had become the purchasers, and not having sooner instituted this suit; but it is a sufficient answer to this argument that the plt. could not sue until the bankruptcy was annulled. For these reasons, in addition to those which have been assigned by my learned brother, my opinion is that this decree cannot be maintained, and that there must be a decree setting aside these purchases on the usual terms; and I agree to what the Lord Justice has proposed as to the costs, and as to the decree being without prejudice.

Decree:—*The purchases by the debts. to be set aside, without prejudice to the question whether the creditors or assignees are entitled to claim the benefit, if any, to arise from the suit; the usual accounts of the purchase-money and payments, and of the rents and profits received*

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by the defts.; the defts. to pay, in equal shares, 100l. to the plt. towards his costs of the suit to the present decree.

Solicitor for the plt. appealing, *George Smith.*

Solicitors for the defts. *Sworder, Mason, Sturt and Mason.*

Solicitors for the defts. *Ree, Newbon, Evans, Newbon and Heritage.*

Dec. 9 and 19.

(Before the LORD CHANCELLOR (Westbury).)

ISENBERG v. THE EAST INDIA HOUSE ESTATE COMPANY (LIMITED).

Ancient lights—Mandatory injunction—Damages—Inquiry to assess amount of damages.

In cases of obstruction of ancient lights, where the court is called upon to exercise its power of mandatory injunction, ordering the defts. to restore things to the condition in which they were before the old building was removed, each case must be decided upon its own peculiar circumstances.

Semble, the power is to be exercised only in cases where the injury done to the plt. cannot be estimated and sufficiently compensated for in money.

In a case where the defts. insisted on the right to the mandatory injunction, and the plt. admitted that some damage had been done to the defts. by obstructing his light and air, but said that the amount of injury was exaggerated, the Court directed that, instead of an injunction, an inquiry should take place before itself to ascertain the amount of pecuniary damage.

This was a suit by Louis Isenberg, a leather merchant, who was tenant under a long lease of a house, No. 21, Leadenhall-street, and 54, Lime-street, in the city of London, for an injunction to restrain the above-named company from "proceeding with their new buildings," or making or erecting any building whatever in such manner as to darken, obstruct, or injure the ancient lights in the plt.'s house, as they were enjoyed by the plt. previously to the taking down of the India House.

A correspondence had taken place between the parties prior to the filing of the bill on the 25th Feb. 1863, in the course of which the plt.'s architect and surveyor, on the 6th Nov. 1862, wrote to the architect of the company, saying that Mr. Isenberg was fearful the new buildings would interfere with the light he had hitherto enjoyed, and intended taking such legal proceedings as he might be advised, should the height of the new buildings exceed that of the old, so as to injure his property; and asking how high they proposed carrying the wall. To this Mr. Tite, a promoter and large shareholder in the company replied, "Mr. Isenberg need have no apprehension whatever, for his house will be much improved in every respect, and his light and air increased."

Notwithstanding this, the plt. by his bill alleged he had been informed that the proposed new buildings abutting on Lime-street were to exceed the height of the old India House by about 15 feet.

On the 20th Feb. 1863 Mr. Clarke, another architect and surveyor, on behalf of the plt. gave the defts. a similar notice, and on the following day, finding that the defts. had taken no other notice of the letter than putting on an extra number of workmen, Mr. Clarke gave them another notice, to the effect that they would, at their own peril, raise the building higher than the old. The building was not raised higher than the former prior to the 25th Feb., but was subsequently raised some fifteen feet higher, with a heavy cornice.

The defts.' case was, that the letter of the 7th Nov. amounted to an offer on their part so to alter and widen the plt.'s windows that his light and air would

be increased, and that, as the plt. had not availed himself of such offer, he had in fact acquiesced in the defts.' proceedings; and that as the defts.' buildings were already let to the London Dock Company, it was of the utmost importance to the defts. under their agreement with the company that the buildings should be proceeded with without delay. They also contended that, inasmuch as by direction of the Commissioners of Sewers Lime-street was to be widened by the alteration, the plt.'s light and air would be actually increased and improved by their proceedings, independently of any alteration of his house.

On the 19th March the injunction was moved for before the M. R., and was then ordered to stand over and be turned into a motion for decree, the plt. to give notice within a fortnight.

On the 24th June the M. R., without hearing plt.'s counsel on the point, decided that there had not been such acquiescence on the part of the plt. as to deprive him of his right to complain of the injury; and on the 1st July his Honour, after having heard a great deal of evidence, and having himself visited and had a view of the premises, made a decree restraining the defts. in terms of the prayer of the bill, and ordering that, "so far as the new buildings of the defts. should or might have been carried higher than the said East India House, in such manner as to prejudice or obstruct the ancient windows, or lights of the plt., as the same were enjoyed before the taking down of the said East India House, an injunction be awarded to restrain the defts. from permitting or suffering the works or erections raised by the defts. to remain at a greater elevation than the said India House so pulled down as aforesaid to the obstruction or prejudice of the ancient lights or windows of the plt." A motion to vary the above decree by substituting for the former words in italics the words "built or constructed," and by leaving out the latter words in italics altogether, was subsequently, on the 23rd July, refused; but his Honour directed execution of the mandatory part of the decree to be stayed till the second seal in Michaelmas Term, the plt. not objecting.

From this decree the defts. appealed. Upon the matter coming on before the L. C. on the 9th Dec., his Lordship suggested whether the plt.'s windows could not be altered so as to admit more light and air, and the case stood over to see if an arrangement could be effected in this way, but the plt.'s solicitor in reply to the defts.' solicitors wrote to the effect that the plt. was entitled to alter his windows by putting in plate glass, or in any other way (provided he did not enlarge the size of his windows) he might think fit, and retain them as ancient lights, without affecting his rights against the defts. He further said it was impossible that any alteration whatever in the plt.'s windows would ever give the same quantity of light as the plt. previously enjoyed. The plt. asserted that Mr. Tite on behalf of the company had indirectly made him an offer of 20,000l. for his property, but this the defts. distinctly denied.

The appeal accordingly came on again on the 19th Dec.

The *Attorney-General* (Sir R. Palmer, Q. C.), *Wickens* and *Horace Davey* were for the defts.

The LORD CHANCELLOR said he might at the outset observe that, unless he were satisfied by the plt.'s counsel that his opinion was incorrect, he should certainly not permit the injunction to stand so far as it was mandatory, because, as he now had the power of substituting damages, he should direct an inquiry as to the amount of pecuniary damage sustained by the plt.

The *Attorney-General* said he was not prepared to satisfy his Lordship that no damage had been done; he said that it was at all events exaggerated in amount. The defts. had offered either to submit to arbitration to ascertain how much of the building should be taken

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down, or how much should be paid by way of compensation; or to improve the plt.'s windows.

The LORD CHANCELLOR said he was determined that none of these things should be made the means of extorting money.

The Attorney-General referred to the case of

The Attorney-General v. Nichol, 16 Ves. 343.

W. D. Gardiner (with whom was *Selwyn*, Q. C.) appeared for the plt.—He supported the decrees on the established ground that this was a constantly recurring grievance, which no amount of damages could compensate; and that the court granted its mandatory injunction on no other principle than this. The conduct of the defts. in continuing the building after notice, had brought on themselves the consequences of having this injunction directed against them. He cited

Broadbent v. The Imperial Gas Company, 7 De G. M. & G. 436; s. c. 7 H. L. Cas. 600.

No reply.

The LORD CHANCELLOR.—Every one of these cases must depend upon its own peculiar circumstances. The remedy given by common law for grievances of this description is an action for damages. That action is liable to be repeated as long as the cause of damage continues. On that ground, and by reason also of the amount of damage in many cases not being estimable in money, this court has exercised jurisdiction. Now this jurisdiction, as far as the preventive remedy is concerned, that is to say, a protection from further damage, is a jurisdiction exercised without any difficulty, and rests upon the clearest grounds. But there is superadded to this the remedy by way of mandatory injunction. This is an order compelling the deft. to restore things to the condition in which they were before the old building was removed. The exercise of that power is one which must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it should be confined to cases where the injury done to the plt. cannot be estimated and sufficiently compensated by pecuniary payment. Where the injury admits of being estimated, and where it may be abundantly compensated in money, it appears to me there is no necessity to superadd this extraordinary power. I can easily understand that there may be cases in which another man's rights may be prejudiced in such a way that the only effectual remedy is that of restoring things to their former condition. I can imagine an interruption of a supply of water to a fulling manufactory, which would so interfere with the trade carried on there as to render it difficult to define the sum of money which would be an adequate compensation for the injury done. But that is not the case before me. I think it a matter of very doubtful result whether any damage has been sustained by the plt., but it is a case beyond all question in which, taking into account the confession of the defts., the whole of the injury sustained or likely to be sustained by the plt., the whole of the prejudice and damage (if any) done to the plt.'s premises by the erection of the defts.' premises may be abundantly compensated in money. To what end then should I exercise a jurisdiction which would simply be mischievous to the defts. without being attended with corresponding benefit to the plt., unless indeed I could approve of the plt. taking advantage of the mischief and loss which the defts. would have to sustain in order to exaggerate his claim for pecuniary damages. This is a case in which the power of the court to assess pecuniary damages will be properly exercised, and I shall hold it my duty to direct an inquiry, in order that the amount of damages may not be increased by any extraordinary demand that the plt. may make. I therefore substitute for the injunction an inquiry in order to ascertain the amount of damages. In so doing I shall not forget that the

defts., after notice from the plt., continued to carry on their works, but I do not mean to hold judicially that they had no right to do so. The confession by the defts. that the building would be attended with some amount of injury to the plt. will not be of the least weight in ascertaining the amount of injury actually done. This arrangement will really carry into effect what both sides admit can be done, although they are not so fortunate as to agree upon the right mode of doing it. I shall suspend the order and direct an inquiry for the purpose of ascertaining what damage has been sustained by the plt. by reason of the buildings erected by the defts., and what will be the proper amount of compensation to be paid by the defts. to the plt. as satisfaction for such damage, including therein a power to direct any work to be done by the defts. for the benefit of the plt.s. as part of the compensation to be made by them. The parties respectively to have their witnesses examined *vide* *roce* before me, if they prefer that course to making affidavits; that is to say, both courses may be combined: if affidavits are filed, and cross-examination of witnesses is desired, the cross-examination may take place before me in court.

The LORD CHANCELLOR added that, as the plt. was now under the orders of the court, he would leave it for him to consider whether he might not get better terms from the defts. than he would under the inquiry; and his Lordship expected the defts. would meet the plt. in a liberal manner; intimating beforehand that he considered it a case in which a jury would undoubtedly give liberal damages.

Solicitors: for the plt., *J. W. Nicholson*; for the defts., *Hollingsworth, Tyerman and Green*.

Wednesday, Jan. 13.

(Before the LORD CHANCELLOR (Westbury.)

Re ADAMS.

Lunacy—Summary jurisdiction clauses—25 & 26 Vict. c. 86, ss. 12 and 13.

*In ascertaining whether the property of a lunatic, under the summary jurisdiction of the Lunacy Regulation Act, does or does not exceed 1000*l.* in value, the word "property" must be taken to mean "clear property."*

An arrangement for the disposition of an estate, made between parties interested in common with a lunatic in the estate, although it involves complicated accounts, may be made the subject of a reference within the 13th section of the Lunacy Regulation Act.

This was an application under the "summary jurisdiction" clauses of the Lunacy Regulation Act (25 & 26 Vict. c. 86, ss. 12 and 13), for an order to render the estate of a lunatic available for his maintenance or benefit.

When the matter was first mentioned to the Lords Justices, Knight Bruce, L. J. suggested that an arrangement might be come to by the parties out of court to settle the various claims on the property in such a way as to leave a clear income of part of the estate for the lunatic's benefit. This was accordingly done.

It appeared that the lunatic was entitled to a moiety of an estate of the net annual value of 240*l.*, which was subject to a mortgage, of which the interest amounted to 76*l.* 5*s.* 11*d.*, leaving an annual income of 43*l.* 14*s.* 1*d.*

He had also inherited other real estate from his father, to the value of 820*l.*, but the father's estate was subject to claims in respect of promissory notes given by the father to his brother, the uncle of the lunatic, which were admitted by the parties to amount to 891*l.*, and the residuary personal estate of the father was only

350*l*. The lunatic's estate was further liable to claims for past maintenance and other simple contract debts to the extent of 330*l*. 15*s*. 7*d*. Under these circumstances the agreement made between the uncle and the sister of the lunatic, who was administratrix of the father, was, that the uncle was to take the real estate in lieu of his claim against the father, and the daughter was to take the residuary personalty on behalf of herself and the other next of kin, she undertaking to pay the lunatic's debts, and to exonerate his remaining estate therefrom. By this means the above-mentioned income of 43*l*. 14*s*. 1*d*. would be left free for the lunatic's benefit.

When the parties came back before the L.JJ. with this arrangement, Turner, L.J. expressed a doubt as to whether debts ought to be deducted in estimating the limit of the value of the property, i. e. whether it did or did not exceed 1000*l*. His Lordship thought that mortgage-debts and debts charged might be deducted. The Act, he thought, was intended to apply only to sums of stock and other property immediately ascertainable. He was unwilling to turn the case into a precedent. There was danger of fictitious debts being set up, and in this instance *non constat* but that some of the promissory notes may have been paid.

Their Lordships said that if the parties desired to take the opinion of the L. C. in the matter, it might be done with their sanction.

The case was accordingly now brought before his Lordship on the original application for a reference.

The registrar, Mr. Wilde, informed the court that Turner, L.J. had subsequently expressed himself satisfied on the question of the debts; but felt a difficulty on two points—first, whether there was machinery in the Act to carry out such an arrangement as this; and secondly, whether the court was empowered by the Act to give its sanction to such an arrangement.

W. W. Mackeson, in support of the application, said that the Act gave to the court precisely the same power as it possessed under the old lunacy procedure, and that the debts might be proved by affidavit, &c., in the ordinary way.

On the other point he was not called upon.

John Edwards appeared for the next of kin.

The LORD CHANCELLOR, after suggesting that the word "property" might be expressed as meaning "beneficial property" or "property clear of debt," finally made a declaration that the word "property" in the 12th section was to be construed as "clear property;" and referred it to the master to inquire whether it was the fact that the property did not exceed 1000*l*.; and whether it was for the benefit of the lunatic that the arrangement proposed by the agreement should be carried out. His Lordship added, he was sorry to say it was impossible to exercise the summary jurisdiction in lunacy without great danger and probability of doing some injury.

Solicitors, *Tuke and Valpy*.

Nov. 10, 12 and 13, and Jan. 15.

(Before the LORD CHANCELLOR (Westbury).)

SUFFIELD v. BROWN.

Easement—Unity of possession—Vendor and purchaser—Implied reservation—"Continuous" and "apparent" easements.

If a purchaser buys the fee-simple of a tenement for a valuable consideration, and has it conveyed to him without any reservation, he is not bound to take notice of the manner in which the tenement has, prior to the sale, been used by the vendor for the convenience of the adjoining tenement: on the principle that a grantor cannot derogate from his own grant.

When a purchaser buys a house and has it conveyed to him without any reservation, he takes the house, not "such as it is," but such as it is described in the particulars of sale, and conveyed by the deed.
Case of Pyer v. Carter, 1 H. & N. 916, overruled.

In the year 1845 the owner of two adjoining tenements, a dock and a wharf, sold the wharf. The owner had been in the habit of allowing the bowsprits of ships in his dock to project over his wharf: Held, that this was neither a "continuous" nor an "apparent" easement.

The wharf having been sold in fee without reservation, it not being shown that there was any existing easement of this kind prior to the unity of possession which ended in 1845; and as this was neither a continuous nor an apparent easement:

It was held that a subsequent purchaser of the dock was not entitled to restrain a grantee of the purchaser of the wharf from interfering with his use of the dock in the manner above mentioned; in other words, that the dock owner could not exercise any right of placing ships in the dock in such a manner as that their bowsprits should overhang the wharf.
This was an appeal from the M. R.

The facts of the case are fully given in the previous report, *ante*, p. 192. They will also be found stated in his Lordship's judgment.

The M. R. granted to the plts., one of whom was the owner and the other the lessee of a dock, an injunction to restrain the deft., the owner of the wharf, from preventing or interfering with the full use and enjoyment by the plts. of their dock in the manner in which the same had been theretofore used, namely, by allowing the permanent bowsprit of any vessel in the dock to overlay or overhang the deft.'s wharf.

The appeal being from the whole decree, *Selwyn, Q.C.* and *Druce* opened the case on behalf of the plts.—First, they contended that this easement was "necessary" to the reasonable use and enjoyment of the plts.' property; and, secondly, if compelled (though the plts. resisted this), they were prepared to show that the purchaser, through whom the deft. claimed from a common owner of both tenements, had sufficient notice of previous user by the plts., and of the existence of an easement which was both apparent and continuous. They cited

Swansborough v. Coventry, 9 Bing. 305;

Pyer v. Carter, 1 H. & N. 916;

Hinchliffe v. Earl of Kinnoul, 5 Bing. N.C. 1.;

Richards v. Rose, 9 Ex. 28;

Ewart v. Cochrane, 4 M'Q. 117; 5 L. T. Rep. N.S. 1.;

Pinnington v. Galland, 9 Ex. 1.;

Riviere v. Bower, 1 Ry. & Moo. 24.;

Hall v. Lund, 32 L. J. 113, Ex.; 7 L. T. Rep. N.S. 692.;

Gale on Easements, 3rd edit. pp. 85, 99.

Baggallay, Q.C., *Mellish, Q.C.* and *Wickens* appeared for the deft.—The distinctions between continuous and discontinuous, and between apparent and non-apparent servitudes, are laid down in *Gale on Easements*, 3rd edit., p. 20. By unity of possession all easements are extinguished: (*Gale*, p. 123.) The present is a non-existing and non-apparent easement; it is a mere trespass by the so-called dominant over the so-called servient tenement: (*White v. Bass*, 7 H. & N. 722.)

"The only opposition to the current of authority, that a disposition of the owner of two tenements is binding equally on the grantor and grantee, and the parties claiming under them respectively, is a dictum of Lord Holt, in the case of *Tenant v. Gardiner*, 2 Ld. Raym. 1093:—" (*Gale*, p. 83.) It is admitted that a way of necessity may be reserved without express mention, but the case of *Pyer v. Carter* has been held to be inapplicable to

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cases where "necessity" is not proved, in the following authorities:

Worthington v. Gimson, 29 L. J. 116, Q. B.;
Pearson v. Spencer, 1 Best & Smith, 571;
Dodd v. Burchell, 1 H. & Colt. Ex. 113;
Polden v. Bastard, 8 L. T. Rep. N. S. 535;

And see an old case of

Nicholas v. Chamberlaine, Cro. Jac. 121.

Moreover there must be a continuous and apparent enjoyment, neither of which can be shown to exist in this case. The apparent enjoyment, if not actually visible, must attach to some existing construction, which may be discovered, as in the case of a drain. The cases of *Hinchcliffe v. Earl of Kinnoul*, *Ewart v. Cochrane*, and *Richards v. Rose* are each distinguishable from the present. They establish that an actual corporeal appurtenant of the dominant tenement resting upon or passing through the servient tenement will not be taken away, although it be not expressed in the grant of the servient tenement: but the present case is wholly distinct.

The following authorities were also referred to and commented on:

Pomfret v. Ricroft, 1 Wms. Saund. 323 (c);
Clarks v. Cogge, Cro. Jac. 170;
Beaudely v. Brooke, Cro. Jac. 189;
Parker v. Welstead, 2 Sid. 112;
Houlton v. Frearson, 8 T. R. 50;
Holmes v. Goring, 2 Bing. 84;
Proctor v. Hodgson, 10 Ex. 828;
Morris v. Edgington, 3 Taunt. 24;
Pheysey v. Vicary, 16 M. & W. 484;
Barlow v. Rhodes, 1 Cr. & M. 449.

Druce in reply.—We show an apparent and uninterrupted user of the easement; not a continuous user in the strict sense of the word, but continuous in the only sense in which such an easement can be continuous: (see *Hall v. Lund*.) We show, moreover, the absolute "necessity" of the right which we claim to the "reasonable" user of the dock; without this right we can enjoy, not the whole, but only a part of our property.

His Lordship reserved judgment.

Jan. 15.—The LORD CHANCELLOR.—The plt. is the owner of a docksituate on the Thames, at Bermondsey, and used for repairing ships, principally sailing vessels. The deft. is the owner of a strip of land and wharf adjoining the dock, on which he has begun to build a warehouse. The plt. has filed this bill for an injunction to restrain such building, on the ground that when his dock is occupied by a vessel of large size, her bowsprit must project over the boundary fence of the dock, across the deft.'s premises, which it cannot do if the deft.'s building is erected, and that he has a right to restrain such building, because it will deprive him of an easement or privilege which he is entitled to use or exercise over the land of the deft. The plt. puts his case upon possession and enjoyment of the privilege claimed by him of sufficient duration to create a legal title. The M. R. has decided (and, I think, correctly) that the plt. has not proved a possession or enjoyment sufficient to create a legal title to an easement. Nevertheless his Honour has granted the injunction. The grounds on which his Honour proceeds are clearly stated; but to understand them it is necessary to state shortly the facts of the case. From the year 1841, until the month of June 1845, a person named Knox was the owner in fee, and also the occupier, both of the dock and of the adjoining strip of land and coal-wharf; and the evidence proves that, during such period, whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across the adjoining strip of land. In the month of June, 1845, the two properties, the dock and the strip of land and coal-wharf, were put up for sale by

Knox by public auction. In the description given in the particulars of sale, it is stated that the dock was capable of holding two vessels of large size, and that at low water several vessels, or a steamer of the largest class, could safely lie on "the ways" for repairs. The strip of land described and sold as a "freehold coal-wharf" is stated to be capable of being rendered worth a very large rental by a comparatively small outlay. It is represented therefore, as an improvable property, and nothing is stated to show that the dock or its owners either then had, or were intended to have, any right or privilege over the adjoining premises. At the auction, the strip of land and coal-wharf were sold to one Gibson, and by the conveyance, which is dated in July 1845, the vendor (who at the execution of the deeds still remained owner of the dock) conveyed the strip of land and coal-wharf to the purchaser, under whom the deft. claims, in the most unqualified manner, in fee-simple, "together with all privileges, easements and appurtenances to the premises belonging, and all the estate, right, title, interest, property, claim and demand whatsoever, both at law and in equity, of the vendor, in, to or out of the same hereditaments and premises and every part thereof." The dock was afterwards sold and conveyed to other persons, under whom the plt. claim. The conveyance of the coal wharf, therefore, is the grant of a person who was at that time absolute owner of the dock, in respect of the ownership of which the present right is now claimed by his grantees against the coal-wharf, and it is very difficult to understand how any interest, right or claim, in, over or upon any part of the coal-wharf could remain in the grantor, or be granted by him to a third person, consistently with the prior absolute and unqualified grant that was so made of the coal-wharf premises to the purchaser. Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal-wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the subservient property. It seems to be more reasonable and just to hold, that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances. But this view of the case is not that taken by his Honour the M. R. His Honour's reported words are these: "The effect of this is, that if I purchase from the owner of two adjoining freehold tenements the fee-simple of one of those tenements, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance." This is a very serious and alarming doctrine. I believe it to be of very recent introduction, and it is, in my judgment, unsupported by any reason or principle when applied to grants for valuable consideration. That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement, is wholly immaterial, if he buys the fee-simple of his tenement and has it conveyed to him without any reservation. To limit the vendor's contract and deed of

conveyance by the vendor's previous mode of using the property sold and conveyed, is inconsistent with the first principles of law as to the effect of sales and conveyances. Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it, on which he has been for years in the habit of throwing out the cinders, dust, and refuse of his workshops, which would be an easement necessary (in the sense in which that word is used by his Honour) for the full enjoyment of the manufactory; and suppose that I, being desirous of extending my garden, purchase this piece of land and have it conveyed to me in fee-simple, and the owner of the manufactory afterwards sells the manufactory to another person, am I to hold my piece of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of the judgment before me, I certainly am so subject; for the case falls strictly within the rules laid down by his Honour, and it reduces them to an absurd conclusion. The first introduction of this extraordinary doctrine appears to have been made in the following manner:—A learned and ingenious author, the late Mr. Gale, published in the year 1839 a work of great merit on this subject of easements, in which he derived from the doctrine of the French Code Civil certain rules with which he conceived that the law of England agreed, and, inasmuch as these conclusions have been cited with approbation in some recent cases at common law, and as they form the principal support of the pl.'s argument, it is right to state and examine them. The doctrine is stated in Mr. Gale's book in the following terms: "The implication of the grant of an easement may arise in two ways: first, upon the severance of an heritage by its owner into two or more parts; and, secondly, by prescription. Upon the severance of an heritage a grant will be implied, first, of all those continuous and apparent easements which have in fact been used by the owner during the unity [and which are necessary for the use of the tenement conveyed] though they have had no legal existence as easements; and, secondly, of all those covenants without which the enjoyment of the severed portions could not be had at all:" (Gale, 3rd edit. chap. 4, p. 81.) It will be observed that the learned author is not here speaking of easements which are already legally existing before the unity of possession, but of those which he supposes to arise, for the first time, by implication from the grant. If nothing more be intended by this passage than to state, that on the grant by the owner of an entire heritage of part of that heritage as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted, there can be little doubt of its correctness; but it seems clear that the learned writer uses the word "grant" in the sense of reservation or mutual grant, and intends to state that, where the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous and apparent or necessary easements out of or upon the thing granted, as have been used by the owner for the benefit of the unsold part of the heritage during the unity of possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the *quasi*-dominant or *quasi*-servient tenement. But I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were, at the time of the grant, continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor. Consider the easements as if they were rights, members, or appurtenances of the adjoining tenement. They still admit of being aliened or released, and the abso-

lute sale and grant of the land in or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted, which is separable from the tenement retained, and can be aliened or released by the owner. Many rules of law are derived from fictions, and the rules of the French code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations, which accompany such portions when divided among them; or even, as it is said in French law, when aliened to strangers. But this comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one to a purchaser for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burden imposed upon it during his joint occupation, and the condition of such tenement is thenceforth determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership. And this observation leads me to notice the fallacy in the judgment of the Court of Ex. in the case of *Pyer v. Carter*, being one of the two cases on which his Honour relies. In *Pyer v. Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely and without any reservation, and he subsequently sold and conveyed the remaining house to another person. It appeared that the second house was drained by a drain that ran under the foundation of the house first sold, and it was held that the second purchaser was entitled to the ownership of the drain; that is, to a right over the freehold of the first purchaser, because, said the learned judge, the first purchaser takes the house "such as it is." But, with great respect, the expression is erroneous, and shows the mistaken view of the matter, for, in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house, not "such as it is," but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the court that the easement was "apparent," because the purchaser might have found it out by inquiry; but the previous question is, whether he was under any obligation to make inquiry, or would be affected by the result of it? Having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case of *Pyer v. Carter*, the true conclusion was that, as between the purchaser and the vendor, the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority. But to the earlier cases cited by the court in *Pyer v. Carter* as authorities for its decision, there can be no objection. In *Nicholas v. Chamberlains*, Cro. Jac. 121, it was decided that if the owner of a house, being also the owner of the land surrounding it, make a conduit through part of the land to the house, and then sells the house with its appurtenances, the right to that conduit passes; that is to say, the court held that the conduit was a thing appertaining to the house, and as such passed under the conveyance; and in the same case it was also decided, that if the owner sell the land, reserving

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DUTTON v. CROWDY.

[ROLLS.]

the house, the right to the conduit is reserved—a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances. To this case, and to the case in the year-book of the 11th of Hen. 7, or the case of *Shury v. Pigott*, Palm. 444, there can be no objection; but they do not give any support to the decision in *Pyer v. Carter*. The other cases relied on by his Honour, namely, *Hinchcliffe v. The Earl of Kintore*, is of a different character, and does not apply to the question of easements reserved by implication, or the grant of the quasi-servient tenement. In that case, there being two adjoining houses belonging to the same lessor, it appeared that the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house, and it was held that a demise, by the owner of both houses, of the first house with its appurtenances, carried with it the right to use the coal-shoot, and also a right of way to the coal-shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal-shoot—a decision which rests upon the ordinary principle of law, that, if I grant a tenement for valuable consideration, I also grant a right of way to it through my land, if such way be absolutely necessary for the enjoyment of the thing granted. This case might have had some application to the present if the dock had been the property first sold, and had been conveyed with all privileges, easements, rights and appurtenances, as then used and enjoyed by the vendor, he being still the owner of the adjoining strip of land and coal-wharf; but it is plain that no easement can arise by the necessary operation of a grant, unless it be in the power of the grantor to give such easement. It is true that there may be two tenements, as, for example, two adjoining houses, so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour; in which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he retains, that support from the house sold which is at the same time afforded in return by the former to the latter tenement (which was the case of *Richards v. Rose*, 9 Ex. Rep.); but where the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former tenement, it is severed and either passed or extinguished by the grant. It must be always recollected that I have been speaking throughout of cases where (as in the present case) the easement claimed had no legal existence anterior to the unity of possession, but is claimed as arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both, which is, in my opinion, an ingenious but fanciful theory; which is, as to part, not required by, and is, as to the other part, wholly inconsistent with, the plain and simple principles of English law that regulate the effect and operation of grants of real property. There is, in my opinion, no possible legal ground for holding that the owner of the dock retained, or had in respect of that tenement, any right or easement over the adjoining tenement of the strip of land and coal-wharf after the sale and alienation of the latter in the year 1845. I must entirely dissent from the doctrine on which his Honour's decree is founded, that the purchaser and grantee of the coal-wharf must have known at the time of his purchase that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, and that he must be considered therefore to have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut

down and reduced accordingly. I feel bound, with great respect, to say that in my judgment such is not the law. But if any part of this theory were consistent with law, it would not support the decree appealed from, for the easement claimed by the plt. is not "continuous," for that means something the use of which is constant and uninterrupted; neither is it an "apparent" easement, for, except when a ship is actually in the dock with her bowsprit projecting beyond its limits, there is no sign of its existence; neither is it "necessary" easement, for that means something without which, in the language of the treatise cited, the enjoyment of the dock could not be had at all. But this is irrelevant to my decision, which is founded on the plain and simple rule, that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made. Therefore, reverse the decree of the M. R., dissolve the injunction he has granted, and dismiss the plts.' bill with costs.

Solicitors: for the plts., *Kearney*; for the deft., *Bridger and Collins*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Saturday, Dec. 5.

DUTTON v. CROWDY.

Devise—Share—Original and accrued—Cross-remainders.

Where a testator has devised his real estates in certain shares, and has expressly stated what is to be done with the original shares, the court will not imply cross-remainders between the devisees in order to affect the accrued shares only.

The word "share" was held to include both original and accrued shares.

William Hugessen, by his will dated the 25th June 1800, duly devised certain real estates to the use of his nephew William Hugessen Spratt for life without impeachment of waste, with remainder to the use of trustees to preserve contingent remainders; with remainder as follows:—"To the use of all and every the child and children both sons and daughters of the body of my nephew John Spratt lawfully to be begotten, equally to be divided between or among them (if more than one) share and share alike as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such child and children severally and respectively lawfully issuing; and in case any one or more of such children shall happen to die without issue of his, her, or their body or bodies lawfully begotten, then as to the share or shares of him, her, or them so dying without such issue, to the use of the eldest surviving son for the time being of the body of my said nephew John Spratt lawfully to be begotten, and the heirs of the body of such eldest son lawfully issuing; and in case there shall not be any such son, then to the use of the survivors or survivor, and others or other, of the children of the said John Spratt lawfully begotten, equally to be divided between or among them (if more than one) share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of such survivors or survivor, or others or other of them; and if all such children but one should happen to die without issue of their bodies lawfully begotten, or if there shall be but one such child, to the use of such surviving or only child, and the heirs of his or her body lawfully begotten; and for default of such issue then to the use of my dear niece Elizabeth Spratt (spinster, sister of my said nephew William Hugessen Spratt and John Spratt) and of her heirs

and assigns for ever, to and for her and their own use and benefit; but in case my said niece E. Spratt should happen to die in my lifetime, or afterwards in the lifetime of her said brothers, and without leaving issue of her body lawfully begotten which shall be then living, then, in default of issue of them my said nephews William Hugessen Spratt and John Spratt lawfully begotten, to the use of the right heirs of me, the said William Hugessen for ever, and to and for noother use or uses, intents, or purposes whatever."

The testator died without having revoked or altered his said will.

John Spratt, the testator's nephew, had six children, viz. :—1. William Hugessen Spratt (the younger). 2. John Spratt (the younger). 3. Robert Spratt. 4. Mrs. Crowdy. 5. Elizabeth Spratt. 6. Michael Spratt.

Robert, Elizabeth and Michael died under twenty-one, and unmarried, in the lifetime of William Hugessen Spratt (the younger). William Hugessen Spratt (the younger) died intestate and without issue in 1832.

John Spratt (the younger) died in 1849, leaving Elizabeth Hugessen Dutton (the plt.) his only child. William Hugessen Spratt (the elder) died in July 1861.

The questions in the suit were, whether, on the death of William Hugessen Spratt the younger without issue, the original shares of Robert Spratt, Elizabeth Spratt and Michael Spratt, which accrued on their deaths to William Hugessen Spratt the younger, belonged to Mr. J. Spratt the younger, as the eldest surviving son of Mr. J. Spratt the elder; or whether such accrued shares devolved upon John Spratt the younger, and Mrs. Crowdy, the two surviving children of John Spratt the elder, as tenants in common in tail.

Hobhouse, Q. C. and *Kekewich* appeared for the plt., and contended that the original shares of Robert Spratt, Elizabeth Spratt and Michael Spratt, which accrued to William Hugessen Spratt the younger, passed on his death, together with his original share, to John Spratt the younger, "as the eldest surviving son, for the time being," of the "testator's nephew, John Spratt the elder." They admitted that, as a general rule, the word "shares" did not mean "accrued" shares; but where the whole scope of the will showed an intention that the estate should be kept together and given over (if at all) in an aggregate mass, accrued passed with original shares. They cited

Doe v. Birkhead, 4 Exch. 110;

Douglas v. Andrews, 14 Beav. 347;

Hawkins on Construction of Wills, 269;

Goodwin v. Finslason, 25 Beav. 65;

Evans v. Evans, 25 Beav. 81.

The plt. therefore, as the only child of John Spratt the younger, was clearly entitled to all the accrued shares which (together with the original shares) were vested in her father at his death.

Erskine, for other parties in the same interest with the plt., cited

Rabbeth v. Squire, 19 Beav. 70; s. c. on app. 4 De G. & J. 406.

Selwyn, Q. C. and *Dickenson* appeared for Mrs. Crowdy, and insisted that the authorities referred to on behalf of the plt. did not apply to this case: that the word "share" ought to receive its strict meaning, and be confined to original shares only; and that the whole scope of the will showed that cross-remainders ought to be implied between the children of John Spratt the elder, as to the accrued shares. The result of that would be, that John Spratt the younger and Mrs. Crowdy were, on the death of William Hugessen Spratt intestate and without issue, entitled to the accrued shares, as tenants in common thereof in tail.

Hobhouse, Q. C., in reply.

The MASTER of the ROLLS referred to the following authorities:

Worlidge v. Churchill, 3 Bro. C. C. 465;

Eyre v. Marsden, 2 Keen, 564;

Sillick v. Booth, 1 Yo. C. C. 117;

Leeming v. Sherratt, 2 Hare, 14.

The MASTER of the ROLLS, after stating the facts of the case as above, said:—The question in this suit is, to whom the three-sixth shares which originally belonged to Robert, Elizabeth and Michael, and which passed without doubt to Wm. Hugessen Spratt the younger, went on his death without issue and intestate? There are three constructions which may be put upon the testator's will. First, it may be contended that, under the terms of it, the gift of "the shares" to the eldest surviving son for the time being carried "accrued" shares; and that John Spratt the younger took them under the express terms of the devise. The second is, that the accrued shares were not given over or disposed of in the event of the devisees upon whom they accrued dying without issue, until the ultimate gift over took effect; which would have been on a failure of all the devisees, and their dying without issue. In that view, the accrued shares remained vested in William Hugessen Spratt the younger, and passed either by his will, if he made one, or to his heir-at-law, if he died intestate; and as he did die intestate, they passed to John Spratt the younger, his brother and heir-at-law, until it could be ascertained whether the ultimate gift over took effect. The third construction, which is that put forth for Mrs. Crowdy is this: it was contended that neither of those events happened; but that the accrued shares are subject to a devise of cross-remainders in tail among the children of John Spratt the elder; that such remainders are to be implied from the terms of the devise to him; and that accordingly one-half of these accrued shares vested in Mrs. Crowdy, as tenant in tail thereof, until the ultimate gift over took effect. Now, there are two circumstances which appear to me to be favourable to the contention of Mrs. Crowdy. The first is this: the ordinary rule of construction is, that the word "shares" unassisted by anything to be found in the context, is to be confined to original shares, and not extended to accrued shares; and the second is this, that if the devise here had stopped at the gift to the children of John Spratt the elder, as tenants in common in tail, and then, omitting all other gifts of the shares of deceased children, had proceeded to say that, in default of issue of all such children respectively, the estate was to go over to Elizabeth Spratt in fee; if that had been the case, it would, in my opinion, have been a clear one for implying cross-remainders in tail between the children dying before the ultimate gift was to take effect. But when I have stated those two circumstances I have stated all that is in my opinion favourable to the contention of Mrs. Crowdy. Those circumstances are, I think, controlled by the general scope and object of the will, the effect of which is to require that "the share" which goes to each son shall be treated as including the accrued as well as the original shares. That also is, I think, the rule where the intention of keeping the estate in an aggregate is plainly shown on the will. That principle was acted on in the case of *Doe v. Birkhead* and *Worlidge v. Churchill*, and by me also in *Douglas v. Andrews*. Where a testator has expressly stated what is to be done with original shares, it would, I think, be a strange thing to imply cross-remainders in order to affect accrued shares only. The case of *Doe v. Birkhead* illustrates my meaning. It was a case of the construction of a deed; but that will not affect the question before me. In that case lands were limited to several persons as tenants in common in tail, with remainder as to the shares of those dying without issue

to the survivors in tail. There the word "shares" was held to include accrued as well as original shares. But if the deft.'s contention here is correct, it would follow that, if a devise be made in the words used in the deed in that case, the original share of the tenant in common who dies without issue would go over by force of the express devise, while the accrued share would indeed go over to the same persons; not, however by force of the express devise, but by that of the implied devise of cross-remainders in tail. It would, I think, be a singular refinement upon the rule, to hold that original shares of a deceased tenant in common, who dies without issue, go over to the survivors by force of the expressions in the will, but that the accrued shares go over in the same direction, not by force of the word "shares," but by that of an implied devise of cross-remainders, to be gathered from the other parts of the will. Yet that is in fact what I am asked to hold by the contention of the deft. Mrs. Crowdy. The original share is given to "the eldest surviving son for the time being;" then it was argued that the testator did not intend the accrued shares to be included in that word "shares," but that he meant the accrued shares to go over to the others, under an implication of cross-remainders in tail. When cross-remainders are implied in a will, it is done in order to carry into effect the obvious scope of the will, ascertained from the whole of it taken together. Here, however, I am asked to imply cross-remainders, with the view rather of defeating the object which appears to be expressed on the face of the will than of carrying it out. It must be remembered, too, that the authorities which have determined that the word "shares" does not include accrued shares, were obtained after contradictory decisions in the first instance; and that the rule of construction, though perfectly well settled now, probably often defeats the real intention of the testator. The case of *Worlidge v. Churchill* is very nearly the same as the present one. There the testator devised his real and personal estate on trusts for sale and division of the proceeds among his four children on their attaining twenty-one; but, if any of them died under that age, the deceased child's share was to go to the survivors or survivor; if all died under twenty-one, then the testator gave it over. As the testator there showed a desire that the estate should be kept entire, the word "share" was held to include the accrued as well as the original shares. The cases of *Eyre v. Marsden*, *Sillick v. Booth*, and *Leeming v. Sherratt*, before Sir James Wigram, were all instances of that kind. If I were to adopt the construction put forth by Mrs. Crowdy, and say that the word "shares" as used in this will does not include the accrued shares, I should be more disposed to hold that the heir or devisee of William took it, than that cross-remainders ought to be implied; particularly as the testator has stated what he wished to be done with the original shares of the children dying without issue. I think the whole scope of this will shows an intention that all the shares which fall by reason of the death without issue of any one of the tenants in common in tail shall be accumulated upon the eldest surviving son for the time being; and that upon the death of the surviving son without issue, the property is to be equally divided between the daughters. I think that extends to accrued as well as original shares; and that is also shown in other parts of the will on which I have already commented. I think it appears from the testator's direction that in case all the children of John Spratt should die without issue, the whole entire subject of the devise should then—but not until then—go to and be vested in Elizabeth Spratt in fee. I will therefore make a declaration to the effect I have stated; viz, that John Spratt the younger, the father of the

plt., became, on the death of his brother Wm. Hugessen, entitled to all the shares vested in him at his decease, both original and accrued, as tenant thereof in tail general.

Solicitors for the parties, *Lakes, Kendall and Lake*.

Tuesday, Dec. 8.

MONTAGUE v. EARL OF SANDWICH.

Bequest—"Money."

Where a testatrix bequeathed certain pecuniary legacies, and then gave some specific chattels to O. M.; and in a later part of her will said, "the residue of my money (if any) I leave to my grandson O. M., he will want it most;" the word "money" was held to pass all the testatrix's residuary personality.

The Dowager Countess of Sandwich by her will appointed executors thereof, and bequeathed to them "everything of which she died possessed in trust for the following" purposes; she then made several pecuniary gifts and specific bequests of jewelry and other things. She then bequeathed certain plate, books, &c., to Lord Sandwich, for life; and added the following clause: "should any money remain after paying these bequests, I leave 50*l.* to each of my two footmen, should they be in my service at the time of my death. The residue of my money (if any) I leave to my grandson Oliver Montague, he will want it most." She then made other pecuniary and specific bequests.

The testatrix died. Her residuary personal estate comprised, besides money at her bankers, money on mortgage, stock in the London and North-Western Railway Company, and rents and interest due to her at her decease.

The plt. in the suit was Oliver Montague, and he claimed the whole of the residuary personality under the above-stated bequest to him. The question was, whether the word "money" extended beyond the ordinary meaning of that word?

Baggallay, Q.C. and *Schomberg* appeared for the plt.

Selwyn, Q.C. and *H. T. Salmon* for the defts. in the suit.

Southgate, Q.C. and *T. H. Earle* for other parties.

The following authorities were cited in the arguments:

Lowe v. Thomas, 5 De G. M. & G. 315;

Chapman v. Reynolds, 28 Bear. 221; 2 L. T.

Rep. N. S. 319;

Rogers v. Thomas, 2 Keen. 8;

Dowson v. Gaskoin, 1*b.* 14.

THE MASTER OF THE ROLLS. — A bequest of "money" does not *primâ facie* pass more than what is actually and literally money. The burden of proof to the contrary lies on those who so contend. There are various circumstances in the present case which show clearly to my mind that the word "money" here includes the whole of the residuary property in question. The cases which have been cited are moreover confirmatory of that view. But with regard to this case itself, in the first place there is *primâ facie* no intestacy. The testatrix has purported to dispose of the whole of her property, and has shown an express desire to do so. The strong point is that which was well put by Turner, L. J., in the case of *Lowe v. Thomas*. If a person gives the whole of his "money" to A. B., and then certain specific chattels, he thereby expresses his intention that they shall not be considered as money, and the word "money" cannot extend to all the property undisposed of. But if the word money cannot extend to all such property, it cannot extend beyond what is strictly and properly money. If a testator gives certain specific chattels, and then the residue of his "money" (which is the converse of the previous case), he shows that he treats chattels as part of his money.

ROLLS.] *Re MERTON COLLEGE—SOUTHAMPTON BOAT, & C. COMPANY v. RAWLINGS.* [ROLLS.]

If in this case Lady Sandwich had begun her will by leaving 1000*l.* to Lord Sandwich, and had then said "all the residue of my money I give to my grandson," there would have been a strong inference that she did not intend this property to pass as money. But she has first given a number of specific chattels, and then all the rest of her "money" to the plt. I am of opinion, therefore, that she has expressed an intention to give to him the whole of the property not previously disposed of; and I will make a declaration accordingly.

Solicitors, *Capron and Co.*

Wednesday, Dec. 16.

Re MERTON COLLEGE.

Railway companies—Money in court—Reinvestment in land—Costs.

Where four railway companies had respectively paid their several purchase-moneys into court, the costs of a petition for the reinvestment in land of portions of each of the funds were ordered to be borne by the four companies equally.

In this case, the Midland Railway Company, the Wycombe Railway Company, the Bedford and Cambridge Railway Company and the East Kent Railway Company (now represented by the London, Dover and Chatham Railway Company), had respectively purchased, for the purposes of their several undertakings, land belonging to Merton College, Oxford. The companies had paid their purchase-moneys into court; and this petition was presented by the college, praying an order for the reinvestment in the purchase of other land of portions of the moneys so paid into court by the four railway companies. Of the moneys sought to be invested, 506*l.* was part of that paid into court by the Midland Railway Company; 200*l.* part of that paid in by the Wycombe Railway Company; 500*l.* part of that paid in by the Bedford and Cambridge Railway Company; and 200*l.* part of that paid in by the East Kent Railway Company. The only question was, how the costs of the petition should be paid?

Law appeared for the college and asked that the costs might be borne equally by the four railway companies. He cited

The Bishop of London's case, 2 De G. F. & J. 14; a. c. 2 L. T. Rep. N. S. 365;

Kekewich appeared for the London, Dover and Chatham Railway Company, and contended that the costs ought not to be paid as asked by the petitioners. The rule stated in the *Bishop of London's case* ought to be followed only where no hardship ensued. But the present case was one in which, if the rule were applied, great hardship would be done to the companies, for the college were now only going to invest a part of each of the moneys in court. There would still be a balance on each fund, and on any subsequent investment the college might again call on all the companies to contribute to the costs. The petitioners should not have taken portions of all the funds. They should have taken entire funds to the amount they required to invest, when those funds would have borne the costs of their own investment:

Re Byron's Estate, 8 L. T. Rep. N. S. 562.

Sargeant and Goren appeared for the other companies.

The MASTER of the ROLLS.—I do not see how I can compel the petitioners to take a whole fund for their investment. I think that the general rule, as laid down in the *Bishop of London's case*, ought to be followed, unless it is shown that the application of it is made in such a form as intentionally to injure a particular railway company. That, however, does not appear to be the case here.

Solicitors for the several parties: *Law, Hussey and Co.; Lawrence, Markby and Southey; S. Carter; and Baxter Rose and Norton.*

Monday, Jan. 11.

THE OFFICIAL LIQUIDATOR OF THE SOUTHAMPTON BOAT AND PIER COMPANY (LIMITED) v. RAWLINGS.

Practice—Re-amended bill—Interrogatories.

The re-amendment of a bill by the addition to it of a new co-plt. does not make the bill a new one, so as to entitle the plt., as of right, to an answer to the whole of it.

Where a plt. who had not required the deft. to answer either the original or an amended bill, afterwards re-amended the bill by adding a new co-plt., and then, without leave of the court, filed interrogatories to the matters contained in the whole bill, it was

Held, that the interrogatories were irregular, and must be taken off the file, but without prejudice to the plt.'s applying for leave of the court to file others.

The original bill in this suit was filed on the 16th June 1863, and an appearance to it was duly entered by the deft. On the 4th July the bill was amended. On the 14th Dec. the bill was re-amended by adding the company as co-plts. with the official liquidator. No answer was required by the plt. to the original or amended bill, and the deft. did not put in any voluntary answer thereto. On the 21st Dec. interrogatories to the re-amended bill were filed, but without the leave of the court.

This was a motion by the deft. to take those interrogatories off the file for irregularity.

Selwyn, Q. C. and *J. N. Higgins* appeared for the deft., and contended that all interrogatories should be filed within eight days after the time fixed for the appearance of a deft. to a bill; if filed after that time, leave of the court should be obtained for that purpose. They cited

15 & 16 Vict. c. 86, s. 12:

Drake v. Symes, 2 De G. F. & J. 81; 1 L. T. Rep. N. S. 186.

Baggallry, Q. C. and *Waller*, for the plts, contended that where the re-amendment of a bill rendered interrogatories necessary upon the whole of the case, leave of the court was not required. Here the addition of the co-plt. made the whole of the case a new one, calling for interrogatories to the whole of it. They cited

General Order 10, r. 3;

General Order 11, r. 2;

General Order 37, r. 7.

The MASTER of the ROLLS.—I think the deft. is right. If interrogatories are not filed within eight days after the appearance of a deft. to the bill, but the plt. then wishes to file them, he must apply to the court for leave to do so. If, instead of that, he amends his bill, he loses his right to interrogate (without leave of the court) to anything beyond the new matter introduced by the amendment. To obtain that leave, he must show that there has been no laches on his part. The introduction of a new co-plt. by amendment does not constitute a bill a new one so as to entitle the plt. as of right to an answer to the whole of it. By his delay in this case he has lost the right to require such an answer, and he cannot recover it by a formal amendment. The motion must be allowed with costs, but without prejudice to any application by the plt. for leave to file fresh interrogatories.

Solicitors for plts., *Newbon, Evans and Co.*

Solicitors for defts., *Harrison and Lewis.*

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs.,
Barristers-at-Law.

Wednesday, Dec. 9.

HAND V. NORTH.

Will—Construction—Gift to children “as they shall become of the age of twenty-one”—Tenancy in common—Period of vesting.

A testator gave a share of his property to the two children of a deceased daughter, “as they should become of the age of twenty-one years.”

Held, that this was a tenancy in common.

A gift to the children of A. as they shall come into esse does not, by reason of its taking effect at different periods, prevent its being a joint tenancy; but a gift to the children of A. “as they shall become twenty-one,” is a tenancy in common, these words being operative as words of severance, the children taken vested interests at different periods.

The question in this case arose under the following will, dated the 22nd May 1840.

Peters Hand, of Burrell, in the county of Lincoln, gave Bryan Smith, Thomas Parker and William Snowden, as executors in trust for his widow and children under the age of twenty-one years at his decease, the whole of his real and personal estate and effects, whatsoever and wheresoever, to be divided amongst his children in manner following, as they should become of the age of twenty-one years (that was to say): to his son, Richard Smith Hand, the sum of 200*l.*, and to his three daughters, Hannah, Mary and Susan Smith, the sum of 400*l.* to be equally divided amongst them in addition to the rest of his children, and the remainder and residue of his estate and effects the said testator gave and bequeathed to all and every one of his children, namely, that was to say, Hannah White, the wife of John White, Mary Hand, Susan Smith Hand, Richard Smith Hand, Jane Hand, Eliza Hand, the plt. Peter Hand, Harriet Hand, the plt. Henry Hand, Betsey Hand, Caroline Hand and James Snowden Hand, and Charlotte Hand, and to any other child or children which he might thereafter have lawfully born in wedlock, share and share alike as they should become of the age of twenty-one years. And the principal sum of each child's share to be put out on mortgage on freehold land security until they should become of age; the interest of each child's share to be applied for the maintenance and education of each child except what thereafter was excepted (that was to say) to the said testator's wife, should she survive him, he gave the sum of 15*l.* per annum, the interest out of the principal of a sum which should be put out on mortgage on freehold land security for that purpose, and to remain on such security or securities during her natural life, and to be paid to her quarterly; the first quarterly payment to be paid to her at his decease, and after her decease the said principal sum to be equally divided amongst his before-named children as they should become of age, and such other children as should be born as aforesaid. And the said testator, after giving certain specific legacies to his said wife, directed (in certain events which did not happen) that the said annuity to his said wife should be reduced or cease, as the case might be, and principal sum secured for the annuity equally divided among his children as should become of the age of twenty-one years.

The said testator made a codicil, dated the 22nd May 1840, whereby he gave and bequeathed to his daughter Adelaide one equal portion or share of his property as the rest of his last-named nine children of his then wife, and also the additional sum of 5*l.* a-year to each of his two youngest children, Charlotte Hand and Adelaide Hand, until they should become of the age of twenty-one years each, and then the principal sum to

be equally divided amongst the whole of his children or their representatives. Also he gave the further sum or annuity to his said wife, during her natural life, of the rents or profits of his cottage, house, and lands situate at North Summercotes, then in the occupation of Hall, or the privilege to live upon it and occupy it herself, but to be kept in good substantial, tenantable repair at her expense. Also the said testator gave and bequeathed unto his two grandchildren, Jane White and Charles White, as they should become of age, the portion or share that would have belonged to their mother had she survived him. The testator died on the 23rd March 1841, and his widow on the 13th April 1860.

The testator had fourteen children, one of whom, Mary Hand, married Thomas Widall, and died leaving issue. Charles White died under twenty-one unmarried. Jane White married Stephen Bourne, and died leaving children. Richard Smith died in 1858, leaving children. James Snowden Hand died under twenty-one, and without having been married. Charlotte Hand married Samuel Marshall, and died leaving one child. The legacies had been paid except the legacy bequeathed to Charles White by the above-mentioned codicil, and a considerable part of the testator's residuary personal estate had been distributed by the trustees, but they still retained Charles White's share.

The plts. submitted that the last-mentioned legacy was given to Charles White contingently on his attaining twenty-one, and on his failing to attain that age it fell into the residue of the testator's estate and became divisible amongst his residuary legatees, and that the share of the residuary estate which was given to Charles White was also given on the same contingency. The last-named legacy and share of the residue was claimed by Stephen Bourne and his children. The personal estate of the testator remaining in the hands of the trustees was insufficient for the payment of the legacy, and the trustees prayed for a declaration of the rights of all parties under the above-mentioned will and codicil, and that the real and personal estate of the testator and the trusts of the will and codicil might be administered by the court.

Nalder appeared for the plts.

Pemberton and Surridge for parties in the same interest.

Rasch for the representatives of Jane White.

Nalder in reply.

The following cases were cited:

Woodgate v. Unwin, 4 Sim. 129;

Kenworthy v. Ward, 11 Hare, 196;

Amies v. Skillern, 14 Sim. 428;

Macgregor v. Macgregor, 1 De G. F. & J. 63.

THE VICE-CHANCELLOR.—Under this will Hannah White would have been entitled to a certain share of the testator's real and personal estate; she however, died in the testator's lifetime, and by a codicil in which he implied she was dead, he gave to her two children the share which would have belonged to their mother had she survived him. Both the children survived the testator, but one of them died under twenty-one, and the question is, what interest did they take under this codicil? The gift is to the two as they shall become of age. If it had been simply to the two grandchildren it would have been a joint tenancy; but the question is whether it is not a tenancy in common by reason of the words “as they become of age,” with which the gift to them is coupled. On this point four cases have been cited, namely, *Woodgate v. Unwin*, *Kenworthy v. Ward*, *Amies v. Skillern*, and *Macgregor v. Macgregor*, the last being a decision of the appellate court. The effect of these cases I suppose to be, that if a testator makes a gift to the children of A. so as to include after-born children, then, although the gift must take effect as to some before it takes effect as to others, that does not prevent the children taking as joint tenants; but if the gift be coupled with the words

"as they attain twenty-one," then it is held, by reason of the different period of vesting, that it is a tenancy in common. This question arises here, and the effect is this: without the words "as they become of age," a gift to the children so as to include after-born children as they come in *esse*, does not, by reason of taking effect at different periods, prevent its being a joint tenancy; but if the gift is to the children of B. "as they attain twenty-one," then indeed, by reason of its becoming vested in them at different periods, not by reason of their coming in *esse* at different periods, it is held to be a tenancy in common. *Kenworthy v. Ward* was a case in which it did occur, and the V. C. determined that, by reason of the different period of vesting, it was a tenancy in common. *Amies v. Skillern* was a different case. There the words did not occur, but the question was, as to the times of coming in *esse*, whether that created a tenancy in common, and V. C. Wood, in *Kenworthy v. Ward*, said that if the V. C. of England meant to decide that, then those two cases were irreconcilable with the general current of authorities. Then when the matter came before the full court in *Macgregor v. Macgregor*, all the cases were cited, and the court came to the conclusion that both *Woodgate v. Unwin* and *Amies v. Skillern* were reconcilable, and were right in deciding that, by reason of the children coming into *esse* at different periods, that did not create a tenancy in common; that *Woodgate v. Unwin* was also right in deciding that where there were such words as here, "as they become of age," then indeed it was a tenancy in common, they being operative as words of severance, because they must take vested interests at different periods. Here there is a gift "to Jane White and Charles White," and if it had stopped there, beyond all doubt there would have been a joint tenancy; but the words were added "as they become of age," and Jane and Charles White being born at different periods, of course they came of age at different periods. A gift at twenty-one is not vested until twenty-one, and vests in the two at different periods, and therefore, according to the decisions, in this case there is a tenancy in common. It has been suggested, that what was found in the will in reference to the gift to Hannah White might be imported into this gift, her portion being the subject of the gift to Charles White; that is, the direction to apply the interest for maintenance, and then the gift would be vested. But that was impossible. That was a gift among the testator's own children, of whom Harriet White was one. It was a direction that the respective shares should be applied for their maintenance during their minority, which (at least as to personality) vested the share; but here these children were to take, as the subject-matter of the gift to them, the portion of Hannah White, if they survived her. How could the court for that reason impart such a direction for maintenance into the codicil, because there was such a direction in the will as to the share with respect to another person? It could not without taking upon itself to make a codicil. The effect is, that Charles White's share with respect to the real and personal estate is undisposed of, with respect to which he took no vested interest. The real estate, therefore, goes to the heir-at-law, the personality to the next of kin. There is still the question, whether the portion of Hannah White, spoken of in the codicil, embraces her share of the legacy of 400*l*.? When the testator gave to his two grandchildren, as they should become of age, the portion or share which would have belonged to Hannah White if she had survived him, he meant to include all that he had given to her not confined to the residue, and it did embrace the share of the 400*l*. if she survived.

Solicitors: *Coverdale and Co.*, 4, Bedford-row; and *W. D. Cooper*, Guildford-street.

Saturday, Dec. 19.

FELKIN v. HERBERT.

Committal for contempt—Newspaper article commenting on affidavits pendente lite.

Previously to the above suit coming on for hearing, a leading article of a newspaper commented on affidavits which had been made in the suit by certain persons whose names had been published in a previous number of the paper, and the same article held up to ridicule the makers of the affidavits, and characterised their conduct as utterly disgraceful:

Held, that the publisher of the newspaper had been guilty of a gross and wilful contempt of court, and must be committed to prison:

Held also, that it was not necessary that the offending party should apologise to those persons whose characters he had attacked, but an apology to the court for the contempt was deemed sufficient to enable the court to order his discharge from custody.

This was a motion on behalf of the defts. in the above suit that Thos. Morton Rigg, who was the proprietor and publisher of the *Sheerness Guardian and East Kent Advertiser*, might be committed for contempt of court in having published certain articles, particularly referred to in the notice of motion, which articles commented on affidavits which had been made in the suit; and it was alleged that such articles were calculated to bring contempt on the persons who had made the affidavits, and to obstruct the course of justice.

The suit had previously come before the court on a motion for an injunction to restrain the authorities of the War-office, as represented by the late Lord Herbert, and also two landowners, named Berridge and Jenkins, from proceeding to fill up a ditch at Sheerness, on the ground that such filling up would be injurious to the public health, and that it would obstruct the free course of the sewage: (see 8 L. T. Rep. N. S. 788, *sub nom. Felkin v. Lewis*.) The bill had been filed by the officer of the local board of health for the district of Sheerness. The cause had not yet come on for hearing.

The publications which were now complained of were two articles which appeared in the *Sheerness Guardian* of the 21st and 28th Nov. 1863 respectively, and the first of these affected to be a report of the proceedings of a meeting of the local board of health. It was alleged, however, that this article was more in the nature of an invective against the defts. than of an ordinary report; it gave (*inter alia*) the names in full of certain persons who had made affidavits which had been filed on behalf of the defts. The article of the 28th Nov. was the leading article of the newspaper, and was as follows:—

"Saturday, Nov. 28, 1863.—Bearing false witness against one's neighbour is, unfortunately, a crime of very ancient date. The bearing false witness against one's self is a somewhat novel procedure, and yet one which some twenty or thirty of our townsmen have been silly enough to practise recently. In the report we last week gave of the meeting of the local board, we mentioned that a number of affidavits were read, which had been made in the interest of the defts. to the Chancery suit, by persons whose names were given. These affidavits have the very questionable merit of cleverness, in making the worst appear the better side. They are artfully concocted, so as to entirely pervert the true merits of the facts they profess to elucidate. This, on the part of the legal gentlemen who assist, is, of course, only what is expected, and a mere matter of business. On the part of the defts., or rather, the one who is the prime mischief-maker in this matter, it is only to be supposed that he will do the best he can to save the costs from coming out of his own pocket. On the

V.C. K.]

FELKIN v. HERBERT.

[V.C. K.]

part of those, whose names we published, who have thus lent themselves to be the tools of the deft. in question, the proceeding is utterly disgraceful. Would it have been believed, had we previously published the fact, that there were upwards of a score of such simpletons among our residents? We adopt, it will be noted, the more charitable hypothesis; we hesitate to brand those who have been the instruments of this attempt to mislead justice with the charge of wilful perjury. We admit the extenuating feature, that in most cases referred to they were entirely ignorant of what they were doing; more than one of these individuals, who were persuaded into making affidavits about the Chancery Ditch, have since admitted that they only signed what they were asked to sign. Now, this will be a lesson to them, and to others, not to be too cheaply sold by designing persons in future. The notoriety these thirty simple people have won is anything but enviable. Their conduct amounts to this—they have aided, to the extent that they are believed, towards saddling the costs of the Chancery suit upon themselves and their fellow-ratepayers. For every penny that is taken out of the rates towards paying any of these costs, every one of this company of affidavit-makers will be responsible. If these affidavits, which the makers and swearers of (or some of them) allow they did not understand, are believed, and if the falsehoods to which they ignorantly swore cannot be effectually exposed on behalf of the public, the whole responsibility rests on their heads. When the board is called upon to pay money for these law expenses, whose fault is it? We refer our readers to the list of names of those who obliged by saying what they were asked to say. It was suggested in the board room that these affidavits should be printed names and all, so that the ratepayers should know who they have to thank for this good turn. Had it been possible we should have assisted the object by putting these obliging affidavit-makers in the moral pillory they deserve to occupy. When space allows to do justice to the whole party, we will endeavour to serve the public by letting them know who are their friends and who are traitors to the public interest. The deception practised by most of them was achieved by trying to convince them that these affidavits were intended only to oppose the board of health, but in reality it is the ratepayers themselves who are the only plts. It is their money will have to pay the costs if justice should be misled by such false statements as were set forth in such affidavits. There is some excuse on behalf of two or three of the affidavit-makers, although even that is but a poor one; they were persons we are told employed by, or under obligations to, the defts.; of such, in charity, we will say nothing. We are only sorry they cannot afford to decline an act which subjects them to so much obloquy. He is poor indeed who cannot afford to keep a conscience. The majority are not men so situated, and these were but the gulls of interested parties in the suit. When the false statements sworn to by these are opposed by more truthful evidence, and when the misrepresentations upon which this evidence was obtained are exposed, the mischief may be somewhat averted, but even then what a waste of time and public money is chargeable on the conduct of these deluded individuals. In olden times there were men who unworthily bore the name of Englishmen, who took money or promises from the King of France of that day, in return for which they sought to betray their country into his hands. The names of those men are preserved and handed down to us, along with the details of their crime. Are their memories respected? We wot not. To treat these townsmen who make affidavits to serve the cause of an enemy of their town aright, it would be but just, whenever the Chancery suit is ended, or how-

ever it may end, to erect a monument on the site thereof, and have inscribed thereon the names of those who did all that it lay in their power to do to saddle the town with ruinous law costs, and to assist the evil-doer who forced the town into the suit, that he might evade the first deserts of his conduct. It will be seen that, of all the medical men in the town, only one was clear-headed enough to see that, by making a half-truth statement, he would be incurring the charge of dishonourable party trickery and one-sidedness. This gentleman, who, on being applied to, conceived himself bound, if he made an affidavit at all, to put the whole truth into it, was not eventually called on to make one. This is precisely the rule on which the majority of the affidavits were concocted, those that are true have in them only half the truth, and that artfully perverted. There are scarcely any of them that contain nothing but the truth, even in its mutilated form. Considerable address has, in all cases, been displayed in selecting such half-truths only as were wanted for the end in view. The whole business has been, it seems to us, thus designedly dragged out by the defts. so as to win by sheer force of tiresome delay. Had it not been for this artful mode of proceeding, the whole business would have been settled in the first three months at a cost of a couple of score pounds or so. On the real naked merits of this case no uninterested person could take long to discover who was the wrong-doer, and the course taken to circumvent the board by a tedious mode of procedure in which the naked merits of the case are very likely to be entirely lost sight of, is a clear proof that the defts. knew this was their only chance. Thus we see what a local curse an evil-disposed person, seeking to set his will above the law, and for his own profit setting public rights at naught, may become. Truth may prevail yet, in spite of these well-concocted suppressions and false evidences; but, whichever be the winning party, those who made their affidavits are equally disgraced. If the defts. have to pay the costs, the public will remember those persons whose names we gave last week did all they could to hinder it. If, on the contrary, artful cunning outwits justice, every ratepayer will owe a debt of detestation to the deluded individuals who thus allowed themselves to be made the tools of the 'knowing one.' Those who live longest will see the most, but we think those who signed their names to these documents will live long ere they outlive the memory of their traitorous folly in the minds of their fellow ratepayers."

Glasse, Q.C. and E. F. Smith, who appeared in support of the motion, argued that it was unjustifiable and a clear contempt of court for a person, *pendente lite*, to publish a defamatory libel, having for its object the intimidation of the witnesses. Mr. Rigg had, after notice of motion had been given, filed affidavits affirming the truth of his statements, or at all events of part of them, and this they asserted was an aggravation of his offence. On the authority, therefore, of *Littler v. Thompson*, 2 Beav. 129, it was urged that Mr. Rigg had been guilty of contempt of court, and ought to be committed to prison. Affidavits were read in support of the motion.

Baily, Q.C. and E. K. Karstake, for Mr. Rigg, stated that their client was prepared to make a most ample apology if he had been guilty of contempt of court, but at the same time they maintained that he had not been so guilty, and they referred more particularly to *Smith v. Lakenan*, 26 L. J. 305, Ch. It was not a question whether the article contained a defamatory libel, but where the decision of the court in the suit was likely to be affected by the article, and it was idle to say that such would be the effect.

Glasse, Q.C. in reply

The following cases were cited:

Littler v. Thompson, 2 Beav. 129;

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Roach v. Garvan, 2 Atk. 469;
Lechmere Charlton's case, 2 M. & C. 316;
Re Turner and Martin, 3 M. D. & De G. 523;
Re Martin, 2 R. & M. 674;
Cann v. Cann, 2 Dick.;
Smith v. Lakeman, 26 L. J., N. S., 305, Ch.;
Birch v. Welsh, 10 Ir. Eq. 93.

The VICE-CHANCELLOR said:—I should not have called for a reply, if this had not been a motion for committal. I have not the slightest doubt that the publications which are complained of are a gross and wilful contempt of court; I use the expression "wilful contempt," not in the sense that the resp. Mr. Rigg had in his mind at the time a desire to commit a contempt, but I mean that it was an act done with a wilful intention of doing what was wrong. I have no notion of the degree of influence which the *Sheerness Guardian* possesses in the neighbourhood of Sheerness, or of the extent of its circulation there. I know nothing about it: it may be insignificant, or it may, on the other hand, have a great circulation; but it must be assumed that it has some circulation, and, at all events, Mr. Rigg, who is its proprietor, would not willingly admit that it is insignificant. What has been done is this. The *Sheerness Guardian*, which is a weekly paper, having given on Saturday, the 21st Nov., a report of what had taken place at a meeting of the local board of health, then sets out the names of certain individuals who had recently made affidavits in this cause; and on the 28th Nov., the following Saturday, there appears a leading article—in fact, the only leading article in the *Sheerness Guardian* of that week—and this is the article which is alleged to be, and I think clearly is, a contempt of this court. [The V.C. then read several passages in the article, making, at the same time, comments upon the expressions which were used.] A party is pointed at, and it is pretty evident who is meant, namely, Mr. Jenkins, to whom is attributed, first, that he is a mischief-maker, which is, perhaps, charging him with no great crime, but it is at least throwing dirt on one of the defts.; and the article attributes to the persons who made the affidavits, and to a list of whose names it refers, as given in the previous paper of the 21st, that they are persons who have lent themselves to be the tools of the deft. in question, and that their conduct is utterly disgraceful; and in what follows, they are evidently characterised as fools, and not knaves, though they are not altogether absolved from that imputation. Then there is the expression, "cheaply sold," and whether that implies a bribe, or is a slang phrase, is immaterial, because the article proceeds to attribute to the procurers of the affidavits, deception upon the makers, and to the makers false statements to mislead justice, and it designates them as the gulls of interested parties. Nothing can be more clearly intentional than these charges, attributing to some ignorance, to some falsehood and self-interest, and to others wilful and direct falsehood; it is a gross, palpable, and intentional imputation upon the affidavit-makers, as they are called, and it endeavours to hold them up to contempt, and it also compares them to those Englishmen who, in the time of the Stuarts, took bribes of the French King to betray their country. Then there is a distinct imputation of perjury in the words, "And scarcely any of them contain nothing but the truth, even in its mutilated form," and the article winds up with a peroration in an evidently well-considered style. It is contended, on behalf of the resp., that even if a judge were to read this article, he would not be influenced by it, and I agree that it would be so. Surely no judge would consider it other than as ludicrous and contemptible. The question, however, is not whether it tends to pervert the course of justice by

pervverting the mind of the judge, but whether there is not a degree of mischief calculated to subvert the course of justice by intimidating and holding up to public ridicule the persons who have made these affidavits in the suit; the degree of mischief depends upon the circulation of the publication. I must say that among the cases of this nature which have come within my own experience I do not remember to have met with one in which the tenour of the article more distinctly manifested a malignant design. It has been suggested that justice cannot in this instance be perverted, because the affidavits were already made when the article was published, but that would not prevent its being a gross contempt; and although it is true that the time had elapsed within which affidavits could be made on behalf of the defts., the plt. had still that opportunity, and who could say what influence such an article might have on his witnesses. A man *vir fortis et constans* would not be influenced by such an article, but mankind are not all *vir fortis et constans*; some are timid, and therefore, even in that narrow view, an improper influence might be exerted. Further, the court might find it necessary at the hearing, or indeed at any stage of the cause, to direct further affidavits to be made by these very persons, who might then be cross-examined and re-examined, and therefore in the ordinary course, in various, not only improbable, but impossible, ways such an article might operate and be calculated to pervert the course of justice. Indeed, in the affidavits made on this motion, although it could not perhaps be asserted that the parties were influenced, it could not be said that they were not. As I have not the smallest doubt that if ever contempt of court has been committed by the publication of an article in a newspaper, this is a most manifest case of contempt, the question now comes, in what way is it to be dealt with? It is always a disagreeable office to commit a person to prison; but the court must not, therefore, shrink from it, if justice requires it, in order to hold him up as a warning to others not to commit similar offences, and I have no alternative in this case but to commit him. I have the less hesitation in doing so by reason of the course he has pursued. He has either been unfortunately advised, or having received from his solicitor good advice, he has not thought fit to follow it. Instead of doing what any reasonable man would have done, and any legal adviser would have counselled, instead of making an affidavit expressing regret, and endeavouring to propitiate the justice of the court, he causes affidavits to be filed vindicating the truth of some portion of his statements, and instructs his counsel to argue that there has been no contempt of court, and that he had a right to publish the article; and also, that if the court should decide that he had committed contempt, he would express his regret for doing so, which, of course, is no expression of regret at all. I shall actually commit him to prison, where, no doubt, he will do that which will enable the court to discharge him at the earliest possible moment, which, I need not say, I shall be too happy to do, as I have no personal feeling in the matter. I shall have no feeling about maintaining the dignity of court to deter me from entertaining an application from Mr. Rigg on the subject. The order must be in the usual form, and the committal in respect of the articles both of the 21st and 28th Nov.

Jan 15, 1864.—*Karslake* now moved the court that Mr. Rigg might be discharged from custody. Heread an affidavit made by Mr. Rigg, in which he stated that he had surrendered to the custody of the court on the 6th Jan., and had been in Whitecross-street gaol ever since. The affidavit went on to say that he (Mr. Rigg) had always been of opinion that the article in question was no contempt of court; but as the V.C.

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had ruled otherwise, he bowed to that decision, and expressed his regret for the offence which he had committed. The notice of motion stated that the court would be asked that Mr. Rigg might be discharged from his contempt and from the said prison on payment of his fees, and notice of reading his affidavit was given. An article which had been published in the *Sheerness Guardian* on the 26th Dec., a week after the committal, was also read, and the passages which bore more directly on the subject in question were the following:—"In penning the article, and also inserting the previous report, we believed that we were simply exposing what we considered 'ill-advised' or 'unthinking' conduct on the part of some of our townsmen. We had neither the thought, wish, nor intention of imputing to them anything more than a want of due care and thought. The fact is we distinctly and intentionally sought to clear them of any other imputation. The idea of impeding the proper course of justice was the thought furthest from our mind. . . . We can only regret that our own want of proper explicitness should have laid us open to the suspicion of such an intention. Had we had the slightest notion that the publication of any report of what took place at any of the meetings of the local board respecting the Chancery suit was a contempt of court, or a proceeding in any way likely to prejudice the due course of justice, we unhesitatingly declare that no part of such proceedings should have been mentioned, much less commented upon, by us." The article admitted that what had been written was open to misconception, and it reiterated its expressions of regret; it also repudiated the notion that there was any wrong intention in its publication.

Glasse, Q. C. and E. F. Smith, on behalf of the defts., opposed the motion on the ground that Mr. Rigg's affidavit was not an apology, neither was the article in the newspaper an apology, and in neither of these did the resp. make any retraction to those parties whom he had attacked in the original publication, and he had not disclosed the name of the writer of the libel complained of.

The VICE-CHANCELLOR asked whether the court, in dealing with cases of contempt, ever considered any question as to personal injustice, or whether it only considered the question of impeding the due course of public justice?

E. F. Smith said that the case showed that the court in general took only the question of obstructing the course of justice into consideration, but in the case before Lord Hardwicke, he had required the name of the author to be given up; and Lord Cottenham, in *Mr. Lechmere Charton's* case, allowed time for a more ample apology.

Karslake in reply.

The VICE-CHANCELLOR said that he would take time to consider more attentively the articles in question, and would give judgment in the case on the following morning.

Jan. 16.—The VICE-CHANCELLOR now said that it was necessary that he should refer to one passage in the article which had appeared in the *Sheerness Guardian* subsequently to the committal, the one by way of apology, as it contained the misapprehension that the committal took place by reason of the first article being a report of a meeting of the local board. But such was not the case. That article was only referred to in the order of committal, because it contained the names of the parties spoken of in the subsequent article. The committal took place, not because the article was offensive to the honour or character of the persons attacked, but because such an attack was a contempt of that court, and tended to impede the due course of justice. Therefore the defts.' contention that Mr. Rigg must apologise to the defts.,

as a condition precedent, must fail. Mr. Rigg had expressed his regret and contrition by an affidavit, and had submitted himself to the court. He had already been ten days in prison, and it appeared to him that the authority of the court had been sufficiently vindicated, and that he must be discharged, upon payment of the fees and the costs of the application to commit; the taxation of costs, however, should not be waited for.

At the suggestion of the V. C., it was arranged that 50*l.* should be paid by Mr. Rigg to the defts., as a composition for their costs in the matter.

Solicitors for plt., *Taylor, Mason and Taylor*; for defts., *Willoughby, Cox and Lord*.

Friday, Jan. 15.

ASHCROFT v. POWELL.

Practice—Evidence—Entry of children's birth in Prayer-book and Bible.

Where the only evidence that the petitioners were the children of a certain marriage was the affidavit of their mother, and an entry of their births in a Prayer-book and Bible bound together, the Court, taking into consideration, amongst other things, the fact that the father entertained peculiar religious opinions and disapproved of baptism, held this evidence to be sufficient.

This was a petition for payment of money out of court, and the only evidence that the petitioners were the legitimate children of John Ashcroft, deceased, and Agnes Ashcroft, was the affidavit of their mother, and an entry in a Prayer-book and Bible (the two being bound together).

The affidavit of Agnes Ashcroft (widow) stated that she was married to John Ashcroft, since deceased, on the 26th Dec. 1839, and that there had been issue of the marriage three children, two of whom were surviving, viz., the petitioners, Isabella Ann Ashcroft and James Hewson Tipping Ashcroft. The affidavit further stated that her late husband John Ashcroft entertained peculiar religious principles, and amongst other things considered the baptismal ceremony unnecessary, and her said children issue of her said marriage were never baptised, neither were the births of any of them registered. No one was present at their births except her husband and a nurse, both of whom were since deceased, but shortly after the births of her now surviving children, she made the following entry of their births in a family Bible, viz.: Isabella Ann Yates, daughter of John and Agnes Ashcroft, born 8th Oct. 1840; James Hewson Tipping Ashcroft, son of John and Agnes Ashcroft, born 18th April 1842.

This book was produced and inspected. The petition had been served on other parties interested, but was unopposed.

Glasse, Q. C. and G. R. Harding appeared in support of the petition.

The VICE-CHANCELLOR considered that the above entries were sufficient evidence, under the circumstances of the case, to establish the birth and identity of the petitioners.

Solicitor, *S. A. Kisch*, 8, Lancaster-place, Strand.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-inn, Barristers-at-Law.

Tuesday, Nov. 24.

CURRIE v. LARKINS.

Marriage-settlement—Construction—Vesting of shares—Accruer.

By a marriage-settlement, after reciting an intention to provide for the children of the marriage, the trusts of a fund were declared, after the death of the parents,

for the benefit of all and every the child or children of the marriage, share and share alike, "and to be paid or assigned to such child or children respectively," at twenty-one or marriage, after the death of the survivor of the parents; and it was declared that the share or shares of such child or children "should become and be a vested and transmissible interest" at twenty-one or marriage after the death of such survivor; but with respect to any child who should be under age or unmarried at the decease of such survivor, upon trusts for education and maintenance. It was further agreed that if there should be any child who should survive the parents and die before twenty-one or marriage, the share of any child so dying should be held for the benefit of the survivors or survivor of such children, and be equally divided between them, and become a vested and transmissible interest, and be assigned and transferred to them, him, or her, when their, his, or her original share or shares were and was before vested. Also, that such increased share as might have accrued to any deceased child or children should accrue together with and in the same manner as his, her, or their original portion, and that if all such children except one should die before the shares should become vested or transmissible, or in case there should be only one such child, then that the fund should be held for the benefit of such one surviving or only child, to become vested and transmissible at twenty-one or marriage after the death of the survivor of the parents.

There were three children of the marriage: one died an infant in the lifetime of both parents; another survived the mother, attained majority, and died in the lifetime of the father; the third, having also attained majority, and having survived the father, was still living:

Held, upon the construction of the settlement, that the fund was divisible in moieties, of which one belonged to the representative of the child who died in the lifetime of the father, and the other to the surviving child.

Harry Meggs Graves, on the 21st Jan. 1828, in contemplation of marriage with Louisa Seton Larkins, executed a bond to the pils. Sir F. Currie and Alexander Colvin, and two other persons since deceased, in the penal sum of sicca rupees 64,000 of lawful money of Bengal, conditioned to be void on payment by the said H. M. Graves to the said obligees of the sum of sicca rupees 32,000 so soon as he should become possessed thereof, to be held by them upon the trusts declared by an indenture of settlement of even date.

The said sum was further secured by a warrant of attorney to confess judgment.

By the indenture of settlement dated the same 21st Jan. 1828, and made between the said H. M. Graves of the first part, the said L. S. Larkins of the second part, and the said obligees of the third part, after reciting that another sum of sicca rupees 32,000 had been provided on the part of L. S. Larkins and was invested in three promissory notes, and that it had been agreed that the same should be transferred to the said trustees upon the trusts thereafter mentioned, and reciting that the said H. M. Graves, for making a further provision for the said L. S. Larkins and the children of the said intended marriage, had executed the said bond and warrant of attorney; it was covenanted, declared and agreed by and between the several parties thereto that the trustees and the survivors and survivor of them, and the executors, administrators and assigns of such survivor, should stand and be possessed of the said bond and warrant of attorney, upon trust after the solemnisation of the marriage to hold the same until the said H. M. Graves should pay or cause to be paid the said sum of sicca rupees 32,000, and upon such payment to deliver up the same to him to be cancelled; and upon further trust to

stand and be possessed of the said sum of sicca rupees, or such part thereof as might be paid by the said H. M. Graves, upon certain trusts therein mentioned for the benefit of the said H. M. Graves and the said L. S. Larkins, during their respective lives; and from and after the death of both of them, "to stand and be possessed of all the said trust premises for the benefit of all and every the child or children of the said intended marriage, to be divided between and amongst them, share and share alike, and to be paid or assigned to such child or children respectively at their respective age or ages of twenty-one years, being a son or sons, and at their respective age or ages of twenty-one years, or day or days of marriage, being a daughter or daughters, whichever should first happen after the death of the survivor of the said H. M. Graves and L. S. Larkins." And it was thereby agreed between the parties thereto, that such share or shares "should become and be deemed a vested and transmissible interest (being a son or sons) at his or their ages or respective ages of twenty-one years, or (being a daughter or daughters) at her or their age or respective ages of twenty-one years or day or days of marriage respectively, which should first happen after the decease of the survivor of the said H. M. Graves and L. S. Larkins," with provisions for education and maintenance; and it was further thereby agreed between the parties thereto, that "in case there should be any child or children who should survive the said H. M. Graves and L. S. Larkins and should die before he, she, or they, being a son or sons, should have attained the age of twenty-one, or being a daughter or daughters, should have attained the said age or been married as aforesaid, then and in that case the share or shares of any child or children so dying, and the dividends, interest and annual produce which should then have accrued or afterwards should or might accrue on the same respectively, should be held by the trustees in trust and for the benefit of the survivors and survivor of the said children and be equally divided amongst such survivors, if more than one, share and share alike, and to become a vested and transmissible interest, and to be assigned and transferred to them, her, or him respectively, when and as their, his, or her original shares or share were and was before vested, and to be paid and transferred as aforesaid; and also that such increased share or shares as might have accrued to any deceased child or children by the death of any other or others of them, should from time to time survive, accrue and remain over, together with and in the same manner as his, her, or their original share or shares, and become vested and payable at the same time therewith; and that if all such children except one should die before the said portions or shares of the said principal moneys, and all and every other sum and sums of money, should become vested or transmissible as thereinbefore mentioned, or in case there should be only one such child, then upon trust that the trustees should stand possessed of the whole of the said principal moneys and all and every other sum and sums of money as thereinbefore mentioned, and all the interest, dividends and increase thereof, for the benefit of such one surviving or only child, to become a vested and transmissible interest in such surviving or only child on his attaining the age of twenty-one years, being a son, or day of marriage, being a daughter, which should first happen after the decease of both of them, the said H. M. Graves and L. S. Larkins." There was an ultimate trust in favour of the next of kin of the survivor of both parents.

Louisa Seton Graves, the wife, died in 1836, leaving two children of the marriage surviving, John Henry Graves and the deft. Louisa Catherine Graves.

In 1841 H. M. Graves, the husband, married his second wife, the deft. Sarah Catherine Graves.

On the 8th July 1857 John Henry Graves, the son,

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died intestate at Lucknow, and on the 26th April 1861 H. M. Graves the father died.

The bill was filed by the surviving trustees and obligees of the bond against the administrator of H. M. Graves and his daughter and widow, for administration, and questions now arose between the administratrix Mrs. Graves and Miss Graves. The administrator contended that nothing was now payable under the bond. Mrs. Graves alleged that there were three other children of the first marriage who died in infancy, and claimed that the estate of her late husband, as next of kin of his four deceased children, was entitled to four-fifths of the trust-fund. Miss Graves, on the other hand, claimed the whole fund.

At the hearing it was finally admitted that there were only three children of the first marriage, one of whom, Harry Percy Graves, was born on the 9th Feb. 1835, and died in 1836, in the lifetime of his mother.

Malins, Q. C. and Bedwell, for the p'ts., claimed to be entitled to the 32,000 sicca rupees upon the bond, together with interest to be calculated from the death of the intestate in April 1861.

Rasch, for W. F. Larkins, the administrator, observed that the Statute of Limitations barred the legal remedy on the bond, and submitted that the proper construction of the settlement was, that the two children who attained twenty-one took vested interests. The consequence of this would be that the administrator would be entitled to one moiety of the trust-funds as representing John Henry Graves. He cited

Torres v. Franco, 1 R. & M. 649;
Hotckin v. Humfrey, 2 Madd. 65;
Farrer v. Barker, 9 Hare, 737;
Sallow v. Binns, 1 Kay & J. 417; and
Jopp v. Wood, 28 Beav. 53; 2 L. T. Rep. N. S. 451.

Bacon, Q. C. and Martineau, for the widow Mrs. Graves, argued that the settlement was framed for the benefit of all the children of the marriage, and hence that two-thirds of the fund became the property of the next of kin of the father. They referred to

Baillie v. Jackson, 1 Sm. & Giff. 175.

Greene, Q. C. and Joseph Chitty, for Miss Graves, argued that in equity the bond and the settlement constituted one transaction; and that the sum secured by the bond was still raiseable as a specialty debt against the obligor's estate. (On this point they were stopped by the Court.) On the construction of the settlement they submitted that there was no provision for the case of a child who did not attain the age of twenty-one, or marry and survive both parents. Miss Graves was the only child who had survived both parents, and as the gift over was only meant to operate in case of all the children dying in the lifetime of their parents, she was entitled to the whole fund. They cited

Hougrave v. Cartier, 3 V. & B. 85.

THE VICE-CHANCELLOR.—I think the clause of accruer is too strongly expressed to justify me in saying that the child who attained the age of twenty-one, and died in the lifetime of his father, took nothing. In the cases of *Perfect v. Lord Curzon*, 5 Madd. 442, and *Woodcock v. The Duke of Dorset*, 5 Bro. C. C. 569; s. c. 3 V. & B. 82 (n.), the questions which have arisen in this case were very much discussed. In *Perfect v. Lord Curzon*, at p. 444, Sir John Leach, in delivering judgment, said, that "the settlement in that case was to be tried by the rule which was stated by Sir W. Grant in the case of *Hougrave v. Cartier*, and if that settlement clearly and unequivocally throughout all its provisions made the right of a child to depend upon its surviving both its parents, then a court of equity had no authority to control that disposition; but if the settlement were in any of its provisions ambiguously expressed, so as to leave it

in any degree uncertain whether it was intended that the right of a child should depend upon the event of its surviving both its parents, then the court was bound by authority to declare, upon what might be called the presumed intention in instruments of that nature, that the interest of a child, though not to take effect in possession until after the death of both parents, did, upon the limitations of that settlement vest in sons at twenty-one, and in daughters at twenty-one or marriage." It was also said that, "in settlements of that description there were two sets of clauses to be considered; the clauses of gift to the children, and the clauses of gift over to others upon failure of children, and that the authorities required that both sets of clauses should be clearly and unambiguously expressed." The first gift over in *Perfect v. Lord Curzon* was, "in case the wife should happen to die in the lifetime of the husband, and there should be no issue of the marriage living at her death, or in case all and every such child or children should happen to die after the husband and wife, and after the survivor of them, and before the fund should vest in him, her, or them respectively as aforesaid, then upon trust over," &c. In that case there was a son and a daughter. The daughter attained the age of twenty-one, and married and died leaving issue before the death of the survivor of the parents, and the question arose, whether such daughter took a vested interest in a moiety of the fund? The learned judge, at p. 445, said: "In this settlement the clauses of gift to the children are clearly and unambiguously expressed. There is clearly no direct gift to any child who is not living at the death of the survivor of the parents. If it were equally clearly and unambiguously expressed that the gifts over were to take effect in every event, unless some child survived both parents, there would be no ground for acting upon any presumed intention in favour of the children, and the clear expressed intention must prevail." And, at p. 447, the learned judge thus concluded: "Upon the whole, therefore, although in the clauses of gift to the children there is clearly no direct gift to any child who does not survive both parents, yet, in the clauses of gift over upon failure of the children, it is, to say the least of it, not clearly and unambiguously expressed that the gifts over are to take effect in every event unless some child should survive both parents." It was held by the court that the child who attained the age of twenty-one, and died before the parents, took a vested interest. Now, in the present case, although the recital of the intention to provide for all the children of the marriage goes to sanction a construction of a right in the child who died under twenty-one, yet these general words of intention to provide for all the children of the marriage in the event of death under twenty-one are controlled by the perfectly clear and unambiguous words in the accruer clause, and I do not feel myself at liberty to say that the accruer clause shall have no effect in favour of those children who attained the age of twenty-one. The result will be that the court does violence to the language of the settlement in favour of the child who attained the age of twenty-one and died in the lifetime of his surviving parent, but does not do so in the case of the child who died under twenty-one in the lifetime of that parent. As to the clause of survivorship, that is not so clearly expressed—indeed, there is much ambiguity in the language of the settlement generally. The declaration will be, that the trusts of the settlement must be carried into effect, and that the funds in the settlement are divisible in moieties—one moiety belonging to the legal personal representative of the child who attained the age of twenty-one and died in the lifetime of his father, and the other to the deft. Catherine Louisa Graves, the surviving daughter. There must be the ordinary administration decree, and a declaration that

the plts., as the surviving trustees, are entitled to prove as specialty creditors under the bond against the intestate's estate for the money due thereon; and also that Mrs. Graves is entitled to prove for a sum of 1500*l.* belonging to her; it appearing to the satisfaction of the court that the sum was received by her husband under an obligation to settle it for the benefit of his widow.

Solicitors: for the plt., *Tanqueray-Willaume and Hanbury*; for the defts., *J. H. and H. R. Henderson*; *Mathews and Greetham*.

Dec. 5 and 8.

CAREW v. COOPER.

Assignment of military pension—Half-pay—Indian and Queen's services—47 Geo. 3, sess. 2, c. 25, s. 4.

*An officer in the East India Company's service became, in the year 1856, under the Act of transfer of that year, an officer in the Queen's service. In 1862 he retired on colonel's pay, and obtained a commission, issued from the Horse Guards, bestowing on him the rank of colonel, from 31st Dec. 1861. He also had a pension of 450*l.* a-year, and an annuity of 200*l.*, payable under a general order of the Secretary of State for India. In the course of the same year he assigned the pension and annuity, as securities for a debt, with power of attorney:*

Held, that the above pension and annuity were not within the provisions of the 47 Geo. 3, sess. 2, c. 25, s. 4, and that the assignment was not void, either under that statute, or on grounds of public policy.

The deft. in this suit, Colonel Charles Cooper, having been formerly a major in the East India Company's service, became an officer in the Queen's service under the Transfer Act of 1858, the 20 & 21 Vict. c. 106.

On the 31st Dec. 1861, he retired on colonel's pay. He had also a pension of 450*l.* per annum (less 40*l.* deducted for the military fund), together with an annuity of 200*l.* per annum, payable under an order made by the Secretary of State for India in council, published in the *Gazette* for the 12th Aug. 1857. This order directed that annuities, at the rates therein mentioned, be offered to lieutenant-colonels and majors, as they stood regimentally in the cavalry and infantry of the three presidencies, in addition to the pensions to which they might be entitled under the regulations of the service.

The commission granted to the deft., and which was signed pursuant to the 25 Vict. c. 4, intitled "An Act to enable Her Majesty to issue commissions," &c., was thus worded:—

"Victoria, by the grace of God, &c. To our trusty and well-beloved Charles Cooper, Esq., greeting. We, reposing especial trust in your loyalty, &c., do, by these presents, constitute and appoint you to have the honorary rank of colonel in our army from the 31st Dec. 1861, and we do hereby give and grant you full power and authority to command and take your rank accordingly," &c. Given at our court at St. James's, &c., this 8th June 1862."

On the 30th April 1862 Colonel Cooper, being indebted to Major Whalley Master in a sum of 2856*l.* 8*s.* 5*d.* (consisting of 2813*l.* 10*s.* 8*d.* for which judgment had been recovered in an action and costs), assigned to Major Master the annual sum of 100*l.*, part of the said pension of 450*l.* (less 40*l.*) and annuity of 200*l.*, for a period of eleven years, if the assignor should so long live, together with a power of attorney to Major Master, in the name of Colonel Cooper, to demand, sue for and give receipts and discharges for the said annual sum of 100*l.* in quarterly payments.

Notice of this assignment was, on the 28th May 1862, served by Colonel Cooper's solicitors on the Secretary of State for India, and in reply to the said notice they received the following letter:—

"India-office, S.W., 17th June 1862.

"Gentlemen,—I am directed by the Secretary of State for India in council to acquaint you, with reference to the notice of assignment by Colonel C. Cooper of a portion of his pension to Major Whalley Master, lodged by you at this office, that assignments of military pensions are not recognised by this department, but that these pensions are paid either to the officers to whom they were granted, or to their duly constituted attorneys.

"I am, Gentlemen, your obedient servant,
"J. COSMO MELVILL."

On the 12th Oct. 1862 Major Whalley Master died, leaving the plt. his executor.

Default was made in payment of the instalment of 25*l.* due in Feb. 1863, and the plt. filed this bill for the purpose of enforcing his security.

The deft. had since, on the 18th July last, been adjudicated a bankrupt, and the official assignee, H. H. Cannan, was made a deft. No creditors' assignee had been appointed. On the 15th Oct. he obtained his discharge.

The plt. had obtained an injunction to restrain Col. Cooper from receiving the pension of 450*l.* and annuity of 200*l.* or any part thereof.

Roxburgh now moved, in behalf of the deft. Col. Cooper, to dissolve the injunction. In support of the motion it was argued that the assignment came within the provisions of the 47 Geo. 3, sess. 2, c. 25, s. 4 (which was in the same terms as sect. 7 of the 46 Geo. 3, c. 59), and was therefore absolutely null and void to all intents and purposes. Colonel Cooper, before he retired from the service, had been made an officer of Her Majesty's army by the Act of Parliament, and his retiring commission expressly stated him to be an officer in the Queen's service. This case was governed by that of *Lloyd v. Cheetham*, 3 Giff. 171; 4 L. T. Rep. N. S. 576. In *Heald v. Hay*, 3 Giff. 467; 5 L. T. Rep. N. S. 740, where the assignment was upheld, the pension had been granted, not by the Queen, but by the East India Company, before the passing of the Act of 1848. He further cited

Gibson v. The East India Company, 5 Bing.

N. C. 262;

21 & 22 Vict. c. 106, ss. 39, 43, 56, 58;

24 & 25 Vict. c. 134, s. 134.

Malins, Q.C., and *Bagshawe*, for the plts., were not called upon.

H. Stevens appeared for an incumbrancer, subject to the plt., under a similar instrument.

THE VICE-CHANCELLOR.—The two sections of the Acts of Parliament which have been referred to—the 7th section of the 46 Geo. 3, c. 59, and the 4th section of the 47 Geo. 3, c. 25—are peremptory enactments annulling assignments of military pay and military pensions, upon the ground of public policy. So highly does the law estimate the principle of public policy upon which these sections proceed, that even at common law it has been, I think, decided (*Flarty v. Odium*, 3 T. R. 681; and *Lidderdale v. The Duke of Montrose*, 4 T. R. 248) that independently of these enactments an assignment of the half-pay of a military officer is invalid, and can confer no right whatever upon the assignee. That has been decided on grounds of public policy, the payment being made to retain the services of a person who has been in the employment of the Government, but who has ceased to be actively employed in that service. If I had discovered any ground for importing these enactments or for carrying this principle of law so far as to reach assignments of all pensions and pay, including the

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CAREW v. COOPER.

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pension and pay now in question, I should certainly have hesitated very long before I did anything to sanction the validity of any assignment of the pay or pension of any officer in the service of the Crown. But the question here is, whether or not the pay and pension, which the deft. Col. Cooper claims, are pay and pension of the kind to which these enactments apply; and after the best consideration that I can give to the matter, and which the able argument of Mr. Roxburgh has made very clear, I am of opinion that they are not within these enactments. The pay and pension in question proceed not from a grant of the Crown, or of money to be paid through the office of the Paymaster-General, or of anything which is included in the army estimates, or which is under the control of Parliament in that shape, but from funds of an entirely different character. By the General East India Act of 1858, all the revenues and property of the East India Company were taken out of the control of that company, and were placed, not upon the same footing as the revenues of England, but upon an entirely different footing. That Act of Parliament, sect. 39, enacts that they are to be vested in Her Majesty, not for the purposes of the general government of this country, but to be disposed of, subject to the provisions of the Act, for the purposes of the government of India. That is the special purpose of this enactment, and this 39th section of the Act of 1858 is followed by a series of enactments, commencing with the 41st and ending with the 55th, all of which relate to the revenues of India. So far from the funds out of which this pension is granted, and all the funds which are under the control of the Indian council for the purposes of the government of India, being regulated by Parliament, the parliamentary control is only preserved by the 53rd section, which requires that the Government of India shall lay before Parliament in every session an account of the way in which they have employed their revenues for the purposes of the government of India. Now it is perfectly plain that the statutes of the 46 Geo. 3, c. 59, and the 47 Geo. 3, c. 25, do not apply in any degree to pay or pensions granted by the Government of India, or to pay or pensions granted to any military person, whose conduct is regulated by the Government of India, or who is employed in services in India for the purposes of the Indian government. It is very true, and Mr. Roxburgh was justified in saying, that the Act of 1858 was passed for purposes entirely different from financial purposes; that it was passed to preserve a direct control in the Crown over the officers employed in the army of India, and to regulate the discipline of the Indian army under the power of the Crown, as a superintending power, instead of under the East India Company as a superintending power; that is to say, the Act makes every officer in the Indian army hold his commission from the Queen. But those officers of the Indian army who hold their commissions from the Queen as this gentleman does, as appears from the commission, are not paid by the Crown in the sense in which the British army is said to be paid by the Crown, which receives the money voted by Parliament through the army estimates. This is the sort of pay, and these are the sort of pensions which are alone within the scope and under the control of the Acts of the 46 Geo. 3, c. 59, and the 47 Geo. 3, c. 25. It was thought necessary, in order to enforce that principle of public policy to which I have alluded, that Parliament should peremptorily enact the nullity of all assignments of the half-pay and pensions of officers who were in the service of the Crown, as contemplated by those two Acts of Parliament. It might have been a very wise thing to import these enactments into the Act for the regulation of the Indian army of 1858. But I find that Parliament,

although speaking in 1858 decidedly as to that which is properly the British army, and not the army of India, and as to moneys which are paid under the direct control and by the direct vote of Parliament, is yet silent as to any such enactments as those above mentioned, and that this principle of public policy is not embodied in an express enactment. I can only consider, therefore, that it was not thought proper or necessary for very wise reasons, to apply these enactments to officers who derive their pay and pensions from the revenues of the Government of India, and who are not, like the British Army, paid through the medium of the Paymaster-General. Therefore I cannot see that the East India Act of 1858, or the circumstance of this gentleman's commission being granted by the authorities at the Horse Guards and signed on behalf of the Queen, and not by the East Indian authorities, in the least degree affects the question of the assignment by him of his pension and annuity, which must be decided upon by a consideration as to the funds out of which they come, and of what Parliament has said as to imposing fetters upon the alienation of any pension and annuity so received. I observe in the bill there is a letter signed by Mr. Cosmo Melvill, and it states that these pensions are granted by the India-office, and that they are paid to the officers to whom they are granted, or to their duly constituted attorneys. I find no warrant for saying that an instrument which contains such a power of attorney is null and void under the operation of those two sections of the two Acts of Geo. 3. Mr. Melvill has, moreover, deposed that it is mentioned in the order 905 of 1861, that these payments are in respect of these two items, "retired pay 25s. per diem, and special annuity of 200*l*." Now the expression "special annuity" is not to be found in the Acts of 46 & 47 Geo. 3, which have been referred to. This is only a small circumstance, but it shows that the pension and annuity now in question are not regulated by the 46 & 47 Geo. 3, and do not proceed from such a source as to be within the operation of those two Acts of Parliament. I cannot therefore dissolve this injunction, and I must refuse the motion.

Malins, Q.C. asked that the motion might be dismissed with costs.

The VICE-CHANCELLOR refused, and ordered the costs to be costs in the cause.

Bacon, Q.C., for the official assignee, asked for his costs. Mr. Cannan had not been present at the hearing of the original motion on the 5th; but the court had required him to appear on the present occasion. Since the filing of the original bill, Colonel Cooper had been adjudicated a bankrupt. No creditors' assignee had been appointed, and the duty of making up and sending round the accounts had devolved upon the official assignee. He was a public officer before the court with no claim, and having no interest in the matter.

The VICE-CHANCELLOR, after referring to the 134th section of the B. A. 1861, said, it was the duty of the official assignee to have called the attention of the commissioner to that enactment.

Bacon, Q.C.—The official assignee did so, and the commissioner declined to make any such order as pointed out by the 134th section. The official assignee had done his utmost to let every creditor know what the assets of the bankrupt were.

The VICE-CHANCELLOR.—I can discover no trace in the proceedings of the official assignee having called the attention of the commissioner to the section. I think he might have done more than he has done. When I find that there has been more vigour and diligence used in getting in the assets than there has been in this case, then I will give costs; but in this instance I cannot allow the official assignee his costs.

Solicitors, Pilgrim and Phillips; Head and Pattison-

Thursday, Dec. 22.

BELL v. BELL.

Creditor's suit—Death of plt.—Supplemental statement—Practice—15 & 16 Vict. c. 86, s. 52.

Where the plt. in a creditor's suit died pending the proceedings, on a supplemental statement to the original bill, the Court made an order in favour of other creditors whose debts had been allowed by the chief clerk, although the certificate had not yet been made out.

Lowes v. Lowes, 2 De G. M. & G. 784, followed.

The original bill in this cause was filed on the 27th April 1859 by John Gillam Bell the elder, the plt., on behalf of himself and all other the unsatisfied creditors of the said John Gillam Bell the younger, who should come in and contribute to the expenses of the suit against Ann Radclyffe Bell (the deft.), the sole trustee and executrix of the will of the said J. G. Bell the younger. The bill (*inter alia*) alleged that the testator was, at the time of his decease on the 14th March 1859, indebted to the plt. in the sum of 1408*l.* 9*s.* 6*d.*, and it prayed for the proper administration of his estate under the direction of the court. On the 7th May 1859 an administration decree was made; and the usual advertisements calling upon the creditors to come in and prove their debts had been issued, and several debts had been since proved.

In the month of Aug. 1863 the plt. died, and his executors had taken no steps since his death to revive the suit. The accounts and inquiries directed by the decree were now being taken and made in the chambers of his Honour, but the chief clerk's general certificate had not been made out. John Thurlburn, Edward Bell, sen., and five other creditors of John Gillam Bell the younger, whose debts had been allowed, were desirous that the proceedings in the cause should be carried on in their or one of their names, and had signed an authority for that purpose.

A supplemental statement to the original bill was made by the before-named and other creditors, setting forth the foregoing and other facts; and the court was now moved that the usual supplemental order might be made to revive the proceedings in this cause, and for making them, the said creditors, or one of them, the plt. in the place of the said John Gillam Bell the elder (deceased), and that the said creditors or one of them, as plt., on behalf of himself and all other the unsatisfied creditors of John Gillam Bell the younger, who had proved their debts, might have the full benefit of the said decree and other proceedings therein; or otherwise that the said creditors above named might have liberty to carry on and prosecute the proceedings in this cause in the place of the said John Gillam Bell the elder (deceased).

Wickens, in support of the motion, argued that it was unnecessary to give notice of the motion to the executors of the late plt.; that the course that had been adopted was in accordance with the 52nd section of the 15 & 16 Vict. c. 86; and that the creditors were, upon the mere allegation of the facts (*Martin v. Hadlow*, 9 Hare, App. 52), entitled to the order as prayed. The cases of *Lowes v. Lowes*, 2 De G. M. & G. 784, where the master's report had not been confirmed, and *Tuchley v. Allsop*, 7 Jur. N. S. 1181, were referred to.

The VICE-CHANCELLOR said, the mode of proceeding in the present case had been clumsy, and that it would have been better to have filed a simple supplemental bill. All the creditors of the plt. could have then come in and obtained payment under the decree, and the mere fact of the plt. having died could not substantially have interfered with any of them, except

perhaps as to the costs of the suit. He would make an order according to the precedent in *Lowes v. Lowes*. Solicitors for the plt., *Kingsford and Dorman*.

Monday, Jan. 11.

FOLEY v. MAILLARDET.

Practice—Service on deft. out of the jurisdiction—2 Will. 4, c. 33, s. 1; 4 & 5 Will. 4, c. 82, s. 3; 15 & 16 Vict. c. 86, ss. 3, 5—Consol. Order x., rule 7.

A person named as deft. to a suit having been served, out of the jurisdiction, with a copy of the bill, moved to have the order discharged; and in support of the motion, filed an affidavit, in which he denied certain allegations in the bill, the result of which was to show that service might properly be made out of the jurisdiction, under the statutes of Will. 4:

Held, that he was not at liberty, upon a mere question of procedure, to dispute allegations which went to the substantial questions in the cause; and motion dismissed.

Graham Hastings moved on behalf of the deft. in this suit, *Marin Anne Maillardet*, widow, that an order made by the court on the 5th Dec. last might be discharged. The order, which had been granted on the application of the plt. *William Walter Foley*, was to the effect that a printed copy of the bill, together with a copy of the interrogatories, might be served upon the deft. at Crail or elsewhere in Scotland.

The suit was for an account of what was due and owing to the plt. for principal and interest on a legacy to which he became entitled under the will of Mrs. *Eliza Foley*, who died at Calcutta on the 18th Feb. 1844, and that the personal estate of the testatrix might be administered by the court; and also that the payment of the said legacy might be held chargeable on the estate of John William Maillardet, who died at Crail, in Fifeshire, on the 19th Dec. 1862.

In Aug. 1856 letters of administration of the personal estate of *Eliza Foley* had been granted to the deft. when resident with her husband in India. In 1860 Mr. and Mrs. Maillardet returned to England, and shortly afterwards went to reside in Scotland, where they permanently took up their abode.

The deft. was the legal personal representative, in England as well as in Scotland, of her husband John William Maillardet, and the bill alleged that assets of *Eliza Foley* to a large amount had from time to time been received by the husband of the deft., conjointly with herself; also that "the deft. hath in her possession or under her control divers large balances or sums of money, and also divers parliamentary and other stocks or funds, and also divers real and personal securities belonging to, or arising from, the personal estate of the said *Eliza Foley*, and far more than sufficient for the satisfaction of the claim of the plt. in the suit, and that she had in her possession or under her control assets of her late husband to a large amount."

The deposition of the deft. was (in the language of the second of the below-mentioned statutes) to the effect that at the time of the institution of the suit, she had neither "lands nor hereditaments, nor any charge, lien, judgment, or incumbrance thereon, or any money vested in any Government or other public stock, or public shares in public companies or concerns, or concerning the dividends or produce thereof," within the provisions of the Acts of 2 Will. 4, c. 33, and the 4 & 5 Will. 4, c. 82, respectively; nor, to the best of her belief, did any part of the landed estate of John Wm. Maillardet come within the said provisions.

In support of the motion it was argued that the case did not come within the provisions of the statutes of Will. 4; and it was submitted that the order of the

5th Dec. ought to be discharged: first, because the deft.'s domicile was not within the jurisdiction of the court; secondly, because the subject-matter of the suit was not within the statutes; and, thirdly, because no contract had been entered into relating to the subject-matter of the suit within the jurisdiction, and that the court had not the power to act.

The case of *Cookney v. Anderson*, 31 Beav. 452; 7 L. T. Rep. N. S. 491; s. c. on appeal, 8 L. T. Rep. N. S. 295, was referred to.

Prendergast, for the plt., contended that the court had jurisdiction to make the order, because the subject-matter of the suit was shown by the allegation to consist of parliamentary funds and public stocks, and consequently that it was within the provision of the Acts of Will. 4. He cited

Whitmore v. Ryan, 4 Hare, 612 (and see *Blenkinsopp v. Blenkinsopp*, 2 Ph. 1);

The Official Manager of the National Association v. Carstairs, 8 L. T. Rep. N. S. 717; s. c. on appeal, 9 Jur. N. S. 955;

Tracy v. Smith;

Steele v. Stuart, 10 Jur. N. S. 15.

Hastings in reply.

The VICE-CHANCELLOR.—There is a wide distinction between the question which relates to the jurisdiction of the court in reference to matters properly within its cognisance, and which are touched by the general orders of the court, and questions which relate merely to the proper service of the orders which are made in the progress of a suit. *Wigram, V.C.*, when he decided the case of *Whitmore v. Ryan*, seems to have had this distinction very clearly in his mind. On the present occasion, all the court has to consider is, whether or not the order of the 5th Dec. for service of the bill upon the deft. out of the jurisdiction, was properly made, and that service must be judged of by reference to the law of the court, which, by its General Order, No. 10, rule 7, under the provisions of the 15 & 16 Vict. c. 86, s. 3, defines the case in which service out of the jurisdiction shall be proper. The court, by its general orders, has required certain formalities to be observed, and no objection is taken by the deft. on the ground of deficiency in any of these formalities. Moreover, the law of the court, by its general orders, so far as it relates to the service of a copy of a bill out of the jurisdiction, is laid down in the largest and most comprehensive terms; for the words of the order are "in any suit," without confining the service of process to those cases which are defined by the Acts of 2 Will. 4 and the 4 & 5 Will. 4. But it is not necessary, nor do I intend, in the present case, to decide the question whether or not the general orders of the court authorise service in any case other than the case of such suits as are within the operation of the Acts of Will. 4. There is an allegation in the bill to the effect that this case is within the Acts of Will. 4; and what is now proposed is, to show by an affidavit that this case is not within those Acts. But I cannot allow a deft. to come forward and answer by an affidavit such allegations as are contained in this bill, where the question is one merely as to the regularity of the service of an order under the process of the court, and under the general orders which are the law of the court. The proceeding has been mistaken, and the motion must be refused with costs. I cannot dispose of the motion without further observing that it is extremely inconvenient to allow a deft. to come here upon a conditional appearance for the purpose of raising a controversy as to the truth of the allegations of fact put in issue by the bill, and I think such motions as the present ought to be discouraged. I repeat the observations which were made by *Wigram, V.C.*, in *Whitmore v. Ryan*, as to the way in which this court should support its own orders.

Solicitor for the plt., *W. M. Webster*.

V. C. WOOD'S COURT.

Reported by *W. H. BENNETT and EDWARD LLOYD, Esqrs.*
Barristers-at-Law.

Dec. 17 and 21.

STEEL v. STUART.

Practice—*Extra-territorial jurisdiction*—2 Will. 4, c. 33; and 4 & 5 Will. 4, c. 82—C. O. cap. 7—*Services on debts*.

The power of a judge to grant leave of service of proceedings in a suit on debts out of the jurisdiction being discretionary, in a case where the litigation was mainly Scotch, and the bill did not contain an averment that the subject-matter of the suit was within the jurisdiction of the court:

Held, that an order for service of the bill on debts in Scotland must be discharged.

The plt. in this suit was a soap manufacturer, carrying on business in Liverpool as *M. Steel and Son*; the debts. *Alexander Stuart and Robert Towns* were merchants and agents of *Sydney*, under the firm of *R. Towns and Co.*, and the debts. *Joseph Gordon Stuart and Thomas Mitchell Staig* were their agents and correspondents at *Kirkcaldy*, in *Scotland*; *Joseph Gordon Stuart* and the deft. *James Stuart*, under the firm of *Messrs. Stuart Brothers*, carried on business as bankers in *London*, and were the agents and correspondents of *Messrs. Staig and Stuart*, of *Kirkcaldy*.

The plt. carried on his trade in soap with the firm at *Sydney* in the following course of business. Goods were shipped by him, consigned to *R. Towns and Co.*, and a bill of lading and invoice of the goods sent to them, with instructions to sell the goods for the account of the plt., and to remit the proceeds of sale to him through *Messrs. Staig and Stuart*. Meantime the plt. used to advise *Messrs. Staig and Stuart* of the shipments made by him to *R. Towns and Co.*, and to send them one or two of the bills of lading of the set, which they ordinarily forwarded to *R. Towns and Co.* The plt. or *Messrs. Staig and Stuart* used then to draw against the shipments, and these drafts when accepted were discounted by *Messrs. Staig and Stuart*, and the proceeds of such discount remitted by them to the plt. by way of advance on the shipments. In this course of business three parcels of soap were shipped by the plt. to *R. Towns and Co.* in *June*, *August* and *Oct. 1860* respectively, in respect of which advances were made to the plt. by *Staig and Stuart* by means of bills drawn by them and accepted by the plt., and which were discounted at the *Union Bank of Kirkcaldy*. In *Feb. 1861*, *Staig and Stuart* suspended payment, and the plt. some time afterwards ascertained that *R. Towns and Co.* had, by the direction of *Staig and Stuart*, made remittances to *Messrs. Stuart Brothers* of certain sums in respect of sales by *R. Towns and Co.* of some of the soap consigned to them, and intended to make further remittances in the same course. When, however, the bills discounted by the *Union Bank* became due, they were not met by *Staig and Stuart*, and the plt. was thereupon threatened with actions on them by the bank; on the other hand, *Messrs. Stuart Brothers* claimed to retain the sums remitted to them by *R. Towns and Co.* to cover advances made by them to *Staig and Stuart*. The plt., by his bill, charged that these remittances were made by *R. Towns and Co.* to *Stuart Brothers* direct, and were ear-marked, before and when the same came to their hands, as made specifically in respect of or against the proceeds of sale of the plt.'s parcels of soap. The bill also charged that several sums, amounting to more than *22,000*l.**, had been realised by the sales of the soap; that was, however, no express averment that these sums had come into or were in the hands of *Messrs. Stuart Brothers*.

The plt. prayed a declaration that the proceeds of these sales had been appropriated in equity to meet the bills discounted, and for an account of all sums received by any of the defts. to the use of the plt., and the proper application of the total amount when ascertained.

An order had been obtained on the application of the plt. to allow service of the bill and interrogatories on the defts. Staig and Stuart under C. O. x. 7.

Whitehorne now moved on their behalf to discharge this order, on the ground that the "suits" mentioned in the C. O. must be such suits as would come within the terms of 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82:

Cookney v. Anderson, 8 L. T. Rep. N. S. 295.

Druce, for the plt., opposed the motion on the ground that the suit was in respect of moneys which the banking firm in London was liable to pay to the plt., as having been specially appropriated for that purpose by R. Towns and Co. *Cookney v. Anderson* was not in point, for there all the defts. were out of the jurisdiction, as was also the subject-matter of the suit, and the plt.'s title arose under a Scotch deed. He referred to *Whitehouse v. Ryan*, 4 Hare, 612, which had not been in terms overruled, as settling the practice. For the purpose of taking the accounts it was necessary that these defts. should be served:

Kirwan v. Daniel, 7 Hare 347;

Mitford on Pleading, ed. 15, 90.

Whitehorne replied.

The VICE-CHANCELLOR said, that since the case of *Whitmore v. Ryan*, decided before Wigram, V. C., in 1846, the practice of this court appeared to have been so uniformly settled, that he did not feel strong enough to upset it. In 1845 the orders relating to the service on parties out of the jurisdiction had been drawn up by the judges of this court, under the powers conferred on them by the 3 & 4 Vict. c. 94, and had been, in obedience to that Act, laid before both Houses of Parliament, and the thirty-six days within which any objection was to be taken against them had elapsed without any such having been raised, they must therefore be held to have received the fullest confirmation. When *Whitmore v. Ryan* was argued, everything was said that had been adduced in the recent case before the L. C. (*Cookney v. Anderson*), and yet the V. C. gave judgment without calling for a reply, thereby deciding that the term "suits" in the orders of the court was not to be restricted to such suits as were mentioned in the Acts of 2 Will. 4, and 4 & 5 Will. 4. The C. O. had merely, in this respect, followed and confirmed the orders of 1845. Now, although the judgment of the L. C. in had proceeded upon grounds which were inconsistent with the practice of the court as established by *Whitmore v. Ryan*, yet the circumstances of the case went so much further than those of the matter now before him, that he should not have felt bound to apply here the rule there laid down, especially when it was at variance with so long-established a practice. Still the power given to this court by the C. O. x. 7 was discretionary in the judges, and, looking at that circumstance, and at the fact that the litigation arose from dealing with a Scotch firm, and was therefore mainly Scotch in its character, and as there was no express averment in the bill that the moneys, the subject-matter of the suit, were within the jurisdiction, he should hold that the present order must be discharged.

Solicitors: for the plt., *R. Marshall*, agent for *H. Forshaw and Goodman*, Liverpool; for the other parties, *Simpson, Roberts and Simpson*; and *Wilde, Kees, Humphry and Wilde*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,
Barristers-at-Law.

Tuesday, Jan. 12.

KING v. ENGLAND.

Trover—Landlord and tenant—Distress—Transfer of property.

The right of property in goods distrained for rent remains in the tenant until sale, and the taking of such goods to himself, at the appraised value, in discharge of the rent by the landlord, is not equivalent to a sale.

Goods belonging to A. were assigned by bill of sale to the deft., and were afterwards seized by the landlord of A. for rent in arrear; they were appraised but not sold, and were taken to by the landlord at the appraised value, in discharge of his rent and given to the plt. Being afterwards seized by the deft. under his bill of sale, the plt. brought an action of trover for them:

Held, that the landlord had acquired no property in them, and consequently could transmit none to the plt.

This was an action of trover to recover certain household furniture, and at the trial a verdict was returned for the plt., subject to leave reserved to move to enter a nonsuit.

It appeared that the goods in question were included in a bill of sale given by the mother of the plt. to the deft. for money advanced, and that subsequently being in arrear for her rent, her landlord levied a distress upon them, and they were duly appraised; the mother and daughter being in bad circumstances, the landlord took possession of the goods so appraised for his rent, and gave them to the daughter (the plt.) in order that she and her mother might furnish lodgings with them. These goods being subsequently seized by the deft. under his bill of sale, the plt. (the daughter) brought the present action.

Jenette now shewed cause, and contended that the plt. had a lawful property in the goods, they having been given to her by the landlord, who was entitled to them under the distress. [BLACKBURN, J.—The landlord had not such a right of property as would justify him in alienating them.] The substance of the transaction is that instead of selling the goods at the appraised value he takes to them himself, which is in effect buying them. If there is anything wrong in this it amounts to a mere irregularity, and the transaction is not void. He took the goods in satisfaction of his rent. (*Lyon v. Weldon*, 2 Bing. 334; 11 Geo. 2, c. 19, s. 19.) [COCKBURN, C. J.—The goods are the property of England; then there is a distress, and the law says that if they are not redeemed the landlord is to sell them; can he sell to himself?] I submit that he can; there is nothing in the statute to prohibit it.

Wallace v. King, 1 H. Bla. 13;

Roy v. Parker, 25 L. J. 220, C. P.

Ballantine, Serjt. and *Bullar*, in support of the rule, contended that the landlord acquired no property in the goods so as to be justified in banding them over to another; that the landlord had but a provisional title to hold the goods for a certain purpose; that his right was to seize and sell. Here there was no sale; he took the goods to himself and handed them over to another:

Jacob v. King, 5 Taunt. 451;

Moore v. Pyke, 11 East. 52;

2 Will. & M. sess. 1, c. 5, s. 2.

COCKBURN, C. J.—I think the rule must be made absolute to enter a nonsuit. By the old law a land-

Q. B.]

BAILEY AND OTHERS v. EDWARDS.

[Q. B.]

lord had no right to sell goods taken as a distress; the property seized was in the nature of a pledge, but by an Act of Parliament, after certain preliminaries are complied with, he may now sell the property, and until that sale takes place, the property, though in his possession, is not out of the tenant. Then, as the property does not pass until there is a sale, the question is, whether there was a sale? Now what took place was this: Goods, having been seized for rent, are appraised, and instead of being sold, the landlord says, "I'll take them at the price," and he does so and gives them to the daughter. I cannot look upon this as a sale. The statute says, that after the goods have been appraised the parties shall proceed to sell them for the best price that can be got for them. Now this does not authorise the party distraining to take the goods to himself; the Act does not use language that will authorise any such proceeding. Until there is a sale, the goods remain in the ownership of the tenant. As therefore there was nothing like a sale, the landlord could not give them to the plt., who therefore was not the real owner.

BLACKBURN, C.J.—The property seized remains the property of the tenant until sale, and he would have a right to bring trover for them. It is plain that, although the landlord had a right to retain them, he had no right to hand them over to another.

MELLOR, J. concurred.

Rule absolute.

Wednesday, Jan. 13.

BAILEY AND OTHERS v. EDWARDS.

Principal and surety—Discharge of surety—Giving time—Deed of arrangement—Qualified reserves of remedies.

Creditors A. and B., under a deed of arrangement in bankruptcy, were to be paid by instalments, part of the debt in full and part by composition, and they were not to enforce their claims against any parties to the bills in their hands who were not liable thereon to the petitioning debtors; but the rights of A. and B. against all parties to the bills in their hands were not to be prejudiced in case the deed was not carried into effect. It was further provided that the creditors who should execute the deed, and who should hold any bonds, bills, &c., upon which any other persons should be liable, should not be prejudiced as to their rights and remedies against such persons, and that the deed should not be deemed to extend to prevent the creditors from enforcing or otherwise obtaining the full benefit of any mortgage, &c., or from suing any other persons who might be liable to the creditors for any part of their debts as drawers, indorsers, or acceptors of any bills, &c. The proposals in the deed failed by the default of the petitioning debtors:

Held, that the acceptor of a bill at four months, in the hands of A. and B. at the time they executed the deed, who was not liable to the petitioning debtors, is being for their accommodation, and indorsed by them to A. and B., was discharged in Equity from liability to A. and B. by reason of the above deed, under which, by the arrangement, more than two years' time, during which the deed was in force, was given to the petitioning debtors.

Action on a bill of exchange, dated June 4, 1857, at four months, drawn by John Price and accepted by the deft. John Price indorsed to T. P. and D. Price, who indorsed to the plt.

Equitable plea.—That there was no consideration for the acceptance or for the making or indorsing by John Price to T. P. and D. Price, or for their holding the same. That at the time of the indorsement to the plt., the deft. and John Price were merely sureties for T. P. and D. Price to the plt., whereof plt. had notice when the bill was first indorsed to them. That

whilst plt. were holders, and after the bill became due on Nov. 17, 1858, by a deed of arrangement with creditors under the Bankruptcy Law Consolidation Act 1849, it was proposed that certain collieries and works of T. P. and D. Price should be carried on under inspection. And (among other things) that the plt. and one Williams should be paid 8700*l.* in full, and a composition on the residue of their debt, they engaging not to enforce claims against any parties to the bills in their hands, who, as between themselves and the said T. P. and D. Price, were not then liable on the said bills; and it was thereby provided that the rights of the plt. and one Williams should in no way be prejudiced in the event of certain proposals made by the said T. P. and D. Price not being carried into effect. That the deed was executed by T. P. and D. Price, and by the plt. and the said Williams, and by divers other creditors of the said T. P. and D. Price; and that the bill of exchange in the declaration was one of the bills referred to in the said deed, and was then in the hands of the plt. That the said proposals in the said deed have been duly carried into effect, and that the deed was made and entered into between the plt. and the said T. P. and D. Price without the consent of the deft.

Issue thereon.

At the trial before Blackburn, J., the verdict was directed to be entered for the deft. on the above issue, but leave was reserved to the plt. to move to enter the verdict for them on the facts which are fully stated in the judgment of the court.

A rule nisi was accordingly obtained.

Nov. 3.—*Lush and Gibbons* showed cause against the rule. The deft. being a surety only was discharged, for time was given to the principal debtor, and the position of the surety altered. The point turns on the construction of the deed. By the deed the plt. took upon themselves the risk of the deft. being a surety only; and in Equity the deft. can show that he is a surety only, though on the face of the bill he appears to be a principal. By the deed the plt. bound themselves not to sue parties to bills in their hands who were sureties only so long as the deed continued in force. Here the deed was in force two years before T. P. and D. Price made default in carrying out its proposals:

Rees v. Berrington, 2 Ves. jun. 540;

Ex parte Glendinning, Buck, 517;

Smith v. Winter, 4 M. & W. 154;

Moss v. Hall, 5 Ex. 50.

Nov. 3 and 21.—*Coleridge, Q. C. and Gray, Q. C.* in support of the rule.—The deft. is liable; for, although time was given, yet there was a reserve of the plt.'s remedies against sureties. The deed was not intended to discharge parties in the situation of the deft. whom the plt. did not know to be sureties. Stipulations such as those now in question are construed as covenants not to sue the principal debtors, and not as releases of the surety:

Kearsley v. Cole, 16 M. & W. 128;

Otton v. Homan, 4 H. of L. Cas. 1037;

Price v. Barker, 4 E. & B. 760;

Orme v. Young, Holt's N. P. Cas. 84.

Cur. ado. vult.

BLACKBURN, J.—In this case the plt. sued as indorsers of a bill of exchange accepted by the deft. The deft. pleaded as a defence on equitable grounds, that he was surety for Messrs. Price, the indorsers of the bill, and that the plt. had discharged him by giving time to Messrs. Price by a composition-deed. At the trial before me a verdict was directed for the deft. on this plea, with leave to move to enter the verdict for the plt. on the facts proved and admitted at the trial. Power was reserved to amend the plea, if necessary, so that the question is whether the facts proved and admitted constituted a defence in equity,

and is independent of the form of the plea actually pleaded. It was at the trial admitted that in 1858 the plts., without the assent or knowledge of the deft., executed a deed, on the effect of which the question principally depends. That deed was between the Messrs. Price, carrying on business as coal-masters, under the firm of T. P. and D. Price, of the first part, J. Price alone of the second part, some trustees of the third part, the persons forming the firm of Bailey, Greatrex and Co., bankers (the present plts.), of the fourth part, and another firm of bankers, Wilkins and Co., of the fifth part, and the several creditors of Messrs. Price, who had executed the deed, of the sixth part, and the separate creditors of T. P. Price, of the seventh part. It recited that T. P. and D. Price having stopped payment and presented their petition to the Court of Bankruptcy, had made a proposal which, as modified, had been assented to by the creditors and the commissioner, and was intended to be carried into effect by the deed. This modified proposal is there set forth in the deed. The following are the facts of it material to the present question. The proposal was that T. P. and D. Price, the petitioners, should carry on their business under inspectorship for the benefit of all their creditors; that Bailey, Greatrex and Co., the now plts., who, it was recited, held various securities for their debt, should be paid in full the sum of 8700*l.* (being the amount of bills discounted for T. P. and D. Price in respect of some matters specified) by applying the proceeds of the sale of some property over which Bailey, Greatrex and Co. held security in part payment of the 8700*l.*, and that the residue of the sum of 8700*l.*, and 10*s.* in the pound on the rest of their debt, should be paid to Bailey, Greatrex and Co. by eight annual instalments, the first to be made on the 31st Dec. 1860. The proposal then contained stipulations on the part of Messrs. Bailey, Greatrex and Co., amongst others one very material indeed to the present question, and covenanted that they should bind themselves ("subject to the provisions hereinafter contained") not to enforce claims against any parties to the bills in their hands, who, as between themselves and the petitioners, were not then liable on such bills respectively, but it was thereby provided that the rights of the said Messrs. Bailey, Greatrex and Co. against all parties to the bills in their hands (whether liable or not to the said petitioners as between the petitioners and such parties), should in no way be prejudiced in the event of the proposals made by the petitioners or any of them not being carried fully into effect; and also that in such case the said Messrs. Bailey, Greatrex and Co. should, in all respects, be entitled to claim the full amount then due to them, after deduction of any sum in the meantime paid to them, notwithstanding their acquiescence in the proposals of petitioners thereby made. Then followed, in the proposal, stipulations with respect to the debts due to Messrs. Wilkins and Co., the parties of the fifth part, which it is not necessary to notice, and that the creditors in general should receive a composition of 10*s.* in the pound out of the proceeds of the trade. The deed, then, for the purpose of carrying out this proposal, contained a grant of licence from all the creditors (as well Bailey, Greatrex and Co., and Wilkins and Co., the parties of the fourth and fifth parts, as the parties of the sixth and seventh parts) to carry on the business under the inspectorship, so long as they should obey the conditions and covenants on their part contained. These conditions and covenants were to the effect that they would apply the proceeds under the inspectorship to paying the composition agreed upon. Then comes an agreement "that the creditors of the said T. P. and D. Price (except as mentioned in the proposal) who shall execute these presents, and who shall hold any bonds, bills of ex-

change and promissory notes, or other securities upon which any other person or persons shall be liable to the payment of the money thereby secured, shall not be prejudiced as to their rights and remedies against such person or persons respectively." And finally, the deed contains the following proviso:—"Provided always, and it is hereby agreed between and by the several parties to these presents, that nothing herein contained shall extend or be deemed or construed to extend to prevent the said creditors parties hereto, or to be charged hereby, or any of them, or their or any of their respective partners or partner, or their or any of their respective heirs, administrators, executors, or assigns, other than is provided for in the said proposal, from enforcing or otherwise obtaining the full benefit and advantage of any mortgage, claim, charge, or lien which they or any of them now have or hath upon any estate or effects whatsoever, whether of or belonging to the said T. P. and D. Price, or any other person or persons whomsoever; or from suing or otherwise proceeding against any other person or persons other than the said T. P. and D. Price, their or his heirs, executors and administrators, who is, or shall, or may be liable to or accountable for the payment or making good to any of the said creditors, all or any part of their respective debts, either as drawers, indorsees, or acceptors of any bill or bills of exchange or promissory note or notes, or as being jointly or separately bound in any bond or bonds, obligation or obligations, or other instrument or instruments, or as being liable or accountable for the payment of any debt or debts, without having subscribed any bill, bond, or other instrument whatsoever, or otherwise however as if these presents had never been made; and, for conformity sake (but for conformity sake alone), the said T. P. and D. Price, their heirs, executors, or administrators, may be joined in any such proceeding as last aforesaid." The bill on which this action was brought was one of those of which the plts. were holders at the time when the deed was executed. It was apparent, from the terms of the proposal, that the plts. were aware that some of the parties to the bills in their hands were not liable to T. P. and D. Price, but it was admitted that they had no notice that the present deft. stood in that position. The only disputed fact was, whether he really was, as between him and them, liable to Messrs. T. P. and D. Price on his acceptance. Evidence was given showing that the acceptance by the deft. of the bill in question was for the accommodation of the Messrs. Price. The question was left to the jury, who found that he was not liable to them, and that finding is not now complained of. The Messrs. Price made default in paying the instalments, the first of which became due on the 30th Dec. 1860, before this action; but from the execution of the deed till default was made, a period of more than two years, the deed was in full force, and during that period time was given to the principal debtors. A rule to enter the verdict for the plts., pursuant to leave reserved, was obtained, and was argued in the course of last term, before my Lord, my brother Mellor and myself. We are of opinion that the rule must be discharged, as the effect of this deed is, under the circumstances, to discharge the deft. in equity. The principle upon which the courts of equity have proceeded appears to be this: A surety has, as such, a variety of rights; amongst others he has a right in equity to call upon the creditor to enforce all his (the creditor's) remedies against the principal debtor for the sureties' benefit and at the sureties' risk and expense: (*Wright v. Simpson*, 14 Ves. 734.) No doubt a court of equity would put the surety under terms to give indemnity to the creditor before it would enforce this right, and consequently the right which the surety has is of very little practical value, and is seldom if ever exercised;

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still the surety has this right, and if the creditor willfully deprives the surety of this right he so far alters the surety's position. Lord Eldon, in his judgment in *Samuel v. Howarth*, 3 Mer. 272, says: "If time is given by virtue of positive contract between the creditors and the principal, the surety is held to be discharged; for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will resort to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract." Whether, if the matter were *res integra*, it might not have been better to confine the surety's right in such cases to compensation in damages for this injury, which is generally only nominal, it is not now open to us to consider. A long series of decisions, many of which may be found collected in the notes to *Rees v. Berrington*, 2 White and Tudor's Leading Cas. in Eq. 822, has settled that such an alteration in the position of the surety discharged him, even though the change may be shown to be for his benefit. Lord Eldon, in *Samuel v. Howarth*, gives as a reason for this apparent harshness that, "the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit." This principle has been imported from the courts of equity into those of law, and is clearly stated by Williams, J., in *Strong v. Foster*, 17 C. B. 219. He there says: "What I understand by a giving of time in such a case is this: the surety has a right at any moment to go to the creditor and say, 'I have reason to suspect the principal debtor to be insolvent, therefore I call upon you to sue him, or permit me to sue him.' If the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety. The case then falls within the general doctrine as to principal and surety, which equally obtains at law and in equity, that if the creditor does any act to alter the position of the surety he thereby discharges him." There is, however, another point to be noticed here. The bill of exchange on which this action is brought is a written contract, and conclusively shows, both at law and in equity, that the contract of the debt. to the plts. was as principal and not as surety; and moreover the plts. had no notice at the time when they took the bill that the debt. was other than an acceptor for value. There are authorities (amongst others *Strong v. Foster*) tending to show that, in order to enable a surety to raise, at law, a defence on the ground that time has been given to the principal, it is necessary to show that the original contract between the plt. and the debt. was that of creditor and surety. How this may be at law we are not now called on to decide, as we are determining this case as a court of equity. It was decided in this court, in *Pooley v. Harradine*, 7 E. & B., on an equitable plea, that the equity on which the court should act "does not depend on any contract with the creditor, but on its being inequitable in him knowingly to prejudice the rights of a surety against the principal." By this judgment we are bound, even if we did not agree with it, as we do. In *Pooley v. Harradine* the plea alleged that the creditor at the time when he became holder of the bills, as well as when he gave time, had notice of the relationship of principal and surety between the debt. and his co-debtor, and the decision did not go further, but it had previously been determined by Sir John Leach, when M. R., that even though the relationship of principal and surety was created by an agreement between them after the parties had become liable to the creditor as joint debtors, the creditor, by giving time to the principal with notice of this agreement, discharged the surety, and this decision was adopted

by Brougham, L. C., and by the H. of L. in *Oakley v. Pasheller*, 4 Cl. & F. 207, and 10 Bli. N. S. 548. Now, in the present case, the plts., when they executed the deed, had notice that some of the parties to the bills in their hands were not properly liable to the Messrs. Price on those bills. They entered into the deed, making stipulations with regard to such parties, and taking their chance as to who they should turn out to be. We think that, if the effect of the deed was to alter the position of the parties who should turn out to be sureties, it was as wrongfully done and as inequitable as if they had expressed who those parties were. The question, therefore, as it seems to us, comes round to this, whether the effect of the deed does give time to Messrs. Price and Co., so that it would discharge ordinary sureties of whom the plts. then had notice. The plts. and Messrs. Price did not intend to discharge the sureties. One of them had, by an express proviso, agreed that, in the event (which has happened) of the proposal not being carried fully into effect, the sureties should be liable to them as if the deed had never been made. But during the two years which elapsed before the Messrs. Price made default, the plts. could not, without a breach of faith and the contract on their part, have sued Messrs. Price; and if the surety had called on them to sue, they would have been bound to refuse. It is quite true that where a contract by which the creditor binds himself to the principal debtor not to sue for a time is so worded as to show it was intended only to apply to suits for the benefit of the creditor, and to exempt from its operation suits at the instance of sureties, and on their behalf, no alteration in the position of the surety is produced, and he is not discharged. And it seems established that if in a contract for giving time there is an unqualified reservation of remedies against sureties, the contract is to be construed as allowing the surety to retain all his remedies over against the principal debtor; and, as is said in *Price v. Barber*, 4 E. & B. 780, "a covenant not to sue is to operate only so far as the rights of the surety may be effected." In the deed now before us the creditors generally have stipulated for a right and immediate recourse against sureties, but from this there is an exception of those mentioned in the proposal; and on reference to the proposal we find that Bailey, Greatrex and Co. expressly bound themselves not to sue the parties to the bills, who stood in the position of sureties for a period which turned out to be two years, and we find nothing to show any intention to preserve to those sureties during that time the right to call upon Bailey, Greatrex and Co. to sue Messrs. Price if so advised. We think, therefore, that an equitable defence is made out, and consequently that the rule must be discharged.

Rule discharged.

Saturday, Jan. 16.

REG. v. HAGUE.

Municipal corporation—Voting for councillors—Inducing another to personate a voter—Conviction.

Under sect. 9 of the 22 Vict. c. 35 (an Act to amend the law relating to municipal elections), the offence of inducing another to personate a voter is committed, although the person induced, upon tendering the voting-paper and being asked if he is the person whose name is signed to the voting-paper, replies "No," and the vote is accordingly rejected. The formal conviction of such an offence need not set out the facts constituting the inducement.

At the election of town councillors for the borough of S., A. gave B. a voting-paper signed with the name of C., who was a burgess entitled to vote, with directions to go to the polling-place and give it

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n. B. went accordingly and tendered the voting-paper; but, upon being asked if he was C.? said he was not, and thereupon the voting-paper was rejected:

2d, upon a conviction of A. for inducing B. to personate C., that the conviction was good.

This was a case stated by the Quarter Sessions of the West Riding of Yorkshire, upon an appeal, wherein a conviction of justices of one Thomas Hague, under sect. 9 of 22 Vict. c. 35, for inducing one James Fogle to personate a voter at an election of town councillors, was affirmed.

The case stated, that on the 5th Nov. 1862, Thomas Hague was summarily convicted, under 22 Vict. c. 35, s. 9, for unlawfully and knowingly inducing one James Fogle to personate one George Bamford, then being a Burgess of the borough of Sheffield, then entitled to vote at the election of councillors for St. Philip's Ward, in the said borough, on the 1st Nov. 1862, as by the annexed conviction appears.

By the 9th section of the said Act it is enacted that if, pending any election of councillors, any person shall personate, or induce any other person to personate, any person entitled to vote at such election, or whose name is on a Burgess-roll then in force, or falsely assume to act in the name or on behalf of any person so entitled to vote, &c., he shall be liable to be convicted and punished as therein mentioned.

On the 1st Nov. 1862, pending the annual election of councillors, the said Thomas Hague gave a nomination paper (a copy of which is annexed), signed by one George Bamford, to the said James Fogle, at a public-house in Sheffield, and asked him to take it to the schoolroom, Bowling-green-street, to vote. Fogle looked at the paper, and said it was not his name that was on it; that Hague told him to vote for Wood and Trickett, and said he was to take the paper and put it down before a gentleman he would see sitting, and that they would not say anything to him. Fogle asked Hague if he should get into any trouble; to which Hague said, "Oh no," there was one man voted eight times in an hour at the previous election." James Fogle after this took the said nomination-paper to the said schoolroom and put it into the hands of one John George Robson, the presiding officer there for the reception of votes for the said ward. The said John George Robson thereupon, being so required, asked the said James Fogle the following question: "Are you the person whose name is signed as George Bamford to the voting-paper now delivered in by you?" To this question the said James Fogle answered "No."

The name of George Bamford was at the time on the Burgess-roll then in force. The voting-paper was not filed, nor was the vote of George Bamford recorded in the said election in consequence of the paper being so handed to the said John George Robson by the said James Fogle.

Against this summary conviction the said Thomas Hague appealed to the Court of Quarter Sessions holden for the West Riding of Yorkshire, at Sheffield, on the 9th Jan. 1863; and at the hearing of the said appeal contended that, on the above-stated facts, the offence within the meaning of the said statute whereof he had been convicted, had not been committed by him, inasmuch as Fogle did not actually vote, nor was the vote of George Bamford recorded at the said election, nor had Fogle represented himself to be the person whose name was on the voting-paper as entitled to vote, nor had the said offence been duly and sufficiently set forth, as no particular act of inducing had been specified in the conviction. The said Court of Quarter Sessions confirmed the conviction subject to a case for the decision of the Court of Q.B. whether the said Thomas Hague had, under the above facts, committed the alleged offence, within the meaning of the said statute, of inducing James Fogle to personate

the said George Bamford pending the said election, and whether the offence of inducing was duly and sufficiently set forth in and by the said conviction.

If the Court of Q.B. are of opinion either that the said Thomas Hague did not commit the offence within the meaning of the said statute of which he is convicted, or that such offence is insufficiently set forth in the said conviction for the reason aforesaid, then the decision of the said Court of Quarter Sessions, confirming the said conviction, and the said conviction, are to be quashed; but if the Court of Q.B. are of opinion that the said Thomas Hague did commit the offence within the meaning of the said statute of which he was convicted, and that the said offence of inducing James Fogle to personate the said George Bamford is duly and sufficiently set forth in the said conviction, then the said decision of the Court of Quarter Sessions, and the said conviction, are to be confirmed."

The conviction was as follows:—

"Borough of Sheffield in the West Riding of Yorkshire, to wit.—Be it remembered that on the 5th day of Nov. 1862, at the parish of Sheffield in the borough of Sheffield, in the West Riding of the county of York, Thomas Hague, of the parish and borough aforesaid, in the said West Riding, labourer, is convicted before us the undersigned John Brown, Esq., mayor of the said borough, and Thomas Dunn, Esq., two of Her Majesty's justices of the peace in and for the said borough of Sheffield; for that he the said Thomas Hague within the space of six calendar months next before the laying of the information whereon this conviction is founded, to wit, on the 1st day of Nov. in the year aforesaid, in the West Riding aforesaid, pending a certain election of councillors for St. Philip's ward in the said borough, unlawfully and knowingly did induce one James Fogle to personate one George Bamford, then being a Burgess of the said borough then entitled to vote at the said election, against the form of the statute in such case made and provided. And we adjudge the said Thomas Hague for his said offence to be imprisoned in the house of correction at Wakefield in the said West Riding for the space of two months. Given under our hands and seals the day and year first above mentioned, at the parish and borough aforesaid in the West Riding aforesaid.

"JOHN BROWN (L.S.), Mayor.

"THOMAS DUNN, (L.S.)"

The conviction then set out the form of the voting-paper, purporting to be signed by George Bamford, of 97, Allen-street.

By sect. 9 of the 22 Vict. c. 35 (an Act to amend the laws relating to municipal elections) it is enacted that, "If pending or after any election of councillors, auditors, or assessors, any person shall personate or induce any other person to personate any person entitled to vote at such election, or whose name is on the Burgess-roll then in force, or falsely assume to act in the name or on behalf of any person so entitled to vote, or wilfully make a false answer to any of the questions mentioned in sect. 18 of this Act, he shall for every such offence be liable on conviction before two justices in petty sessions to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour.

Fowler appeared in support of the order of sessions and the conviction, but the Court called upon

Macle for the app., who argued, first, that as Fogle did not vote, and upon the question being put to him declared at once that he was not George Bamford, he had committed no offence, and that Hague consequently could not be guilty of inciting him to commit it. [COCKBURN, C.J.—The question is, whether because a trick fails, it is less a personation.] The 5 & 6 Will. 4, c. 76, s. 32, describes the mode of voting, and by sect. 34 the questions can only be

asked upon the requisition of two burgesses. [COCKBURN, C.J.—If these questions are not asked, the fact of personation is complete by handing in the voting-paper. BLACKBURN, J.—Surely, if by words or signs he represents himself to be the person, it is a personation.] The question is, did the inducer succeed in making Fogle pass off as another person? [COCKBURN, C.J.—Or rather, did he succeed in inducing him to go and endeavour to vote as another person? Is a man less guilty of uttering a forged note, because he is stopped before it actually changes hands?] There the offence is complete by tendering the note. [COCKBURN, C.J.—So is it here by his tendering himself as another person.] It is a distinct offence to make a false answer. Secondly, the conviction is bad for not setting out the facts constituting the inducement. In *R. v. Marsh*, 6 A. & E. 250, the indictment for a similar offence set out all the facts. [MELLOR, J.—There are certainly cases in which a general allegation is not sufficient, as where the act charged does not show what was really done; but here it is obvious.] The inducement certainly is set out, but not the means of inducement. The word "induce" may mean anything.

COCKBURN, C.J.—I am of opinion that the order of sessions should be confirmed. Whatever doubt may have existed as to whether or not the offence has been committed, if the charge had been upon the second branch of the section for making a false answer, yet there can be no doubt as to the first branch, which makes it an offence to personate, or to induce another to personate, a voter; and I cannot but think that if a man goes up to the voting-place and represents himself as another person, it is a false personation. The giving of a false answer to the questions would be of itself an offence, but that is an additional offence. I think it is not because his attempt was frustrated that he was not guilty of the offence. It was not because he would not give a false answer that he has not falsely personated another. His offence was equally grave whether he succeeded or not. As, therefore, Fogle actually falsely personated, the deft. was guilty of inducing him to personate.

CROMPTON, J.—I am of the same opinion. Mr. Maule argues that, to constitute the offence of inducing a person to personate, it is necessary that he should have successfully personated, and that as the personation was not successful, therefore he was not guilty. I am certainly inclined to think that if the party did not in fact personate another, the deft. cannot be guilty of inducing him to personate; but here there is an actual personation. I take it that the meaning of the section is—pretend to personate. Now here the party gives in a voting-paper, and so represents himself to be another person. I do not think that his refusal to tell a falsehood purges his offence. As regards the second objection, there is no authority for saying that you must set out the particular facts. In the old convictions it was certainly necessary to set out the evidence, that the court might see that the party has been convicted upon legal evidence, but this is not necessary at the present day.

BLACKBURN, J.—I am of the same opinion. I take it that, as soon as the man holds himself out to be the person entitled to vote, and does so in the name of another, he commits the offence; and that it is utterly immaterial that he is stopped before he succeeds in his object. Upon his tendering his voting-paper, he has done sufficient to warrant the conclusion that he personated.

MELLOR, J.—I think that when a man presents a voting-paper to the person whose duty it is to take the votes, the personation is complete, and it matters not that he afterwards withdraws from the act. I think also that the conviction sufficiently sets out the offence.

Order of assize and conviction affirmed.

Tuesday, Jan. 19.

PENFOLD v. WEST AND OTHERS.

Overseers—Action against—Debts of outgoing overseers—Plea—11 & 12 Vict. c. 91, s. 1.

*The plt. performed work and services for A. and B., as overseers of the parish of K., and upon their quitting office, he performed other work and services for C. and D., their successors, and afterwards brought an action against the latter for the amount due to him in respect of both sets of work and services. To this, C. and D. paid 60*l.* into court, which the plt. took out and entered a *nolle prosequi* to the remainder. Subsequently he brought an action against A. and B. for the amount incurred by them during their year of office, on the ground that in the former suit he had no right of action against C. and D. in respect of his claim against A. and B., and that he took the 60*l.* out of court only in discharge of his claim against C. and D. In this action A. and B. pleaded upon equitable grounds a plea setting out the proceedings in the former action, and alleging that the sum of 60*l.* was enough "to satisfy all the said claims made by the said plt. in his said action, including his claim in this action." Upon demurrer to this plea:*

Held, that it was a good plea, and an answer to the action.

This was a demurrer to a plea.

The declaration was for money payable by the defts. to the plt. for work done and materials provided by the plt. for the defts. at their request and for money paid, and upon an account stated.

The 4th plea was as follows, "and for a fourth plea by way of defence, upon equitable grounds the defts. say that the said debts were contracted by the defts. by virtue of their office which they held of overseers of the poor of the parish of Kingston-upon-Thames, in the county of Surrey, and they lawfully contracted the same within three months prior to the termination of their year of office, which terminated before the commencement of this action, and the same not having been discharged by them before the termination of their year of office, the same, according to the statute in that behalf became and were payable by and recoverable from the said Philip Jones, James Page, James Werman and James Coe White, who were the defts.' immediate successors in the said office of overseers of the poor of the said parish, and were chargeable upon the poor-rate of the said parish in like manner as it would have been by the defts., and the same being unpaid, the plt. brought an action against the said Philip Jones, James Page, James Werman and James Coe White, then being such overseers as aforesaid, in Her Majesty's Court of Q. B. for the recovery of the said debts, and other claims or debts made by the plt. against them as such overseers, and the plt., by a particulars of demand in the said action, and the declaration therein claimed and sought to recover from the said defts. in the action, the said debts in this declaration mentioned. And the said Philip Jones, James Page, James Werman, and James Coe White thereupon pleaded to the said declaration and the said claims against them, that as to 60*l.* parcel of the plt.'s claim therein, they brought into court the sum of 60*l.*, and that that was enough to satisfy the plt.'s claim as to that sum, and that as to the residue of the plt.'s claim, they never were indebted. And the plt. thereupon replied, taking the said sum of 60*l.* out of court in satisfaction of the said 60*l.* parcel, &c., and entered a *nolle prosequi* in the said action as to the residue of the plt.'s claim therein. And the defts. say, that the said 60*l.* so paid into court was enough to satisfy the said 60*l.* in respect to which it was paid, and to satisfy all the said claims made by the plt. in his said action, including his claim in this action. And the said Philip Jones, James Page, James

Q. B.]

BARTHOLOMEW AND OTHERS v. MARKWICK.

[C. B.]

Werman and James Coe White were never indebted to the plt., and no money became payable by them to him, nor had the plt. any claim whatever against them in respect of the residue of the plt.'s claims in this action, or otherwise."

To this plea there was a demurrer.

Bysect. 1 of the 11 & 12 Vict. c. 91 (an Act to make provision for the payment of parish debts, the audit of parochial and union accounts, and the allowance of certain charges therein), it is enacted "that if the overseers of the poor of any parish shall lawfully by virtue of their office contract any debt on account of the parish within three months prior to the termination of their year of office, and the same shall not have been discharged by them before their year of office shall have determined, such debt shall be payable by and recoverable from their immediate successors in office, and chargeable upon the poor-rates of the said parish in like manner, as the same would have been payable and chargeable by such first-mentioned overseers during their year of office," &c.

Mellish, Q.C. (*Keane* with him) now appeared in support of the demurrer, and contended that the plea was no answer to the plt.'s claim, for that as in the former action the plt. could not recover against the then defts. the amount incurred during the year of office of their predecessors, the present defts., so, in taking as satisfaction in the action against them of the 60*l.* he only satisfied such claim, and did not thereby discharge his claim against the present defts. That the case of *Chambers v. Jones*, 5 Ex. 229; 19 L. J. 239, Ex., shows that under the 11 & 12 Vict. c. 91, the contract is not transferred to the succeeding overseers, and that if the plt. had gone on with the action against them in the former action for the amount due from their predecessors he must have failed, and that his acceptance of the 60*l.* was only in discharge of the claim he had against such succeeding overseers; that the plt. being advised that he could not recover against the subsequent overseers in respect of that part of the demand which arose against the former overseers, he took the 60*l.* in discharge only of his claim against the then defts. The entire claim of the plt. was 159*l.*

M. Smith (*B. C. Robinson* with him) appeared in support of the plea, and contended that it was an answer to the action, for that the 60*l.* was paid into court not only to satisfy so much, but "to satisfy all the said claims made by the plt. in his said action, including his claim in this action." [BLACKBURN, J.—There are no words in the 1st section of the 11 & 12 Vict. c. 91, to say that the prior overseers shall be discharged.] That may be so; but if an action has been brought against the succeeding overseers for the whole, and they have paid into court a sum of money in respect of the whole, which is taken out in satisfaction of the demand in the action, that is an answer to a subsequent action, as in this case.

Mellish, Q.C. in reply.

COCKBURN, C. J.—As I understand the Act of Parliament, it is not to transfer the debt to the succeeding overseers, but to authorise them to pay it, and so it was payable by their successors in the sense that it was justifiable for them to pay it. Here is an action brought against the overseers, and a sum of money was paid by them sufficient, as they said, to include all the demand. That being so, this plea is good; at all events we cannot say that it is a bad plea. It was competent to the defts. in the former action to pay that demand, and if paid it was a discharge. I understand the plea to be in effect a plea of payment, and in that sense I cannot say that it is bad.

BLACKBURN, J.—I am of the same opinion. The effect of the statute is, that a debt due from one set of overseers may be recoverable from their successors in

office. I am certainly inclined to the opinion, that the construction put upon the statute by the Court of Ex. in *Chambers v. Jones* is correct, and that the subsequent overseers are not personally liable for the former debts. But it is quite plain that they would be the persons who would ultimately have to raise the money. Then, that being the case, they may certainly have set up that they were not liable for the debt, but they were not bound to set up such a defence. In the former action the plt. not only claimed for the first, but for the subsequent amount. Then the payment of the 60*l.* into court is general, and it seems to me that payment should be allowed as against both portions of the claim. The plea says that the 60*l.* was paid into court "to satisfy all the said claims made by the plt. in his said action, including his claim in this action." If that was so, this is a perfectly good plea.

MELLOR, J.—I agree with the Court of Ex. that the section of the statute does not transfer the contract; and in the former action the overseers may have supported a defence as to the sums incurred in the time of their predecessors, but they were justified in not choosing to do so. Then, the two claims being mixed together, a payment is made for the whole. The plt. thereupon takes the sum out of court, and a fresh action is brought, on the ground that a portion that was claimed in the first action could not have been recovered. I will not say how that might be, but it is now said by the plea that the amount was paid into court upon the whole demand. I think this is a good plea.

Judgment for the defts.

Plt.'s attorney, *Thomas E. Penfold*.

Defts.' attorney, *Bartrop*, Kingston-on-Thames.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Nov. 24 and Jan. 11.

BARTHOLOMEW AND OTHERS v. MARKWICK.

Contract—Rescission of—Debt.

*A. agreed to purchase goods of B. of the value of 500*l.* or 600*l.*, on the terms of payment on completion of the order by half cash and half by bill at six months. Having selected and received goods of the value of 88*l.* 17*s.* 6*d.*, A. wrote to B., stating that "he should close his order." B. then sued A. to recover the value of the goods delivered:*

Held, that the refusal of A. to order more goods was a rescission of the contract, and that in an action for the value of the goods actually delivered, it was not necessary for B. to declare specially on the contract.

The declaration contained only the money counts for goods sold and delivered, goods bargained and sold, and accounts stated. The only plea was, never indebted.

The plts. are upholsterers; and the deft. being about to furnish an hotel, called at their shop and stated that he wished to purchase 600*l.* or 700*l.* worth of furniture, which the plts. agreed to supply him on the terms, that he should pay half cash and half by bill at six months, "on completion of delivery." The deft. then selected goods of the value of 73*l.* 5*s.* 6*d.*, which were duly delivered to and accepted by him. Shortly afterwards he gave another order amounting to 43*l.* 18*s.*, but returned goods of the value of 28*l.* 6*s.*, as being unsuitable. The plts. having then applied to the deft. for payment, and some misunderstanding having arisen between them, the deft. wrote to the plts. the following letter:—

"3, Hanover-square, 17th April 1863.

"Gentlemen,—The way you do your business will not suit me. I have an account for a large amount

of goods not purchased, and a demand made for payment opposed to treaty. Your salesman well knows my terms, and I now close all further orders, and desire what I have not purchased may be taken off my premises. I will not be responsible for them against damage.—I am, Gentlemen, yours obediently,

“MARK MARKWICK.

“I shall settle your account upon the terms agreed, when corrected.”

This action was then commenced to recover the value of the goods supplied to the deft.

At the trial before Keating, J., at the sittings in London after Trinity Term, it was submitted that the plt. must be nonsuited, as the contract was an entire contract to purchase 500L or 600L worth of goods, and the plt. ought therefore to have declared specially. Keating, J. directed the jury, that if they were of opinion that the deft. refused to perform his part of the contract, that would amount to a rescission of the contract, and the plt. would be remitted to their common law rights, and might recover in an action for goods sold and delivered. The jury found a verdict for the plt. for 88L 17s. 6d., the value of the goods supplied.

Coleridge, Q. C. (Griffiths with him) having obtained a rule calling on the plt. to show cause why the verdict should not be set aside and a nonsuit entered, on the ground that the action could not be sustained on the common counts,

Nov. 24.—O'Brien, Serjt. and H. Mathews now showed cause.—The letter of the 17th April was a rescission of the contract, and we treated it so; the original contract that the deft. should order 500L or 600L worth of goods was at an end. The case of *Paul v. Dodd*, 2 C. B. 800, relied on by my friend in moving for the rule, is distinguishable, as that was a contract to supply certain articles, and the plt. had supplied them all, for which he was to be paid by 30L cash and a bill at three months, and it was held that he could not sue till the end of the three months' credit. There one of the parties had performed his part of the contract, but here it was only in process of being performed. I say that the contract was rescinded when the deft. wrote, “I close the order,” and I say further, that when the contract depends on a number of contemporaneous acts, as here, as soon as one portion of the goods had been supplied, the plt. had a right to say, “Pay me the money and give me the bill.” (*Withers v. Reynolds*, 2 B. & Ad. 882.) [ERLE, C.J.—There is a difference between a breach of contract and a rescission, but had the plt. not a right to say to the deft. who had broken his contract, “I elect to take this as a rescission of the contract?” KEATING, J.—I took my direction from a passage in Smith's *Leading Cases (Cutler v. Powell*, 2 Smith, L. C. 4th edit. 16): “And it is further submitted that it is an invariably true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may on doing so immediately sue on a *quantum meruit* for anything that he had done under it previously to the rescission.” I submit that the letter is evidence of an account stated: it amounts to this, “Correct your bill, and I owe you so much.” [KEATING, J.—How do you distinguish the case of *Paul v. Dodd*?] There the contract was complete, the plt. had done all he had to do; here the contract was made up of a series of acts. The question of rescission or no rescission was a proper question for the jury. It is not every branch of contract that would allow the other party to rescind, but it must consist of the non-performance of something essential. In *Franklin v. Miller*, 4 A. & E. 599, it was held that there was only a partial non performance. The deft. here refused to do that which was necessary to enable the

plt. to perform their part of the contract; he refused to inform them what articles he wanted. The refusal to give any more orders was such an essential branch of the contract as to entitle the plt. to rescind (*Lee v. Risdon*, 7 Taunt. 188.) [ERLE, C.J.—A contract cannot be rescinded in part, and it must be done mutually; the question then is, whether the deft., having refused to perform his part, has given the plt. a right to rescind?]

Jan. 11.—Coleridge, Q. C. (Griffiths with him) was now heard in support of the rule. The case has been put quite differently to what it appeared at the trial. The plt.'s wished for further references, after they had supplied some of the goods, and then the deft. wrote, “I shall give you no further orders.” In Chitty on Contracts, 6th edit. 390, it is said, “where by the terms of the contract the goods are to be paid for by bill of exchange or promissory note, or partly in money and partly by bills, and the vendee refuses to give either, it is necessary to declare against him specially for such default, and neither the price of the goods nor the amount of the stipulated cash payment can be recovered on the common counts, until the period of credit has expired.” See also the authorities cited there:

Bigg v. Whisking, 14 C. B. 195;

Paul v. Dodd,

and the cases collected there are quite in point.

ERLE, C. J.—I am of opinion that this rule should be discharged. The plt. and deft. entered into a treaty for the delivery of a large quantity of goods on the terms of payment by half-cash and half by bill at six months, and I treat the whole as one contract. Part of the goods were delivered and the plt. here brought this action for debt for goods sold and delivered. It is clear that he could not bring an action of debt for the half of the money, but I do not rest my judgment on that ground. There was a contract which was in course of performance, and a larger order was a part of the bargain. Then the purchaser says, “I will take no more goods,” and that in my opinion was a rescission of the contract, and the plt. elect to adopt it as a rescission. The authorities are collected in *Cutler v. Powell* and *Hockster v. De la Tour*, 2 El. & Bl. 678. I think that in this case the deft. gave notice that he would have no more goods, and his refusal to go on purchasing gave the plt. a right to rescind the contract, and the contract being rescinded, debt lies for the value of the goods received.

WILLIAMS, WILLES and KEATING, JJ., concurred.

Rule discharged.

Nov. 9 and 25 and Jan. 12.

BENNETT AND ANOTHER v. BENHAM.

Practice—County Court—Concurrent jurisdiction—Appeal from decision of a judge at chambers.

Where one of two plt. in an action which might be brought in a County Court resides more than twenty miles from the deft., the Superior Courts have concurrent jurisdiction with the County Court, and the plt., if they succeed, are entitled to their costs.

Hickie v. Salamo followed.

Upon an appeal to the full court from the decision of a judge at chambers, it is a rule that all documents used at chambers should be laid before the court, but a document which is admitted by both parties to be utterly irrelevant to the matter of dispute need not be produced.

Nov. 9.—Hance obtained a rule calling on the deft. to show cause why the plt. who had obtained a verdict in this action should not have their costs. The action might have been brought in a County Court, but one of the plt. lived more than twenty miles

from the deft., and it was contended that the Superior Court had therefore concurrent jurisdiction with the County Court under 9 & 10 Vict. c. 95, s. 128. A similar application had been made to Willes, J., at chambers, but he had refused to make an order for costs. *Hickie v. Salamo*, Ex. 59, was in the plts.' favour.

Nov. 25.—*Dowdeswell* showed cause, but admitted that he could not distinguish the case from that of *Hickie v. Salamo*. He then objected that this was an appeal from the decision of a judge at chambers, and that all documents which had been laid before him should have been brought before the full court, whereas an affidavit of the deft. which had been used at chambers had not been laid before the court.

Hance, in supporting the rule, submitted that this was not an appeal from a decision at chambers, as the judge had merely indorsed the summons with the words "no order." It was admitted on both sides that the affidavit in question was quite irrelevant to the question in dispute. *Cur. adv. vult.*

Jan. 12.—**ERLE, C. J.** delivered the judgment of the court (**ERLE, C. J., Williams, Byles and Keating, JJ.**).—With respect to the costs in this case, upon the authority of *Hickie v. Salamo*, the plts. are entitled to them. As to the other point, which we took time to consider, it is a rule that, upon an application by way of appeal from the decision of a judge at chambers, all documents laid before him should be laid before the court; but one which was admitted by both sides to be irrelevant to the matter in dispute may be taken to be non-existent, so that all which were really used at chambers have been brought before the court.

Rule absolute.

Wednesday, Jan. 13.

HEATH v. BREWER.

Notice of action—Cab Act—6 & 7 Vict. c. 86, s. 47—Belief—Acting bonâ fide.

To entitle a person to notice of action under the 6 & 7 Vict. c. 86, s. 47, on the ground that he bonâ fide believed that he was entitled under that Act to do what he did, the belief must not only be bonâ fide, but also reasonable, and therefore, where the Act gave the deft., a cab proprietor, power to summon the plt., a cab driver, before a magistrate for any misconduct, and the deft., instead of doing so, made an indorsement on the plt.'s licence which had the effect of depriving the plt. of employment as a cab driver,

Held, that the deft. was not entitled to notice of action, on the ground that he believed that he was putting the law in motion.

The plt. in this action was a cabdriver, and the deft. a cab owner, in whose service the plt. had been. On discharging the plt., the deft. wrote on his licence, "For damaging cab and not bringing home money," the effect of which was, that the plt. could not obtain employment as a cab driver, and he therefore brought this action against the deft. for damaging his licence. At the trial before Byles, J., at the sittings after last term, a verdict was found for the plt. for 20*l.*

Kemp now moved for a rule to set aside this verdict and enter a non-suit, on the ground that the deft. bonâ fide believed that he was entitled to do what he did under the provisions of the 6 & 7 Vict. c. 86, and therefore was entitled to notice of action under the 47th section of that act. By the 21st section of that act it is enacted that "Every proprietor of a hackney-carriage, and of every metropolitan stage-carriage who shall permit or employ any licensed person to act as the driver or conductor thereof, shall require to be delivered to him, and shall retain in his possession the licence of such driver or conductor while such driver or conductor remains in his service," &c.; and by

sect. 24, "When any licensed driver or conductor shall leave the service of any proprietor, such proprietor shall, upon demand thereof, return to him his licence: provided always that if the said proprietor shall have any complaint against the said driver or conductor, it shall be lawful for such proprietor to retain the licence for any time not exceeding twenty-four hours after the demand thereof, and within that time to apply to the police-court of the district in which the said proprietor shall dwell, &c., for a summons against him," &c.; and by sect. 47, "All actions and prosecutions which shall be brought or commenced against any person for anything done under the authority of this act, or of such orders or regulations as aforesaid, shall be commenced and prosecuted within three calendar months next after the fact committed and not afterwards . . . and notice in writing of such action and of the cause thereof shall be given to the deft. one calendar month at least before the commencement of the action, &c." It was now contended that the deft. was entitled to notice of action under this section, on the ground that he bonâ fide believed that he had a right to indorse the licence of the plt. without summoning him before a magistrate, under the 24th section. [**ERLE, C. J.**—The belief must be a rational belief. **WILLIAMS, J.**—The rule has been laid down that he must believe facts which, if they were true, would justify him.]

ERLE, C. J.—I am of opinion that there should be no rule. The cab-owner had indorsed on the licence words which would deprive the plt. of his profits as a cab-driver, and this action is brought for damaging the plt.'s licence. Then it is said that the deft. was entitled to notice of action, on the ground that he had done this thinking that he was acting in pursuance of the Act of Parliament. Now can it be said that the deft. honestly believed that he was acting within the provisions of the statute? I think that the law on this subject is very clearly laid down by my brother Williams in the case of *Hermann v. Seneschal*, 13 C. B., N. S., 393. The only thing that would bring the deft. within the rule there laid down, would be that he honestly believed that he was a magistrate, or that the indorsement of a magistrate was a superfluity, and that he had a right to be a judge in his own cause. There is nothing in the statute which says that, and I think this rule ought to be refused.

WILLIAMS, WILLES and KEATING, JJ., concurred.

Rule refused.

Thursday, Jan. 14.

COLE v. MEEK.

Charter-party—Full and complete cargo—Broken stowage.

The deft., by charter-party, bound himself to ship on board the plt.'s ship a full and complete cargo of sugar and (or) other lawful produce. Certain rates of freight were specified in the charter-party for sugar, rum and timber, and then followed the words, "Other goods, if any be shipped, to pay in proportion to the foregoing rates, except what may be shipped for broken stowage, which shall pay as customary." The deft. shipped as much timber as the vessel would carry, but did not fill up the interstices between the logs with broken stowage, of which the vessel would have carried 30 tons, in addition to the timber on board:

Held, that broken stowage being produce contemplated by the parties, and the shipowner being bound to receive it, and it being impossible to fill a ship loaded with timber without broken stowage, the charterer was bound to provide it, and that he had not shipped a full and complete cargo within the terms of the charter-party.

Moorsom v. Page distinguished.

C. B.]

DAY v. VINSON.

[Ex.]

Action brought upon a charter-party entered into at Liverpool on the 24th July 1861, between George Cole, of Bristol (the plt.), owner of the ship *Ina*, registered tonnage 258 tons, then in Liverpool, and John Meek, of Liverpool (the deft.), charterer.

The following were the material parts of the charter-party:—

"It is mutually agreed that the said vessel, being now staunch, strong, and in every respect fitted for the voyage, shall immediately be made ready in any dock charterer may name in the river Mersey, and there load a full and complete cargo of coals, and (or) other lawful merchandise, the vessel being guaranteed to carry at least 375 tons of dead weight if required; and being so loaded and despatched shall immediately proceed to Havana and discharge the same, agreeably to bills of lading; after which she shall again be made ready, and there and (or) at one or other usual loading places in the island, as ordered, load, from the agents of the said charterer, a full and complete cargo of sugar and (or) other lawful produce which the said charterer binds himself to ship (not exceeding what the vessel can reasonably stow and carry over and above her cabin tackle, provisions and furniture), and being so loaded shall therewith proceed to Cowes for orders (unless ordered direct on signing bills of lading), to discharge at a safe port in the United Kingdom, or on the continent between Cronstadt and Havre, both inclusive, or in the Mediterranean or Bosphorus, and being arrived at the port as ordered, shall there deliver the said cargo to the charterer or his agents, according to bills of lading."

Certain rates of freight were specified to be paid by the charterer to the owner for the round voyage to a port in the Baltic, elsewhere on the continent, or to the Mediterranean, "for sugar and molasses, per ton of, &c.; the same rates for rum per liquid tun, and load for timber; other goods, if any be shipped, to pay in proportion to the foregoing rates, except what may be shipped for broken stowage, which shall pay as customary." "If timber be shipped, the quantity of Sabina not to exceed 60 tons, to be taken through the vessel's hatchway." The first count of the declaration, after setting out the material parts of the charter-party, alleged three breaches of the charter-party, viz., nonpayment of freight, loading a short and incomplete cargo, and, thirdly, loading a cargo of timber of unreasonable and improper dimensions and sizes for the ship, without providing broken stowage for the same, although broken stowage was necessary for the due and proper shipment of such cargo. It further alleged loss of freight sustained by the plt. in consequence of a full cargo not being loaded on board. There were also *indebitatus* counts for freight and demurrage.

The deft. paid into court 145*l.*, and denied the second and third breaches of the charter-party.

At the trial before Erle, C.J., at the sittings in London after last term, it was arranged that the matters of account should be referred, and the only question left to the jury was, whether or not the deft. had loaded a full and complete cargo for the homeward voyage, within the meaning of the charter-party. The deft. had shipped timber, and it was admitted that he had shipped as much timber as the vessel would carry, but the interstices between the logs might have been filled up by other produce, and the ship would have carried thirty tons of broken stowage if this had been done. The deft. contended that it was optional with him to ship "broken stowage" or not, and that he was not bound to do so under the charter-party, the construction of which was for the judge. There was evidence that express contracts that vessels should be filled up with broken stowage were frequently inserted in charter-parties. Erle, C.J. left it to the jury to say whether the deft. had loaded a

full and complete cargo, and they found in favour of the plt., with damages 56*l.* 5*s.*

Karslake, Q. C. (*F. M. White* with him) now moved, pursuant to leave reserved, to enter a verdict for the deft. on the ground that there was no question to go to the jury, or for a new trial on the ground that the finding of the jury was against the weight of evidence. Both the shipowner and the charterer are interested in limiting the amount of broken stowage, the former because it only pays half freight, and the latter because he has difficulty in obtaining it. In Havana it cannot be got. The deft. did provide a full and complete cargo:

Moorsom v. Page, 4 Camp. 103;

Irving v. Clegg, 1 Bing. N. C. 53.

ERLE, C.J.—This question was for the jury, and I am not dissatisfied with their verdict. If it was for the court, I agree with the jury that the plt. is entitled to sustain his claim. The charterer had the option of putting in any cargo that he pleased, but he was bound to fill the ship, and if he shipped a cargo which would not fill the ship without broken stowage he was bound to provide broken stowage. The shipowner was under an obligation to receive it, and there must have been a correlative obligation on the deft.'s part to supply so much as would render the cargo a complete one.

WILLIAMS, J. concurred.

WILLES, J.—I also concur, but I wish to point out that our decision is not in conflict with that of Lord Ellenborough in *Moorsom v. Page*. In that case the vessel was filled with tallow, together with as much ballast as was necessary for a complete cargo of tallow. The contention of the shipowner was, that some of the ballast ought to have been taken out and its place supplied by copper, one of the articles which the charterer was entitled to ship, for which the owner would have received freight. But the charterer there was entitled to ship a complete cargo of tallow, and the fact that, if he had loaded the ship in some other way the owner would have received more freight, did not render it compulsory upon him to do so. Here broken stowage was part of the produce contemplated. The owner was bound to receive it, and there is nothing in the charter-party to show that the obligation was not intended to be correlative.

KEATING, J. concurred.

Rule refused.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Tuesday, Jan. 12.

DAY (Administrator, &c.) v. VINSON.

Setting aside order of judge—Practice.

Before the court will entertain an application for a rule to set aside an order of a judge made on an ex parte statement, application must be made to the judge himself, giving him the opportunity of amending his own order, if he thinks fit to do so, after hearing both sides.

Kingdon, on the part of the deft., moved for a rule to set aside a certificate granted by Erle, C.J., on the ground of irregularity in not having been granted at the trial in conformity with the C. L. P. A. 1852, sect. 117. The plt. having, when called upon for that purpose, declined to admit a certain document, and having neglected to procure a certificate from Erle, C.J., at the trial, under sect. 117 of the Act, subsequently, upon taxation of costs, applied *ex parte* to the learned judge for and obtained such certificate, which it was contended was irregular. [POLLOCK, C.B.—Should you not in the first instance apply to the learned judge?] The result of such an application might be that the order would be sustained,

[Ex.]

STAPLETON v. HAYMEN AND ANOTHER.

[Ex.]

and then the plt. would have to apply to the court afterwards, thus incurring a double expense.

POLLOCK, C.B.—If the certificate which has been granted be irregular, it is to be presumed that Erle, C.J., on application, will set it aside. We cannot entertain an application to review or set aside an order made by a judge on an *ex parte* statement, before an opportunity has been given to the judge, by an application to him for that purpose, to amend his own order, if he think fits so to do after hearing both sides.

Attorneys for defts., *Clarke, Son and Rawlins*, 29, Coleman-street, E.C., agents for *Buss*, Bideford.

The rest of the Court (MARTIN, CHANNELL and FIGOTT, BB.) concurred. Rule refused.

STAPLETON v. HAYMEN AND ANOTHER
(Assignees, &c.)

Merchant Shipping Act, 17 & 18 Vict. c. 96—*Transfer under sect. 55*—*Infant purchaser*—*Equitable rights in vessels under 25 & 26 Vict. c. 63*, s. 3.

The transfer of a vessel by a bill of sale, under sect. 55 of the Merchant Shipping Act, 17 & 18 Vict. c. 96, to a bona fide purchaser for value, vests the property in such vessel in the transferee from the moment of its execution, and gives him a good title in an action of trespass against the assignees of his vendor for seizing and selling the vessel under the bankruptcy of the latter, although, until registration of the transfer under sect. 57, the transferee could not have transferred the vessel to a purchaser from himself.

On the purchase of a vessel by a person under twenty-one years of age, the vendor becomes a trustee in equity for the purchaser, until the latter, on coming of age, is enabled to make the declaration of ownership required by sect. 38 of the 17 & 18 Vict. c. 96, previously to registering the vessel in his own name; and sect. 3 of the Merchant Shipping Amendment Act, 25 & 26 Vict. c. 63, expressly recognizes and gives effect to such equitable rights, and enables them to be enforced.

The Liverpool Borough Bank v. Turner (3 L. T. Rep. N. S. 84; 29 L. J. 827, Ch., Wood, V. C.; confirmed on appeal to Lord Campbell, L. C., 3 L. T. Rep. N. S. 494; 30 L. J. 379, Ch.) discussed.

Declaration.—For that defts. converted to their own use the goods of plt., that is to say, a sailing barge, sails, ropes, rigging, &c., whereby plt. was deprived of the profits and earnings of the said barge, and was prevented from carrying on his trade of a bargeman for a long time, and was and is thrown out of employment and greatly impoverished. Plt. claims 500*l*.

Pleas:—1. (By stat. B. L. C. A. 1849, s. 125), not guilty. 2. That the goods were not the plt.'s as alleged. Issue thereon.

This was an action brought by plt. against defts. as assignees of one Attwater, a bankrupt. At the trial before Martin, B., at Guildhall, at the sittings after Trinity Term last, it appeared that on the 29th April 1862, plt., then under twenty-one years of age, bought the barge in question of Attwater, the then owner, for 100*l*, and a bill of sale for the transfer of the barge from Attwater to plt. was duly prepared and executed and the money paid by plt. to Attwater. Plt.'s evidence as to the transaction, and which was not contradicted or disputed, was as follows:—"I was not twenty-one when I took the bill of sale. I went with Attwater to the Custom-house. I told them my age. I left my papers and the bill of sale at the Custom-house. I went there several times afterwards. I could not get the certificate. They told me no one could touch my property. They gave me back the bill of sale, and said no one could interfere with my prop-

erty. They said they could not give me my certificate before I was of age. I came of age on 3rd Sept. 1862." Being unable to get the barge registered in his own name by reason of his being unable to make the declaration required by the Act owing to his infancy, plt. continued in possession and use of the barge under the registry of it in Attwater's name.

On the 17th July, after the transfer to plt., Attwater became bankrupt, and defts. were appointed assignees, and the proceedings were subsequently transferred to the County Court of Kent, at Sheerness, under sect. 109 of the B. A. 1861.

The assignees having subsequently discovered that the barge was still registered in the bankrupt's name, they caused it, together with the sails, rigging, and fittings, &c., to be seized by the bailiffs of the County Court under a warrant of seizure, authorising the seizure of the goods of Attwater wherever the same might be. The seizure was made on the 6th Nov. 1862, and on the 28th of the same month it was sold by auction for 77*l*. Prior to the sale by auction the barge was registered in the name of the assignees, but it was not clearly proved whether or not such registration took place before or after the seizure on the 6th Nov. Subsequently to his purchase of the barge, plt. had bought a new mainsail, for which he had paid 20*l*. This was seized and sold with the other fittings. The *bona fides* of the purchase by plt., and of his proceedings throughout, was not questioned. Upon these facts a verdict was found for plt. for 120*l*. damages, leave being reserved to the defts. to move to reduce the damages to 20*l*.; plt. having contended at the trial that in any event he was entitled to a verdict for 20*l*., the price of the mainsail.

A rule having been obtained for that purpose, on the ground that plt. was not the legal owner of the barge,

Joyce (with him Gibbons) now showed cause on the part of the plt. against it.—The question is, whether the assignees are the true owners, because, as against any but the true owner, plt. (as in possession) must be taken to be the true owner. But it is insisted that plt. is the true owner within the statute. *Boyson v. Gibson*, 4 C. B. 121; 16 L. J., N. S., 147, C. P., which will be relied on contra, is an extreme case, and moreover does not apply, being on a repealed statute (the 3 & 4 Will. 4, c. 55), and one very different from the Merchant Shipping Act, 17 & 18 Vict. c. 104. All that was necessary to keeping up the national character of the vessel might be done without going the length of that case. By the Act of 3 & 4 Will. 4, the transfer of a ship was invalid for every purpose unless it was registered. But that is not so by the Act of 1854 (sect. 18). There is nothing, it is submitted, in the present Act, which says that a transfer by an unregistered bill of sale shall be invalid. By sect. 38, the owner is to make a declaration according to the requirements of that section, which declaration the plt. could not make until he was of age. Sect. 55 enacts what are to be the necessary requisites to a transfer, namely, a bill of sale containing a certain description:—and on the execution of such bill of sale the property it is contended would pass. Beyond giving the privilege of a British ship, registration is nothing in the present case. All the requisites of sect. 55 have been complied with. [CHANNELL, B.—Sect. 57 will be a difficulty in the way of your construction. MARTIN, B. refers to and reads plt.'s evidence of what took place on his leaving the papers at the Custom-house.] Sect. 99 assumes that infancy would prevent a person "doing anything required by the statute," and contemplates the infant getting some person to act for him, and until that is done the vendor, the original registered owner, remains on the register, and is a trustee for the infant. The case of *Duncan v. Tindall*, 13 C. B. 258; 22 L. J., N. S., 137, C. P., cited contra, has not much bearing on the case.

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[The *Solicitor-General*, contra, referred to *The Liverpool Borough Bank v. Turner*, 29 L. J. 827, Ch., Wood, V. C.; 3 L. T. Rep. N. S. 84, confirmed on appeal to Lord Campbell, L. C., 3 L. T. Rep. N. S. 494; 30 L. J. 379, Ch. MARTIN, B. referred to *Hughes v. Morris*, 21 L. J. N. S., 761, Ch.; 9 Hare, 636; 2 De G. M. & G. 349.] Since and in consequence of the case of the *Liverpool Bank v. Turner*, which was in 1860, the Merchant Shipping Amendment Act, 25 & 26 Vict. c. 63, has been passed, which, by sect. 3, lets in equitable interests. If the legal estate in the barge was not in plt. until completion of the registration by the bankrupt, it was a mere equity, and as such did not pass to the assignees. Plt. being incapable, and having no guardian, then, till one was appointed under sect. 99, the bankrupt was trustee for the purpose of protecting him, and it was a trust enforceable in equity. It was like the case of *Dixon v. Ewart*, 3 Mer. 322. The property either passed to plt., or it was a trust in the bankrupt for plt.'s benefit, and no property passed to the assignees. [MARTIN, B.—On the transfer by the bill of sale under sect. 55, the property passed out of the bankrupt, and nothing passed to the assignees. The debts must say they have a better title than the plt., or they fail.]

The *Solicitor-General* and F. J. Smith contra, in support of their rule.—The case raises the important question, whether the policy of the Legislature for a hundred years, that registry shall be evidence of the legal ownership of a ship, is to be departed from. In *Ex parte Yallop*, 15 Ves. 60, Lord Eldon comments on the policy and decides in conformity with the view contended for by debts. *Boyson v. Gibson* was on the 3 & 4 Will. 4, c. 55, which contained negative words (sects. 31, 34, 35). Does the absence of negative words in the present statute make all the difference? The judgment of Lord Campbell in *The Liverpool Borough Bank v. Turner* (*ubi sup.*) is most important, as pointing to registry. [MARTIN, B.—In reality, that case does not apply to the present case at all. The point there decided has no bearing here. If you read the letter on which the decision in that case turns, you will see no other conclusion could have been come to; it could not be contended that that letter was "in the form I."] It may be conceded that it was not necessary to decide the precise question there; but it is clear that both Lord Campbell and Wood, V. C. considered the whole bearing of the case as involving the larger question, as to whether the policy of the Legislature was changed, &c., and their opinions that it was not changed are entitled to great weight. There can be no dealing with a ship unless it be registered, and all the arguments in that case are founded on that proposition, and the V. C.'s judgment decides in effect that no transfer shall be valid unless registered. Registration is the only evidence of ownership. As to Atwater being a trustee for plt. till registration, that is not so; a trusteeship is not recognised in the sale of a ship. *Hughes v. Morris*, and the judgments of Knight Bruce, L. J. and Lord Cranworth (*ubi sup.*), contradict Mr. Joyce's proposition in that respect. A cautious purchaser would meet and settle at the registry office. [POLLOCK, C. B.—Your view would paralyse all the commerce of the country.] Sects. 58 and 59 relate to a transfer in case of bankruptcy. No doubt the owner of an unregistered ship, in the case put by Martin, B., could bring an action on a policy, because being in possession he would have title against third parties; but here there is a question of title between two parties, and whether the equitable title is good against the parties having the legal estate. They commented on the cases cited contra, and cited also *Ex parte Mathews*, 2 Ves. 272. [MARTIN, B.—Sect. 3 of the last Act (25 & 26 Vict. c. 63), which lets in equitable interests, settles the question.]

POLLOCK, C. B.—We are all, I believe, agreed that the debts' rule to reduce the damages in this case to 20l. must be discharged. Before the passing of the last statute (the 25 & 26 Vict. c. 63) there would have been some ground for the arguments which have been urged by the learned counsel for the debts, that in case of the transfer of a ship the legal ownership alone is to be looked at. But since the case which has been cited, of the *Liverpool Borough Bank v. Turner*, and for the very reason that persons might be defrauded by not getting possession of ships for the purchase of which they had paid their money, through the vendors' becoming bankrupt, the Legislature passed the statute of 25 & 26 Vict. c. 63, expressly recognising and giving effect, by the 3rd section, to equitable rights arising out of transactions precisely the same as that in the present case. I should be sorry to decide against the very high authority of Lord Campbell or Wood, V. C. without having the fullest ground for it. But the 25 & 26 Vict. c. 63, passed subsequently to their decision, expressly enacts by sect. 3, that "Equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same manner as equities may be enforced against them in respect of any other personal property." Now here the plt. purchased the barge, paid the purchase-money, and took a bill of sale from the vendor, the registered owner, and it was only because of the purchaser being under twenty-one years of age, and so unable to make the requisite declaration under the Act, that the barge was not registered in his name. It was, however, delivered to him and he used it in his business under the original registry in the bankrupt's name, and he was told at the Custom-house that no one could interfere with his property. Under these circumstances I think the bankrupt was a trustee for plt. the infant purchaser, and I have great satisfaction in concurring with the rest of the court in deciding that this rule must be discharged.

MARTIN, B.—I am entirely of the same opinion. So far from our departing from the cases which have been cited in argument by the debts' counsel, I think they were rightly decided. I think the plt. is entitled to have this rule discharged, on two grounds. Apart from the statute 17 & 18 Vict. c. 104, the plt. was, in my opinion, in lawful possession of the barge as against the bankrupt and his assignees, and though by virtue of the 57th section, assuming him to have been of age, he could not have transferred the vessel until registry, yet for the purposes of an action of trespass he had, as being in the lawful possession, a perfectly good title against the debts. The Act is precise that the transfer shall be by a bill of sale (sect. 55), and the moment that instrument was executed, the property in the barge vested, and he became the legal owner of it, although until something else was done he could not have transferred it. He had a lawful title in the ship against all persons having no better title. I apprehend the bankrupt and his assignees, as appearing as owners on the register, might have been entitled, if dealing with a *bonâ fide* purchaser for value, to have given a title, subject only to the operation of the recent Act, recognising equitable rights. But unless the Act of Parliament absolutely and expressly so enacted, it would be contrary to reason and good faith that we should decide in favour of the view urged by the debts' counsel. As to the second ground; supposing that, owing to the purchaser's incapacity during his minority, any thing remained to be done, still the law is that the vendor shall be a trustee for him as the real owner, and then the Act of Parliament applies. The plt. was entitled by virtue of his possession, and the debts had no title. I will add that one cannot help rejoicing that it should be so, and that such a gross and monstrous injustice, if not fraud, as that which the contention of the debts,

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SICHEL v. BORCH.

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had it been successful, would have worked to the plt., should be frustrated.

PIGOTT, B.—I have nothing to add, but that I feel all the satisfaction expressed by my brother Martin in saying that this rule ought to be discharged. (a) *Rule discharged.*

Plt.'s attorney, *Peddell*, 82, Cheapside.

Def'ts.' attorneys, *Sandys and Knott*, 5, Gray's-inn-square, agents for *Hayward*, Rochester.

Wednesday, Jan. 13.

SICHEL v. BORCH.

Action against foreigner—C. L. P. A. 1852, ss. 18 and 19—Cause of action.

An inhabitant and native of Norway drew a bill of exchange there, indorsed it there, and posted it from thence to England, where it was received, accepted, and again indorsed:

Held, in an action in this court by the indorsee against the drawer, the foreigner in Norway, that such a suit was not maintainable, as the whole cause of action within the meaning of the C. L. P. A. 1852, ss. 18 and 19, did not arise within the jurisdiction of the Superior Courts: (Pigott, B. dubitante.)

Sir G. Honyman moved for a rule to set aside the writ of summons, its service, and subsequent proceedings (if any) in this suit, on the ground that the def't. was a foreigner, living in Norway, not liable to be sued in this country, as he was not within the jurisdiction of this court, and the cause of action upon which the present proceedings were instituted arose in Norway. A summons had been obtained for this purpose, and was heard before Bramwell, B. at chambers, when he referred the matter to the court. The action was brought by the plt., a merchant residing in London, against the def't., a merchant residing at Drammen, in Norway, upon a bill of exchange drawn by the def't. in Norway, payable to his order on merchants in London, indorsed by def't. in Norway to the plt., and then sent by def't. in Norway to the plt. in London. The following is a copy of the bill of exchange:—

"Drammen, 15th Nov. 1862.

"For 256*l.* 8*s.* 5*d.* sterling. At four months' date pay this first of exchange (second unpaid) to the order of myself, two hundred fifty-six pounds eight shillings fivepence sterling, value in myself, and place it to account for cargo of the *Hamlet*, as advised by

"JACOB BORCH.

"To Messrs. Kirkup and Co.,

"Sunderland, payable London. Payable at Barclay and Co., London. "C. KIRKUP and Co."

(Crossed, "Payable at Barclay and Co., London. C. Kirkup and Co.")

(Indorsed, "Order Messrs Henry Dresser and Co., value in account.

"HENRY DRESSER and Co.

"JACOB BORCH.")

Def't. wrote this letter, dated 16th Nov. 1862, and sent it with the bill to Mr. Dresser, the first indorsee in London:—

"By the present I beg to hand you 256*l.* 8*s.* 5*d.*, 4/ on D. C. Kirkup and Co., Sunderland, against which I valued on you.—Yours truly,

"JACOB BORCH."

So that the bill was drawn, indorsed and given in Norway. The writ was personally served on the 17th Nov. last, twenty-five days being limited for the def't.'s appearing thereto, which did not expire until the 13th Jan. instant, and no appearance had as yet been entered. The def't.'s agent and correspondent in London, a ship and insurance broker, made an affidavit to the effect that the def't. is a merchant residing and carrying on business and domiciled at Drammen, in Nor-

way, is a foreigner, a native of and residing in Norway, and is not a British subject; that this action has been brought against the def't. as drawer of a bill of exchange for 256*l.* 8*s.* 5*d.*; the bill of exchange was drawn by def't. at Drammen, in Norway; that on or about the 19th Nov. last def't. was served at Drammen with notice of action in this cause, &c.; that the deponent was advised and believed that the action was not brought upon any contract made in England, and that the plt. has no cause of action which arose within the jurisdiction of this hon. court against def't., nor in respect of any contract made within the jurisdiction of this court. There was no affidavit on behalf of the plt., so that in Norway it was, and not in England, the cause of action, if any, arose. The C. L. P. A. 1852 (15 & 16 Vict. c. 76) s. 18, enacts, "In case any def't., being a British subject, is residing out of the jurisdiction of the Superior Courts in any place except in Scotland or Ireland, it shall be lawful for the plt. to issue a writ of summons in the form contained in the schedule (A) to this Act annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said Superior Courts, and the time for appearance by the def't. to such writ shall be regulated by the distance from England of the place where the def't. is residing, and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction, &c., or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plt. shall be at liberty to proceed in the action in such manner as to such court or judge may seem fit, &c. By sect. 19: "In any action against a person residing out of the jurisdiction of the said courts, and not being a British subject resident out of the jurisdiction, save that in lieu of the form of writ of summons in the schedule (A) to this Act annexed marked No. 2, the plt. shall issue a writ of summons according to the form contained in the said schedule A marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the def't. therein mentioned, which notice shall be in the form contained in the schedule also marked No. 3, and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, by leave of the court or a judge, and upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon." The action being against a foreigner residing out of the jurisdiction of the Superior Courts, the plt. must by affidavit satisfy the court that there is a cause of action which arose within the jurisdiction.

A rule nisi having been granted,

Garth, for the plt., showed cause against it in the first instance.—The cause of action comprises two things, the contract, and the breach of such contract. This bill of exchange was by the def't., the drawer, made payable in London, and sent by him to the indorsee in London; it was received by the indorsee in London; the transaction was incomplete until it had been received by the plt. in London and taken as complete. If it had been for too small a sum, for instance, the plt. would have refused it, and the def't.'s merely sending it would have availed nothing. The contract with the indorsee was not complete until it reached the plt. in London. [MARTIN, B.—That may depend upon whether he sent it by a private hand or not; if it were sent through the post-office, the post-office would be treated as the agent for the def't.] There must not only be an indorsement of the bill, but a delivery and reception of it by the indorsee. The assent of the person to whom it was sent was necessary, and that was given in England. It was

(a) CHANKELL, B. left the court to go to chambers during the argument.

accepted in London, and there is no complete indorsement until delivery: (*Marston v. Allen*, 8 M. & W. 494.) In *Buckley v. Ham*, 5 Ex. 43, a bill of exchange was drawn and accepted, and the indorser put his name upon it within the city of London, but it was delivered to the indorsee in the county of Middlesex: it was held that the cause of action did not arise within the city of London. Parke, B. said the statute (the London Small Debts Act) required the cause of action, that is the whole cause of action, to arise in the city; in this case it did not. Until the bill was delivered to the plt., no cause of action arose from the indorsement to him. [MARTIN, B. mentioned *Wetherell v. Langston*, 1 Ex. 634.]

Honyman in reply.—If a debtor remit his creditor a bill of exchange by a conveyance which the creditor directs, or by post, if that be the ordinary way of transmission between them, and the bill be lost or stolen, the loss will fall on the party to whom the bill was intended to be remitted: (Byles on Bills, 354.) Delivery to a postman of a bill of exchange by the drawer in a letter to be forwarded to a creditor, is a delivery of it to the creditor:

Rees v. Lambton, 5 Pri., 428, and other authorities, collected in Byles on Bills, 139.

POWLOCK, C. B.—This was a rule nisi, moved for by Sir G. Honyman and granted, and cause having been shown against it in the first instance by Mr. Girth, I am of opinion that the rule ought to be made absolute. Here is a statute that alters the common law, and the court is bound to give effect to the intention and object of the Act of Parliament, if the words there used will admit of it, and if it is reasonably clear that the statute intended it. If foreigners, residing out of the jurisdiction of our courts, are liable to be served with legal process from these courts, upon showing to us by affidavit that there is a cause of action which arose within the jurisdiction of these courts, we ought first to be perfectly satisfied that there was a good cause of action which arose within the jurisdiction, and to be quite sure that the Act applies, before we allow the proceedings. The cause of action mentioned in the C. L. P. A. 1852, sects. 18 and 19, means, in my judgment, the whole cause of action which has arisen within the jurisdiction, not the mere breach: that alone is not enough; for it is the contract complete which gives rise to that breach. The cause of action—that is, the whole cause of action—was neither entirely in Norway nor in London; but it would be requisite to have evidence of what took place at both. I am not satisfied, therefore, that the whole cause of action arose within the jurisdiction, and the statute does not in my opinion in this case apply.

MARTIN, B.—I am of the same opinion. The question depends upon the 18th and 19th sections of the first C. L. P. A., and the first question is, does the cause of action, which means the whole cause of action, arise within the jurisdiction of these courts? This bill was drawn in Norway by the defts., who lives there and is a native of that place. It was indorsed by him there, and there posted to the indorsee, who received it in London, where it was accepted. I think it very clear that, under these circumstances, the whole cause of action did not arise in England, for the most material part (the indorsement of it) was made in Norway. This is not, I think, within the words of the Act of Parliament, and certainly it is not within the spirit of it.

PIGOTT, B.—I entertain some doubt (I may say considerable doubt) about this question. The Act says, "upon the court or judge being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction." In Mr. Lloyd's book on the Law and Practice of the County Courts, it is said, that if a contract be made in one district which

by its terms is to be performed in another, an action for the breach of such contract may be said to be for a cause of action arising wholly in the last-mentioned district, and it has been held that the venue in such a case might be changed on the ordinary affidavit that the cause of action arose in such district. *Mondel v. Steele*, 8 M. & W. 640, is cited in support of it. But that was merely as to changing the venue. However, I am not disposed to differ from the other members of the court in now making this rule absolute; but it appears to me that the Act is a remedial Act, and should be so construed. It has been said to be hard to compel a foreigner to come over to this country to defend an action, brought against him in these courts, upon a bill of exchange given abroad. It may be so; but it should at the same time, I think, be borne in mind, that he has come here himself, or by his agent, to procure our English merchants' goods, and not paid for them, which is the real grievance complained of. The Act was made in favour of plt., and where the breach of contract is, there, it occurs to me, might well be the remedy.

Rule absolute, without costs.

Plt.'s attorney, *J. Mortimer*, 17, Clifford's-inn.
Def'ts. attorneys, Messrs. *Hollam*, Mincing-lane.

COURT OF PROBATE.

Reported by DR. SWAREY, of Doctors'-commons.

Saturday, Jan. 16.

TWEELS v. CLARKE AND OTHERS (on motion).

Pleading—Leave to introduce new plea—Plea "not the will of deceased"—Practice.

Leave to introduce a new plea after issue joined will not be given unless the affidavit in support of the motion discloses such facts, as if proved in evidence, would warrant the plea.

If at the trial evidence of such facts were to be given, the court would allow a corresponding plea to be added to the record, if it could be done without injury to the other party.

Semble, a plea of "not the will of the deceased" means that the deceased signed the paper in question without intending it to operate as a testamentary instrument; and

Quære, whether the terms of such a plea ought not to be more precise than "that such a paper is not the will of the deceased."

This was a question arising on the pleadings in a testamentary suit. The plt. declared in usual form the will of Esther Cooke. The plea was incapacity.

Dr. Spinks, on behalf of the defts., now moved for leave to add the plea, "that the said paper writing alleged to be the will of the deceased, etc., is not her will." The motion was founded on an affidavit to the effect that, on placing the evidence before counsel to advise on behalf of the defts., he considered that it would be prudent to apply to the court for leave to add such a plea.

Sir J. P. WILDE.—What is now asked can be done at the hearing if the evidence is such as to make the judge think that such an addition would further substantial justice between the parties. The affidavit before the court discloses no such facts as would entitle the party to an amendment of the pleadings now.

Dr. Wambey, on behalf of the plt., objected to the form of the plea proposed, on the ground of its vagueness; that, in fact, it involved every plea that could go to the validity of a testamentary instrument; that in *Cunliffe and Ormerod v. Cross*, 8 L. T. Rep. N.S. 172; 3 Swa. & Tr. 37, where Sir C. Cresswell suggested the adoption of the plea, he seems to limit its meaning to this, that deceased never signed the paper with the intention that it should operate as his

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will; if so, the plea should be *totidem verbis*, as in *Thorncraft and Clark v. Lashmar*, 6 L. T. Rep. N. S. 476; 2 Swa. & Tr. 480. In *Mitchell and Mitchell v. Gard and Kingwell*, 8 L. T. Rep. N. S. 438; 3 Swa. & Tr. 75, the same plea seems to have caused great difficulty, and involved part of the case in considerable obscurity.

Sir J. P. WILDE.—The proper office of the plea no doubt is, to show that though the deceased signed the paper in question, he did so without intending that it should operate as a testamentary instrument. In the present case the whole question will stand over till the trial, for the reason which I have already mentioned. In the meantime I think there is a good deal in what Dr. Wamsey says, as to the vagueness of the plea in the form in which it seems hitherto to have been used.

Attorney for plt., *Grover*.

Attorney for defts., *Risley*.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs.,
Barristers-at-Law.

Dec. 31 and Jan. 9.

(Before Mr. Commissioner GOULBURN.)

Ex parte CURLING, *re* A JUDGMENT-DEBTOR
SUMMONS.

Judgment-debtor summons—Costs.

A judgment-debtor summons will not lie for costs only.

Judgment-debtor summons. The debtor had brought an action against Curling in the Court of Ex. for 110*l.*, in respect of the balance claimed to be due upon a contract. Curling paid 87*l.* into court, which the debtor refused to accept, and the matter was referred to Mr. Petersdorff, who found that the sum paid in was sufficient, whereupon judgment was given to Curling with the subsequently incurred costs. These costs not being paid Curling sued out a judgment-debtor summons under the 76th section of the B. A. 1861, which was returnable on the 31st Dec.

By the 76th section it is enacted that "every judgment-creditor who is or shall be entitled to sue out against a debtor a writ of *capias ad satisfaciendum*, or to charge the debtor in execution in respect of any debt amounting to fifty pounds, exclusive of costs, shall be entitled at the end of one week from the signing of judgment to sue out against the debtor, if a trader . . . and whether he be in custody or not, a summons to be called a judgment-debtor summons, requiring him to appear and be examined respecting his ability to satisfy the debt."

By the 6th General Order of Oct. 1861, every judgment-debtor summons shall be in the form specified in the schedule 4 to the orders annexed.

The form of the summons given in schedule 4 is as follows:—

"These are to will and require you to whom this summons is directed personally to be and appear before the commissioner in attendance in chambers, at the Court of Bankruptcy, in Basinghall-street, in the city of London, on the day of December instant, at eleven o'clock in the forenoon, to be examined respecting your ability to satisfy a debt of 95*l.* 18*s.* 4*d.*, claimed of you by Curling, of upon and by virtue of a judgment of the Court of Exchequer, for the said sum of 95*l.* 18*s.* 4*d.*, recovered by the said

Curling against you on the 25th day of November last, and of which said sum the sum of 95*l.* 18*s.* 4*d.*, exclusive of costs, is sworn to be due from you to the said Curling, and the sum of £ for taxed costs, making together the said sum of £ . . . You are to be examined also for the discovery of property applicable to satisfy the said debt. You are, moreover, to

observe the notice indorsed hereon; and hereto you are not to fail at your peril.

"Given under my hand and the seal of the court the day of in the year of our Lord 1860."

The words in italics in the above form were struck through with a pen in the summons served upon the debtor.

Curling (solicitor) appeared in support of the summons.

Lucas, for the debtor, contended that the summons being exclusively for costs, could not be maintained, the 76th section of the Act requiring that it could only be in respect of a debt of 50*l.* exclusive of costs. The debt having been struck out of the summons, nothing remained but the costs. A sum of money had been paid into court by the creditor, the deft. in the action, whereupon a verdict was given for the deft. with costs accrued subsequently to such payment. For these costs the deft. now sought relief under the 76th section. He asked that the summons should be dismissed.

Curling in reply.—The costs could be levied by writ of execution against the debtor, the plt. in the action. It was therefore a debt within the meaning of the 76th section.

The COMMISSIONER reserved his judgment.

Jan. 9.—Mr. Commissioner GOULBURN.—This was a summons issued by a judgment-creditor, who claimed the benefit of the 76th section of the B. A. 1861, and contended that he was entitled to bring his debtor here for the purpose of examining him touching his estate and effects under the 82nd section, and that if his debtor did not either pay, secure, or compound his debt, an adjudication of bankruptcy should be made against him. It was objected, on behalf of the debtor, that the creditor was not such a judgment-creditor as that pointed to by the statute, as his debt was not a debt amounting to 50*l.* exclusive of costs. The circumstances of the case are rather peculiar. An action was brought against the gentleman who now stands in the position of creditor. Instead of being tried at Nisi Prius, the matter was referred to Mr. Serjt. Petersdorff on the usual terms, namely, that the costs of the cause were to abide the result of the award, and the costs of the arbitration were to be in the discretion of the arbitrator. For the sake of saving expense, the arbitrator was authorised, instead of making a formal award upon a stamp, to make a certificate, and the verdict was to be entered upon his certificate. The deft. entered up his judgment upon the back of the *postea*, whereupon he was entitled to and did sue out a writ of *ca. su.*; so that in one sense he is a judgment-creditor, having perfected his title by making the award a rule of court, and getting a copy of the judgment-roll, which will be placed upon the proceedings. The question is, whether a judgment for costs only is or is not within the meaning and intention of this Act of Parliament. I have given this case much consideration, and undoubtedly my first impression was very strong that it was; for I reasoned thus: those costs when taxed became a debt; an action of debt may be brought upon them; a *ca. sa.* has issued upon them as for a debt; and it appeared to me and those whom I have consulted that in one sense the words of the statute are satisfied, and that the summons has been properly issued as in respect of a debt amounting to 50*l.*, within the meaning of the statute. But it was contended that that could not be so, because the section says that the judgment-creditor is to be a creditor in respect of a debt amounting to 50*l.* exclusive of costs, distinguishing as a separate thing the debt from the costs; and this view, he says, is confirmed by looking at the 5th General Order of Oct. 12, 1861, which says that every creditor applying for a judgment-debtor summons shall file an affidavit of debt, and such affidavit of debt shall be in the form specified in the schedule 3, which follows the

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words of the Act, and states that the person against whom the summons is issued is a debtor in respect of a debt "exclusive of costs." It further appears that the affidavit filed with this summons does not follow the form specified by schedule 3, but omits the words "exclusive of costs." Therefore the affidavit not being in the form specified, furnished another argument in favour of the contention on the part of the debtor. Upon reflection, it has seemed to me that this contention is well founded, because the judgment in this case is not for a debt at all; it is not for costs as a debt, but it is for costs as accessory only to the judgment. The costs are part and parcel of the judgment. They belong to it; but the original judgment is not for costs separately as a debt. The question may be tried in this way: suppose a judgment recovered for a debt under 50*l.*, but the costs (say 20*l.*) being added, make it over 50*l.* If it be right to treat costs when taxed as a debt, they might in such a case be added to the original debt and adjudication be made thereupon. But that cannot be done, as it would be contrary to the Act. Mr. Commissioner Holroyd agrees with me that for certain purposes taxed costs become a debt; an action may be brought for them, and a *ca. sa.* may issue in respect of them; but they cannot be made the subject of an adjudication of bankruptcy. The Act of Parliament, we think, intended to confine the right to make a man a bankrupt to the case of debt above 50*l.*, and to treat the costs as a mere adjunct. That being so, I shall decline to receive this summons.

Lucas asked for costs.

THE COMMISSIONER declined to give them, considering the point he had decided a very doubtful one.

Summons dismissed.

Tuesday, Jan. 12.

(Before Mr. Commissioner HOLROYD.)

Ex parte E. M. BUTLER, re E. M. BUTLER.

12 & 13 Vict. c. 106, s. 112—Discretion of court under—Release from custody—Feme covert—Debts contracted *dum sola*—Separate property—Practice. A *feme sole* having separate property, without power of anticipation, contracted debts and married. Her husband became bankrupt, and having in his accounts included his wife's debts, obtained his order of discharge. Prior to his order of discharge being granted, the wife was arrested at the suit of one of her creditors, and several other detainers were lodged against her. She was then adjudicated a bankrupt by the registrar, who declined to release her from custody. Upon application to a judge at chambers for her release, the Court refused the application, being of opinion that the proper course would be for her to proceed by writ of *audita querela*:

Held, that, under the circumstances, this court ought not to interfere in ordering the bankrupt's release, but that she should be left to her remedy at law.

Seemingly, the discretionary power given by the 112th section of the Consolidation Act 1849, to order a bankrupt's release from custody, ought not to be exercised unless some benefit would thereby accrue to the general body of creditors.

The bankrupt being a married woman having separate estate, and being in custody for debts contracted by her *dum sola*, her husband being also bankrupt, the proceedings under the wife's bankruptcy were ordered to be impounded, and the further prosecution thereof stayed. The husband subsequently obtained his order of discharge:

Held, that the proper course was to rescind the order for impounding and staying the proceedings, and to allow the bankruptcy to proceed down to the last examination.

Release. The bankrupt, whose maiden name was

Eliza Mary Amphlett, was a married woman, having been married to George Butler on the 1st Feb. 1862, previously to which, and whilst a *feme sole*, she had contracted debts to the amount of 1200*l.*, and amongst other with different persons, as under:

With Mr. Jay, the execution-creditor	£60 15 11
Mr. Stanway, a detaining creditor...	119 10 8
Mr. Wickens ditto	28 5 10
Mr. Dixon ditto	28 18 8
The Consolidated Insurance Society,	
ditto	194 16 9

Jay commenced his action against the bankrupt in May 1861, and, having recovered judgment, sued out a *ca. sa.*, under which the bankrupt was arrested on the 29th Oct. 1862, and had continued in custody ever since.

Stanway commenced his action against the bankrupt and her husband in Oct. 1862, and having recovered judgment lodged a detainer against her on the 25th Nov. following.

Wickens' action was brought against the bankrupt alone by her maiden name in April 1859. He recovered judgment, and lodged his detainer on the 25th Nov. 1862.

Dixon's action was also brought against her as a *feme sole*, and his detainer bore date Dec. 15, 1862.

The action by the insurance company was brought against the bankrupt and her husband in Dec. 1862, and the detainer lodged on the 14th Jan. 1863.

The bankrupt's husband was adjudicated a bankrupt upon his own petition on the 22nd Nov. 1862, and in the statement of accounts filed by him in pursuance of the 93rd section of the B. A. 1861 he included the debts contracted by his wife *dum sola*. His order of discharge was granted on the 30th March 1863, but the fees not having been paid, the order was not issued out until the last week in December last. His wife was adjudicated a bankrupt on the 21st Jan. 1863, by the registrar in prison, and on the 24th Feb. an order was made by Mr. Commissioner Holroyd to impound the proceedings and stay all further prosecution of the bankruptcy. The case is reported 7 L. T. Rep. N. S. 866.

The bankrupt was entitled to separate property under the will of her mother Eliza Amphlett. The words of the will relied upon were:—"in case my daughter Eliza Mary Amphlett shall at the time of my death be unmarried, or if being married at the time of my death she shall at any subsequent time become discoverd, and in case of either of the events aforesaid, the said interest, dividends and annual proceeds, if directed to be paid to her, could be personally enjoyed by her, and would not become vested in or payable to some other person or persons, upon trust to pay the said interest, dividends and annual proceeds to my said daughter until she shall be outlawed or declared bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or shall make or enter into any composition with her creditors, or shall assign, charge, or incur, or attempt to charge or assign, or incur the said interest, dividends and annual proceeds, or any part thereof, or shall do or suffer any act or thing whereby the same or some part thereof could not be personally enjoyed by her, then to the trustees for their own use and benefit, but in the event of the said Eliza Mary Amphlett having children by marriage, then in trust for the benefit of such children." But in case my said daughter "shall marry at any time after my death, and the trust hereinbefore declared in favour of my said daughter shall not during any discovery have determined in manner aforesaid," then in trust that the said trustees or the survivor of them shall pay, "during the life of my said daughter, the interest, dividends and annual proceeds of the said trusts-moneys, &c., to my said daughter for her sole

and separate use, independently and exclusively of any husband of my said daughter, and of his debts, control, and engagements, and that her receipts alone shall be discharges for the same, and that she shall not have power to deprive herself of the benefit thereof by sale, mortgage, or otherwise in the way of anticipation."

Linklater (solicitor) appeared for the bankrupt, in support of the application, and submitted that she was entitled to her release under the 112th section of the B. L. C. A. 1849. He contended that her husband having included his wife's debts contracted before marriage in the statement of accounts furnished by him, upon which he had passed his examination and obtained his order of discharge, she was thereby in law released from those debts. Upon the refusal of the registrar to release her, she applied for her release to the Court of Ex., but the application was refused upon the ground that she had separate property applicable to the payment of her debts. The Court of Ex., however, gave her leave to apply by writ of *audita querela*; but, considering that there were five detainers against her, that was equivalent to keeping her in prison to the end of her days. No principle of law was better established than that the debts of a woman contracted before marriage devolved upon the husband. The law had released him, and therefore she was released. There was no good reason why the bankruptcy should not be allowed to proceed, and the order of discharge be granted to her, unless she had been guilty of any of the offences specified in the 159th section of the B. A. 1861. If she possessed any property, or contingent interest in property, it vested by operation of law in the official assignee under the bankruptcy. The court had adjudicated her a bankrupt, by which process all right to property was taken away from her; and yet it had impounded the proceedings, refused to proceed with the bankruptcy and declined to release her from prison. She had no control whatever over the separate property given to her under her mother's will. That as well as the execution of the trusts of the will was entirely with the trustees.

Singood appeared for Mr. Jay, the execution-creditor, in opposition to the application. He contended that the fact of her husband having obtained his order of discharge did not release the bankrupt from her debts contracted before her marriage. It operated only as a release to him of his liability to pay those debts. The creditors wished to know whether she had not received her income every quarter as it became payable, notwithstanding her bankruptcy. The court would not ordinarily, where a married woman had separate property, interpose summarily to release her, unless she gave up her property for equal distribution amongst the creditors. Nothing had been done since the order impounding the proceedings, and the facts remain unaltered in every respect. The court, by causing the proceedings to be impounded, had adopted the more lenient course, to give the bankrupt an opportunity of acting honestly. It might have annulled the bankruptcy. He submitted that the court could not rescind its own order.

Watson (solicitor) opposed the application on behalf of Stanway.

Linklater in reply. He also asked that the court would now receive the bankrupt's surrender.

Mr. Commissioner HOLROYD.—Yes; I think I should now allow the bankrupt to surrender, and for that purpose the proceedings must be discontinued. The question before me is whether, having regard to the circumstances which have occurred since the matter was last before the court, some opportunity has not been afforded to the bankrupt of making a proposal to her creditors, more especially as her husband has since then received his order of discharge. I think the better course now is that the

order for impounding the proceedings be rescinded, and that the proceedings in the bankruptcy be allowed to proceed. As to the second part of the case, I must say that it has always appeared to me that the bankrupt laws ought to be construed beneficially for creditors, independently of the express provisions of any Act of Parliament. Moreover this court would be very slow in interfering with the legal rights of creditors, where those rights have been put in force and expressly sanctioned by a Superior Court. The bankrupt applied for her release to the Court of Ex., but her application was refused, upon the ground that she had separate property available for the payment of her debts. After her husband had obtained his order of discharge, a second application was made to the same Court of Ex., and that court again, upon the authority of *Lockwood v. Salter*, 5 B. & Ad. 303, declined to interfere upon motion. The application on the bankrupt's behalf is reported in 7 L. T. Rep. N. S. 866. But the court intimated that recourse might be had to an *audita querela*. It is said that this is equivalent to telling the applicant she must remain in custody for ever; but I do not think so. Proceedings by writ of *audita querela* are no doubt seldom resorted to, but Best, C. J. and Burrell, J. were of opinion that it was a proceeding neither obsolete nor difficult. It was referred to in the case of *Lockwood v. Salter*, and more recently in this case by Bramwell, B., as a proper course of proceeding under such circumstances. As to the separate property of the bankrupt, were it not for the restraint of anticipation, it might be reached for the benefit of creditors; but it must be remembered that the restraint is of that character which will only last during coverture; and if she survive her husband, this restraint will be removed, and the property may be made available. It appears to me that at present this court ought not to interfere for the release of the bankrupt, nor do I think the discretionary power given to the court by the 112th section of the Consolidation Act 1849 ought to be exercised, unless where a benefit will accrue to the creditors from such release. Here the creditors contend that it is by force of the imprisonment alone that they hope to obtain relief. It may be possible hereafter, when the restraint upon anticipation ceases, to reach the fund through a court of equity, that is, in case she should survive her husband. The best course now is, that the bankruptcy should be proceeded with to the last examination. But I decline to order the bankrupt's release, and must leave her to her remedy in the Court of Ex.

Application refused.

Tuesday, Jan. 19.

(Before Mr. Commissioner HOLROYD.)

Ex parte LEACH, re LEACH.

Amending petition for adjudication.

A petition for adjudication may be amended by adding an additional description, which has been accidentally omitted when the adjudication has not been advertised.

Munns (solicitor) applied, on behalf of the bankrupt, for leave to amend a petition, by adding a former place of residence of the bankrupt which had been accidentally omitted from the description in the petition as filed. Adjudication had taken place, but had not yet been advertised. [The Commissioner.—As an adjudication has taken place I doubt if I have any power to order the amendment.] In the statement of accounts filed the description was right. In the petition the bankrupt was described as "William Leach, of the Robin Hood and Little John, Greenwich, Kent, beer retailer." In the statement of accounts there appeared the necessary supplemental

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description, "late of Kertesbeare, in the county of Devonshire, farmer."

Mr. Commissioner HOLROYD, after some hesitation, expressed his opinion that, as the advertisement had not appeared, the amendment might be made.

Ordered accordingly.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS,
Esqs., Barristers-at-Law.

April 16 and Nov. 23.

RICHARDS v. MORGAN.

Evidence—Depositions in Chancery—Admissibility, in action by a third party.

In replevin for distraining sheep damage feasant, the question raised was whether the locus in quo was the property of B. or of M. To prove the extent of M.'s property, the plt. tendered in evidence two depositions of witnesses used by M. in an equity suit instituted against him by A. in 1842. The suit was to set aside the sale of an estate which A. had sold to M., his solicitor at the time, for an alleged inadequate price. The estate was said by A. to contain the locus in quo. M. gave evidence of its extent, and on that and other grounds M. contended the price was not inadequate, and for the purpose of showing the extent, M. used the two depositions in question. The depositions were taken before commissioners sworn to secrecy, but were published and were accessible to the parties a month before the hearing of the suit. In the present action the plt. claimed through B., and the deft. held under M., but B. was in no way a party or privy to the equity suit of A. v. M.

Held (per Cockburn, C.J. and Crompton, J.), that the depositions were admissible in evidence in this action: (Blackburn, J. dissentiente.)

Replevin for taking plt.'s sheep.

Avowry. That the sheep were damage feasant on a certain close of which the deft. was tenant to William Meyrick. Issue thereon.

At the trial before Wilde, B., at the Glamorganshire Spring Assizes 1862, it appeared that the plt. was tenant to the Marquis of Bute, and the deft. held under William Meyrick, and the question in dispute was whether the locus in quo, a mountain tract called Ysgwyddgwyn, was the freehold of William Meyrick, who was the real deft., or was the property of the Marquis of Bute, the lord of the manor in which the locus in quo is situate, the real plt. in the action.

The counsel for the plt., for the purpose of showing the measurement of Meyrick's estate, and that the locus in quo formed no part of it, put in evidence the answer of William Meyrick in a suit in Chancery instituted against him by Lewis Edwards in 1842, and also the bill in equity to which it was pleaded. The suit was to set aside the purchase by Meyrick from Edwards of the estate of which it was now alleged by Meyrick that the locus in quo formed part on the ground that Meyrick had taken advantage of his position as Edwards' attorney to obtain it for much less than its real value. Meyrick, in his answer, detailed the circumstances connected with Edwards' proposal that he should become the purchaser of the estate, and averred that, immediately after such proposal, "the deft. sent to Henry Harries, who recently had been the tenant of the said two farms (Tyr Twppa and Ysgwyddgwyn), and had occupied the same as such tenant for some years then last past, together with the lands of the said Marquis of Bute, intermixed therewith, which he held under one taking at a gross rent, and inquired from him what was the value of the said two farms, and the said Henry Harries informed the deft. that he considered the yearly value thereof under

his taking from the plt. amounted to the sum of 63*l.*, and that, in his judgment, that sum was the fair and full value of the said two farms." The plt.'s counsel also tendered in evidence the depositions of two witnesses, Henry Harries and Francis Morgan, taken in the suit under the old system in Chancery by commissioners sworn to secrecy. It was proved that the practice was, that publication of depositions so taken was made a month before the hearing of the cause, and both parties then had access to the depositions, and that neither party was bound to use, at the hearing of the suit, the deposition of any witness unless he pleased. It was also proved that Meyrick's counsel, at the hearing of the cause of *Edwards v. Meyrick*, read and used as evidence for him the above two depositions.

It was now objected that the depositions were inadmissible in this action, but the learned Baron overruled this objection, and admitted them in evidence.

The material parts of these depositions are as follows:—

Henry Harries deposed:—I have known the said farms called Ysgwyddgwyn and Tyr Twppa for forty years. I was in the occupation thereof as lessee for a term of fourteen years, from Feb. 1818 to Feb. 1823, under the complainant (Lewis Edwards) as lessee thereof. In Feb. 1823 the lease determined. I held the said farms, called Ysgwyddgwyn and Tyr Twppa, in conjunction with a farm called Gwern Dwyn, containing about 109 acres, also held by me under the complainant (Lewis Edwards), who held the same under a lease for lives under the Marquis of Bute, and I paid for the whole of such two farms, and such other lands, the yearly rent of 105*l.* The said complainant offered me the two last-mentioned farms, just before I left them in 1823, at the yearly rent of 63*l.*, which offer I refused, because the Marquis of Bute refused to allow his farm to be occupied in conjunction with the said two farms of the complainant, and it did not suit me to rent those two farms without.

Francis Morgan deposed:—I know the said farms and lands called Tyr Twppa and Ysgwyddgwyn, and I have known them well for nineteen or twenty years, and I lived in the immediate neighbourhood of them previously. I became tenant of the said farms in the year 1831 under the deft. (Meyrick), and have since continued the tenant thereof to the present time. The rent from the year 1831 up to about a year ago was 90*l.* per annum, when the same was reduced to 80*l.* per annum, but in consequence of my complaining every year to the deft. of the dearth of the farm, and my threatening to give it up to the said deft., the deft. (Meyrick) made me allowances varying from 5*l.* to 8*l.* in each year for the dearth of the farm, and in consideration for the improvement I made to it. The total extent of the said farm is, I believe, 135 acres, and consists of about 30 chain acres of arable land, about 30 chain acres of meadow, and the rest consisting of pasture, woodland and rough land, the exact proportion of which I am unable to state. In my opinion, the full and fair value of the said farms at rack-rent, without any deductions or allowances whatsoever, is 70*l.* per annum, and I have often told my master the deft. and had hoped by this time he would have reduced the rent to that sum.

The verdict passed for the plt.

A rule nisi for a new trial having been obtained on the ground of the improper admission in evidence of the above depositions,

W. M. James, Q.C. (of the Chancery bar) *Toulson* and T. Allen showed cause.—The depositions were properly admitted. It is established that an affidavit used by a party in any matter can be afterwards used against such party in any other matter by any person producing that affidavit. The oral testimony of a witness at Nisi Prius cannot be used against the

party calling him in any other matter. Depositions in Chancery are like affidavits, and are *prima facie* evidence against the party using them of the facts contained in them. The party may rebut such evidence, but having used it deliberately in an equity suit it is admissible against him on a subsequent occasion. The cases in which depositions in Chancery have been held inadmissible proceeded on an erroneous view of the practice in Chancery. The correct practice is that proved at the trial :

2 Daniel's Ch. Prac. 623, edit. 1840 ;

3 Daniel's Ch. Prac. 824 ;

Smith v. Bates, 5 Sim. 391 ;

Wilson v. Culvert, 5 Sim. 194 ;

Rushworth v. Countess of Pembroke, Hard. 472 ;

Brickell v. Hulse, 7 A. & E. 454 ;

Gardner v. Moulit, 10 A. & E. 464 ;

Atkyns v. Humphreys, 1 Moo. & R. 523 ;

Borlase v. Rutlin, 2 Ex. 665 ;

Grant v. Jackson, Peake N. P. 268 ;

Prichard v. Bagshawe, 11 C. B. 459 ;

White v. Dowling, 8 Ir. Law Rep. 128 ;

Taylor on Evidence, s. 691.

Grove, Q.C., Giffard and G. B. Hughes supported the rule.—The depositions were inadmissible. The cases in which depositions have been held admissible are, where the parties against whom they have been received are the parties who made the depositions. No doubt a party may so conduct a suit or other proceeding as to make a deposition or affidavit or evidence used therein admissible against him on future occasions, as in

Brickell v. Hulse, *supra* ;

Gardner v. Moulit, *supra* ;

Chambers v. Bernasconi, 1 C. M. & R. 347.

But the conduct of counsel in a cause electing to make use of such evidence does not bind the client as to future litigation :

Blackstone v. Wilson, 26 L. J. 230, Ex. ;

Atkyns v. Humphreys, *supra* ;

Doe v. Earl of Derby, 1 A. & E. 783 ;

Gilbert on Evidence, 55 ;

Taylor on Evidence, s. 709.

Cur. adv. vult.

Nov. 22.—BLACKBURN, J.—This was an action of replevin for taking the plt.'s sheep on a mountain called Tarren Ysgwyddwyn. The deft. avowed for damage feasant in the *locus in quo* averred to be held by the deft. as tenant under William Meyrick, who had the fee. On this avowry issue was taken. On the trial before my brother Wilde, the question raised was, whether the *locus in quo* was part of the freehold of W. Meyrick, who defended the action in the name of his tenant, or part of the freehold of the Marquis of Bute, who is lord of the manor within which the *locus in quo* lies, and who was the real plt., though not so named in the record. The counsel for the Marquis of Bute tendered in evidence the answer of William Meyrick (the landlord of the deft. on the record, and who was now actually defending the action in his tenant's name) in a suit in Chancery, in which one Lewis Edwards was plt. and William Meyrick deft., and also two depositions taken in that suit ; the answer was admitted to be evidence, and the bill was read without objection, as explanatory of the answer, and showing the nature of the suit. From this it appeared that Lewis Edwards sought to set aside the purchase from him by Meyrick, in 1825, of the property of which it was now alleged that the *locus in quo* formed part on the ground of Meyrick having been his solicitor, and having taken advantage of that situation. It was charged in the bill, that the full value was not given for the estate. Two depositions in the suit taken in 1842 were tendered in evidence, and were objected to. It was admitted that the depositions were taken upon the old system in Chancery by

commissioners sworn to secrecy. It was proved that publication passed a month before the hearing of the cause, and that after publication both parties had access to the depositions ; that, according to the then practice in Chancery, a party was not bound to read at the hearing or use the evidence of any witness unless he pleased ; and it was also proved that Meyrick's counsel, at the hearing of the cause of *Edwards v. Meyrick*, read and used as evidence for him the two depositions now tendered on behalf of the Marquis of Bute against Meyrick, as being the deft. in substance in the present action. There was no privy whatever between either the Marquis of Bute or the plt. on the record and Lewis Edwards, the plt. in the Chancery suit ; but it was contended that the using of those depositions on behalf of Meyrick was an admission of their truth, and that they thus became admissible as against him for any one. The depositions were received in evidence and read subject to the objection. The first was a deposition of a witness, F. Morgan, who, at the time he gave the evidence, was a tenant of the farm under Meyrick. The object of his testimony was to show that the farm was of but little value. In the course of it he mentioned the acreage of the farm, which was such as to show that he did not include in his holding the extensive mountain track forming the *locus in quo*. The other deposition was that of Henry Harries, who had formerly been tenant of the same farm, but who at the time when he made the deposition had no interest in the estate in any way. His evidence, though much less explicit on this point than Morgan's, might have led the jury to draw the conclusion that when he occupied the farm he did not hold the *locus in quo* as part of it. The verdict passed for the plt. A rule nisi for a new trial, on the ground of the improper reception of evidence, was obtained, which was argued in the course of Easter Term, 1862, before my Lord, my brother Crompton and myself. The argument was entirely confined to the question whether the deposition of Henry Harries was properly received in evidence or not ; and rightly so, for if it was improperly received, the deft. was entitled to a new trial, and it was therefore unnecessary to consider whether there was any special ground on which the deposition of F. Morgan could have been received. It was not contended that Harries' deposition could be received as being a declaration against his interest, or on any other ground whatsoever, except that it had been used on behalf of Meyrick as evidence in the suit of *Edwards v. Meyrick*, the effect of which was, it was contended, to make it evidence against Meyrick for every purpose as an admission, by conduct, of the truth of the statement contained in the deposition. The deft.'s counsel, on the argument, said that there was no case in which the deposition of a witness, whether taken in Chancery or under a commission in a suit at law, had ever been admitted as evidence for a person who was neither party nor privy to the suit ; that depositions in Chancery had been rejected in the time of Charles II., in *Rushworth v. The Countess of Pembroke*, 1 Hard. 472 ; and again by Tindal, C. J., in *Atkyns v. Humphreys*, 1 Moo. & R. 523 ; and that during that long interval it had always been considered to be the law that depositions could not be given in evidence against any one who was not party or privy to the suit, and could not be evidence for any one who was not a party or privy to it, for reasons most forcibly given in Gilbert on Evidence, p. 55. Chief Baron Gilbert there says : " A man shall never take advantage of a deposition that was not a party to the suit ; for if he cannot be prejudiced by the deposition he shall never receive any advantage from it ; for this would create the greatest mischief that can be, for then a man that never was a party to the Chancery proceedings might use against his adversary all the depositions that made against him, and he in his own advantage could not use the

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depositions that made for him; because the other party, not being concerned in the suit, had not the liberty to cross-examine, and therefore cannot be encountered with any deposition out of the same." All this was not denied by the counsel for the plt., but they said it had application only to depositions used in the original suit against a party, and sought to be made evidence against him, because taken upon oath and subject to cross-examination, and that this written evidence was admissible, not because it was on oath and subject to cross-examination, but because it had been used and read by Meyrick's counsel, which it was said made it evidence against him to the same extent and on the same principle as if there had been evidence that Meyrick had himself said, "I have read Harries' deposition; it is every word of it correct." For this reliance was placed on the cases of *Brickell v. Hulse*, 7 A. & E. 455, and *Gardner v. Moul*, 10 A. & E. 464. In *Brickell v. Hulse* the question at the trial appears to have been whether there was legal evidence that White, who had seized the goods of the plt., was the bailiff of the deft. the high sheriff. To connect White with the deft., the plt. proved that in the vacation the deft. applied to a judge at chambers to extend the time for returning the writ in order that an application might be made in term time under the Interpleader Act; that the time was extended accordingly; and that on that application at chambers the deft. had put in an affidavit of J. White, who produced it, from which it appeared that White had seized the goods as officer to the deft., and had been in possession of them. White was in court at the time of the trial. The evidence was objected to, but received; a new trial was moved for, but refused, and Lord Denman gives, as the reason, that there was nothing to distinguish the affidavit thus used from a statement made by the party himself. He proceeds to distinguish it from the case of a deposition in an equity suit, on a ground, as he says, "founded on the nature of the proceedings in equity; the party who uses such depositions does not know beforehand what they are; and if he did, such cases would stand on the same footing as the present; he can only refer to what he expects would be produced. It is like the case of a witness at Nisi Prius, whose evidence does not bind the party calling him." The reason for this distinction (as will presently be shown) is a mistaken one; still it appears clear that Lord Denman did not suppose that a deposition could be used as evidence against the party producing it in another suit. In *Gardner v. Moul*, 10 A. & E. 464, a deposition made in bankruptcy on which a fiat was issued was admitted in evidence against the defts. to prove an act of bankruptcy, on proof that their solicitor had sent the person who made the deposition to make it. It was held that the evidence was admissible, Lord Denman saying, "No doubt a party in a cause is not bound by all that his witnesses say at Nisi Prius, or on their depositions in Chancery, but the defts. are here bound by the particular statement which their agent was sent to make." And Patteon, J. says: "The distinction pointed out in *Brickell v. Hulse* is a sound one, and I do not intend to depart from it; but it is not material by what name the document is called. It is in substance an affidavit within the meaning of the distinction there laid down, though called a deposition. Hay therein makes a statement of facts which the petitioning creditors had previously ascertained from him that he was able to make; he says nothing but what they knew he would say, and was subject to no cross-examination." Here again the distinction is recognised and insisted on between evidence called by the party to a former suit, which, it is conceded, would not be available for a stranger, and an affidavit, or anything equivalent to an affidavit, which is admissible. The authority

of these two decisions was questioned by the learned Irish judge, Crampton, J., in *White v. Dowling*, 8 Irish C. L. Rep. 128, but was recognised in the same case by Perrin, J., in *Pritchard v. Bagshaw*, 1 C. B. 459. They were assumed by the court, as well as by the very able counsel who was then arguing, to be binding authorities; and in the considered judgment of the Court of Ex. in *Boileau v. Rutlin*, 2 Ex. 665, they are recognised, but they are explained on a principle which seems satisfactory and which it is important for the decision of this case to keep in mind. Parke, B., speaking of *Brickell v. Hulse* and *Gardner v. Moul*, says: "In the first of the above-mentioned cases it may be presumed that the deft. prepared the affidavit which he afterwards exhibited as true; at all events, that he exhibited it for the purpose of proving a certain fact. In the second it must be taken that he sent the servant to prove a particular act of bankruptcy; for if he sent him to be examined as a witness and to give evidence generally as to any act as to which the commissioner might examine, there could be no reason for holding that his answers would be evidence against the party any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which it is conceded can never be done." In all these cases it is agreed that the party by using the evidence of the witness does not make any admission that the answers of that witness are true, so as to make them evidence against him afterwards. On the argument before us the counsel for the plt. succeeded in showing that Lord Denman in *Brickell v. Hulse* had misapprehended the course of the practice under the old system in Chancery; for that though it was true that till publication the deposition of the witness was kept secret, yet that between publication and the hearing of the cause the depositions were not secret, so that the counsel at the time of the hearing either refrained from using them, or used them with full knowledge of their contents; and they argued, founding themselves on this decision by Lord Denman, that there is a distinction between the evidence of a witness examined *vidæ voce*, the full effect of whose testimony must always be uncertain till the cross-examination is over, and the deposition of a witness examined under the old system in Chancery, or under a commission, or before a master at common law, whose evidence is completely known before the counsel puts it in. But though Lord Denman there put the distinction on a mistaken ground, there is a distinction recognised in that case, and it seems to me that the true distinction is that pointed out in *Boileau v. Rutlin*, and which appears to have been in the mind of Patteon, J., in *Gardner v. Moul*, namely, the distinction between the statement of a particular fact, through the means of an affidavit, or otherwise, and the production of evidence in the cause; and that the distinction does not depend on the question whether the evidence is written or *vidæ voce*. Where evidence is tendered, the party, through his counsel asserts that the testimony which the witness has given, or is expected to give, is legal evidence from which an inference favourable to his client in the particular suit may, as he thinks, be drawn; he does not assert that it is all accurate. Indeed, as was pointed out in the course of the argument, it is quite conceivable that ninety-nine assertions out of a hundred in the evidence may be unfavourable to the cause of the party producing it, but he trusts to convince the tribunal that they are either immaterial or inaccurate, and he uses the depositions solely to furnish evidence of the hundredth; and this may be safely done if the whole evidence before the court is taken together. But if the using such a deposition is to be considered as asserting the accuracy of the whole of it, so as to make it evidence against the party at all times and in all

suits and for all persons, the counsel must consider its possible bearing on all the affairs of their client, and the client cannot safely entrust a cause to a counsel without instructing him fully, not only as to the cause in question, but also as to all his other affairs. We all know that, in practice, counsel never are so instructed, and never do, when considering whether they will use a deposition or not, consider its bearing on any but the cause in hand; and the extent to which that doctrine may be carried is very startling. In this very case, according to the argument of the *plt.*'s counsel, the Marquis of Bute must be taken to have admitted that all the statements in the answer in *Edwards v. Meyrick* are true; and in any future suit by the Marquis that answer may be read as evidence against him by any person, as evidence of every statement in it. It is clear that this would produce a most unjust result, unless the whole course of the present cause be explained so as to show that all that his counsel meant to prove was that Tarren Ysgwyddgwyn was not parcel of Mr. Meyrick's estate. Such an explanation is at Nisi Prius impracticable. It seems, therefore, that, if the deposition were admitted, the mischief so forcibly pointed out by Chief Baron Gilbert would unavoidably result. It would create the greatest mischief, for the other side might use against the marquis all the depositions that made against him, and he, in his own advantage, could not use the depositions that made for him. If I am right in the principle which I have been expounding, it applies to the present case. The deposition of the witness was one which the party in Chancery must use as an entire deposition, making it all evidence, so that he equally asserts the accuracy of every statement in it, and either the whole deposition is made evidence for a stranger, or no part of it. The relevancy of the part of the deposition relied on in the issue in Chancery goes to the weight of the evidence if admissible, but does not, in my mind, affect its admissibility. For the reasons I have given, it seems to me that using the evidence of a witness in a suit, whether the evidence be *vivâ voce*, or reduced to writing, is not to be considered as an admission of the accuracy of the statements in that evidence so as to make those statements evidence against him for a stranger; and as it is admitted that there is no case, as yet, in which such evidence has been received, I think we ought not now to sanction its receipt, and consequently that the rule ought to be made absolute for a new trial.

CROMPTON, J.—The only question in this case was, whether my brother Wilde was right in receiving in evidence certain depositions which had been used by the *def.* in a previous suit in Chancery. It appeared that the deposition in question had been used by the real *def.* in this action in a previous suit in Chancery instituted by a stranger to all the parties in the present action, and that they had been so used by the *def.* for the purpose of proving against the *plt.* in that Chancery suit the small extent of the acreage of the farm in question, which it was the object of the *plt.* to make out in the present action, so that both the *def.* in the suit with the stranger and the *plt.* in the present action sought to use the same depositions for the same purpose. It appeared also that the depositions in the Chancery suit had been published some time before the hearing of the suit, and that they had been in the hands of the advisers of the *def.*, whose counsel read in evidence at the hearing such only of the depositions as he thought fit to read. It was shown that this was the old system of giving depositions in evidence on the hearing of a cause in Chancery, and that it has been a mistake to suppose that the parties reading depositions in evidence at the hearing of a Chancery suit were not aware of the exact written evidence they were about to offer, so as to be in the situation of a party at Nisi Prius, who cannot

tell what may be the exact evidence of a witness he calls to give his testimony. The depositions taken in judicial proceedings where a party has had an opportunity of cross-examining are in many cases admissible as secondary evidence against such party or his privy, for the other party or his privy. It was not contended that the depositions in question were admissible within the class of cases in which depositions are so admissible, the present *plt.* being an entire stranger to the parties in the original suit; but it was contended that they were admissible as primary evidence as admissions by conduct within the class of cases where a party has, by using a document or otherwise, admitted the truth of a matter therein stated, just as much (except in degree and weight of evidence) as if he had expressly declared by word of mouth that it was true. The admissibility of such evidence does not depend on the regularity of the judicial proceedings, or on the parties in the pending suit being or not being parties in the former suit, or on there having been an opportunity of cross-examination, or upon the primary evidence being shown to be unattainable; but it would be primary evidence as a statement made by the person, just as if the present *def.* had expressly stated that the acreage in question had been of smaller dimensions. Many cases were cited before us in which depositions in former suits had been rejected; but in these cases they were always rejected as depositions, on the ground of the absence of the requisite conditions under which depositions as such are receivable; and in all the cases except one, at Nisi Prius (*Atkins v. Humphreys*), they would seem not to have been offered under circumstances which would have raised the question of their being receivable as admissions under the doctrine as to the admission of documents by conduct, to which I have alluded. In that case, also, the question was treated as a question of the admissibility of the document as a deposition. The doctrine now in question was not adverted to, but it will be seen that the text writer's question was, whether the document would not have been receivable as an admission, except for the mistaken notion of the parties not knowing what the deponent would prove, which I shall afterwards allude to, and on which ground alone they suggest that the rejection might be supported: (See the query made as to this decision in the note (a) of the 3rd edit. of Starkie on Evidence, p. 312, referring to the observations of Mr. Phillips on the same case in the 8th edit. of his treatise on Evidence, p. 371.) Mr. Taylor, in the 2nd edit. of his treatise on Evidence, p. 397, remarks, "That it might appear, at first sight, that these depositions having been read by the party himself against whom they were offered in evidence, would, in spite of a want of mutuality, be receivable as admissions, and the correctness of this decision has consequently been questioned by more than one able writer on evidence; but the Court of Q. B. has given the true answer to the argument by pointing out that a party who prior to the 1st Nov. 1852 read depositions in equity did not know beforehand what they were, and therefore was no further bound by their contents than he would have been by the *vivâ voce* testimony of a witness whom he might have called at Nisi Prius." I was entirely satisfied in the course of the argument that the courts and judges who have relied on the supposed want of knowledge of the contents of depositions read by the parties offering them in evidence at the hearing of a cause in equity proceeded on a mistake of practice, the depositions being in the hands of the party after publication, and it being for him to select what portion of the deposition he chooses to read, and this was proved at the trial to have been the case in the suit in equity in which the depositions in question were read. That documents admitted by the party or used in evidence by him are generally receivable as admissions, has

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been established by many modern cases, and though in the discussion of such cases it has been repeatedly assumed that depositions in Chancery used by the party against whom they might be offered would not be evidence, it has been laid down that they would be so admissible except for the mistaken notion above referred to that their contents are unknown to the party like the evidence of a witness he is calling at Nisi Prius. In *Brickell v. Hulse* Lord Denman says: "It is very important that this subject should not be left subject to doubt. There can, I think, be no question but that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. There is nothing to distinguish it from a statement made by the party himself. *Rushworth v. The Countess of Pembroke*, at first, seemed opposed to this view, for there the deft. was not permitted to use any of the depositions made in an equity suit wherein the plt. had been deft. That decision, however, was founded on the nature of the proceedings in equity. A party who uses such depositions does not know beforehand what they are; if he did, such cases would stand on the same footing as the present. He can only refer to what he expects will be produced. It is like the case of a witness called at Nisi Prius, whose evidence does not bind the party calling him. It is quite different from a case where a party produces as part of his own statement an affidavit of which he knows the contents." Patteson, J., in the same case, lays it down positively that when a party or any purpose produces a document containing certain statements, such statements are, as against him, evidence of the facts which it contains." Coleridge, J. remarks: "If the deft. arms himself with a statement which he makes his own and uses it, that is clearly evidence against him afterwards of the facts in the statement. The statement may be of more or less avail, and it may be matter of remark that the person making the affidavit is not called." The same learned judge afterwards, in the course of his judgment, says: "As to the depositions in equity, they stand on the same footing with the *vivâ voce* evidence given in a court of law. A man does not make all that is said by a witness whom he calls evidence against himself hereafter. In Chancery the depositions are sealed up from the time of their being taken until publication passes. That is like the case of a party calling a witness whose evidence he does not hear till it is given. The present is the case of a party using a statement which he has seen before he uses it, and which is neither the more nor the less admissible for being made on oath." There could hardly be a stronger recognition of the principle now contended for by the plt. than the above judgments of the three learned judges. In the subsequent case of *Gardner v. Moul*, 10 A. & E. 468, Patteson, J. distinctly recognized the above doctrine, saying: "The distinction pointed out in *Brickell v. Hulse* is a sound one, and I do not intend to depart from it. But it is not material by what name the document is called. It is in substance an affidavit within the meaning of the distinction there laid down, though called a deposition." It would certainly be a very strange distinction, as pointed out by Mr. James in his very able argument, if it were to be held that a deposition read as this was read is not evidence, but that an affidavit, when the court is proceeding on affidavits, is evidence against the party using it. It must always be remembered that it is not the obtaining the affidavit or deposition, but the making use of it as true, with knowledge of the contents, which is the ground on which such evidence is supposed to be receivable. These cases are commented on and rightly explained by the Court of Ex. in the case of *Boileau v. Rutlin*, as instances of admissions by conduct. Parke, B. says, in delivering the judgment of the Court: "In the first of the above-mentioned

cases, *Brickell v. Hulse*, it may be presumed that the party prepared the affidavit which he afterwards exhibited as true; at all events, that he exhibited it for the purpose of proving a certain fact." In the present case the deposition seems to me to have been used for the purpose of proving the very fact which the plt. sought now to prove as against the now real deft. by these depositions. The most recent case upon the subject, *Pritchard v. Bagshaw*, is a very strong case to establish that every document knowingly used as true by the party in a suit is evidence against him. In that case an abstract of title and an affidavit had been used by the deft. before a Master in Chancery in a suit with a third party, and the same were afterwards offered in evidence in the action by the plt., a stranger to the suit in equity. The very learned counsel for the deft., in moving for the rule for a new trial, was obliged to concede that, the affidavit having been used by the deft. in the Chancery suit, was no doubt admissible as against him, but he insisted that the abstract of title stood upon a different footing. Sir J. Jervis, then Lord Chief Justice of the C. P., observed, "that it would be a dangerous principle to lay down, that a statement by a party is not evidence against him because it is not quite full;" and the court refused to grant a rule on the ground of the reception of either of these documents. It may be observed, with reference to one branch of Mr. Grove's argument, that the affidavit in this case seems probably to have been used by his legal advisers, and not by the party, as was certainly the case in *Gardner v. Moul*, where the solicitor was the party sending the witness and using the deposition; and the Court of Q. B., and afterwards the Court of Ex., in their remarks upon the case of *Boileau v. Rutlin*, treated the act of the solicitor as the act of the party. Upon this state of the authorities, I feel bound to hold that a document knowingly used as true by a party in a court of justice is evidence against him, and is admissible even for a stranger to the prior proceedings, at all events, where it appears to have been used for the very purpose of proving the very fact for the proving of which it is offered in evidence in the subsequent suit. I think also it now appears that such depositions as those in question do not fall within the class of cases which establish, as a kind of exception, that a party is not bound by evidence he adduces without knowing what it may turn out to be, as in the common case of the evidence of witnesses called at Nisi Prius by a party who cannot tell what they will say. I am quite sensible of the difficulty and inconveniences which are suggested as likely to arise, and have had, and still have, great doubts upon the question; and I am very glad that the parties will have an opportunity of having it discussed and settled in a Court of Error, so that they may examine the authorities more fully than a court of co-ordinate jurisdiction can do. At present it seems to me to fall within the principle established by the weight of authority, and I certainly am not prepared to decide that my brother Wilde was wrong in receiving the evidence, and I therefore think that these rules must be discharged.

COCKBURN, C. J.—I am of opinion that the depositions upon which the present question arises were properly received in evidence. The depositions in question were made in a suit in Chancery of *Edwards v. Meyrick*, in which the real deft. in the present action (Mr. Meyrick) was deft., and which was a suit instituted by the plt. Edwards to set aside a purchase from him by Meyrick of the estate in which the locus in quo in dispute in the present action is, according to Mr. Meyrick's present contention, situate, on the ground that Mr. Meyrick, having been the solicitor of the vendor, had taken advantage of that position, and had not given full value for the estate. In order to negative the allegation of inadequacy of price, it became material to Mr. Meyrick to reduce as much as

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possible the acreage and value of the estate, and the depositions in question were taken and used in the suit for the purpose of fixing the acreage at a given amount and materially lowering the value. Now the contest in the present action being whether an extensive tract of mountain land formed part of Mr. Meyrick's estate, or belonged to the Marquis of Bute as lord of the manor, and it being clear that if the acreage and value of the estate were what was contended in the Chancery suit by the deft., the *locus in quo*, in respect of which, for the purpose of the present action, the deft. Mr. Meyrick asserts a right of ownership, could not possibly be included in it, the depositions were offered in evidence for the plt. for the purpose of proving what, according to the deft.'s own showing, the extent and value of the estate really was. I am of opinion that these depositions were properly admitted in the present action as assertions made by the real deft. Meyrick, as to facts material to the issue in the action. It cannot be doubted that a man's assertions or admissions, whether made in the course of a judicial proceeding or otherwise, and in the former case, whether he was himself a party to such proceedings or not may be given in evidence against him in any suit or action in which the fact so asserted or admitted becomes material to the issue to be determined. And in principle there can be no difference whether the assertion or admission be made by the party sought to be affected by it by himself, or by some one employed, directed, or invited by him to make the particular statement on his behalf. In like manner, a man who brings forward another, for the purpose of asserting or proving some fact on his behalf, whether in a court of justice or otherwise, must be taken himself to assert the fact which he thus seeks to establish. Thus, in *Brickell v. Hulse*, an action against a sheriff, an affidavit used by the deft. with a view to obtaining interpleader process, for which purpose it was necessary to show that the goods the subject-matter of the action had been seized by an officer of the sheriff, was held admissible on the trial of the action to establish this fact against the deft., on the ground that such an affidavit was equivalent to the statement of the party himself. So, in *Gardner v. Moult*, a deposition made by a witness who was sent by the solicitor of the deft. to prove an act of bankruptcy with a view to a fiat, was held admissible in an action by the assignees of the bankrupt against the petitioning creditor. These cases appear to me fully to establish the proposition that where a witness is called for the purpose of proving a particular fact, this amounts to an assertion of that fact by the party who so uses his testimony. And, in this respect, I must observe that I can see no difference between written and oral testimony. For, while I concur in the position that the evidence of a witness called on a trial is not necessarily, or to the full extent to which it may go, admissible against the party calling him in a future proceeding, yet, if it can be shown that the witness was called to prove a specific fact, it appears to me that this would be admissible as an assertion of such fact by the party calling the witness. Thus, if in *Gardner v. Moult* the evidence of the witness who was sent to prove the act of bankruptcy, instead of being taken in the form of a deposition, could, according to the procedure of that court, have been taken orally, it would, in my judgment, have been equally receivable as being in effect the statement of the party using it. On the other hand, as I have already said, I entirely concur in the position that it is not because a witness is called for the purpose of proving a particular fact or facts, that all that he may say becomes admissible in any future proceeding against the party calling him. And here again I see no valid distinction between *vivâ voce* and written testimony. It has indeed been said, that a

party calling a witness to be examined in court may in many instances be ignorant how far the witness may make statements unfavourable to the party calling him, while a party using a written deposition does so with a full knowledge of what it contains, and after full opportunity of balancing the advantages and disadvantages of using it. But it must be borne in mind that the party in the one case calling the witness, and in the other using the deposition, may do so, not only without the intention of abiding by all the witness may say, but with the deliberate intention of calling on the court or jury to disbelieve so much of the evidence as makes against him. Just as, at *Nisi Prius*, a party is sometimes under the necessity of calling a doubtful or even hostile witness, in order to prove some part of his case which cannot otherwise be made out, and, in the event of adverse statements being made by the witness, seeks to induce the jury to reject them as unworthy of belief, or as contradicted by the rest of the evidence; so in the case of written evidence, a deposition or affidavit may, under similar circumstances, be used with a view to the adoption of a part and the rejection of the rest. It would be in the highest degree unreasonable to suffer the party using the evidence to be affected by that portion which he may have repudiated or disregarded, on the ground that the statements of the witness must be taken to be his. Bearing in mind that the true ground on which such evidence is admissible is, that a party seeking to establish a fact by evidence in a court of justice must be taken to assert the fact he so seeks to prove, it seems to me to follow, on the one hand, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will be evidence against the party using it, as an assertion of that fact, and on the other, that written evidence will be admissible against the party using it in a subsequent proceeding with a different party, not for the purpose of proving all the statements it may contain, but only so far as it shall appear to have been used to establish a given fact or facts. It is not because a witness may have been called, or a deposition may have been used, that all the statements made are to be considered as having been adopted by the party using the evidence. In order to render this species of evidence admissible as the assertion of a particular fact by the party using it, it must appear either from the evidence itself, or from extrinsic circumstances, that it was used for the purpose of proving such fact. In the present instance it sufficiently appears both from the depositions themselves, and also from the answer of the defendant in the suit, that the depositions were used for the express purpose of establishing the more limited acreage and value of the estate. This being so, the depositions were, in my judgment, admissible in the present action, as showing the assertion by the deft., in a former legal proceeding, of facts material to the case of the plt. in the present action. I am not insensible to the inconvenience that may result from the admission of evidence of this sort. The evidence may have utterly failed in its effect in the original suit. The fact which was sought to be established may have been disproved by other evidence; the decision of the court or jury may have been adverse; the party may long since have abandoned the ground he formerly took. The production of such evidence in a subsequent suit may lead to collateral issues in the shape of inquiry into all the circumstances and bearings of the first. Counsel, too, may possibly be embarrassed in the conduct of a cause, as regards the production of evidence, by having to consider what may be its effect on the interests of their client beyond the present proceeding. But many of these difficulties would obviously apply in the case of statements made by the party, irrespective of legal proceedings, which, if relevant to the matter in dispute, no one can deny to be admis-

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Re DE VISME. Re THE TRUSTEE ACT 1850—FROST v. WARD.

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sible against him. All these difficulties exist equally in the case of affidavits and depositions in bankruptcy, both of which have been held to be admissible. The difficulty in which it is suggested that counsel would be placed in the conduct of a cause becomes obviously reduced to a matter of small importance when the admissibility of the deposition is limited by the qualification which in my view it should be subjected to, namely, that it can only be used against the party where the purpose for which it is sought to use it is the same as that for which it was used on the previous occasion. To me it appears that, as soon as the principle is once admitted that evidence given for the purpose of proving a particular fact may be afterwards received against the party producing it as having been in effect his statement, the admissibility of depositions used in a suit in equity under similar circumstances seems necessarily to follow. The ground upon which it has been thought in courts of law that such depositions were not admissible, namely, that the party sending the witness before the examiners had no opportunity of seeing the evidence till it was produced in court, proves to have been founded on an entire misapprehension of the practice of courts of equity. It was shown incontrovertibly in the course of the argument before us in the present case, that at the time the suit of *Edwards v. Meyrick* was pending the parties to a suit in equity, after publication of the evidence, were entitled to use or to reject such depositions as they thought fit. It is plain from the language of Lord Denman, and of Patteson and Coleridge, JJ., in *Brickell v. Hulst*, that, had those learned judges been aware of the real state of the practice in equity, they would have considered depositions in an equity suit as standing on the same footing as affidavits and depositions in bankruptcy. I feel it scarcely necessary to notice the objection that counsel in a suit are not authorised to affect their client beyond the limits of the cause immediately in hand. The same argument might be urged in the case of affidavits, and of depositions in bankruptcy, the admissibility of which cannot now be denied. But, in my opinion, a counsel conducting a cause must be taken, as to the production and use of evidence, to be acting upon instructions from his client, and as representing the client; and if evidence is produced to establish a particular fact, that fact must be considered as asserted by the party in the cause. For these reasons I am of opinion that the evidence was rightly received, and consequently that this rule must be discharged. *Rule discharged.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON
Esqrs., Barristers-at-Law.

Friday, Dec. 4.

(Before the LORDS JUSTICES.)

Re DE VISME.

Re THE TRUSTEE ACT 1850.

Lunacy—Married woman—Savings—Investment—Advancement of child.

A married lady out of her separate estate purchased stock in the names of her son and daughter, and died. The son became lunatic, and on a petition by the daughter for transfer of the stock to her as executrix of her mother, it was

Ordered accordingly, on the ground that the presumption which would prevail in the case of a father, that the purchase was an advancement for the children, did not arise in the case of the mother, and a bill to assert the right of her estate was therefore unnecessary.

This was a petition by the daughter and sole executrix of a lady now deceased, presented in the matter of the above lunacy and of the Trustee Act 1850, praying a transfer to her of a sum of stock which was then standing in the joint names of the petitioner and her brother, who was the lunatic.

The circumstances were, that the testatrix in her lifetime was entitled to separate estate, and was living apart from her husband, when out of the savings of this separate estate she made the investment in the stock now sought to be transferred in the names of her son and daughter, wherein it continued standing till her death. The son afterwards became lunatic, and is still living.

The allegations were, that the purchase or purchases were made by the testatrix in the names of her children, in order to exclude the rights of her husband.

G. Lake Russell supported the petition, and submitted that the order ought to be made upon petition notwithstanding the case of *Re Collinson, Collinson v. Collinson*, 3 De G. M. & G. 409, in which case, although lands bought by a father in the name of a son were held under the circumstances of the case not to amount to an advancement, yet Cranworth, L.C. declined to make an order to that effect on the petition of the father, though founded on the certificate of the Master in Lunacy, on the ground that the court would not conclude the possible rights of the son without a bill, upon which he would be properly represented. The case of a mother making such a purchase was, he submitted, different from that of a father, who was under a legal obligation to support his children, which occasioned a presumption that the purchase was intended as an advancement for them. Against the present petitioner as representative of her mother there was no similar presumption.

The LORDS JUSTICES concurred in that view, and made the order as prayed by the petition.

Wednesday, Jan. 13.

(Before the LORDS JUSTICES.)

FROST v. WARD (No. 1.)

FROST v. WARD (No. 2.)

Practice—Two suits for the same purpose—Conduct of proceedings.

Suit No. 1 was instituted on behalf of infants by a next friend for administration of their father's estate. This suit was by bill, to which an answer was required, but, before any answer, suit No. 2 was instituted for the same purpose, on behalf of the same infants, by another next friend, who appeared by the same solicitors as the person who was the deft. in both. In this latter suit a decree was at once obtained by consent. The next friend in the first suit then applied for the conduct of the proceedings in the second, but his motion was refused by Stuart, V. C. On appeal, however, Their Lordships thought that the second suit ought not to have been instituted, and ordered that the next friend in the earlier suit should have the conduct of the decrees already obtained in the later one.

In this case a motion on behalf of Mr. Samuel Frost, the next friend of the infant plts. in the first-mentioned suit, that he might have the conduct of the proceedings under the decree which had been obtained in the second-mentioned suit, which motion was refused by Stuart, V. C., was renewed before their Lordships.

The circumstances were these:—Both suits were by bill filed for the administration of the estate of William Frost, who died in the month of June 1862, having devised and bequeathed his real and personal estate to his wife, Mary Frost, upon trust for herself for life, and after her death for his children, the infant plts. in both of the suits, and appointed her his executrix.

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That lady survived her husband, but she also died on the 5th Sept. 1863, having by her will given all trust-estates vested in her to Eliza Ann Ward, whom she appointed her executrix, who proved the will. Thus representing the original testator, she was the deft. in both causes.

On the 16th Oct. 1863 the first of the above-named suits was instituted by a bill filed in the court of the M.R. in the name of the three infant children of William and Mary Frost, by Samuel Frost, their paternal uncle and next friend. The solicitors for the plts. in that suit were Messrs. Johnson and Weatheralls, who acted as agents for Messrs. Campbell, Burton and Browne, of Nottingham; and the solicitors for the deft. Eliza Ann Ward were Messrs. Kingsford and Dorman, acting as agents for Messrs. Wood, of Woodbridge, in Suffolk. They entered an appearance for the deft., and interrogatories were filed in due course, but before any answer was put in—namely, on the 18th Nov. 1863—the bill in the second suit was put on the file on behalf of the same infant plts., this time represented by one George William Gunnell as their next friend, the deft. thereto being the same Eliza Ann Ward, and the object of the suit being substantially the same as that of suit No. 1. The solicitors for the plts. were Messrs. Kingsford and Dorman, and in their former capacity as agents for Messrs. Wood they acted again as solicitors for Eliza Ann Ward.

To this second suit the deft. at once appeared, namely, on the 20th Nov., and on the 21st of that month a decree for general administration was made by consent in that suit. On the 25th Nov. an order was made staying all proceedings in the earlier suit, but reserving liberty to Samuel Frost to make such application as he might think fit in the second suit.

Accordingly, on the 22nd Dec. Samuel Frost made the motion, the order upon which it was now sought to discharge, that the conduct of the decree might be given to him, the ground of his application being, that Mr. Gunnell was in no way connected with the parties, and was only put forward by the deft.'s solicitors, who thus represented all the parties in the suit. The deft. and Mr. Gunnell opposed the motion, alleging the independence and *bona fides* of the latter; and further, that the testator's widow, with the knowledge and connivance of Samuel Frost, or of his solicitors, had been guilty of various breaches of trust. Upon this subject much evidence was gone into of an accusatory character; but, as it had no effect save that of depriving both parties of costs, it need not be referred to here.

Stuart, V.C. refused to make any order upon the motion, and Samuel Frost now appealed.

Osborne, Q.C. and Waller supported the appeal.

Malins, Q.C. and Woodhouse were for Mr. Gunnell.

Greene, Q.C. and Dauncey for the deft. in both the suits.

Osborne, Q.C. having replied,

Lord Justice KNIGHT BRUCE said, that the earlier suit, that at the Rolls, was instituted on the 16th Oct. last; the later suit in the court of Stuart, V.C. not before the 18th Nov. In the latter a decree was obtained within three days after its institution; namely, on the 21st Nov., the solicitors in the suit being, in effect, the same on both sides. Although the obtaining of a decree in a second suit with such expedition as to be before a decree in a suit of earlier institution for the same purpose and the fact that in that second suit the same solicitors were acting for all parties might not in every case be of material importance, yet in a case like the present each of these circumstances was very material. He was of opinion that the second suit had been unnecessarily and improperly instituted by solicitors who were in effect the solicitors of the deft., and that the decree ought not to have been so obtained. It ap-

peared to him that, as between Mr. Samuel Frost, the near relative of the infant plts., and Mr. Gunnell, of whom nothing seemed to be known, and of whose intervention in this matter no explanation had been afforded, Mr. Frost must be held entitled to have the conduct of the cause in which a decree had already been made, and an order to that effect should now be made. The court had of course no intention to prejudice any application which might be made on proper grounds to deprive him of the conduct of the proceedings under the decree, in case he should act negligently or improperly, or it should appear that such a course would be of benefit to the infants, and the order would so express it. The affidavits which had been filed on both sides were of such a character that, as it appeared to him, the order should be wholly silent on the question of the costs of the application.

Lord Justice TURNER was of the same opinion.

Solicitors for the next friend Samuel Frost, *Johnson and Weatheralls*, agents for *Campbell, Burton and Brown*, Nottingham.

Solicitors for Mr. Gunnell, and for the deft. in both suits, *Kingsford and Dorman*, agents for Messrs. *Wood, Woodbridge*, Suffolk.

Wednesday, Jan. 20.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte BIRD, re THE SOUTHAMPTON, ISLE OF WIGHT AND PORTSMOUTH IMPROVED STEAMBOAT COMPANY (LIMITED).

Bankruptcy—Contributory—Motion to rectify register of shareholders—Principal and agent—Notice.

B., having subscribed for fifty shares in a company, and his name appearing on the register, and having been placed on the list of contributories for that number of shares, moved to have the register rectified erasing his name as a shareholder on the ground that he had subscribed as agent for *W.*, who, in ignorance of what *B.* had done, had himself taken 100 shares.

No distinct proof was adduced of any notice of the agency having been given to the company.

Held, upon failure of proof of any expressed intention to subscribe as agent, *B.* must be held to have subscribed in the ordinary way, and motion refused, but without costs.

This was a motion in Chancery, made under, sect. 25 of the Joint-Stock Companies Act 1856, on behalf of James Binfield Bird, of West. Gosport, that the register of shareholders of the above company might be rectified by erasing the name of the said J. B. Bird as a shareholder holding in all eighty-seven shares in the company, and by inserting his name as a shareholder holding thirty-seven shares only.

The company was incorporated in 1860, under the Joint-Stock Companies Act 1856. Mr. Bird was a shareholder from the first, and one of the directors. Previously to Dec. 1861, he was registered as the holder of thirty-seven shares. Afterwards in December he was registered as holding fifty shares more. The present appeal was with reference to these fifty shares.

A winding-up order in bankruptcy was made by Mr. Commissioner Rose on the 1st Nov. 1862, and an appointment made to settle the list of contributories. It was urged upon the commissioners that, with respect to several persons, including Mr. Bird, he had no power under the Act to settle a person on the list of contributories without proof that such person had in the words of clause 1, table B of the 19th & 20th Vict. c. 47, testified his acceptance of shares by writing under his hand. On the part of the official liquidator it was contended that the commissioner was bound to settle every person on the list of contributories whose name appeared on the register, leaving it to the person so

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placed on the list to appeal to the L.C. in Chancery to rectify the register.

On the 22nd July, Mr. Commissioner Fane, not noticing the question as to the jurisdiction, decided that Mr. Bird was liable to contribute for thirty-seven shares only, on the ground that Mr. Bird had by an affidavit deposed that he was a shareholder for thirty-seven shares only, and that he had taken the other fifty only as agent for Ward; also because Mr. Bird had never testified his acceptance of the fifty additional shares by writing under his hand.

From this order the official liquidator appealed, and on the 31st July last the L. C., being of opinion that the commissioner was bound to follow the register, and that the name of Mr. Bird must be placed on the list for eighty-seven shares, the motion was directed to stand over till Michaelmas Term, Mr. Bird undertaking to give notice of motion in Chancery to rectify the register; and the two motions now came on together.

Daniel, Q.C. and Higgins, for Mr. Bird, relied on the affidavit, which was in these terms:—"Expressly and distinctly as such agent for the said W. G. Ward, I consented to take fifty shares of 10*l*. each in the said company, in or about the month of Dec. 1861."

The LORD CHANCELLOR asked how Mr. Bird told that to the company?

Daniel, Q.C. admitted that Mr. Bird's affidavit was loose as to this. Mr. Bird said that subsequently the chairman of the company and one of the directors had an interview with Mr. Ward personally, at which Mr. Ward, in ignorance of his (Bird's) having subscribed for the fifty shares, agreed to take 100 shares, and he (Bird) was directed to pay 100*l*. on such shares, which he did. He (Bird) "specifically informed the secretary of the company that the 100 shares paid upon by him for Ward included the fifty he had consented to take on his (Ward's) behalf." It was further contended that, as sect. 1 of table B declares that no person shall be deemed to have accepted a share unless he has testified his acceptance by writing under his hand, in such form as the company directs, and the company had directed no form, Mr. Bird had not accepted within the terms of the Act.

Bacon, Q.C., Bagley and Waller, for the official liquidator, were not called upon.

The LORD CHANCELLOR.—I should be very glad, if I could, to relieve this gentleman, because I believe that the retention of his name on the list was really what he did not intend; but I fear it is out of my power. I mean to put this decision upon what this gentleman himself has proved. If his case had been, what I understand his counsel to argue, that at the time of his subscription he represented that he intended to take these shares as the agent of Ward, an equity would have arisen, on which he might have relief. But it is essential to that equity that it should be proved that notice was given to the company of these shares having been taken on behalf of some one else. In this case I cannot find that this gentleman told the company that in subscribing he was acting as the agent of Ward. It is one thing for a man to subscribe, having a secret intention to subscribe as agent, and quite another thing to communicate the fact of agency, at the time of his subscription, to the company to whom he applied, and by whom his name was received, and by whom reliance is placed on that subscription. This gentleman appears to have taken fifty shares; the fact of his having subscribed for them is acknowledged, and then he applies to be permitted to withdraw that subscription. He argues that, as when he subscribed he intended to take the shares on behalf of his principal, he ought to be relieved from this responsibility. No doubt, if the company had been aware of what his intentions and motives were, there would be good reason

for his being heard to say, "You knew I was acting only as agent." But Mr. Bird himself stood towards the company in a relation which rendered it doubly incumbent on him to explain exactly the terms on which he became a shareholder. But the subscription was made, not as if it was in part Ward's, but in such a manner as that the company are entitled to take the unqualified signature as being that which on the face of it it appears to be. An equity of this kind cannot be protected where the company has become insolvent. The facts must be taken according to the documents, unless it is plain that they are inconsistent with what the parties intended. Here the documents are consistent with the expressed intention; and a secret intention on the part of the app. cannot be admitted to control and nullify what he has done. I am compelled to reverse the orders, and put Mr. Bird upon the list for eighty-seven shares. There will be no costs on either side. The deposit may be taken back.

Solicitors for the app., *Harrison and Lewis*; for the official liquidator, *Newbon, Heritage, and Evans*.

Jan. 21, 24 and 25.

(Before the LORD CHANCELLOR (Westbury).)

Re BOYCE; Re THE TRUSTS OF THE WILL OF WM. BLACKWOOD; AND Re THE TRUSTEE ACTS 1850 AND 1852.

Appointment of new trustee—Estate by implication—Trustee Act 1850, ss. 32, 33—Lunatic trustee—Vesting order.

*Testator, after appointing his wife executrix and B. executor and trustee of his will, and directing his debts, &c. to be paid, devised his real estate to his wife for life, but in case she should marry again, he gave and devised the same "to the use and intent" that she should during her life receive an annuity of 20*l*., with powers of distress and entry upon, and sale of, his said real estate. He then directed his said trustee to invest the surplus rents as in the will mentioned; and on the decease of his said wife he directed his said trustee to sell his said real estate with somewhat fully expressed directions, and with power to execute such instruments and assurances as should be requisite for effecting and completing the sale:*

Held, on the construction of the will, that the trustee took a contingent estate per autre vie, in the event of the subsequent marriage of the widow, with a remainder in fee by implication.

Independently of the estate by implication in the trustee, inasmuch as there were here three things combined—the office of trustee, a personal obligation, and a power of fulfilling that obligation—the case was within the Trustee Act 1850, sects. 32 and 33.

The case of a simple office of trustee, without more, is within the provisions of the above statute, subject to the judgment of the court as to the expediency of appointing a new trustee.

This was a petition under the Trustee Act of 1850 and the Trustee Extension Act, and also the Act for the Relief of Suitors in Chancery, praying that two persons might be appointed trustees of the will of William Blackwood in the place and stead of James Stanford Boyce, and that the freehold and copyhold hereditaments and premises with the appurtenances devised by such will might vest in the said two persons upon the trusts therein declared.

The testator, by his will dated the 19th Dec. 1851, after appointing his wife Sarah executrix, and the said J. S. Boyce to be the executor and trustee of his will, and directing all his just debts, &c. to be paid as soon as conveniently might be after his decease, devised all and every his messuages, lands, tenements, hereditaments,

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ments and real estate whatsoever and wheresoever to his wife and her assigns for her life in case she continued his widow, she keeping the same in tenantable repair and the buildings thereof insured. But in case his said wife should marry again, then he gave and devised all such messuages, lands, tenements, hereditaments and real estate "to the use and intent that his said wife and her assigns should receive during her life" an annuity of 20*l.* payable as therein mentioned, with powers to his said wife of entry and distress upon and sale of the said hereditaments if the same should be in arrear for twenty-one days. "And he directed his said trustee to invest the surplus (if any) of the rents and profits of his said hereditaments and real estate which should be remaining after payment of the said annual sum and the expenses of keeping the same hereditaments and real estate in tenantable repair and the buildings thereof insured from loss or damage by fire," in or upon "any of the public stocks, funds, or securities of the United Kingdom, or any real securities in England or Wales, but not in Ireland or elsewhere, and improve the same as an accumulating fund, varying the investment from time to time," &c. "And on the decease of his said wife testator directed his said trustee to sell his said messuages, lands, tenements, hereditaments and real estate, together or in parcels, by public auction or private contract, at such place and time, and subject to such stipulations relative to the title, or the evidence of title, or to the payment of the purchase-money, or to any other matters connected with the sale, as his said trustee should judge expedient, or as his counsel should advise, with full discretion and authority to sell either, subject to or discharged from or with an indemnity by impounding part of the purchase-money, or otherwise, against any incumbrances; and also to fix a reserved bidding and buy in any lot or lots at any auction, and to resind or vary any contract for sale without being liable for any consequential loss; and also to execute such instruments and assurances as should be requisite for effecting and completing the sale of his said hereditaments and real estate: and the money arising from such sale or sales, after paying thereout the expenses attending the same sale or sales, and of all necessary acts on the part of the vendor for the completion of the title to the same hereditaments and real estate, should be received by his said trustee, and be held by him, together with the accumulation (if any) of the said surplus rents and the money to arise from the sale of his household furniture and effects, the use whereof was thereafter given to his said wife for her life upon trust to pay, and he thereby bequeathed the same respectively unto and among such of his (testator's) nephews and nieces as should be living at the decease of his said wife, in equal shares and proportions as tenants in common, if more than one, and if but one, then the whole thereof respectively to such one." And testator declared that, "if his said trustee, or any trustee or trustees to be appointed under that provision, should die or become unwilling or unable to act as trustee or trustees of his will, it should be lawful for testator's said wife to appoint any fit person or persons to be a trustee or trustees in the place of any trustee or trustees dying or becoming unwilling to act, and he declared that the trustee or trustees for the time being of his will should be competent to exercise all the powers and discretions thereby confided to the trustee therein named."

Testator's widow survived him and died in 1863, and the trustee of the will, James Stanford Boyce, had become of unsound mind.

The petition was brought before the Lords Justices, when a difficulty arose in making the order under the above Acts, there being no express devise of the real estate to the trustee, and Turner, L. J. feeling a doubt as to whether there was any legal estate in the trustee by implication.

Cory appeared in support of the petition. He submitted that there was not a mere power in the trustee, but that it was a trust, and hence was within the scope of the Trustee Acts. He referred to

Ex parte The Countess of Mornington, 4 De G. M. & G. 537.

Jan. 25.—THE LORD CHANCELLOR.—A short question arises upon this petition, whether, under the circumstances of the case, a new trustee can be appointed under the Act of the 13 & 14 Vict. c. 60. The testator by his will, after appointing his wife to be executrix, and a person named Boyce, who is now a lunatic, to be executor and trustee of his will, devises all his real estate to his wife for life in case she continues his widow; but in case she should marry again, he devises the said real estate to the use and intent that his wife should receive an annuity of 20*l.* for her life, with power of entry and distress upon and sale of the said real estate. He then directs his trustee to invest the surplus of the rents and profits, which should be remaining after payment of the said annuity, in or upon any of the public stocks, funds, or securities of the United Kingdom. Now that direction would no doubt give to the trustee Boyce an estate, enough in point of quantity, to enable him to carry the trusts of the will into effect. It would give him a contingent estate *pur autre vie* during the life of the widow, in the event of her subsequent marriage. Upon the decease of his wife, testator directs his trustee to sell his real estate, with directions as to the nature and mode of sale, and with power also to execute such deeds and assurances as should be requisite for executing and completing the sale of his said hereditaments and real estate. Upon this state of circumstances I understand that a difficulty has arisen before the Lords Justices, and that their Lordships have come to no definite opinion. The first question is, whether the language of the will is sufficient to give to the trustee an estate by implication, and the other, whether, where there is a trustee with simply a power to sell, the case falls within the provisions of the statute. With regard to the first question, the inclination of my opinion is, that since these words are sufficient to create a trust to sell and convey, if the trust had been executed in these terms the trustees would have taken a remainder in fee. But I do not think it necessary to decide that point, because, if the trustee takes merely a power to sell the real estate, I have three things combined—namely, the office of trustee, a personal obligation, and a power of fulfilling and discharging that obligation. Where these three things concur, I think it clear that the case falls within the statute. Further, I am of opinion that with the simple office of trustee, the case would be within the statute if the court were to think fit to appoint a new trustee under the circumstances. I think the 32nd section of the 13 & 14 Vict. c. 60, must be held not to apply to such a case. The words are, "Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do, without the assistance of the Court of Ch., it shall be lawful for the said Court of Ch. to make an order appointing a new trustee or trustees." Now, under the will before me, the testator contemplates the probability of a new trustee being required, and gives a power which, in consequence of the death of the widow, cannot be exercised. Inasmuch therefore as, owing to the insanity of the trustee, the estate cannot be sold, I think it "expedient" to appoint a new trustee, and I find that it is "impracticable so to do without the assistance of the Court of Ch." Under these circumstances, understanding that the Lords Justices have not given any decision, but desire me to express my opinion, I must say I think the case falls distinctly within the statute. Inasmuch, he

[CHAN.]

Ex parte BARKER, re BARKER—Re PATRICK JOHNSON.

[CHAN.]

ever, as the power given to me in lunacy seems restricted by the 3rd section of the Act to cases where I am enabled to make a vesting order, I think the order should be drawn up both in lunacy and in Chancery. The order will be for the appointment of new trustees in the terms of the prayer of the petition.

Cory asked his Lordship to make an order, expressly vesting the estate in the new trustees.

The LORD CHANCELLOR said he thought it better to give an indication of his opinion only that the trustee took an estate by implication, and then to make an order vesting in the new trustees the estate (if any) which was in the original trustee.

Solicitors: *M. Shearman*, agent for *James Winter and Son*, Norwich.

Wednesday, Jan. 20.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte BARKER, re BARKER.

Bankruptcy—Order of discharge—Accommodation bills.

*Where a young man started in business as a trader with 500*l.*, of which 400*l.* was borrowed money (afterwards repaid), and in the course of two years became bankrupt through the failure of a large firm, who had prevailed on him to accept accommodation bills to the extent of 4196*l.*,*

A motion to reverse the commissioner's order refusing him his discharge was dismissed with costs.

Bagley appeared in support of a motion by Robert Barker, a bankrupt, to reverse a decision of Mr. Commissioner Ayrton, whereby, in December last, he refused to the bankrupt his order of discharge, on the ground that the bankrupt had signed and accepted certain accommodation bills, not having at the time of signing such bills any reasonable or probable expectation of being able to pay the same.

The bankrupt, who was a cotton-spinner at Huddersfield, was only twenty-five years of age. He began business about two years since with 500*l.*, of which 400*l.* was borrowed, and had since been repaid. On beginning business, he took as tenant, from year to year, a room with steam power and machinery. The money was borrowed from Monk and Co., a firm of cottonspinners at Huddersfield, and one of the members of the firm was owner of the mill in which was the room and steam power of which the bankrupt was tenant. Monk and Co., being at this time in extensive business, induced the bankrupt to sign bills for them, amounting in the whole to 4196*l.* Afterwards, in October last, Monk and Co. called their creditors together, and ultimately became bankrupt. Their liabilities amounted to 107,000*l.*, a great part of which arose out of accommodation bills.

The learned commissioner held the bankrupt to have been guilty of a grave commercial offence, and refused to grant the discharge.

In support of the motion the case of

Ex parte Hammond, 6 De G. M. & G. 699, was referred to.

De Gez, contra, was not called upon.

The LORD CHANCELLOR said that, individually, he might feel some compassion for this bankrupt, because he had been an instrument in the hands of persons who were in a better position than himself, and whose names, probably, he held with a feeling of confidence and trust. But the public good required that this portion of the law should be exercised with firmness; and he was glad to find that the learned commissioner had been firm in the matter. This was one of the ordinary combinations which prevailed in the trading world in order to obtain factitious credit. Here was a bankrupt starting with only 100*l.*, borrowing 400*l.* for the purpose of hiring a room, machinery and steam-power, and starting as a trader on these terms.

He was then appealed to by this firm to accept accommodation bills to the extent of 4200*l.* or thereabouts. There could not be a doubt that when he did this he contracted debts without the least probability of being able to repay them. No doubt a greater degree of culpability attached to the persons who induced him to give those acceptances. But that formed no excuse for the bankrupt's conduct. He had no right to exhibit himself to the world, and induce people to give credit on his acceptances when he knew perfectly well that he had not a shilling to meet those acceptances. This was one of the cases which it was the object of the new statute of bankruptcy to meet. He felt bound to administer the law without trusting to any feeling of compassion; and he must refuse to alter the order of the commissioner. The appeal must be dismissed, the assignees to have their costs out of the deposit.

Solicitors: *Van Sandau and Cumming*, agents for *Floyd and Learoyd*, Liverpool; for the assignees, *Murray and Wrigley*, Oldham.

Re PATRICK JOHNSON.

Bankruptcy—Jurisdiction—Salary of retired official assignee.

Where a retired official assignee omitted to close his accounts, or to deliver up his books, the commissioner having omitted to make a periodical audit of the accounts, the Court, in ordering that the balances due from and to the official assignee be paid into court, directed the retiring salary of the official assignee to be suspended until the result of the inquiries was known.

Observations on the administration of the law in bankruptcy.

This was a motion by the Attorney-General on the relation of the chief registrar of the Court of Bankruptcy that Patrick Johnson (late an official assignee of the court) might be ordered forthwith to pay into the Bank, to the chief registrar's account, all the balances remaining due from him to the several estates of which the said P. Johnson was official assignee, and which had not already been duly accounted for; and that it might be ordered that such balances (if any) as were then due to the said P. Johnson from any of such estates, in respect of which he might have been under advances at the time of retiring from his office, and all future payments to become due to him in respect of his retiring annuity of 800*l.* might be retained and applied under the direction of the court, in satisfaction as far as the same would extend of the sum due from the said P. J. Johnson, and that all such accounts as might be necessary for the purpose of ascertaining the balances due from and to him might be taken before such of the commissioners as the L. C. should direct, and that in taking such accounts the said P. Johnson should be charged with interest at 20 per cent. on all sums improperly retained in his hands.

Mr. P. Johnson, with others, was in 1832 appointed official assignee under the 22nd section of 1 & 2 Will. 4, c. 56, and the 22nd, 23rd and 24th orders of the 12th Jan. 1832, and executed a bond with sureties for 6000*l.* to the chief registrar and another registrar of the court, in conformity therewith.

In 1859 one of Mr. Johnson's sureties died, and a fresh surety was not obtained, but he deposited with the then chief registrar a lease of a house and premises at Stoke Newington.

Shortly after the passing of the B. A. 1861, Mr. Johnson resigned, and an annuity of 800*l.*, being two-thirds of his salary, was granted him under the 33rd section of that Act. Mr. Johnson, notwithstanding, did not close his accounts or deliver up his books, but

although he made repeated promises to do so, always evaded performance. A copy of the correspondence had been laid before the Attorney-General, upon whose advice the present motion was made.

From the affidavit of Mr. Harding, accountant, it appeared that the sums of money due from Mr. Johnson amounted to 14,736*l.* 19*s.* 4*d.*, against which he claimed to have allowances deducted to the amount of 1021*l.* 7*s.* 5*d.*

In his affidavit Mr. P. Johnson said that he had had the management of 2268 bankruptcy estates; and that in all cases where his accounts as official assignee had been audited, he had paid the sums of money appearing to be due from him upon such audits into the Bank of England. In the early part of his practice he had appointed a sitting for the audit whenever he had any funds in hand, but objections having been taken to that course by the commissioner, he had refrained from taking any steps to procure the audit of any of the estates until he was directed to do so. In the year 1855 he had had an accident which disabled him, and during his illness a clerk in his employment embezzled moneys, and the fraud was not detected until after he had absconded. He further said that the sum claimed from him was an estimated deficiency on the gross receipts, without taking into consideration claims of his, amounting to 4500*l.*, for commission in respect of the unaudited accounts, allowances and incidental expenses. 2500*l.* was the estimated amount of the clerk's defalcations.

The Attorney-General (Sir R. Palmer), J. Chitty and H. Brougham Miller appeared in support of the motion.

Bacon, Q.C. and Tripp appeared for Mr. Johnson. — They resisted that part of the order which proposed to deal with Mr. Johnson's annuity.

The LORD CHANCELLOR, after observing that the senior commissioner was dead, and that there was no successor to him, said he must select a commissioner to whom to refer this matter, and he had no doubt that Mr. Commissioner Holroyd would undertake it. His Lordship desired publicly to acknowledge the great obligations under which the court and the public had been placed to Mr. Commissioner Holroyd for the zealous care and attention he had displayed in carrying the orders of the court into execution. A computation of the penalty must be directed. That must form part of the present reference, without prejudice to any question. His Lordship further observed: I speak only of that which has been confessed. It may turn out that the state of things is different from that which is apprehended; I hope it may be so. But one delinquency is admitted, which has to be shared between the commissioner and the official assignee, namely, a deliberate disregard of and disobedience to the orders of the court, which have been provided with the utmost care in order to ensure that the accounts of the official assignee should be periodically audited. Day by day I discover things which fill me with pain and apprehension as to the administration of the law of bankruptcy. The other day I discovered that an estate of nearly a million of money was totally without protection, owing to a disregard of the statute and of the orders of the court. I cannot assume that this is a case of grave default, because that is a subject of investigation. But I wish to have it understood that I will exercise my jurisdiction to the utmost extremity, in order to reach any case of deficiency, and visit it in the strongest and most stringent manner that I can. And if I find any disregard of these orders, I will take care that the language inserted in the statute and the orders of the court, requiring the officials of the court to perform their duties "on pain of discharge," is not mere words of form, but words which I shall enforce with the most unsparing determination. I will take measures to have a rigid investigation of what goes on in the court at Basinghall-street, in order

to see whether the rules of the court are adhered to. I trust that they are: but if they are not, the result will be that which I have already mentioned. The sureties of Mr. Johnson must be served with the order now made, and will be at liberty to attend the taking of the accounts. In the meantime, payment of Mr. Johnson's annuity must be suspended.

Solicitors: Aldridge and Bromley.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Monday, Nov. 23.

ASH v. ASH.

Will—Construction—Residue undisposed of.

Where a testator expressly bequeaths property to his next of kin according to the Statutes of Distribution, he does not mean, as a general rule, those only to take who have been held to fill that character; but what he does mean is, that the law is to distribute his property as it would do in the case of an intestacy.

Where a testator said in his will, "the residue of my personal estate and effects, not hereinbefore disposed of, I propose to bequeath by a codicil to this my will, or otherwise to allow the same to go to my next of kin, according to the statutes for the distribution of the estates of intestates;" and the testator died without having made any codicil to his will, leaving no children, but a widow and several next of kin; it was

Held, that there was no express gift of the residuary personally to the next of kin; but that the property must go and be distributed as undisposed of by the testator.

William Ash, by his will dated the 2nd Nov. 1860, bequeathed the residue of his personal estate and effects to trustees, upon trust to invest the sum of 24,000*l.*, and to permit his wife to receive the annual income thereof during widowhood; and after her decease or second marriage, then to hold the said trust-fund in trust for such of the children of his brothers and sisters John Shipley Ash, Jane Roberts, and Elizabeth Haigh (then deceased), and of Jane the wife of William Thomas Metcalfe, as should be living at the time of the death or second marriage of his said wife, in equal shares *per capita* and not *per stirpes*; subject nevertheless to a general power of appointment by his wife in case she should remain his widow and unmarried. The testator bequeathed to each of his brothers and sisters a legacy of 1500*l.*; and the will then contained this statement: "The residue of my personal estate and effects not hereinbefore disposed of I propose to bequeath by a codicil to this my will, or otherwise to allow the same to go to my next of kin according to the statutes for the distribution of the estates of intestates."

The testator died on the 18th Nov. 1860, without having made any codicil to his will; and leaving his widow, but no children. His next of kin at the time of his death were his brothers and sister Benjamin Ash, John Shipley Ash, Richard Ash, and Jane Roberts; and the two children of his deceased sister Elizabeth Haigh.

After payment of, and making due provision for the testator's debts, funeral and testamentary expenses and legacies, there was a large surplus of his personal estate. The widow contended that the clause in the will relating to the residue was a declaration that, in case the testator should not make a codicil he intended to die intestate as to the residuary personality; and that, as he had not made any codicil, she was entitled to a moiety thereof. The next of kin of the testator insisted that, according to the true construction of the

ROLLS.] — v. —. *Re ANON—PENFOLD v. KELLY—ALLARDICE v. ONSLOW.* [V.C.K.]

clause in the will, the testator's residuary personal estate was divisible among them, as his next of kin according to the statutes.

Baggallay, Q. C. and *H. F. Bristowe* appeared for the widow, and contended that the clause in question did not amount to an express gift of the property to the next of kin according to the Statutes of Distribution. Had it done so the widow would no doubt have been excluded from that class: (*Garrick v. Lord Camden*, 14 Ves. 372.) All the testator intended was, that his residuary personalty should, if he made no codicil, be treated as undisposed of; in which event, the widow, as such, would take her share of it.

Hobhouse, Q. C. and *Bradrick*, for the next of kin, insisted that the words of the clause did amount to an express gift of the property to them, as being the next of kin according to the statutes. Furthermore, the widow was otherwise provided for by the will; and therefore it was clear the testator did not mean his residuary personalty to be undisposed of.

W. Forster for other parties.

The MASTER of the ROLLS.—In my opinion the clause in question does not amount to a gift of the residue to the next of kin of the testator. All he means to express by it was, that if he disposed of the residue at all, it would be by a codicil to his will. It is certain that where a person makes an express gift of property to his next of kin according to the statutes, he does not, as a general rule, mean those persons only to take who have been held entitled thereto according to the decided cases. What such a person does mean is this, that the law shall distribute the property as it would do in the case of an intestacy. In the present case, there is no express gift; but simply an intimation of the testator's desire that if he makes no codicil the residue shall be allowed to go to his next of kin according to the statutes, i. e., that it should go as if he died intestate. I approve of the decision in *Garrick v. Lord Camden*, but I think that case does not apply to the present. There will therefore be a declaration that the testator has made no disposition of the residue of his personal estate and effects.

Solicitors, *Few and Co.*

Friday, Jan. 22.

— v. —.

Re ANON.

Practice—Order to take a bill pro confesso against a deft. out of the jurisdiction—Affidavit.

An order was pronounced in July last, to take a bill pro confesso against a deft., upon the usual affidavit, which stated that he was then known to be at New York, out of the jurisdiction of this court. The order, however, was not drawn up till after the Long Vacation. The registrar objected that the deft. should be proved to be now out of the jurisdiction. It was stated by a near relation of the deft. that he believed him to be still at New York, where he had been served with process six months since.

Held, that the order might now be drawn up, without further evidence from America.

In this cause and matter, an order was pronounced in July last, directing the bill to be taken pro confesso against one of the defts., upon the usual affidavit, which stated that such deft. was then known to be at New York out of the jurisdiction. The order was not, however, drawn up until after the Long Vacation, when the registrar objected that the affidavit upon which it had been pronounced in July was not sufficient. The deft. ought to be proved to be out of the jurisdiction when the order was drawn up.

H. F. Bristowe now mentioned the case to the court, and stated that, to comply with the registrar's

objection, it would be necessary to send a person a second time to New York, where it had been proved that the deft. resided in July, and which statement had been then ascertained to be true. The deft. had also resided there when process was last decreed upon him, viz. six months ago. He therefore asked that the court would now assume that the deft. was still residing at New York. He produced the allegation of a near relative of the deft. to the effect that such relative had every reason to believe the deft. to be still residing at New York, and at the place where he was last served with process.

The MASTER of the ROLLS.—I think, Mr Bristowe, that under the circumstances I may assume the deft. to be now residing at New York, and that the order may be drawn up accordingly.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA MITCALFE and G. T. EDWARDS, Esqrs., Barristers-at-Law.

Tuesday, Jan. 12.

PENFOLD v. KELLY.

Practice—10th Consolidated Order, r. 18—Party returning within jurisdiction of court.

An application after decree, under the 10th Consolidated Order, r. 18, to serve a copy of the bill on a deft. who, at the time of filing the bill, was beyond the jurisdiction of the court, but returned within it after decree, refused.

In this case a bill had been filed by trustees, being a question of construction arising upon a post-nuptial settlement, and the suit had been heard.

Kelly Harris, one of the defts., was at that time out of the jurisdiction of the court, but his residence was not known. At the hearing of the cause, the V. C. thought that some of the questions involved were so clear that it was not necessary as to them that the deft. Harris should appear, but that he ought to be at liberty to come in and argue the other questions, if he thought fit to do so. Harris had now returned to England, and wished to appear in the suit.

W. H. Terrell now applied for leave to serve a copy of the bill on Harris. The twelve weeks from the filing of the bill had elapsed, and it was therefore necessary, under the 10th Consolidated Order, to make this application, as he could not be now served without the leave of the court.

Upon the V. C. asking why Harris should not appear and consent to be bound, *Terrell* said that he could not assume that he was willing to be so bound.

The VICE-CHANCELLOR said that, supposing he gave the authority asked, and the deft. did not appear within the time limited by the practice, how could the court in such a case say that the deft. should be bound? What could be done in chambers he did not know. The plt. was no doubt in a difficulty, but he could not now give any direction on the subject. The application must be refused.

Jan. 22 and 23.

ALLARDICE v. ONSLOW.

Domicil—Acquisition of new domicil—Fiduciary to country of domicil of origin.

C., born in Scotland, settled in India as a coffee planter, and after a residence in India for twenty years he returned to Great Britain, where he remained for seventeen months; during six of these months he resided in Scotland. He then returned to his plantations in India, and died there. While in England he expressed his desire to Scotland as a residence:

Held, that C.'s domicile was Anglo-Indian, and that he had not re-acquired his domicile of origin by his visit to Scotland.

This was a petition by executors which prayed that it might be declared that no legacy duty was exigible in respect of the legacies and residuary estate given by the will of Thomas Cannon.

The main question in point was, whether Mr. Cannon, by a temporary sojourn in Scotland, his domicile of origin, lost his Anglo-Indian domicile, which it was maintained he had acquired by his residence in India, and re-acquired his Scotch domicile.

Mr. Cannon, who was born in Scotland of Scotch parents, commenced life at sea in the mercantile service, about 1834, but went to Wastarah, in the kingdom of Mysore, in 1840, with a capital of 500*l.* which he invested in the purchase of land for coffee plantations. He carried on the business of a coffee planter for the last twenty years of his life, and in 1852 he entered into partnership with Col. Onslow, which partnership lasted till 1858. In that year he came to England, his business in India being carried on in the meantime as usual, and he remained at home seventeen months, being eleven months of that time principally residing in furnished lodgings in London, St. Leonards, and elsewhere in England, and the remaining six months he was visiting relations in Scotland. In 1859 he returned to his coffee plantation in Mysore, where he died on the 12th March 1860.

While he was in England he frequently complained that Scotland was too cold for him, and it was the cause of his illness, which was disease of the lungs. It was, he said, too near the North Pole.

The testator's will was executed in 1859, in Mysore. All the testator's real and personal estate—which was considerable—was situated in India, being invested in land and securities there.

The suit was an administration suit, and as the petitioners contended that the testator's domicile was Anglo-Indian, and therefore that no legacy duty was payable, they had agreed with the Commissioners of Inland Revenue that a judicial opinion on the question should be obtained.

Anderson, Q.C. and G. W. Collins, for the petitioners, cited

Attorney-General v. Fitzgerald, 3 Drew. 610;
Lyall v. Paton, 25 L. J. 746, Ch.;
Cockrell v. Cockrell, 25 L. J. 750;
Moorhouse v. Lord, 8 L. T. Rep. N. S. 212, 215;
Mazwell v. McClure, 2 L. T. Rep. N. S. 65;
Kennedy v. Bell, 1 Third Series Court of Sessions Cases, 1127;

Anderson v. Laneville, 9 Moo. P. C. 325.
Walford, for Miss Forgan, a party interested.

Hanson, for the Commissioners, cited

Hodgson v. De Beauchesne, 12 Moo. P. C. 285;
33 L. T. Rep. 36;
Craigie v. Lewin, 3 Cur. 435;
Van Grullen v. Digby, 31 Beav. 561;
Jopp v. Wood, a case before the M. R. in May last;

Stanley v. Burness, 3 Hagg. Ecc. Rep. 373;
Attorney-General v. Rowe, 1 Hurl. & Colt. 31;
6 L. T. Rep. N. S. 438.

THE VICE-CHANCELLOR said that he could not come to any other conclusion in the present case than that the domicile was Anglo-Indian. The circumstances were simple. He must be governed by the authorities, and more particularly by the decision of the H. of L. in *Moorhouse v. Lord*, 8 L. Rep. N. S. 212, where it was held that Dr. Cochrane, who, being a domiciled Scotchman, had entered into the medical service of H. E. I. C., had acquired an Anglo-Indian domicile. The evidence in that case showed that, during a considerable portion of his life, he intended only to remain in India long enough to make his

fortune and then to return to England, and the Lords held that by that residence in India he had acquired an Anglo-Indian domicile. A question had been urged whether the fact of Dr. Cochrane's being in the service of the East India Company would make any difference, and whether, if he had been in India on private business, the Lords would have decided that he had thereby acquired an Anglo-Indian domicile. The fact of Dr. Cochrane being in the service of the East India Company would be a reason why he should not have acquired an Anglo-Indian domicile, because the company was a body of English merchants trading in India, with an office in London. All the accessories were English. It was not unlike the case of an officer in Her Majesty's army being sent to Canada. If any consideration were due to the circumstance that Dr. Cochrane was in the service of the company, the operation would be against the acquisition of an Anglo-Indian domicile. The question in this case was, whether there had been an abandonment of the domicile of origin, and an acquisition of an Anglo-Indian domicile. He must confess that he was much struck by the decision of the M. R. in *Jopp v. Wood*, which was now under appeal, in which under very similar circumstances it was held that the domicile of origin was not lost. According to what he conceived to be general notions of adoption of domicile and change of domicile, he should be disposed to say, that a man intended to retain his original domicile. Indian domicile, and the only ground upon which it could be contended that he had acquired by any act either a domicile in England or a domicile in Scotland was the fact of his residence in these countries for seventeen months in 1858 and 1859, when he left his property in India and brought with him only his personal baggage. Of these seventeen months he was six months in Scotland and eleven in England. He moved about to different places. He did not fix himself in Scotland. He returned to India, and still continued at his plantation. Under these circumstances, without any expression of Mr. Cannon's intention on the subject, he should have declared that there was no acquisition either of an English or of a Scotch domicile. With regard, however, to Scotland, Mr. Cannon, not owing to any dislike to his native country, had indicated his great aversion to making Scotland his residence. As to acquiring domicile in England by residing there in lodgings for eleven months, it was out of the question. It must be declared, therefore, according to the terms of the prayer. The costs of the petitioner and of Miss Forgan to be costs in the cause.

Solicitors: *Thomas, Moore and Street*; Solicitors Inland Revenue.

[NOTE.—See *Forbes v. Forbes*, Kay, 341.]

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-Inn, Barristers-at-Law.

Saturday, Dec. 19.

WILSON v. ROUND.

Solicitor's costs—Charging order—Attorneys and Solicitors Act 1860 (23 & 24 Vict. c. 127, s. 28).

Where a solicitor applied, under the above Act, to have his costs of a foreclosure suit charged upon certain real estate of a deceased client, in respect of which he had obtained a foreclosure decree, and which estate had been ordered in an administration suit to be sold for payment of his debts:

Held, that the order must be strictly confined to the costs, charges and expenses incurred in reference to the foreclosure suit in which the decree was obtained.

This was a petition presented by a solicitor under the 28th section of the Attorneys and Solicitors Act

V.C. S.]

SHAFTO v. ADAMS.

[V.C. S.]

1860 (23 & 24 Vict. c. 127, s. 28), praying that it might be declared that his bill of costs might be charged upon certain real estate, in respect of which a foreclosure decree had been made in favour of the client of the solicitor. Among the costs sought to be charged as above, were those of actions of ejectment and of indictments preferred against certain persons who had entered forcibly upon the mortgaged property. The client had died, and a creditors' suit had been instituted for the administration of his estate, in which his real estates had been ordered to be sold, and the proceeds, after paying incumbrances, applied in payment of his debts.

Eddis appeared in support of the petition.

De Gez, for the executors of the deceased client, contended that, after the decree in the creditor's suit, the order asked for could not be made, and, at all events, he submitted that such order should not be allowed to extend to any other costs than those of the foreclosure suit.

THE VICE-CHANCELLOR.—The costs will be a first charge; but the charging order can only include the taxed costs, charges and expenses of or in reference to the foreclosure suit, and I shall direct the amount of them to be raised by sale or mortgage of the property, with liberty to apply.

Solicitors: *Rhodes, Sons and Duffet*; *E. P. De Gez*.

Friday, Jan. 15.

SHAFTO v. ADAMS.

Post-nuptial settlement—Expectant heir.

The principle upon which the court acts in discouraging mortgages and sales made by expectant heirs of their reversionary interests, has no application to the case of an expectant heir who has made a settlement of his reversionary interest for the benefit of his wife and children.

This suit was instituted by the plt. William Henry Shafto the younger, for the purpose of setting aside a voluntary post-nuptial settlement of his reversionary interest in certain real estate upon his wife and children.

The bill stated that, a few days previously to the date and execution of the said settlement, the plt., in consequence of differences which existed between himself, his wife and his wife's mother, Mrs. Eleanor Lee, left his residence, and for a short time took up his abode at an hotel in Plymouth, where he expected to be joined by his wife, but she, acting, as he alleged, not in accordance with her own feelings, but under the influence of her mother, refused to communicate with the plt., and that Mrs. Lee insisted that, previously to any communication taking place between the plt. and his wife, he should execute a settlement of his reversionary life-estate. Subsequently Mrs. Lee's solicitor, accompanied by a Major Studdy, a friend of hers, called upon the plt. and represented that no reconciliation could take place between him and his wife unless the proposed settlement was made. The solicitor, as alleged, further stated that, if the plt. attempted to sell his said reversionary estate, he would not be able to obtain more than 100*l.* or 200*l.* for it, and promised that Mrs. Lee would, if the plt. made the proposed settlement, give him 60*l.*, and settle 1000*l.* on the plt.'s wife.

The plt., relying on the truth of these statements, accordingly agreed to execute the settlement, and on the 27th July 1858 he was taken by Major Studdy to the solicitor's private residence, who at once produced the engrossment, and read over the same to the plt., but without comment of any sort, and the plt. subsequently signed the same in the presence of the solicitor and Major Studdy. No other person was present at the execution of the said settlement. The settlement was retained by the solicitor. Previously to

and at the date of the execution the plt. was in pecuniary distress. No copy or draft of the settlement was previously perused by or on behalf of the plt. Neither the plt.'s uncle, the tenant for life, nor the plt.'s father, was consulted by the plt. with reference to the settlement, and the plt. was without professional or other advice or assistance. The costs of preparing the settlement were paid by Mrs. Lee.

The settlement was of his reversionary interest for the benefit of his wife and children.

The plt. alleged that, since his marriage and before the execution of the said settlement, Mrs. Lee had made some payments on his account, not exceeding the sum of 1000*l.*, which it had been arranged should be deducted out of the money to which his wife would be entitled on her mother's death; also, that after the date of the settlement, Mrs. Lee, under her covenant, had paid for the separate use of the plt.'s wife, interest on the sum of 1000*l.*, but that he had never received from Mrs. Lee's solicitor, or any other person, the said sum of 60*l.* The plt. further alleged that, at the date of the settlement, the annual rent of the lands comprised in the settlement, in which the plt. had a reversionary life-interest (then subject to a charge of 3089*l.* 17*s.* 5*d.*, and certain annuities), exceeded the sum of 3800*l.* and that the value of his reversionary life-interest therein was 16,000*l.* at least, but of which value he was at that time in complete ignorance.

The bill was filed against the surviving trustee, Mr. Adams, Mrs. Lee and the plt.'s wife and children, and prayed that the settlement of the 27th July 1853 might be set aside, the plt. offering to repay to Mrs. Lee all payments, if any, made by her under her covenant in the said settlement for the benefit of the plt.'s wife.

Bacon, Q.C. and *F. T. White*, for the plt., contended that the settlement was one made by an expectant heir, without having the benefit of independent legal advice; that he was at the time embarrassed and under the influence of his wife's mother; that the value of what he was settling had been greatly misrepresented to him; that during the joint lives of himself and his wife the whole income of the property settled was made payable to his wife, and that the consideration for the settlement was altogether inadequate. They cited the cases of

Hoghton v. Hoghton, 15 Beav. 278;

Cooke v. Lamotte, 15 Beav. 234;

Archer v. Hudson, 7 Beav. 551;

Jenner v. Jenner, 2 Giff. 232; s. c. on appeal, 3 L. T. Rep. N. S. 488.

Malins, Q.C. and *C. Hall*, for the defts. Mrs. Lee and Mrs. Shafto and her children, were not called upon.

E. K. Karslake appeared for the trustees.

THE VICE-CHANCELLOR.—Independently of the question of purchase, this bill cannot be sustained. There is no authority or intelligible principle upon which this court can interfere at the instance of a husband to set aside a settlement made by himself in favour of his wife and children. In this case an attempt has been made to set aside a settlement upon the ground of the husband being an expectant heir; but his being an expectant heir is no reason why he should not make such a settlement as this. The principle upon which this court acts in discouraging mortgages, sales and dealings by expectant heirs of their reversionary interests, has no application to the case of an expectant heir who has made a settlement upon his wife and children, and very properly not, and I hope the day will never arrive when it will be so applied. The bill must be dismissed, but without costs.

Solicitor for the plt., *E. G. Lawrence*.

Solicitors for the defts., *Bockett, Son and Borton* and *Thomas Baker*, jun.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, ESQs.,
Barristers-at-Law.

Saturday, Dec. 19.

Re CHAPLIN'S TRUSTS.

Practice—Petition—Costs.

The court will usually allow the costs of two petitions, each having for its object the payment out and distribution of a fund in court, where each has been prosecuted *bonâ fide* by a separate class of persons entitled to the fund.

But where the presentation of the first petition was known to the solicitor of parties who afterwards themselves presented a petition, both being for the same purpose, and the solicitor having the opportunity of knowing the purport of the first petition, the costs of preparing and presenting the second were disallowed.

The facts of this case are reported *ante*, p. 476. It was now mentioned again on the question of the costs of the two petitions then presented, the one by the surviving legatees under the will of the testator, the other by his next of kin, who, according to the decision of the V.C., took the lapsed third of his residuary estate.

A petition had been prepared by the surviving legatees for payment of the fund out of court, and raising the question of lapse; before it was presented, the next of kin having previously applied to the solicitor for the legatees to know what course he intended to follow, without obtaining any satisfactory answer, presented their petition, raising the same question, which was answered in due course.

The agent in London of the solicitor having declined to accept service of the latter petition, it was sent into the country at once and served on the solicitor himself. Before, however, service could be effected the former petition was presented, and was afterwards served on the next of kin and other parties.

Kenyon, Q. C. and *Woodroffe*, for the legatees, claimed to be entitled to their costs, out of the fund, of the preparation and presentation of their petition. They urged that the petitioners were twelve out of nineteen persons entitled, and that the terms of the prayer of the petition of the next of kin might possibly not have carried the disposition of the whole fund.

Daniel, Q. C. and *Marten*, for the next of kin, maintained that the presentation of the second petition was wholly superfluous, and that these petitioners ought to pay their own costs.

Eddis, *C. Hall*, and *Turner*, for the several respondents to both petitions, asked that some provision might be made for payment of their costs.

The VICE-CHANCELLOR said that the question in all these cases was, what amount of knowledge the one party had of the proceedings of the other. The court would generally allow the costs of two petitions out of a fund in court, though both were for the same object, where they appeared to have been presented *bonâ fide*. In this case, however, the parties who presented the second petition were informed of what was being done, and yet chose to persist in coming to the court. He should always be careful not to allow a fund in court to be needlessly squandered, and should not, therefore, under the circumstances of this case, allow the legatees any of the costs of preparing or presenting their petition; without, however, requiring them to pay costs. The costs of the respondents to the second petition would be added to the costs of the first, and be paid out of the fund in court.

Solicitors for the next of kin, *Rickards* and *Walker*; for other parties, *Norris*.

Thursday, Jan. 21.

THE SCOTTISH UNION INSURANCE COMPANY v.
STEELE AND OTHERS.

Practice—Interpleader suit—Costs—Affidavit of merits.

Where, in an interpleader suit, the plaintiffs filed an affidavit of some length as to merits:

Held, that in making the usual order on defendants to interplead, and for taxation of costs, there should be a direction to the taxing master to have regard to any prolixity in the plaintiffs' affidavits.

This was a motion for decree in an ordinary interpleader suit, the only question being whether the plaintiffs were to be allowed the costs of an affidavit filed by them in support of it, and which was a mere echo of the bill, setting out a great number of letters, which formed the greater part of the case.

Phoebe Johnson, on the 21st Nov. 1840, effected a policy of insurance on her life with the plaintiffs for 600*l*. On the 18th Jan. 1841 this policy was assigned to two trustees, and notice of the assignment was, in due course, served on the plaintiffs. On the 28th Nov. 1856 the policy was mortgaged to the defendant Steele, and notice of the mortgage given by him to the office. Phoebe Johnson died on the 12th Aug. 1863, and the defendant G. F. Cobham was her executor. In September of the same year Steele applied to the plaintiffs for payment of the policy money, at the same time furnishing an abstract of his title. The plaintiffs, however, acting upon advice, were obliged to decline payment until the rights of the parties under the assignment of 1841 were ascertained. A long correspondence ensued, and Mr. Steele, who was acquainted with the contents of the assignment of 1841, persisting in his claim, and being unable to induce the plaintiffs to part with the policy-money, commenced an action, in which the writ was served on the plaintiffs' secretary on the 4th of the present month. Upon this the bill was filed.

The plaintiffs also filed an affidavit, embodying the whole case made by the bill, and giving the whole of the correspondence stated in the bill.

Roll, Q. C. and *A. F. Bedwell*, for the plaintiffs, argued that there was no rule of the court, nor any authority which had decided that in a suit of this character a plaintiff was wrong in filing an affidavit of merits; in the present case very little time was allowed for preparing proceedings, and it had been thought more convenient to adopt the present course, and in all these cases the court would not go minutely into each step in the proceedings, but would consider generally whether the conduct of the plaintiff was, on the whole, oppressive. In case the defendant Steele had not appeared, an affidavit of merits would have been necessary to secure to the plaintiffs their costs of this suit. They applied to have the order in the usual form.

Gifford, Q. C. and *G. L. Russell* submitted to have a decree made in accordance with the prayer of the bill, only objecting to the plaintiffs' affidavit, and asking that a special direction be given to the taxing master to disallow the costs of it, on the ground that in an interpleader suit the only affidavit should be one that there was no collusion.

Fischer for the trustees of the assignment of 1841.

Roll in reply.

The VICE-CHANCELLOR said that if no rule existed as to the practice in interpleader suits, it was quite time that one should be settled. The worse the case was, as made by a plaintiff, against one or other claimant, the more careful would the court be that the plaintiff, being secure of his costs, should not be allowed to run them up unnecessarily. He considered, however, that it was a proper question, in the first instance, for the taxing master to decide what portion of the pleadings were proper, and what were not. It seemed that this would not be done in taxation under the

usual order, and he must therefore give a special direction to the taxing master. Minute: After the interpleader order, tax the costs of the plt., including their costs of the action at law, the taxing master in such taxation to have regard to any prolixity in the plts.' affidavits. Then the usual order for the payment of the policy money into court, less the taxed costs.

Solicitors: for plt., *Oliverson, Larie and Peachey*; for the trustees, *Church and Sons*; for the defts., *Steele*.

Friday, Jan. 22.

THE CHARTERED MERCANTILE BANK OF INDIA,
LONDON AND CHINA v. DE JONGE.

*Practice—Charging order—1 & 2 Vict. c. 110—
Costs of stakeholder.*

Where a company is made a deft. to a bill by a plt. claiming an incumbrance on shares of a shareholder also made deft., the company is entitled to costs as between party and party from the plt., and to the difference between such costs and costs as between solicitor and client out of the fund.

The plts. in this suit were creditors of the deft. De Jonge, who was the registered proprietor of 190 ten-pound shares in the East India Coal Company (Limited), who were the other defts. In 1859 the plts. obtained a verdict by default in the Court of Q. B., and signed judgment against De Jonge for 1449l. 6s.

It appeared that De Jonge was possessed of no other property in this country except these shares, and was himself residing abroad. A charging order under 1 & 2 Vict. c. 110, s. 14, was accordingly obtained upon the shares, which was made absolute on the 10th Feb. 1862. The six calendar months prescribed by the Act having elapsed, and the plts. not having been able to obtain any information as to the place of residence of De Jonge, filed the present bill; they prayed a declaration that they were entitled to the benefit of the charging order, and for an injunction to restrain either of the defts. from dealing with the shares.

Knox Wigram for the plt.

A. Smith for the company.

Defts. (the company) submitted to the direction of the court, on provision being made for their costs as between solicitor and client.

The VICE-CHANCELLOR said that the company could only be entitled, as against the plts., to costs between party and party, and to any extra costs out the shares.

(It was agreed that in the present case it would come to the same thing if the order was made at once for taxation of the company's costs as between solicitor and client, and that such costs should be paid by the plts. and added by them to their security.)

The VICE-CHANCELLOR said the order might be in this form.

Solicitors: for the plts., *Clarke and Morris*; for the company, *Haward, Dolman and Lowther*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS,
Esqs., Barristers-at-Law.

Saturday, Nov. 14.

HUDSON (app.) v. MACREA (resp.)

*Summary conviction—Bond *sic* claim of right—
Claim without colour to support it—Jurisdiction.*

*To oust justices upon a summary conviction, of their jurisdiction by the assertion of a bond *sic* claim of right, such claim must have some colour to support it. Where, therefore, the claim set up is wholly*

*without colour, the jurisdiction of the justices is not ousted, notwithstanding it is set up *bona fide*, and believed to be so set up by the justices.*

This was a case stated by justices under the 20 & 21 Vict. c. 43, upon a conviction of the app. for trespass in fishing, contrary to sect. 24 of the 24 & 25 Vict. c. 96.

The case stated that "Whereas on the 18th and 25th of July 1863, at Croydon, in the county of Surrey, there was brought on for hearing and determination before us Edward Richard Adams and Nathaniel Lawrence Austen, Esqrs., two of Her Majesty's justices of the peace for the said county, a certain information of John Macrea, in the following form, that is to say, for that he the said Charles Hudson, at the parish of Carshalton, in the county of Surrey, on the 2nd July 1863, by angling at a certain hour, not between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully and wilfully attempted to take fish in certain water, in which Samuel Gurney, Esq. then and there had a private right of fishing, contrary to the statute 24 & 25 Vict. c. 96, s. 24. And whereas the said Charles Hudson and John Macrea appeared by their respective attorneys before us upon the two hearings of the said information. And whereas having duly heard and considered the evidence produced, and the facts admitted by both parties, we did thereupon determine that the said complaint was proved, and ordered the app. to pay a fine of 1s. and 2l. 8s. 6d. costs, and in default to be imprisoned for twenty-four hours. And whereas the said app. being dissatisfied with our determination upon the said hearing as erroneous in point of law duly applied to us to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion thereon of her Majesty's Court of Q. B. Now therefore we the said justices, in compliance with the said application and the provisions of the said statute, do state the following case:—

"All the facts and charges set forth in the information are admitted and are to be taken as proved, reserving only the question whether the act of the app. therein complained of was or was not illegal and contrary to the statute therein referred to.

"At that part of the river Wandle where it separates the parishes of Mitcham and Carshalton, in the county of Surrey, there is, on the Mitcham side of the stream, a dwelling-house and garden, which are occupied by one W. Macrea under a lease from Samuel Gurney, Esq., M.P. The land on the other side of the river is in the parish of Carshalton, and immediately adjoins the river, and running above its banks there is a public footpath. On the occasion in question the app. was fishing from this footpath. The Wandle is a non-navigable river. Many persons, some residing at Mitcham, some at Carshalton, and others at a distance from those places, have for many years—some for sixty years and upwards, and others for less periods—fished at their pleasure, and without interruption, in the said river, by angling from this footpath above mentioned; and it was stated in evidence that the public had fished there for sixty years and upwards. The defence of the app. was that, under the above circumstances, he had a right, as one of the public, to fish in that part of the river above described from the said footpath, and that by the making a claim *bona fide* to that right our jurisdiction was ousted. We were of opinion that the app. had acted and made his said claim under the *bona fide* but mistaken supposition that he had such a right. But we were of opinion that such a right could not, under the above circumstances, be acquired in a non-navigable river, and that it was not sufficient to oust our jurisdiction that the app. by mistake supposed that he possessed it and *bona fide* claimed it. The question of law arising on the

above case for the opinion of Her Majesty's Court of Q. B. is, first, whether the claim by the app. as one of the public, and, under the above circumstances, to fish at the place in question was such an assertion of right as ousted our jurisdiction; secondly, and if not, whether our decision against the validity of the claim was right in law."

Mellish, Q. C. appeared for the resp., and argued that, to oust the jurisdiction of the justices, the claim of right must be supported by a colour of right, and that far from this being the case in the present instance, it was absurd to suppose that the public could have a right to fish in a non-navigable river; that *bona fides* alone, without some colour of right, was insufficient to oust the jurisdiction of the justices:

Scott v. Vine, 30 L. J. 207, M. C.;

Cornwall v. Saunders, 32 L. J. 6, M. C.;

Reg. v. Stimpson, 32 L. J. 209, M. C.; 8 L. T. Rep. N. S. 536.

Philbrick, who appeared for the app., argued that the finding of the justices that the app. acted *bona fide* ousted them of their jurisdiction to convict:

Taylor v. Newman, 32 L. J. 186, M. C.; 8 L. T. Rep. N. S. 424.

BLACKBURN, J. (a)—I am of opinion that the conviction was quite right. This was undoubtedly a private fishery, and though the app. showed that he *bona fide* believed that he as one of the public had a right to fish there, the justices were right in holding that in point of law such a right could not exist in a non-navigable river. The rule has often been laid down in this court that the title set up by a deft. in order to oust the jurisdiction of the justices must be supported by some show of right, and here there was none whatever, for such a claim could not possibly exist. In *Reg. v. Stimpson* we held that the jurisdiction was ousted, for that was a navigable river, and the presumption was, that the public could fish there. As to the necessity of a *mens rea*, this was not a case in which the question of jurisdiction turned upon that ingredient. The only point was, whether there was reasonable evidence of a claim of right in the app.

MELLOR, J. concurred.

Conviction affirmed.

Nov. 13 and Jan. 11.

CLAPHAM v. ATKINSON.

Bankruptcy—Deed of arrangement—Validity—Cessio bonorum.

A deed of arrangement under sect. 192 of the Bankruptcy Act entered into between the debtor and the requisite three-fourths of the creditors, and containing nothing to prevent all the creditors from obtaining the benefit of the deed, is good, although it does not expressly purport to have been made for the benefit of all the creditors.

The absence of a provision in the deed for a cessio bonorum, i. e., an entire assignment of the debtor's property, does not avoid the deed.

Action on promissory note and on the money counts. Plea by way of equitable defence (except as to 14*l.*), that deft. duly executed a deed of arrangement under the Bankruptcy and Insolvency Act 1861. (The plea set out the deed.)

Demurrer and joinder therein.

The deed was in the following brief form:—

"This indenture made 8th March 1862 between J. R. W. Atkinson, of 6, Alma-terrace, Kensington, in the county of Middlesex, gentleman, of the first part, and the undersigned creditors of the said J. R. W. Atkinson of the other part. Whereas the said J. R. W. Atkinson from divers causes is unable to pay us the several creditors full 20*s.* in the pound, and whereas

the said J. R. W. Atkinson hath applied to us to receive and take a compensation of 2*s.* 6*d.* in the pound in full satisfaction and discharge of our several respective claims and demands on him payable on the 9th March 1863, which we the several creditors signing these presents have agreed to, and being a majority in number representing three-fourths in value of the creditors of the said J. R. W. Atkinson, whose debts respectively amount to 10*l.* and upwards, have agreed to accept such composition as aforesaid, and in consideration thereof and on payment thereof, or whenever thereafter called upon for the purpose, hereby severally undertake and agree to execute to the said J. R. W. Atkinson a good and sufficient release in law of our several and respective claims and demands on him. In witness whereof, &c."

Nov. 13.—*Kemplay* for the plt.—The point turns on the sufficiency of the deed under sect. 192 of 24 & 25 Vict. c. 134. The first objection to it is, that it is not a deed for the benefit of all the creditors of the deft. This is substantially a similar deed to that in *Walter v. Adcock*, 7 H. & N. 541. The covenant to pay applies only to the particular creditors who execute the deed, and the authorities show that that vitiates the deed:

Ex parte Morgan, 32 L. J. 15, Bank.

Macnamara for the deft.—It appears on the face of the deed that it was intended to give all the creditors the benefit of the operative part, and that those who executed the deed executed it only as representing three-fourths of the creditors. A deed, the same in this respect as this, was held free from objection on this ground in *Hodgson v. Wightman*, 8 L. T. Rep. N. S. 932. As to the *cessio bonorum*: in *Ex parte Morgan*, the L. C. expressed an opinion that a deed of arrangement under sect. 192 might be good although it did not contain a *cessio bonorum*. And in *Ex parte Rawlings*, 7 L. T. Rep. 582, Turner, L. J. expressed a similar opinion. The only case in which it has been said that a *cessio bonorum* is necessary is *Walters v. Adcock*, and there the court was divided in opinion, and the judgment of the court did not proceed on that ground. The opinion expressed proceeded on the ground of *Tetley v. Taylor*, 1 E. & B. 521. But the 24 & 25 Vict. c. 134, s. 192, is different to the provision in the B. A. of 1849, on which *Tetley v. Taylor* was founded. Sect. 197 was cited. Creditors who do not execute may come in and have the benefit of the deed; and they may apply to the Bankruptcy Court for an order to be paid the composition under the deed: (2 Ld. Raym. 760.)

Kemplay.—*Hodgson v. Wightman* arose on sect. 194, and the plt. was a party to the deed, and the question was whether it was admissible in evidence, not having been registered under sect. 194. In *Ilderton v. Castrique*, 8 L. T. Rep. N. S. 537, a deed which limited the composition to the parties executing it was held bad. *The General Furnishing Company v. Venn*, 8 L. T. Rep. N. S. 432, was also cited. Secondly, there must be a substantial giving up of the deft.'s property for the benefit of his creditors. There is no decision cited against this view; and Mr. Commissioner Goulburn has ruled that a *cessio bonorum* was necessary. Sects. 195-7 contemplate a *cessio bonorum*.

Cur. adv. vult.

Jan. 11.—BLACKBURN, J.—In this case, which was argued before my late brother Wightman, my brother Mellor and myself, the judgment I am about to deliver is that of my brother Mellor and myself only. The question raised on the demurrer is, whether a composition-deed executed by a majority in number representing three-fourths in value of the deft.'s creditors was binding on the plt., a creditor of the deft., who had not executed or assented to the deed. The deed is set forth in the plea, and the question is, whether that deed so set

(a) Cockburn, C. J. and Wightman, J. were not present at the argument.

forth is such a deed as is contemplated by the 192nd section of the B. A. 1861. If it is, then, by virtue of that enactment, it is binding on the plt.; as, if he was party to it and had duly executed it, then the deft. is entitled to judgment; but if the deed is not such as is contemplated by that section, it is not binding on the plt., and he is entitled to judgment. The first objection made to the deed is, that it purports to be made only with those creditors who sign the deed, and that those who do not sign the deed are placed in a worse position, not being able to avail themselves of the deed. No doubt this objection would be fatal if it were borne out by the true construction of the deed. It is, independently of authority, clearly necessary that the creditors who are to be bound by the acts of those executing the deed should be at least in as good a position as those who bind them, and that point has been decided in *Walters v. Adcock*, 7 H. & N. 541; *Ex parte Rawlings*, 32 L. J. 37, Bank.; and *Iderton v. Castrigue*, 8 L. T. Rep. N. S. 537. But in the present deed it is expressly stated that the creditors executing the deed are a majority in number representing three-fourths in value of the whole creditors. In *Hodgson v. Wightman* it was held that a statement in a deed to this effect sufficiently showed that it must have been intended to be an arrangement between the debtor and the whole body of his creditors. By this decision of a court of co-ordinate jurisdiction we are bound, and if the plt. seeks to impeach the decision he must do so in a court of error. But though we are bound, in deference to that decision, to hold that this arrangement is made with all the creditors, it does not necessarily follow that it is free from the objection now under consideration. The frame of a composition-deed may be such as to render the remedy of the creditors who did not execute the deed less easy than that of the creditors who had executed the deed; and it may even be such that the creditors who had not executed the deed could not by any of the ordinary processes of law obtain the same benefit from the deed as those who had executed it; and in such cases the objection would be at least fairly arguable. But in the present case there is no such difficulty. The remedy of the creditor who has not executed the deed is a very stringent one, as if the debtor does not with punctuality pay him the 2s. 6d. in the pound on his debt, the creditor is remitted to his old right and may recover, not only the 2s. 6d. but also the 17s. 6d., and the remedy of a creditor who has executed the deed is not greater. The remaining objection is that on which principally we took time to consider. The deed in question contains no conveyance of any part of the debtor's property. It is specially a composition-deed without anything in the nature of a *cessio bonorum*; and the question therefore comes to be, whether such a mere composition-deed can be made binding on those creditors who have not assented to it. In *Tetley v. Taylor*, 1 E. & B. 521, it was decided in the Ex. Ch. that the arrangement clauses of the Bankruptcy Act 1849 applied to those cases only where the arrangement was as to the disposal of the whole estate of the debtor among the creditors, but the sections in that Act on which the judgment proceeded have been repealed and others substituted for them in the Act of 1861. We do not consider ourselves at liberty, sitting in the Court of Q. B., to inquire whether *Tetley v. Taylor* was or was not rightly decided by the Court of Ex. Ch. We are bound by that decision, and though the enactments in the Act of 1849 are repealed, yet those of 1861 are substantially the same as those for which they are substituted. We ought to give judgment for the plt., leaving the deft. to question that case in the H. of L. But the enactments in the Act of 1861 are such as to leave it open to controversy whether they are so much the same as those in the Act of 1849

that the decision in *Tetley v. Taylor* does apply to them, and this is the question now for our determination. We have now to ascertain the intention of the Legislature as expressed in the latter Act, and we feel the force of what my brother Bramwell said in *Walter v. Adcock*, "If the old law was intended to continue, why was any alteration made in the language used? If the law was intended to be altered why was not the alteration made in plain and unambiguous language?" Whatever might be the reason for the manner in which the new Act was framed, it is certain that the effect has been to produce a difference of opinion as to whether the doctrine laid down in *Tetley v. Taylor* is applicable to deeds made under the new Act or not, though hitherto there has been no actual decision on the point. In *Walter v. Adcock*, 7 H. & N. 541, the Chief Baron and Martin, B. were of opinion that the enactments in the Act of 1861 were such that the decision in *Tetley v. Taylor* on the construction of the Act of 1849 was still applicable. Wilde, B. was of the opposite opinion, and Bramwell, B. abstained from expressing any opinion on this point. There was, therefore, no decision of the Court of Ex. upon this point. In Chancery, in *Ex parte Morgan*, 8 L. T. Rep. N. S. 778, the present L. C. expressed a decided opinion both that *Tetley v. Taylor* was ill decided (which sitting in this court we consider ourselves precluded from entertaining as a ground of our decision), and also that the alteration in the enactment in the Act of 1861 was such as to prevent the decision from having effect on the construction of the new Act; but the decision in *Ex parte Morgan* was upon another ground. In *Ex parte Rawlinson*, 7 L. T. Rep. N. S. 582, Turner, L. J. expressed his opinion, that though, before the passing of the Act of 1861 the law must be considered as having been settled, that in order to validate an arrangement between a debtor and his creditors, so as to make it binding on those who had not assented to it, there must be a complete *cessio bonorum*, the alteration in the Act of 1861 was such as to show that the law in this respect was intended to be altered, and that an arrangement under the new Act, if in other respects fulfilling the requisites of the statute, would be binding on the creditors who had not assented to it, though there was no *cessio bonorum*. But the decision in *Ex parte Rawlinson* proceeded on another ground. We have therefore both those judges' opinions entitled to the greatest respect as authorities, but we have no decision either way which we are bound to follow. We must therefore act upon the opinion which we ourselves form on the best consideration we can give to the matter. And on the whole we think that the reasons which are so fully stated by Turner, L. J. in *Ex parte Rawlinson* that we do not repeat them, are convincing. Those reasons are already in print. Adopting them as ours, we come to the conclusion that sect. 192 of the Act of 1861 extends to deeds of composition, although there may be no *cessio bonorum*, and consequently we give judgment in the present case for the deft.

Judgment for the deft.

Attorneys for plt., *Ridsdale and Craddock*.
Attorneys for deft., *Tennant and Darley*.

Monday, Jan. 18.

HAYWARD v. METROPOLITAN RAILWAY COMPANY.
Costs—Lands Clauses Consolidation Act—Composition—Offer—Verdict.

If, in a case of injury to land by execution of the works under sect. 68, the promoters of a company, previously to the ten days' notice of trial before a jury required by the Lands Clauses Consolidation Act, s. 46, offer on aggregate sum equal to that awarded by the verdict, the claimant is deprived of his costs by sect. 51.

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In ascertaining whether the offer of the company is equal to or less than the amount awarded, the aggregate sum only is to be looked at, and not the separate items of which it is made up, even though the award is so much for each item.

Rule nisi calling on the Master to tax Mr. Hayward's costs in a compensation case under the Lands Clauses Act.

The question was whether Mr. Hayward was entitled to costs. The Master was of opinion that he was not, and had refused to tax them, on the ground that Mr. Hayward had not recovered more compensation than the sum offered by the railway company.

On the 10th June 1863 Mr. Hayward claimed, under the Lands Clauses Act, sect. 68, 500*l.* damages for permanent injury to his land occasioned by the works of the Metropolitan Railway Company, and 268*l.* for loss of trade, and gave notice of his desire to have the question of compensation settled by a jury. On the 30th June the company offered him 70*l.* for the injury to his land, and 30*l.* for loss of trade; and on the 2nd July they increased the offer to 100*l.* for the injury to the land, and 50*l.* for loss of trade. On the 30th June the company issued their warrant to the sheriff to summon a jury for settling the amount of compensation; and on the 1st July the company received notice from the sheriff appointing the 7th July for nominating the jury (special). On the 10th July notice of trial was given for the 20th July.

At the trial the jury awarded 50*l.* for the injury to the land and 100*l.* for loss of trade, i. e., the same aggregate amount as the second offer of the company, but reversing the proportions for injury to the land and loss of business.

Lush showed cause.—This is not a case where land is taken by the company, and they are required by the statute to take the initiative, but it is a claim under sect. 68 for injury arising from the execution of the works, of which claim the company may know nothing until it is made by the claimant, who takes the initiative by sending in his claim. Then, unless the company are willing to pay the amount claimed, they are within twenty-one days after notice of the claim to issue their warrant to the sheriff "to summon a jury for settling the same in the manner herein provided." (a) It has been held that sect. 51 is to be incorporated into sect. 68, and that sect. 38 is not, and therefore it is contended that the company having offered 150*l.* compensation, and the jury having awarded that

amount and no more, the claimant is not entitled to his costs of the inquiry:

Railstone v. York, &c. Railway Company, 15 Q. B. 404; .

Richardson v. South-Eastern Railway Company, 11 C. B. 154; 15 C. B. 810; 21 L. J. 122, C. P.

The severance of the compensation into so much for injury to land or structural damage, and so much for loss of trade, &c., is not required by the statute, but is made for convenience, and the only thing to be regarded on this question is the aggregate amount offered. The company have a right to say, "Take all or none." It is as if they said: We offer you 150*l.*, and we calculate it in this way. At Nisi Prius the verdict is sometimes taken on separate heads of damage, but it is entered on the record for the entire sum. By sect. 68 the company are to have twenty-one clear days for determining whether they will pay the claim before they are to issue their warrant to the sheriff, and, according to *The Metropolitan Railway Company v. Turnham*, 13 C. B. 212; 8 L. T. Rep. N. S. 280, it is sufficient if the offer be made not later than the time for giving notice of trial, that is, ten days before trial (sect. 46), to oust the claimant of his costs under sect. 51. In the case of an arbitration on a claim under sect. 68, if the company before nominating their own arbitrator tender a sum greater than the amount awarded, that is sufficient to deprive the claimant of costs:

Yates v. Mayor of Blackburn, 29 L. J. 447, Ex.; 2 L. T. Rep. N. S. 746.

Francis (Beresford with him).—The first offer was formally made under the Act, and that only is to be regarded now; and the verdict being for a greater sum, the claimant is entitled to costs. The company had no right to increase their offer any more than the claimant to increase his claim. The original offer or claim may be withdrawn, and a fresh one substituted. As soon as ever the company have given notice of their intention to summon a jury, the claimant is justified in preparing for the inquiry and incurring expenses, which it would be unfair to deprive him of by an offer subsequently made. The verdict justifies the claimant's going on after the first offer. Since *Senior v. The Metropolitan Railway Company*, 32 L. J. 225, Ex., it has always been the practice to separate the claims for structural damage and loss of trade. After sending in the claim the company have the entire conduct of the proceedings, and sect. 38 is the

(a) The 8 Vict. c. 18, s. 38. Before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works.

Sect. 51. On every such inquiry before a jury where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one-half of the costs of summoning, impanelling and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs other than as aforesaid, incident to such inquiry.

Sect. 68. If any person shall be entitled to any compensation in respect of any lands, or of any interest therein which shall have been taken for or injuriously affected by the execution of the works, and for which the

promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration, or by the verdict of a jury as he shall think fit; and if such party desire to have the same settled by arbitration it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed and the same may be recovered by him, with costs, by action in any of the Superior Courts.

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only section which prescribes the course of proceeding.

COCKBURN, C.J.—I am of opinion that this rule ought to be discharged. I must confess my utter inability to reconcile sect. 68 with the earlier sections of the statute which relate to the mode of ascertaining compensation, where land is taken by the company. When the legislator drew sect. 68, and framed the mode of proceeding therein provided, he had not present to his mind to what the enactments in the previous sections were directed, and that they related to a different set of facts. It is almost impossible to apply the machinery in those sections to sect. 68; and I therefore take my stand on the authority of the previous decisions. The Court of C. P. has laid down a rule which is not an inconvenient one, and which it would be wise to abide by. That court has held that the earlier clauses are to be considered as incorporated into sect. 68, and consequently that sect. 51 is to be read as part of sect. 68, and that where an offer has been made previously to giving the ten days' notice of trial, the costs of the inquiry shall depend on whether or not the sum awarded by the jury exceeds the offer of the company. The Court of C. P. thought that by the word "previously" was meant a reasonable time, at least ten days before the actual inquiry, and I cannot say that is an unreasonable time. By sect. 68 the company must, within twenty-one days after notice of the claim, issue their warrant to the sheriff to summon a jury, and they are not bound to give the claimant notice of their having done so. Then by sect. 46 they are to give ten days' notice of the time and place of the inquiry to the claimant. As that is the first time the company come into contact with the claimant, that gives him ten days to consider of the propriety of accepting the company's offer, or of going on with the inquiry. Such being the decision of the Court of C. P., I cannot say that it is wrong. It seems to me that the claimant is bound, before sending in his claim, to consider the real amount of injury he is likely to sustain, and ought to make it out on a pure consideration of all the circumstances. Therefore it does not take him by surprise when he sees the offer of the company, and he ought to be able to make up his mind upon it at once. With regard to the point of the company being bound by their first offer, if the time for giving the ten days' notice of trial had not elapsed, and they amend their offer before giving that notice, I think they are at liberty to do so. As I said before, I am unable to construe the Act, and I therefore take my stand on the decided authorities.

BLACKBURN, J.—I am of the same opinion. By sect. 68 the company are, within twenty-one days from the receipt of notice of the claim, to issue their warrant to the sheriff to summon a jury for settling the question of compensation in the manner therein provided, referring to the provisions in the previous part of the Act. The previous sections were drawn with reference to the cases where the land was meant to be taken by the company. Sect. 51 is the only one providing how the costs of the compensation inquiry are to be borne; and *Richardson v. South-Eastern Railway* decides that sect. 51 is incorporated in sect. 68. Then the question arises, previously to what is the offer on the part of the company to be made? The only section bearing on that point is sect. 38. Then the question is, is sect. 38 incorporated into sect. 68? Upon that question, *Railstone v. York, Newcastle and Berwick Railway* is in point, and there the majority of the judges decided that the section did not apply, and that the company were not bound to give the notice under that before issuing their warrant to the sheriff. Those authorities are binding on us, and we must hold that sect. 51 is incorporated into sect. 68, and that sect. 38 is not. Then, to what are we to say the offer pre-

viously made, referred to in sect. 51, points? Upon that the case of *The Metropolitan Railway Company v. Turnham* is an authority, and it was held in that case that the offer must be previously giving the ten days' notice of trial under sect. 46. As to the second point, I think that when the company have made an offer they may increase it from time to time, up to the time of giving the ten days' notice of trial. As to the other point of the severance of the particulars of damage, I think these are not separate matters of inquiry, but only separate items of damage.

MELLOR, J.—I am of the same opinion. There are two ways of looking at this question. There is a distinction between lands taken by the company and a proceeding by a claimant under sect. 68, and the machinery provided in the two cases is different. I think that sect. 38 does not apply to this case; if it did, it would practically limit the twenty-one days given by sect. 68 to eleven days. It is very material to see what are the legitimate costs of the compensation inquiry. The company are to issue their warrant to the sheriff to summon a jury, and he is obliged to appoint a certain time, not less than fourteen days, nor more than twenty-one days, after the receipt of the warrant, and forthwith to give notice, not to the claimant but to the promoters, and they are then to pay the claim, or to litigate it; and by sect. 46 they are to give ten days' notice of trial to the claimant. That being so, it seems to me that the offer on the part of the company must be made before they give the notice which brings them into direct collision with the claimant; that is, the ten days' notice of trial. The reasonable construction was, I think, given by the Court of C. P. in *The Metropolitan Railway Company v. Turnham*, which so decided.

Rule discharged.

Thursday, Jan. 21.

REG. v. CLEWORTH.

Sunday labour—29 Car. 2 c. 7, s. 1—A farmer not within it.

By the 29 Car. 2, c. 7, s. 1, it is enacted that "no tradesman, artificer, workman, labourer, or other person whatever," shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's day or any part thereof (works of necessity and charity only excepted), &c. : Held, that "a farmer" is not within the operation of this enactment.

This was a rule for a *certiorari* to bring up the conviction of one Peter Cleworth by two justices. The conviction stated, "For on the 19th day of July, at West Leigh, in the parish of Leigh, in the county of Lancaster, being the Lord's day, Peter Cleworth being a farmer, did unlawfully do and exercise certain worldly labour, business and work of his ordinary calling of a farmer aforesaid, by then and there haymaking in a certain field in West Leigh aforesaid, not being a work of necessity or charity, contrary to the form of the statute." The rule was moved upon the ground that the conviction shows upon the face of it that the justices had no jurisdiction to convict the said Peter Cleworth, who is therein described as "a farmer," of the offence stated.

By the 29 Car. 2, c. 7, s. 8, it is enacted that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's day, or any part thereof (works of necessity and charity only excepted)," &c.

Mellish, Q.C. and *Baylis* now shewed cause.—The only question is, whether a farmer who works on his own farm is a labourer within the statute; and whether, if he is not strictly a labourer, he does not come within the operation of the words "or other person whatso-

ever?" It is clear that an agricultural labourer is within the Act, for at the time of its passing they were the most numerous class of labourers. A farmer who works is the same as a labourer, except that instead of working for wages he works for profit. [COCKBURN, C. J.—There is a difficulty in saying that, according to common acceptance, a farmer means a labourer.] But he certainly comes within the operation of the words "or other person whatsoever," for although those words must be construed *ejusdem generis* with the words preceding, such an occupation as that of a farmer must have been intended to have been included. They must include any person who has an ordinary manual calling. [BLACKBURN, J.—A clerk who makes up his books upon a Sunday would be within it; but it would be hard to say, that if a merchant did so he would be.]

Fennell v. Ridler, 5 B. & C. 407, Bayley, J.'s judgment;

Rex v. Whitnash, 7 B. & C. 596.

[BLACKBURN, J.—In the reign of Charles II., the farmers must greatly have outnumbered the other classes, and it is strange, therefore, if the Legislature intended to have included them, it should not have said so.] It would be a strange state of things if the labourer should be liable, and the farmer who employs him not be liable. [CROMPTON, J.—I take the case of a man shaving another; the one who shaves would be liable, whilst the one who is shaved would not.] That might come under the exception of a case of necessity. [COCKBURN, C. J.—Judging from what one sees all around, it can hardly be said that shaving is an act of necessity!]

Scalfe v. Morgan, 4 W. & M. 270;

Sandiman v. Breach, 7 B. & C. 96,

relied upon on the other side, turned upon a different provision of the statute. If a farmer is not included he might go into town and sell his corn on a Sunday, whilst the corndealer would be prohibited. It could not be intended that a farmer might do what a tradesman is prohibited from doing. [CROMPTON, J.—The Legislature may have thought that there were cases in which, though not coming under the denomination of "necessity," might yet be properly exempt from the penalty. BLACKBURN, J.—Large classes of working people must have been considered as exempt; such as sailors, who are certainly labourers, and yet who could not be expected on a voyage to cease from navigating the ship.]

The *Solicitor-General* (Sir R. P. Collier) and *Welsby* in support of the rule.—The Legislature has proceeded upon a descending scale: it begins with a tradesman—not a merchant, then artificer, meaning a skilled workman, then a workman, and then comes to the lowest degree, namely, a labourer, who is supposed to be engaged in low and toilsome work, and it would be strange indeed if, under the words "or other person whatsoever," it had intended to jump back and include such a large class as farmers. If a farmer is to be included, all kinds must be so, and then it would include the private gentleman who occupies his own land. The popular notion of a farmer is that of one who superintends farming operations:

Peate v. Dicker, Cro. M. & R. 428.

(They were stopped by the Court.)

COCKBURN, C. J.—I am satisfied that this conviction cannot be supported. I think that the persons who are within the enactment may be divided into two classes—the employers and the employed. The only persons under the first head are "tradesmen," and under the second they are "artificers, workmen, and labourers." Then comes a general expression of "or other person whatsoever." But according to the general construction of statutes, where general words follow particular ones they are to be construed *ejusdem generis* with the particular ones which have preceded them,

and are to be held to be of the same nature. Now, assuming for the present purpose what it is unnecessary to decide—that the term "labourer" includes an agricultural labourer—it is plain that the term "tradesman" does not reasonably include a farmer. We are, then, to construe the words only as referring to employers and employed. There being these two descriptions, I cannot say that "a farmer" is *ejusdem generis* with "tradesman." The case may be open to the inconvenience of an agricultural labourer being liable to punishment for labouring, whilst the farmer who employs him or takes part is not subject to any penalty. I feel the force of this, but as the Legislature has not provided for it, we must not extend the operation of the statute.

CROMPTON, J.—I cannot look upon this person, who is described as "a farmer," as coming within the Act. A labourer means one who labours for another, and it is therefore too much to say that a farmer is a labourer. The statute no doubt presses more strongly against the labouring classes than the upper classes, as where a gentleman sells his horse upon a Sunday, in which case he would not be liable, though a horsedealer would be. However, it is not a legitimate argument that hardships exist; the real question is, whether "a farmer" is *ejusdem generis* with what goes before. It is quite clear he is not so with respect to "a tradesman," and he cannot be with respect to "a labourer." The ground of my opinion is, that "a farmer" is not *ejusdem generis* with any of the other persons named, and I think there may be very good reasons why the Legislature intended not to include him.

BLACKBURN, J.—I am of the same opinion. Whether or not the term "labourer" applies to an agricultural labourer is not material in this case, for it is quite clear that it does not apply to a farmer. Then with reference to the other descriptions of persons named in the section; I think he is not within any one of them. Does he come then within the words "or other person whatsoever?" I think he does not, and that it was not the intention of the Legislature that farmers, who were a very numerous class at the time the Act passed, should be included.

MELLOR, J.—If this was a question of whether or not the Act applies to an agricultural labourer, I should like to have it further argued, for I am by no means satisfied. But it is quite clear that a farmer, who is one of a well-known class, is not included.

Rule absolute.

Attorney for the prosecutor, *Mylne*, for *Marsh*, of Leigh.

REG. v. PETTITMANGIN.

Justice—Interest—Watch committee—Borough fund—Conviction.

A borough magistrate of a town which has a municipal corporation, of the watch committee of which he is a member, is not thereby disqualified from adjudicating upon an information instituted with the sanction of such watch committee, even though the fine imposed in the case goes into the borough fund.

In this case the deft. had been convicted by two justices of Liverpool of the offence of suffering prostitutes to assemble on his premises, and he was fined 20l. It appeared that one of the two convicting magistrates, a Mr. Rathbone, was a member of the watch committee of the town council, and that information was laid by one of the police inspectors in pursuance of instructions which he and the other members of the police had received from the watch committee, to see that the public-houses in the borough are properly kept; directing also, that informations of this description should be submitted to the law clerk for his opinion.

Q. B.] REV. R. CONGREVE AND ANOTHER v. OVERSEERS OF TOWNSHIP OF UPTON.

[Q. B.]

E. James, Q.C. (Temple with him) now applied for a rule for a *certiorari* to remove the conviction into this court, with the view to its being quashed, on the ground that one of the justices (Mr. Rathbone) was interested, inasmuch as he was a member of the watch committee, and interested also in the borough fund, into which the fine was paid. [COCKBURN, C. J.—The watch committee are a part of the general governing body of the town, and they give the police authorities general powers upon the subject, with directions to lay the cases before the law clerk. BLACKBURN, J.—I don't see how that can render every member of the watch committee disqualified. CROMPTON, J.—If a magistrate took an interest in discovering a murder and set the police in motion, would he be, therefore, disqualified from dealing with the charge?] Then the magistrate was interested in the fine, as it went into the borough fund. [BLACKBURN, J.—If this be a disqualification, the borough magistrates would be disqualified in all cases where a fine is imposed which goes into the borough fund.]

COCKBURN, C. J.—This is not such an interest as disqualifies; it is much too remote. *Rule refused.*

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Saturday, Jan. 23.

THE REV. R. CONGREVE AND ANOTHER (apps.) v. THE OVERSEERS OF THE TOWNSHIP OF UPTON.

Poor-rate—Houses of chaplain and medical superintendent of a county lunatic asylum—17 & 18 Vict. c. 97, ss. 35, 55.

The chaplain to a county lunatic asylum is not required by law to reside upon the premises; therefore where such chaplain did in fact reside within the precincts of such asylum, pursuant to the requisition of the committee of visitors, in a house provided for him for the purpose:

Held, that such house is not privileged to be rated at the lower scale provided by sect. 35 of the Lunatic Asylums Act 1853 (17 & 18 Vict. c. 97).

The medical superintendent of a county lunatic asylum is required by law to reside in the asylum; therefore, where he resided in a house built for him by such committee within the precincts of the asylum:

Held, that such house is privileged to be rated at the lower scale provided by the above-mentioned section.

This was a case stated under sect. 11 of the 12 & 13 Vict. c. 45, upon an appeal against a poor-rate for the parish of Upton in the county of Chester.

The rate in question assessed the Rev. Ralph Congreve to the sum of 15s. for a house, building and gardens, of which he was the occupier, and the trustees of the Chester County Lunatic Asylum were owners, of the gross estimated annual value of 34l. per acre, and it assessed Mr. Brushfield (the other app.) also to the sum of 15s. for a house and garden of the same gross estimated annual value per acre, occupied and owned in like manner. The case stated that the Chester County Lunatic Asylum is situate in the resps. township; that it was built before the passing of the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97), under the statutes then in force, upon a site purchased for the purpose, containing about 18 acres; that the visitors have since from time to time purchased other adjacent land, the whole area possessed by them now consisting of about 56 acres; that the buildings coloured brown in the plan accompanying the case are, except a small portion of the female department and a very small part of the laundry, situate on the land originally purchased; that the red lines indicate walls, those round the outside of the buildings coloured brown in the plan are about 7½ feet high, except that with the black marks across it in front of the asylum, which is only 2 feet

7 inches high; that recently, owing to increased accommodation being required, a large additional building has been erected for male patients outside the before-mentioned walls, also a chapel; that one of the purchases recently made as before stated was a piece of land purchased in the year 1859, on a portion of which, at the extreme north-eastern boundary of the asylum land, a house has been erected for the residence of the chaplain of the asylum, and an acre or upwards of land (including the site of the house and outbuildings) has been appropriated and fenced off as garden ground to the said house. The app., Ralph Congreve, has for many years been, and now is, the chaplain of the asylum and resides in and has the exclusive occupation of the said house, garden and premises, which are entirely detached from the asylum buildings, and are at a distance of 200 yards therefrom. That the house is a good well-arranged modern residence, and contains a study, a dining-room, and a drawing-room, kitchen, five bedrooms, cellar, and the usual domestic offices; nearly adjoining are a stable for two horses, a coach-house, and a wooden shed used as a shippon; that a small portion of the garden ground is used as a flower-garden, and the remainder, being the principal portion, as a kitchen-garden, the fruit and vegetables produced by which are consumed by the app. Ralph Congreve and his household. That the chaplain is not required by any Act of Parliament to be resident at the asylum, and until the said house was provided for him he resided at a considerable distance from the asylum, out of the resps. township; that he is now required by the committee of the visitors of the asylum to reside in such house, and he is not permitted by them to hold any other cure; that he devotes the whole of his time and attention to the office of chaplain; that he pays no rent for his residence, but his occupation thereof forms part of the emoluments of his office, the property-tax, inhabited house duty and tithe commutation rent-charge are assessed thereon, and are paid in respect thereof by the committee of visitors of the asylum; that at the time of the purchase the said land was valued and assessed to the relief of the poor of the resps. township at the gross estimated annual value of 2l. 10s. per annum. That the said visitors in the year 1855 built upon a portion of the ten acres of land before mentioned (being the land purchased when the asylum was first erected) another house and premises for the resident medical superintendent of the asylum, and appropriated thereto (including the sale of the house and outbuildings) about three-quarters of an acre of land for garden ground. That the app. Thomas Nandall Brushfield is the present resident medical superintendent, and resides in and has the exclusive occupation of the last-mentioned house, garden and premises, which are entirely detached, as shown on the plan, and are divided from the asylum buildings by one of the walls coloured red on the plan, and are fenced on all other sides by an ornamental hedge, &c. That the house contains kitchen, scullery, laundry and cellar on the basement, a library, a dining-room and a drawing-room on the first floor, four bedrooms and dressing-room on the second floor, and two servants' bedrooms and two storerooms in the attics besides the usual domestic offices; that it is a good, well-arranged modern residence; that a small portion of the garden ground is used as a flower-garden, and the remainder as a kitchen-garden, the fruit and vegetables produced by which are consumed by the app. T. N. Brushfield and his household. That by sect. 55 of the Lunatic Asylums Act 1853, it is provided that the medical officer shall be resident in the asylum; that, in 1854, when the app., who had previously been assistant medical officer, was appointed superintendent, it was arranged that a residence should be provided for him at the asylum; that until the erection of the house which he now

Q. B.] REV. R. CONGREVE AND ANOTHER V. OVERSEERS OF TOWNSHIP OF UPTON. [Q. B.]

occupies he continued to occupy the two rooms in the block of buildings coloured brown on the plan, which he had occupied whilst assistant medical officer, and which are now occupied by the present assistant medical officer; that there is another room on the ground-floor of the same building which is called the surgery, but which is used as an office, but the said app. discharges a portion of his official duties in the library of his house, which in all other respects he uses as a private residence only. That at the time of the purchase of the land now appropriated to the superintendent's residence, the same was valued and assessed to the relief of the poor of the resps.' township at the gross estimated annual value of 5*l.* an acre. That the app. T. N. Brushfield devotes the whole of his time and attention to his office of medical superintendent; he pays no rent for his residence, but his occupation thereof forms part of the emoluments of his office; that the property-tax, inhabited house duty and tithe commutation rentcharge are assessed thereon, and are paid in respect thereof to the committee of visitors of the asylum. The appa. contend that the lands which are the sites of the said residences and gardens respectively, with the buildings erected thereon, and so occupied by them, are not, according to the 35th section of the said Lunatic Asylums Act 1853, liable to be assessed at a higher value than the value or rent at which such lands were respectively assessed at the time of such purchase as aforesaid, viz., at the sum of 2*l.* 10*s.* in respect of the land the site of the said house and premises occupied by the said Ralph Congreve, and in respect of the sum of 3*l.* 15*s.* in respect of the land the site of the said house and premises occupied by the said T. N. Brushfield. The resps. contend that the occupation by the said appa. respectively of the said houses, gardens and premises is a beneficial and exclusive occupation by them respectively rendering them liable to be assessed to the rate for the relief of the poor in respect thereof, and that the said house and buildings are not such "additional buildings" as come within the exception contained in the 35th section of the said Lunatic Asylums Act 1853; and the resps. further contend, that if the said houses and premises or either of them are used for the purposes of the asylum, the same are not wholly and exclusively so used, and therefore the said appa. are respectively liable to be rated in respect of their respective occupations so far as such occupations respectively exceed the accommodation necessary for the performance of the official duties of the said appa. respectively.

The question for the opinion of the court is, whether the lands and houses occupied by the appa., or either of them, ought or ought not to be rated only at the value or rent at which the same lands were assessed at the time of the purchase or acquisition of such lands respectively under the provisions of any Act of Parliament relating to public lunatic asylums, and if not, then at what amount the same or either of them should be rated? &c.

By sect. 35 of the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97), it is enacted that "no lands or buildings already, or to be hereafter purchased or acquired under the provisions of any former Act, or this Act, for the purposes of any asylum (with or without any additional building erected or to be erected thereon), shall, while used for such purposes, be assessed to any county, parochial, or other local rates, at a higher value, or more improved rent, than the value or rent at which the same were assessed at the time of such purpose or acquisition."

Welsby (*M'Intyre* with him) appeared for the resps., and contended that the rating at the higher value was correct, first, with reference to the chaplain, because, as he was not required by law to reside upon the premises, the house and premises provided for him were

not provided for the purposes of the asylum within the meaning of the statute; and secondly, with reference to the house and premises provided for the medical superintendent, although by law he is required, by the 35th section, to reside in the asylum, yet, as his house was distinct from the main building, it is rateable, or, at all events, it is rateable as being in excess of what is required for his accommodation:

Gambier v. Lydford, 3 Ell. & B. 346.

Mellish, Q.C. (*Beavan* with him) appeared for the appa., and argued that the houses and premises provided for both chaplain and medical superintendent were within the meaning of sect. 35, and that with reference to neither was the accommodation greater than was proper for persons in their station of life:

Reg. v. Stewart, 8 Ell. & Bl. 360.

Welsby in reply.

BLACKBURN, J. (a)—I think that in this case we must give our judgment in favour of the rate as regards the chaplain, but that in the case of the medical superintendent the rate must be that only upon the value of the land at the time it was purchased. The case turns upon the construction to be put upon the 35th section, which says, that "no lands or buildings already or to be hereafter purchased or acquired under the provisions of any former Act, or this Act, for the purposes of any asylum (with or without any additional building erected or to be erected thereon), shall, while used for such purposes, be assessed to any county, parochial, or other local rates, at a higher value or more improved rent than the value or rent at which the same were assessed at the time of such purchase or acquisition." If lands are purchased for the purpose mentioned, it matters not who are the occupiers, as they are to be rated at the old value. Now the lands here were purchased for the asylum, and it is a question whether they are used for the purposes of the asylum? I think that the gentlemen who have the management of the asylum have done very right in having a chaplain upon the spot, and that it is not a misapplication of the funds to provide a house for him. But then I cannot think that it is used for the purposes of the asylum within the meaning of the section. It is certainly for the convenience of the parties, but is not within the words of the Act. I think, therefore, that the parish officers are right in saying that the house and premises of the chaplain were not used within the meaning of the section. But when we come to the case of the medical superintendent, there is a difficulty in coming to the same conclusion, for it is expressly enacted that he "shall be resident in such asylum." Mr. Welsby argued that the residence must be within the building of the asylum or its curtilage, but I do not think that that is the meaning of the section; I think it means within the precincts of the asylum. It is not necessary to go into the question of whether or not his premises really adjoin the asylum, as in no sense of the word can they be said not to be within the precincts of the asylum. Then, as he occupies the premises for the purposes of his office, that is sufficient. I quite agree with Mr. Welsby that if the committee gave the medical superintendent a residence at a distance from the asylum it would not be exempt from the higher rating, but that is not so here, and I agree with the *Portsmouth* case (*R. v. Stewart*), that the residence must be such as is proper for such a person. Here there is a comfortable residence for a gentleman and his family, with a kitchen-garden and a flower-garden; but it is only such a residence as would be reasonable for a gentleman of station and education with his wife and family. As he therefore uses this residence for the purposes of the asylum, it must be rated according to

(a) Cockburn, C. J. and Crompton, J. were engaged in the Court for Crown Cases Reserved.

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the old value. As to the chaplain's premises, they will be rated at the improved value.

MELLOR, J.—I am entirely of the same opinion. Upon a fair construction of the Act I think that, as regards the medical superintendent, he should have such accommodation as is reasonable with respect to such an asylum. Now, his premises are clearly within the grounds of the asylum, and I think he is entitled to be rated at the old rate only. With reference to the chaplain that is a different case. No doubt he uses it for the purposes of the asylum, and it was very right in the committee to provide it; but when we look at the terms of the Act, it is not to be such a house merely as would be convenient, but such as is required by the statute itself for the purposes of the asylum. Now there is nothing in the statute which requires the chaplain to reside in the asylum, and therefore the house is not a building acquired for the purposes of the Act within the meaning of the section.

Rate to stand as regards the premises occupied by the chaplain, but to be reduced as regards those occupied by the medical superintendent.

REG. v. COUSINS.

Poor-law—Appointment under the 43 Eliz. c. 2, s. 1, of one overseer—Extra-parochial place—20 Vict. c. 19, ss. 1 and 2.

By the 43 Eliz. c. 2, s. 1, which directs the appointment of overseers of the poor, it is enacted that "four, three, or two substantial householders there as shall be thought meet, . . . shall be called overseers of the poor of the same parish:" Held, that an appointment of only one overseer for a parish is bad.

By the 20 Vict. c. 19, s. 1, every place entered separately in the report of the Registrar-General on the last census, which now is, or is reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, the relief of the poor . . . be deemed a parish for such purposes: Held, that such report of the Registrar-General is not conclusive of a place being reputed to be extra-parochial.

This was a rule to quash an order of justices appointing Mr. Cousins overseer for the parish of Upper Eldon.

It appeared that the place called Upper Eldon was entered separately in the report of the Registrar-General in the last census as a place reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, and by an order of the Poor Law Commissioners such place was added as a parish to the Stockbridge Union, Hampshire, and Mr. Cousins was appointed overseer of the poor for such extra-parochial place. It was stated upon affidavits that the said place comprised one farm occupied by the said Mr. Cousins, who was the only householder there, there being in all only thirteen inhabitants; that the place had always been a rectory, and was considered to be a parish, though it never had any poor nor a poor-rate, and the church was in ruins; and that in the King's books it was called a rectory and valued at 2*l*.

By sect. 1 of Vict. 20, c. 19, it is enacted that, "after the 31st Dec. 1857, every place entered separately in the report of the Registrar-General in the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate, the relief of the poor . . . be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report; and the justices of the peace having jurisdiction over such place, or over the greater part thereof, shall appoint overseers of the poor therein;" and by

sect. 2 it is enacted, "if in any extra-parochial place it shall appear to the justices that two overseers cannot conveniently be appointed from the inhabited householders thereof or are not required for such place, such justices may appoint one only, and if it shall appear to them that there is no such householder liable or fit to be appointed, they shall appoint some inhabitant householder of an adjoining parish willing to serve to be such overseer," &c.

By the 43 Eliz. c. 2, s. 1, it is enacted "that the churchwardens of every parish, and four, three, or two substantial householders there as shall be thought meet . . . shall be called overseers of the poor of the same parish," &c.

Bullar now showed cause, and contended, first, that the report of the Registrar-General was conclusive as to this place being extra-parochial, and that therefore the appointment of one overseer was good as provided for by sect. 2 of the 20 Vict. c. 19. Secondly, that if this were not an extra-parochial place, still the appointment of one overseer would not be bad, the statute of the 43 Eliz. c. 2, being only directory upon the subject:

Mytton v. Churchwardens of Thornbury, 29 L. J. 109, M. C.; 2 L. T. Rep. N. S. 12;

R. v. Morris, 4 T. R. 550;

R. v. Sparrow, 2 Stra. 1123;

Staple-inn v. The Holborn Union, 8 L. T. Rep. N. S. 464.

He also referred to the 13 & 14 Vict. c. 21, s. 4, which enacts, "that in all Acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural," &c.

Poulden appeared for the justices.

Giffard, in support of the rule, argued that the report of the Registrar-General is not conclusive as to a place being extra-parochial, and that in the present case it sufficiently appears that the place called Upper Eldon was a parish, and that therefore the appointment of one overseer only is bad: (*Rev. v. Cleydon*, 2 East, 168.) And that the 13 & 14 Vict. c. 21, s. 4, does not apply.

BLACKBURN, J. (a)—I think that we must say that this appointment of overseer is bad and must be quashed. The question is, does this place come within the 20 Vict. as being such a place referred to in the 2nd section as may have only one overseer appointed? Upon that point the 1st section says that, "every place entered separately in the report of the Registrar-General on the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate, &c., be deemed a parish." Now, if this had proved to have been a district which had acquired the reputation of being extra-parochial, and the Registrar-General had so put it in his report, then the effect of the statute would have been to treat it as an extra-parochial place. But when we look at the affidavits made in the case, it would appear not to be such an extra-parochial place. It was a rectory, but as there were few inhabitants the church had fallen into ruin, and it was not so much not a parish as that it had no poor, and in the King's books it was called a rectory, and valued at 2*l*. Therefore it was not reputed to be extra-parochial, although the Registrar-General reported it as such. The evidence shows that it is not extra-parochial; therefore it is not within the operation of the 20 Vict. c. 19. Then we must look at the statute of Elizabeth, and it may very well be that the inability to appoint one overseer only in certain cases may be a *casus omissus*, but there is certainly nothing in that statute which authorises the appointment of one only; there

(a) Cockburn, C.J. and Crompton, J. were in the Court for Crown cases Reserved.

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must be two at least. In Steer's Parish Law I find it distinctly laid down that there cannot be less than two overseers appointed. I think the justices had no power to appoint only one overseer.

MELLOE, J.—I am of the same opinion. This is a case in which I would have held, if possible, that the appointment of one overseer was sufficient; but the statute of Elizabeth is express upon the point, and I cannot agree with Mr. Bullar that it is merely directory.

Rule absolute.

COURT OF COMMON BENCH.

Reported by W. MAYN and LUNLEY SMITH, Esqrs.,
Barristers-at-Law.

Monday, Jan. 11.

SICHEL V. LAMBERT.

Marriage—Proof of—Presumption—6 & 7 Will. 4, c. 85.

In support of a plea of coverture the deft. stated that she was married in a Roman Catholic chapel; that she had lived with her husband several years after the marriage; that he was then in Australia, but that she was on good terms with him, and had heard from him a few weeks before; she also produced a certificate of marriage purporting to be signed by the priest who officiated at the ceremony:

Held, that this was sufficient evidence, until the contrary be shown, for the jury to presume that there was a valid marriage, and that the provisions of the 6 & 7 Will. 4, c. 85, had been complied with.

This was an action for goods sold and delivered; the deft. pleaded amongst other pleas coverture. At the trial before Byles, J., at the sittings in London after Trinity Term, the deft. was the only witness called to prove the marriage. She stated that she was a French Roman Catholic, and was married to John Lambert at the Roman Catholic chapel in York-street, Portman-square, and that she was married by a priest in the ordinary way in which Roman Catholics are married. She also stated that she had received a letter from her husband, who was in Australia, a few weeks before the action was tried. There was no evidence that the person who married the deft. really was a priest, that the chapel was licensed, or that the registrar was present during the ceremony; but the deft. produced a certificate of the marriage, purporting to be signed by the priest who officiated, and another from the vice-consul certifying that the parties had entered into a civil contract of marriage before him. The deft. stated that she had lived with her husband several years before he went to Australia.

It was objected that there was not sufficient evidence of the marriage; but the judge directed a verdict for the deft. on the plea of coverture, and gave the plt. leave to move to set it aside and enter a verdict for the plt., if the court should be of opinion that the evidence of the marriage was insufficient.

Marshal Griffiths having obtained a rule accordingly, Beasley now showed cause.—I submit there was abundant evidence of the marriage. [WILLIAMS, J.—The only question seems to be, whether there was sufficient evidence on which the jury could infer that the chapel was licensed?] The statute helps me there. By the 42nd section: "If any person shall knowingly and wilfully intermarry . . . in any place other than the church, chapel, registered building . . . or in the absence of the registrar, &c. . . such marriage shall be null and void." It must be "knowingly and wilfully." Under a plea of coverture, reputation is sufficient, and surely the evidence of the woman ought to be enough: (*Campbell v. Corley*, 28 L. T. Rep. 109.) [WILLES, J. cited *Caterall v. Caterall*, 1 Rob. 580.] I submit that the provisions of this statute are directory, and that as the statute

(sect. 39) makes it felony for the priest to celebrate a marriage in an unlicensed place, there was a strong presumption that this was a valid marriage:

Hopewell v. De Pinna, 2 Camp. 113.

[WILLES, J. cited the case of *Piers v. Tuile*, 1 Dr. & W. 279; on appeal, 2 H. of L. Cas. 331.]

Garth in support.—The question is, how the presumption should be? I must contend that there was no evidence of marriage to be left to the jury. If she had only proved that she lived with the man, that would have been *prima facie* evidence of marriage; but when she goes on to say that she was married in this chapel, she brings herself within the provisions of the statute, and must show that she complied with its requirements. The person who legalises such a marriage is the registrar, and there is no proof that he was present. [WILLES, J.—The priest may have been a registrar.] Then it is a very strong presumption. You would have to presume that Turks and any one who solemnised a marriage were legally married. This is a room in which you cannot have a marriage legally solemnised without the registrar being present. [WILLIAMS, J.—She says the marriage was solemnised in the usual way in which marriages are solemnised in the Roman Catholic Church.] I submit that the officer, without whose presence a marriage in this place is not legal, should have been proved to be present.

Piers v. Piers, 2 H. of L. Cas. 331.

ERLE, C.J.—I am of opinion that this rule should be discharged. The question is, whether there was sufficient evidence on which the jury were justified in finding that the deft. was married. She swore that she, being a Catholic, went to a Catholic chapel, and was married in the ordinary way in which persons of that religion are married; and that she is still on good terms with her husband, though he is abroad. If that marriage was valid, it was so under the terms of the statute 6 & 7 Will. 4, c. 85; that statute enacts that certain marriages, if performed in the presence of the registrar, shall be valid marriages. It is not shown that the witness knew that the chapel was licensed or that the registrar was present. We decide on the ground that the woman was married in such a manner as she thought was valid. The evidence of mere cohabitation has been held sufficient to presume marriage, and I see no reason why this rule should be confined to members of the Church of England. I don't see why, after the 6 & 7 Will. 4, every presumption should not be made which was made in marriages before that statute was passed. Here there is a strong presumption that the chapel was registered, and that the registrar was present, as the statute makes the priest a felon if that was not the case. It seems to me that the rule *omnia presumuntur rite esse acta* should be applied to the present case, and that this rule should be discharged.

WILLIAMS, J.—I am of the same opinion. The question is, whether on this evidence the presumption does not arise that this was a valid marriage till the contrary is shown? I think it does.

WILLES, J.—I am of the same opinion. The 42nd section of the 6 & 7 Will. 4, c. 85, intends to affirm the principle of Lord Stowell's decision as to marriage in *Dalrymple v. Dalrymple*, 2 Hagg. 54, that the parties *bona fide* believed that they were married, though that decision is to be taken with reference to *Reg. v. Mills*, 10 Cl. & Fin. 534, and recent cases. The 42nd section intended to modify what is so much relied on by Mr. Garth. I see no ground for supposing that the rule *omnia presumuntur rite esse acta* does not apply. Lord Ellenborough's judgment in the case of *Rees v. The Inhabitants of Brampton*, 10 East, 282, decides, first, that that rule applies, and, secondly, that there is an additional presumption *pro matrimonio* when the parties cohabit as man and wife, and I think that that

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must be applied to such cases as the present, and the marriage be presumed to be valid till the contrary is shown.

KEATING, J.—I am of the same opinion. Here we have the fact of a religious ceremony performed in a place of worship by a minister of religion, and the only question is, was that a licensed place, and was the registrar present? This being followed by cohabitation, I think we may presume that they were, and that the requisites of the statute were complied with.

Rule discharged.

Friday, Jan. 15.

LONDON INVESTMENT COMPANY v. SIR MOSES MONTEFIORE.

Assignment of policy of insurance.

Where a policy of fire insurance has been assigned, the insurers, in the absence of an express contract to do so, are not bound, upon the application of the assignee, to pay him upon the policy.

This was an action to recover damages upon the ground that the Alliance Insurance Company, of which the deft. was chairman, had not paid to the plts. the sum of 90*l*.

The case was tried before Byles, J., when a verdict was found for the deft.

J. J. Powell, Q.C. now moved for a rule calling on the deft. to show cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection, and also that the verdict was against the evidence. It appeared that a person named Page had borrowed from the plts. the sum of 130*l*., and had assigned the lease and policy of insurance of certain premises as a security; but no notice of such assignment was given to the defts. The premises were burnt down, Page owing at the time 90*l*., he having previously repaid 20*l*. out of the 130*l*. After the loss had occurred, the plts. wrote to the defts., informing them of the assignment, and requesting them to retain 90*l*. out of the money payable to Page on the policy, but the reply was that they could do nothing unless they issued an attachment against the money in the Lord Mayor's Court, which they did, and the plts. then applied to the defts. for the 90*l*., but defts. said they could not pay until the attachment was withdrawn. On the day on which the money was payable, the plts.' clerk went with Page to the office of the defts., and the notice of the withdrawal was handed in; whereupon the defts.' clerk gave a cheque to Page for the whole amount, but refused to give one to the plts.' clerk, stating that he had given Page a cheque for the whole amount, and that the office had nothing to do with the plts. Page refused to pay any of the money to the plts., and has never done so. At the trial the learned judge left it to the jury to say whether there was any promise in fact to pay the plts. upon their withdrawing the attachment—to which they answered that there was not; and it was this question that the plts. objected to, they contending that the learned judge ought to have directed the jury, that although there was no express promise to pay, yet that the circumstances were such that they might have inferred such a promise.

ERLE, C.J.—I am of opinion that there has been no misdirection. The insurers were debtors to Page, and therefore paid him the debt in question. This being the case, an action at law cannot be maintained against them by the plts. unless there had been an express contract that the defts. should pay the money to them. Now the misdirection complained of was, that the judge was wrong in putting this very question to the jury, viz., whether the defts. did, in fact, make the alleged contract.

WILLIAMS, WILLES and KEATING, JJ. concurred.

Rule refused.

Thursday, Jan. 21.

CHRISTOPHERSON v. LOTHINGA.

Practice—Discovery of documents—17 § 18 Vict. c. 125, s. 50 (C. L. P. A. 1854)—Construction of statute.

Under sect. 50 of the C. L. P. A. 1854, a judge, to whom an application is made for an order for the discovery of documents, cannot dispense with the affidavit of the party making the application of his belief that documents to the production of which he is entitled are in the possession or power of the opposite party, the words of the statute being imperative and not directory.

Herschfield v. Clarke confirmed.

In this case, upon an application made on behalf of the plt., an order had been made by Willes, J., under sect. 50 of the C. L. P. A. 1854, for a discovery of documents. The application to the judge at chambers had not been supported by an affidavit of the plt. of his belief that the documents, to the production of which he was entitled for the purpose of discovery, were in the possession or power of the opposite party, as required by the statute, but an affidavit to the effect had been made by the clerk to the plt.'s attorney, stating also that the plt. was in Spain, where he resided and carried on business. Willes, J. made the order, considering that he had power to dispense with the production of an affidavit by the plt. himself, the words of the statute being directory and not imperative. A rule nisi having been obtained by the deft. to rescind the order,

Sir G. Honyman showed cause against it. He contended that the personal affidavit of the plt. could not have been intended to be indispensable, because the plt. might be a corporation or an infant or a lunatic, and unable to make the affidavit. *la Herschfield v. Clarke*, 11 Ex. 712, the question was discussed, but the rule was granted on another ground, and that case is not a conclusive authority against the plt.

Kemplay supported the rule.

The following authorities were cited in order to show the interpretation which had been placed upon other statutes under analogous circumstances:

1 *Smith's Leading Cases*, 5th ed., p. 337;
Pearce v. Morrice, 2 A. & E. 96;
Cole v. Green, 6 M. & G. 872;
The Wolverhampton New Waterworks Company v. Hawksford, 7 C. B., N. S., 795; 2 L.T. Rep. N. S. 354;
Morton v. Copeland, 16 C. B. 517;
Hyde v. Johnson, 2 Bing. N. C. 776; 3 Scott, 289;
Scott v. Parker, 1 Q. B. 809;
Reg. v. Humphery, 10 A. & E. 335.

Sect. 52 of the C. L. P. Act 1854, was also referred to. ERLE, C. J.—I am of opinion that this rule must be made absolute. The words of the statute are very few and perfectly definite, and I feel bound to give the full effect to the letter, although I think that by so doing I do not give effect to the spirit, of the statute.

WILLIAMS, J. concurred.

WILLES, J.—I do not differ from the opinion of the rest of the court, but I should have thought that we might have arrived at a different conclusion on the principle explained in the judgment of the Court of Ex., delivered by Parke, B., in the case of *Bachs v. Smith*, 2 M. & W. 195, that in the construction of a statute we must adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so

as to avoid such inconvenience, but no further. I think that the word absurdity must be considered as amounting to the same thing as repugnance. If then the words of this provision, considered with reference to the other provisions, and to the subject-matter of the statute, lead either to absurdity or repugnance, we ought to modify the provision, not by altering it, but by saying that the words used are not imperative. Comparing the language of sect. 50 with that of sect. 52, and bearing in mind that the object of the statute was to assist all suitors, whatever their status might be, I should have thought that we might dispense with the affidavit when it could not be obtained. The section deals expressly with the discovery of documents which are to be obtained from a corporation, and it seems strange to construe the preceding words so as to prevent a corporation from having a remedy under it. I regret to be compelled to accede to the conclusion, but I do not feel strong enough in my opinion to refuse to concur with the rest of the court.

KEATING, J. concurred. *Rule absolute.*
Attorneys for plts., Thomas and Hollams.
Attorneys for defts., Pyke and Irving.

Jan. 21, 22 and 23.

COURTENAY v. WAGSTAFFE.

Practice—Costs—Certificate that action was fit to be brought in Superior Court—13 & 14 Vict. c. 61, s. 12—15 & 16 Vict. c. 54, s. 4.

An action was brought for a breach of contract and for salary. To sustain the former claim it became necessary to prove a partnership between the deft. and a third person at the time when the contract was made. This was attempted to be done by means of an agreement proved to have been entered into by the deft. with the third person, but it was ruled *nisi Prius* that the agreement did not constitute a partnership, and a verdict was entered for the deft., the plt. having leave to move to enter a verdict for fifteen guineas upon the count for salary. The judge refused a certificate under 13 & 14 Vict. c. 61, s. 12, that the action was fit to be brought in a Superior Court. The plt. moved to enter a verdict for fifteen guineas, and also for a new trial on the ground that the agreement did constitute a partnership, and that therefore the plt. was entitled to recover damages from the deft. for the breach of contract. He also asked for a certificate that the action was fit to be brought in a Superior Court.

The Court held, after an elaborate argument respecting the legal effect of the agreement, that upon the finding of the jury it would not be necessary to decide whether or not it created a partnership, and that the verdict must be entered for fifteen guineas, but considering the difficulty attending the interpretation of the legal effect of the agreement, the action was a proper one to be brought in a Superior Court, and therefore that they were bound under 15 & 16 Vict. c. 54, s. 4, to give the plt. a certificate to that effect.

The first count of the declaration alleged that the plt. had been engaged by the deft. as a reporter in the House of Parliament for a certain newspaper for the whole session, at the rate of five guineas per week, and that the plt. had been wrongfully dismissed by the deft. The second count was for work done by the plt. for the deft. and money due on accounts stated. The deft.'s pleas traversed the material allegations in the first count, and the deft.'s debt on the common count. The action was tried before Bramwell, B., at the summer assizes at Croydon, and a verdict entered for the deft.

It was proved at the trial that one T. L. Holt

being desirous of reviving a paper called the *Iron Times*, and being unprovided with the requisite capital for that purpose, had entered into an agreement with the deft. on the 10th Jan. 1863, which it is not necessary to set out, although its construction was elaborately argued, as the Court declined to decide the question so raised.

The paper was started in Jan. 1863, and discontinued in the following March. The plt. had been engaged by Holt as a reporter in the House of Commons, at a salary of five guineas a week. At the time when the paper was discontinued there was three weeks' salary due to the plt. There was a conflict of evidence at the trial respecting the terms of this engagement, the plt. contending that this engagement was for the whole session, the deft. that it was a weekly engagement. As to the liability of the deft., the plt. contended that the agreement of the 10th Jan. 1863 made him proprietor of the paper, or at least a partner with Holt; and, in addition, that he had held himself out as a partner, and allowed other persons to hold him out as such, and that on the faith of his being a partner the plt. had accepted the engagement. Bramwell, B., ruled that the effect of the agreement was to prevent the deft. from being a partner with Holt, and that the deft. would not be liable unless the agreement was intended as a mere blind, in order to conceal a partnership which really existed. The jury, in reply to questions left to them, found that the agreement was a *bonâ fide* agreement, intended to be acted upon by the deft. and Holt; that the deft. had not held himself out as a partner before or at the time of the plt.'s engagement; but that he had held himself out and acted as such during the last three weeks of the plt.'s employment. They also found that the engagement was a weekly engagement and not a sessional engagement. A verdict was thereupon entered for the deft., the plt. having leave to move to enter a verdict for him on the second count for fifteen guineas for the three weeks unpaid for. The plt.'s counsel then applied for a certificate for a special jury, and also for a certificate under 13 & 14 Vict. c. 61, s. 12, that the case was fit to be brought in a superior court. The learned judge gave the former, but declined to give the second.

A rule *nisi* having been obtained to enter a verdict for the plt. for fifteen guineas, pursuant to leave reserved, or for a new trial on the ground of misdirection by the judge in holding that the agreement between the deft. and Holt prevented them from being partners, Hawkins, Q. C. and Hannen showed cause; and G. Denman, Q. C. and Prentice supported the rule.

An elaborate argument was heard on the question whether or not the agreement did or did not constitute a partnership; but as no decisive judgment was given on this point, it will be sufficient to say that the following authorities were cited:

Waugh v. Carver, 1 Smith's L. C. 818, and note;
Ex parte Davis re Harris, 32 L. J. 68, Bank;
8 L. T. Rep. N. S. 745.
Barry v. Nesham, 3 C. B. 641;
Cox v. Hickman, 9 C. B., N. S., 47; 8 H. of L. Cas. 268; 3 L. T. Rep. N. S. 185
Wilkinson v. Frasier, 4 Esp. 182;
Hesketh v. Blanshard, 4 East, 143;
Pott v. Eylon, 3 C. B. 32;
Stocker v. Brocklebank, 3 M. & G. 250;
Kilshaw v. Jukes, 32 L. J. 217, Q. B.; 8 L. T. Rep. N. S. 387;
Story on Partnership, ss. 15, 23, 27, 36;
Bond v. Pittard, 3 M. & W. 357;
Ex parte Langdale, 18 Ves. 300;
Cornish v. Abington, 4 H. & N. 549;
Ex parte Hamper, 17 Ves. 112;
Gabriel v. Evil, 9 M. & W. 297.

With respect to the certificate that the cause was a fit cause to be tried in a Superior Court, the plt.'s

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[Ex.]

counsel submitted that, although it had been refused by the learned judge who tried the cause, the court had power, under 15 & 16 Vict. c. 54, s. 4, to grant it, and that it ought to be granted in the present case. The powers of the court were much discussed in the case of *Hatch v. Lewis*, 7 H. & N. 367; 5 L. T. Rep. N. S. 254, where the Court of Ex. refused to review the decision of the Lord Chief Baron refusing a certificate.

ERLE, C.J.—I am of opinion that the rule should be made absolute to enter a verdict for the plt. for fifteen guineas, but that there should be no rule for a new trial. With the object of avoiding any necessity for a new trial all questions were put to the jury that could be suggested; and as to one question which governs the case the jury have found an answer which binds us now. They were asked whether the work done by the plt. was done under a sessional or a weekly engagement. They have found that it was done under a weekly engagement, therefore the plt. has been paid for all the weeks during which he served, except those for which he now recovers. Whether, therefore, the liability of the defts. arose from his being a partner with Holt under the deed of agreement between them, or from his holding himself out as a partner with him, or from their occupying in reality the positions of principal and agent, the sum to be recovered by the plt., would be for three weeks; which is the sum for which the verdict is to be entered. It thus becomes unnecessary to consider whether or not the deed did constitute a partnership; and I give no judgment on that point. But in coming to a conclusion whether or not a certificate should be granted that the case was fit to be brought in a superior court, I must say, that the question whether the deed made the defts. a partner with Holt, or a proprietor of the newspaper, was one in the discussion of which elaborate learning and great acuteness might be employed, and if I was obliged to say what, upon the authorities, was the effect of the deed, my inclination would be to say that the defts. became, under the deed, sole proprietors of the newspaper, and that Holt had not the power of stopping the publication at any moment when he might please. I do not decide it, but it required as elaborate research and power of argument as any question concerning a contract that has arisen in Westminster-hall. Therefore, I cannot say that the plt. was wrong in trying the action in a Superior Court instead of in a County Court, and I think that the court ought, under the 15 & 16 Vict. c. 54, s. 4, to grant a certificate that he should have his costs. I should pause for a long time in saying that a judge who had refused such a certificate had exercised a wrong discretion, though I do not say that if the question before us had been the same question which had been raised before him, I should not have granted the certificate which he had refused; but the construction of the deed was considered to be perfectly clear at Nisi Prius, and, assuming that to be so, the question became one simply of remuneration for work and labour, such as might easily have been decided in a County Court. But it was important to the interests of the plt. that he should know the defts.'s liabilities under that deed, and the argument upon that point has brought my mind to an inclination that the deed did constitute a partnership, and I think that it was a fit argument to be heard in Westminster-hall. There will be, therefore, a rule absolute for a verdict for the plt. for fifteen guineas, and for a certificate for costs.

WILLIAMS, J.—I think that there is no course open to us but to order a verdict to be entered for the plt. for fifteen guineas, and to decline to grant a new trial. I agree that we should certify that the plt. was right in trying the case in a Superior Court, but I do so without intending any disrespect to the opinion of Bramwell, B.

I can understand his thinking that the deed did not constitute a partnership, and that the plt., therefore, had no ground for bringing his action anywhere but in a County Court. But a narrower inspection may raise serious doubts whether the defts. was not made a partner by the deed, at all events when the finding of the jury with respect to it is considered. If this was a *bonâ fide* deed, purporting to secure a loan, I should have great difficulty in saying that it constituted a partnership; but the terms of it are so extraordinary that we are driven to one of two conclusions, either that it was a partnership deed or that the jury was wrong in finding that the parties intended to act upon it as a mere security for money lent, and that it must have been intended as a colourable mode of enabling the defts. to carry on the business without incurring the responsibilities of a partner. This being so, I cannot but say that it was a very proper case to be tried in a Superior Court.

Rule absolute to enter a verdict for the plt. for fifteen guineas, and for a certificate that there was sufficient reason for bringing the action in this court.

[Willes and Keating, JJ. were sitting in the Court of Criminal Appeal on the last day of the hearing of this case.]

Attorneys for the plt., *Lansford and Stewart*.
Attorney for the defts., *Elmslie*.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Friday, Jan. 15.

BRUNT V. THE MIDLAND RAILWAY COMPANY.

Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68)—Elastic silk webbing within the meaning of—A question of fact for jury.

Elastic webbing composed of 1½ ounce of rubber, 1 ounce of silk, and ¾ of an ounce of cotton in a yard, and its value 12d. or 13d. an ounce for the silk, the rubber 6d. and the cotton 4d., is "silk wrought up with other materials" within the meaning of the Carriers Act (11 Geo. 4 & 1 Will. c. 68) s. 1, and such elastic webbing above 10l. in value being delivered to a railway company to be carried as a common parcel, without its value or nature being declared, or any increased charge paid:

Held, that the railway company was not to be held for the damage to it occasioned by loss on the journey; and that it was a question of fact for a jury to determine.

This action was brought in respect of a hamper of elastic webbing belonging to the plt. and delivered to the defts. to be carried from Derby to Manchester. It was sent to the defts. as a common ordinary parcel, but on arrival at Manchester it was discovered to be partially wet and damaged, and the action was brought for that damage.

The declaration alleged that the defts. were common carriers of goods for hire from Derby to Manchester, and plt. delivered to defts., and defts. received as such carriers goods of the plt., to be by them safely and securely carried from Derby to Manchester, and to be there safely and securely delivered for the plt. for reward to the defts.; and all conditions were fulfilled, and all things happened necessary to entitle the plt. to have the goods safely and securely carried and to maintain this action; yet defts. did not safely and securely carry the goods, and so negligently carried the same that they were damaged, spoiled and rendered unsaleable, and were so delivered damaged, &c.

Plea.—1. As to not safely and securely carrying a certain part of the said goods, and so negligently

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[Ex.]

carrying same that they were injured, &c., debts. said that the said part was articles and property of the description mentioned in 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, and the value of the said part exceeded 10*l*., and at the time of the delivery thereof the value and nature thereof were not declared by the person sending or delivering the same, nor any increased charge paid over and above the ordinary rate of charge as a compensation for the greater risk and care to be taken for the conveyance, &c. 2. And as to so much of the declaration not before pleaded to, payment into court of 5*l*. Issue was joined, and the cause tried at Derby before Cockburn, L.C.J., when it was proposed to leave two questions to the jury: first, whether silk was the principal article, and secondly, if not, was the silk a material part; but ultimately it was agreed that these questions should be left for this court to determine, and the court to have leave to draw any inferences from the facts. The amount of damage done to the goods was then left to the jury, leave being reserved to the debts. to move to set aside the verdict. The jury assessed the damage for the plt. at 15*l*., in addition to the 5*l*. paid into court. A rule nisi was afterwards obtained to set aside that verdict and enter it for the debts., on the ground that the goods in question were silks within the meaning of the 1st section of the Carriers Act.

Hayes, Serjt. and *Field* showed cause.—The question for the court to determine is, whether this elastic webbing is silk, or silk in a manufactured state wrought up with other materials, within the meaning of the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, s. 1. [MARTIN, B.—Is that not a question for the jury upon the evidence whether silk was the principal or material article in it?] It was considered doubtful at the trial, and by consent of all parties it was then agreed to be left to the court to determine it, whether it was a question of law or fact. These are the proportions of the article: in a yard of it there is about an ounce and a-quarter of rubber, one ounce of silk, and three-quarters of an ounce of cotton: the value would be, for the said silk, 1*s*. or 1*s*. 1*d*. an ounce, the rubber 6*d*., and the cotton 4*d*.; or about as twenty-seven is to twenty-one. By the 11 Geo. 4 & 1 Will. 4, c. 68 (an Act for the more effectual protection of carriers against loss or injury to parcels, &c., delivered to them for conveyance, the value and contents of which shall not be declared), the preamble recited that by reason of bankers and others sending by public conveyances parcels containing money, bills, notes, jewellery, and other articles of great value in small compass; and then by sect. 7 enacted that no common carrier should be liable for the loss of or injury to (amongst other things) silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, &c., delivered to be carried, &c., when the value of such article or articles contained in such parcel shall exceed the sum of 10*l*., unless at the time of the delivery thereof the value and nature of such article or property shall have been declared by the person sending or delivering the same, and such increased charge as thereafter mentioned, or an engagement to pay same, be accepted by the person receiving such parcel. Does this elastic webbing come within that definition of "silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials?" In *Davey v. Mason*, 1 Car. & M. 45, silk dresses made up for wearing were held by Lord Abinger as not silks within the meaning of that Act; nor an eye-glass with a gold chain attached to it for the purpose of being hung round the neck of the wearer, "trinkets" within that enactment:

Bernstein v. Bazendale, 6 C. B., N. S., 251, was also referred to.

Macaulay, Q. C. and *Wills* in support of the rule.

—This hamper of elastic silk webbing was sent as an ordinary parcel; its value was not declared nor paid for extra, or otherwise than as a common parcel; it was above 10*l*. value, and falls directly within this provision of the statute. If the court think it a question of fact, then the learned judges have now by consent power to draw such inferences of fact as are necessary, and will determine the fact as a jury. In a note to the case of *Davey v. Mason*, 1 C. & M. 49, it is said by the editor: "It may be worthy of consideration whether the words 'wrought up with other materials' do not refer to poplins, challoes and other goods composed of a mixture of silk and worsted, or silk and cotton and the like." It may be difficult to define with precise accuracy what are "trinkets" within the meaning of the 1st section of this Act of Parliament; but by *Bernstein v. Bazendale* it appeared that the closest approximation is, that they must be articles of mere ornament, or if ornament and utility be combined, the former must be the predominating quality; as for instance, bracelets, shirtpins, rings, brooches and ornamented tortoiseshell and pearl port-monnaies, however small their intrinsic value, are "trinkets." It was decided by that case that "silk watch-guards" are silk in a manufactured state within the Act. Certainly in the present case silk was the predominating quality, both in quantity and value. It was the silk in this mixture that suffered the damage; the other articles did not. *Davey v. Mason*, the case at Nisi Prius, is overruled by the subsequent case in banco of *Bernstein v. Bazendale*.

POLLOCK, C.B.—I am of opinion this rule should be made absolute. The Legislature has thought fit, in order to protect carriers against the risk incurred of conveying articles of great value at a low price and for which they may have suffered loss, to pass the Act of Parliament referred to for their protection. It was an Act to do justice between and for the more effectual protection of mail contractors, stage-coach proprietors, and other common carriers for hire, and the public, and that carriers should not be liable for the loss of or injury to certain goods above the value of 10*l*., unless delivered as such, the nature and value stated, the carriage paid for, and its safety insured in proportion. The Act enumerates certain articles, beginning with money, bills, notes, &c., and so on to silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials. The Legislature has taken care to use terms distinguishing between silks only and silks mixed or wrought up with other materials or not. I think this is purely a question of fact which may have been left to the jury to determine, and it having been left to us, I think this elastic webbing is silk wrought up with other materials. It was asked in the argument on the other side, where is the line to be drawn? But is not this within the line? I am of opinion it is, and that the verdict should be entered for the debts.

MARTIN, B.—I am of the same opinion. The Legislature has enacted [the learned Baron stated the Act of Parliament]. That this was silk wrought up with something else there can be no doubt; as to the proportions mixed, their relative values and predominating qualities, the proper tribunal to decide this upon the evidence, was a jury. We are now here in the position of a jury, and asked as a jury to decide it. It is a question of fact only, and the Lord Chief Justice at the trial was also of that opinion. I think this silk elastic webbing is within the Act of Parliament. It is silk wrought up with other materials, and by that Act the debts. are protected.

CHANNELL, B.—I think also the rules should be absolute, and that the question we have now to determine is one for the jury; but, by the evidence on the learned judge's notes taken at the trial, I, sitting here as a judge, should say, upon the facts stated, that this was

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[Ex.]

"silk wrought up with other materials," and within the meaning, and therefore the protection, of the Act of Parliament.

PROCTOR, B.—I am of the same opinion, and that it was a question upon the facts for a jury to determine.

Rule absolute.

Attorneys for plt., *Richards and Walker*, for *Baker and Moody*, Derby.

Attorneys for defts., *Beale and Marigold*, Derby.

Monday, Jan. 18.

MASON (Clerk to the Waterloo-with-Seaforth Local Board of Health), app., v. BIBBY, resp.

Public Health Act 1848 (11 & 12 Vict. c. 63) ss. 69 and 150—*Service of notice on "owner" or some "inmate of his place of abode."*

By the Public Health Act 1848, s. 69, it is provided that in case any street or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the "owner" of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, &c., require him to sewer, &c., within a time to be specified in such notice; and if not complied with, the local board may do it and charge it to the "owner."

The service of such a notice upon a clerk at the office of the "owner" where the owner carries on his business, is a sufficient service, and is a service upon some "inmate of his place of abode" under sect. 150 of that Act.

This was a case stated by magistrates pursuant to 20 & 21 Vict. c. 43, for the opinion of this court.

A local board of health for the district of Waterloo-with-Seaforth, in Lancaster, had been duly constituted under the provisions of the Public Health 1848 (11 & 12 Vict. c. 63). By sect. 69 it is enacted "that in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged and channelled, to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, &c., the same, within a time to be specified in such notice, and if such notice be not complied with the local board may, if they think fit, execute the works mentioned therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to and as therein specified; and by sect. 150 in all cases in which any notice is by this Act required to be given to the owner or occupier of any premises, it shall be sufficient to address the notice to them by the description of the "owner" or "occupier" (as the case may require) of the premises (naming them) in respect of which the notice is given without further name or description, and the notice shall be served upon them, or one of them, as the case may require, either personally or by delivering the same to some inmate of his or their place of abode."

At a petty sessions at Liverpool, for the division of Kirkdale, on the 24th March 1863, an information claimed of the app. 245*l.* as his share of expenses incurred by the board in the repair of a certain street, not being a highway, he being the owner of certain premises there. An objection was taken to the service of the notice, and the justices having decided that it was insufficiently served, upon the application of the complainant they submitted the following

CASE.

Upon the hearing of the information it was proved

on the part of the app. and found as a fact, that the resp.'s home or place where he and his family dwelt was not within the district of the said local board of health on the date or at the time of service of the said notice as to the sewerage, &c. the said premises; that the resp. dwelt with his family at Wavertree, near Liverpool, and had also an office or place of business in Liverpool, neither of which places was within the district of the said local board, &c. The evidence on the hearing of the information as regards the service of notice upon the resp. was as follows: Wm. Berks being sworn said—"I served a copy of a notice I produce (being the said notice of the 3rd Sept. 1861) on Mr. Bibby at his office in Water-street in Liverpool, on the 3rd Sept. 1861. I asked a clerk if Mr. Bibby was in? and he said, "He is engaged, and may be so for some time." I told the clerk I wanted to serve Mr. Bibby with the notice. I read a part of it to him (the clerk). It commenced by being addressed to Mr. James Bibby. I then gave it to the clerk, and he read it and seemed to understand it. I explained to him that it was to do some sewerage works at his premises in Waterloo. I waited a quarter of an hour for Mr. Bibby; he was not disengaged, and I did not see him. He (the clerk) said, "I'll see and give it to Mr. Bibby;" who, on being cross-examined, said—"I only saw one clerk. I saw him through a small window in the partitioning of the office. I cannot say, from what I saw of this clerk, what his occupation was." Upon this the resp. contended that, as the notice of the 3rd Sept. 1861 was proved to have been served by being left with a clerk of the resp. at the office or place of business of the resp. in Liverpool, the same not being the place of his residence, and not being within the district of the said Waterloo-with-Seaforth local board of health, it was not legally served, and that it ought to have been served in one of the modes prescribed by the 150th section of the Public Health Act 1848, and that the words "inmate" and "place of abode" in the section referred to service on an "inmate" at the house or place of residence or dwelling-place of the resp. and his family, and that the said clerk was not an "inmate" and the said place of business was not a "place of abode" within the meaning of the said Act, and that accordingly no legal service of the said notice had taken place. The app. contended that the words "place of abode" meant a place where the resp. abides or carries on his business, where he was usually to be found in matters of business, and that the clerk was an "inmate" and the said place of business was a "place of abode" within the meaning of the said Act, and consequently that the service of the said notice was legal. We being of opinion that the said notice had not been legally served, dismissed the information accordingly.

The question of law arising on the above statement for the opinion of the court is—

Whether we are correct in point of law in finding that the notice was not served as required by the 150th section of the Act of Parliament. Therefore the judgment of this court is requested thereon, or what should be done in the premises.

Leo. Temple for the app.—The only question to be determined is, whether the service of the notice referred to was a legal and good service? Nothing appears in the case, nor was there any evidence before the justices, to show that he did not receive it. The presumption is, that he did get it, as he was in court before the justices when the case was heard, and might have deposed to the fact if he did not get it. Delivery of the notice to a clerk at the place of business satisfies the words of the 150th section of the Public Health Act 1848, the resp. being in his office at the time, but, as it was said, then, engaged. In *Abdell v. Busham*, 25 L. J. 239, Q. B.,

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"place of abode," as used in the C. L. P. A. 1852 (15 & 16 Vict. c. 76), sect. 6, is satisfied by giving the place of business. In *Attenborough v. Thompson*, 2 H. & N., Pollock, C.B. said a place of abode is the place where a man abides, and residence is where he resides, and a man may abide or reside not where he sleeps, but in some other place. In *Haslope v. Thorne*, M. & S. 103, Lord Ellenborough said, the words "place of abode" did not necessarily mean the place "where the party sleeps." In *Blackwell v. England*, 8 E. & B. 54, it was decided, that under the Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, the words residence and occupation were satisfied by "W. R. Cuthbert, of King's-bench-walk, Inner-temple, in the city of London, clerk to Messrs. B. and R. of the same place, solicitors." Lord Campbell there said, "his residence is where he is likely to be found." Coleridge, J.: "The strict construction does not apply where the object of the Legislature is to give parties such information as may lead to the finding of the attesting witness." Wightman, J. said: "If he had described himself as residing at his lodgings, his occupation being clerk to an attorney, such a description would not be so convenient as that of the place where he performed his ordinary duties." Erle, J. said that "in *Lambe v. Smythe*, 15 M. & W. 433, it was held a man's actual domicile was where he had his household goods, that that was his place of residence, but it does not decide that the place of actual business was not also a man's residence." In order to ascertain the meaning of the words "place of abode" in the Act of Parliament, it is necessary to see the object the statute had in view, and it intended only that the person to be affected by the neglect to sewer, &c., should have notice of what was required of him by the local board, authorised in case of continued neglect to do the requisite work. The notice was more likely to reach him if left with a clerk at his office, and where he then actually was at the time the notice was left, than if given to a servant at his private residence. The cases above referred to show such service was sufficient.

Lushington, for the resp., contended that the question whether the resp.'s office in Water-street was the resp.'s place of abode was not a question of law but a question of fact only, and for the justices alone to determine. An office or place of business belonging to the resp., not being his residence or dwelling-place, was not the resp.'s "place of abode" within the meaning of the statute 11 & 12 Vict. c. 63, s. 150. That the question whether the clerk or other person mentioned in the case to whom the notice was personally delivered was an "inmate" of the resp.'s "place of abode" was not a question of law but a question of fact only, and that a clerk acting as such to the resp. in the resp.'s office or place of business, that not being the residence or dwelling-place of the clerk or of the resp., was not an "inmate" of the resp.'s place of abode within the meaning of that statute. That the notice mentioned in the case was not duly served upon or given to the resp. according to the requirements of the Act of Parliament, s. 150, or otherwise. In *Rez v. The Inhabitants of North Curry*, 4 B. & C. 953, Bayley, J., at p. 959, says: "The question is, what is the meaning of the word 'reside?' I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep. An affidavit verifying a plea in abatement of the non-joinder of a contractor under the 3 & 4 Will. c. 42, s. 8, must state the place of residence of the contractor, and not merely his place of business." In *Maybury v. Mudie*, 5 C. B. 283, Maule, J., delivering the considered judgment of the court, said: "The place that is described as the place of residence of D. is in some sort of popular sense

his residence; he had until very lately actually resided there, his name was still over the door, and he continued to carry on his business there. We think, however, that it is not, within the meaning of this (the 8th) section, his place of residence." [MARTIN, B.—There are two cases which have been cited by Mr. Templequite in point upon this question; why should we depart from them?] Because the cases I have just referred to are entirely to the contrary, and give the customary meaning to the words used in this statute.

POLLOCK, C.B.—The question put to us by the magistrates is, whether they were correct in point of law in finding that the notice was not served as required by the 150th section of the Act of Parliament, requesting the judgment of this court thereon, or what should be done in the premises. I own I am clearly of opinion that the notice referred to in this case, which was served on one of the resp.'s clerks at his office where his business is carried on, and where the resp. then was, he being at that time there in the inner office, the clerk promising to give it to the resp. as soon as the resp. was disengaged, was a perfectly good service, and the justices should be directed to deal with it accordingly, the 150th section providing that the notice may be served upon the owner either personally or by delivering the same to some inmate of his place of abode; with a proviso that although his place of abode be known to the local board, yet, if he be not within the limits of their district, it shall be sufficient for them to transmit any notice directed to him by name through the post, or if his place of abode be unknown, upon any inmate of the premises, the service was perfectly good, independent of that section; and as to his place of abode, his place of business was here his place of abode, and that without any reference to the 150th section of this Act at all. Our judgment, therefore, will be in favour of the apps.

MARTIN, B.—This notice was served by delivering it to a clerk of the resp. at his office and place of business. A man may have two places of abode, one where he stays by day, and another where he sleeps by night. In my judgment the question put to us—whether the justices were correct in finding that the notice was not served as required by the 150th section—should be answered that they were not correct. I think they were not correct, and I am quite prepared to say that the notice was sufficiently served upon the resp., the owner, as by the 150th section of the statute is required.

FIGOTT, B.—I am of the same opinion, and think there was a sufficient service of the notice in this case.

Judgment for the app. without costs (as it is not usual under such circumstances to grant costs).

Attorney for the apps., *Joseph Mason*, Liverpool.

Attorneys for the resp., *Simpson and North*, Liverpool.

EXCHEQUER CHAMBER.

Reported by W. MAYD, Esq., Barrister-at-Law.

Saturday, Nov. 28.

(Before POLLOCK, C.B., BRAMWELL, CHANNELL and FIGOTT, BB., BLACKBURN and MELLOR, JJ.)

GORE V. SIR GEORGE GREY AND OTHERS.

Lunatic—5 & 6 Vict. c. 22, s. 14 (*Queen's Prison Act*)—*Removal of lunatic prisoners to Bethlehem Hospital*—1 & 2 Vict. c. 100; and 16 & 17 Vict. c. 96.

A prisoner of unsound mind in the Queen's Prison was removed therefrom in 1856 to Bethlehem Hospital under sect. 14 of 5 & 6 Vict. c. 22: Held, in an action for false imprisonment, that the removal was justifiable under that Act, as the Act

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was not qualified by the previous statute, 1 & 2 Vict. c. 110, s. 102 (the Insolvent Debtors' Act), nor repealed or altered by the subsequent statutes 8 & 9 Vict. c. 100; and 16 & 17 Vict. c. 96 (Lunatic Acts).

Error from the Court of C. B.

This was an action for false imprisonment for having removed the plt. on the 9th Feb. 1856 from the Queen's Prison where he was confined for debt to Bethlehem Hospital, and having kept him there as a lunatic.

The defts. pleaded, 1. Not guilty; 2. A justification under the Queen's Prison Act (5 & 6 Vict. c. 22).

The cause was tried before Erle, C.J., at the Middlesex sittings after Trinity Term 1862, when a verdict was found for the defts. on the second plea, the learned judge having directed the jury to consider, if they were of opinion that the plt. was a lunatic, whether the defts. had duly complied with the Queen's Prison Act without regard to the Insolvent Debtors' Act (1 & 2 Vict. c. 110) or to 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96 (statutes relating to lunatics).

A rule having been obtained for a new trial on the grounds *inter alia* of non-direction and misdirection, or for judgment *non obstante veredicto*, and discharged by the court below, the plt. now brought error and appeared in person to support his case.

The *Solicitor-General* (the *Attorney-General*, *Welsby* and *T. Jones* with him) for the defts. were not called on.

POLLOCK, C.B.—I am of opinion that the judgment of the court below must be affirmed. The plt. has contended that being an insolvent debtor he was entitled to be treated as such according to the provisions of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 102. But the Queen's Prison Act virtually repeals that Act so far as it is inconsistent with it, neither is it overridden by 16 & 17 Vict. c. 96. At sect. 4 of that Act, which enacts that no person not a pauper shall be received into a hospital, &c., contains the saving clause, viz., "Save where otherwise provided or authorised under this or any other Act;" and as in the present case it has been "otherwise provided" by the Queen's Prison Act, the judgment of the court below must be affirmed. *Judgment affirmed.*

PARRY v. THE CROYDON COMMERCIAL COKE COMPANY.

Act of Parliament—Penalty—Common informer—10 Geo. 4, c. 73 (Croydon Improvement Act)—10 & 11 Vict. c. 15 (Gas Works Clauses Act 1847)—Repeal by implication.

By the Croydon Improvement Act (10 Geo. 4, c. 73), a penalty of 200*l.* is imposed upon any gas or other company for suffering any impure matter to flow into any stream, &c., to be sued for by any common informer. By the 21st section of the Gas Works Clauses Act 1847 (10 & 11 Vict. c. 15), a like penalty is imposed for the same offence, such penalty (by sect. 22) "to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act."

Held (confirming the decision of the court below), that the latter provision was *pro tanto* a repeal of the former.

This was an action, brought by the plt. as informer, against the Croydon Gas Company for the penalty given by 10 Geo. 4, c. 73, to any common informer, in case of pollution of water by a gas company within the limits of the local Act.

The defts. pleaded that the acts and things complained of were committed and happened after the passing and coming into operation of the Croydon Commercial Gas and Coke Act (10 & 11 Vict. c. 124)

and after the 1st Aug. 1849; and that the said acts and things were and are such and the like acts and things as are described in the 21st section of the Gas Clauses Act 1847 (10 & 11 Vict. c. 14), and noother, and that the plt. is not and never has been the person into whose water the washings or other substances produced in making or supplying gas in such Act mentioned, being the washings and other waste liquids, substances and things in the declaration mentioned, were conveyed or flowed, or the person whose water was fouled.

To this plea the plt. demurred, on the ground that the plt.'s right to sue for the penalty given by 10 Geo. 4, c. 73, s. 27, was not taken away by 10 & 11 Vict. c. 124 incorporating the 10 & 11 Vict. c. 15, s. 21, and that the two penalties were cumulative. The Court of C. B. having given judgment for the defts., the plt. now brought error.

Joyce appeared for the plt., and

Honyman for the defts., and referred to the following cases:—

Goldson v. Buck, 15 E. 372;

Clarks v. Great Central Gas Company, 13 C. B. 838;

Reg. v. Trustees of Northleach and Wily Roads, 5 B. & Ad. 939.

POLLOCK, C.B.—We are all unanimous in our opinion that the judgment of the court below should be affirmed. My own opinion is, that in construing a penal statute of any kind no effect ought to be given to a penal clause beyond that which it is clear the Legislature meant. Whatever one is satisfied is the true construction of the Act, that construction ought to prevail; but if there be any reasonable doubt, whether the subject be a penalty, or confiscation, or a penal infliction of any kind—one is not to construe the Act so as to make it penal. Something more might have been urged in favour of the plt., if he could have shown from any clause that the second penalty was given in lieu of an action for damages. But the new statute creates precisely the same penalty of 200*l.*, and it does not say that it is to be additional. The meaning, I think, is that the second penalty is substituted *pro tanto* for the first.

BRAMWELL, B.—I am of the same opinion. The Croydon Gas Company was not in existence till created by the statute with which the Consolidation Act of 1847 is incorporated, and the penal enactment as to the company may be read thus: that for every such offence committed by the company they shall forfeit 200*l.*; this is the penalty to which they are subjected. But it is said that is not to be the only consequence; but there is another forfeiture, which clearly is not repealed, as to the rest of the world, and is not therefore to be taken as repealed as to the company. It seems, however, to me, that when it is said the company are to forfeit 200*l.*, it means 200*l.* only. It is not necessary to say that the old Act is abrogated; in fact, it is not. There are cases in which it might be put in force. But why should the gas company be liable to two penalties, when nobody else offending under the old Act has to suffer more than one? Lastly, what my brother Williams has said in the court below as to the 33rd section of the Gas Clauses Act 1847 seems to me to be entirely conclusive.

The rest of the Court concurred.

Judgment affirmed

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

Tuesday, Dec. 8.

(Before the Right Hon. DR. LUSHINGTON.)

THE OCTAVIA.

Suit for wages—Foreign seamen—Objection by consul. Under ordinary circumstances, if the consul of a foreign country objects to the continuance of a suit for wages by a seaman of the country which he represents, the court will dismiss the suit. But in this respect there is a great distinction between proceeding against the ship and against the proceeds of a ship sold.

This was a cause of wages, and was brought against the Belgian ship *Octavia*, by her master Jean de Vos, of Ostend, in the kingdom of Belgium.

The vessel had sailed from Ostend in the year 1861, and after making numerous voyages had arrived at Liverpool, and having taken on board a cargo of salt, was about to sail for Ostend, when she was arrested in this suit. The Belgian vice-consul at once appeared in the suit, and filed affidavits desiring that the vessel should be released and return to her home port under the charge of the plt. as master, in order that all questions in dispute might be adjusted at Ostend.

The Belgian consul in London had also protested against the continuance of the suit.

Milward, for the vice-consul at Liverpool, now moved the court to dismiss the suit.

V. Lushington, for the master, opposed the motion.

DR. LUSHINGTON.—This is a suit brought by the master against the ship for his wages, and in such a suit the master now stands precisely in the same position as an ordinary seaman. The ancient practice of this court was, that leave should be obtained, prior to the institution of a suit for wages on behalf of a foreign seaman; but this was found to be exceedingly inconvenient, as the commerce of the world increased so very rapidly, and it was in the exercise of the authority with which I considered I was entrusted, that I substituted, instead of a preliminary order attended with delay and expense, a regulation that notice should be given to the consul of the nation that he might interfere if he thought fit, and in that state the practice has ever since remained. It must be borne in mind the ancient rule undoubtedly was never to proceed, except under very particular circumstances, if the consul or minister of a foreign state interfered. The first question is, whether the court has jurisdiction. The observations that I made in the case of the *Golubchick*, 1 W. Rob. 143, were in answer to the objection that was taken to the court having any jurisdiction at all, because there is a very great difference between having jurisdiction and declining to exercise it; and no consent can give this court jurisdiction unless it originally possessed it. Whether it would exercise it or not depended on other reasons and other principles. Now I take it, the general rule here, and elsewhere in the courts of the United States, which have had on many occasions to consider this subject, is not to proceed if an objection was raised on the part of the minister or on the part of the consul of the state, and not to be very particular with regard to the nature of the objections raised, if they appeared to be *prima facie* satisfactory. There certainly have been cases, not in this country, but in the United States, where their courts have proceeded in the case of a British vessel, even in spite of the remonstrance of the British minister. One or two cases of that description, upon an examination of their reports, I have discovered, but they were very strong cases, and I cannot undertake to say but that the courts were justified in the course they pursued. It is to be remembered

there is a very great distinction between proceeding against the ship and against the proceeds of a ship sold. In the latter case, if the master had been engaged on many voyages in the East Indies or distant parts of the world, it would be unjust to leave him without any provision here for obtaining payment of his wages. But that is not the present case. In this instance a vessel was leaving Liverpool for her home port, Ostend, when she was arrested by the master for his wages. Objection was thereupon taken, after some interval, by the Belgian vice-consul at Liverpool, and subsequently by the Belgian consul himself. Now what are the reasons why the court should not accede to the application made by the Belgian consul here; an application which, according to ordinary proceedings in former times, was never refused, as I am aware, except under circumstances so peculiar as to form no precedent at all. The Belgian consul states that he desires the suit to be put an end to. To this the answer given is that the vessel is in difficulties, and that the master is not able to recover what is due to him if the vessel goes back to Ostend. I do not think that is a sufficient reason, because the master of the Belgian vessel is necessarily subject to the jurisdiction of the courts of his own country, and if they will not do him justice, there is no reason why this court should interpose its authority and interfere. I think this motion must be acceded to and the suit dismissed.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORCAX, Esqrs., Barristers-at-Law.

Tuesday, Jan. 19.

(Before Mr. Commissioner HOLROYD.)

Ex parte NASH, *re* FLEET.

Expunging claim—Action and order of reference therein—Reference to official assignee.

Where an action was brought by an executrix and an order of reference made therein before the bankruptcy of the deft. and the plt. afterwards abandoned the action and claimed under the bankruptcy, the Court, on application of the assignees, refused to expunge the proof, but referred the matter to the official assignee, with liberty for him to raise and state any question for the opinion of the court.

Expunging claim. This was an application to expunge a claim, made the 24th Nov. 1863, on behalf of Elizabeth Edwards, for the sum of 2588*l.* 13*s.* 8*d.* Mrs. Edwards, as executrix of the will of her late husband, had brought an action against the bankrupt, in the Court of C. P., and an order of reference was made under the 17 & 18 Vict. c. 125, s. 3, which gives power to the court or judge to direct an arbitration or reference before an arbitrator appointed by the parties, or to an officer of the court. The order of reference in this case was made to the master, and bore date July 17, 1863, but before any appointment could be obtained under it Fleet became bankrupt upon his own petition on the 24th Nov. 1863.

Arkcoll (solicitor) appeared for the creditors' assignee, and contended that, as the question between the claimant and the bankrupt was one of account, this court ought not to be called upon to deal with it, but ought to expunge the claim, leaving Mrs. Edwards to proceed upon the order of reference which the bankrupt had obtained in the action. He referred to the 182nd section of the Consolidation Act 1849.

Parker (solicitor) appeared on behalf of creditors on the same side.

Norton (solicitor) for Mrs. Edwards, contended that the court was bound to decide the question, and had ample powers to do so under sects. 148 and 155 of the B. A. 1861. The claim having been entered upon

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the proceedings she could not be compelled to proceed under the order of reference, inasmuch as the action under which the order was made must be deemed to have abated, and his client to have made her election under sect. 182 of the Consolidation Act 1849. He cited

Augarde v. Thompson, 5 Dowl. Pr. Cas. 702 ;
Woodward v. Meredith, 2 Dowl. & Lowndes, 135 ;

Bull v. Bowden, 22 L. J. 249, Ex. ;

Any proceeding on her part, after her claim was entered, might be restrained by injunction in Chancery :

Ramsford v. Barry, 7 Dowl. Pr. Cas. 867 ;

Ex parte Diack, 2 Mont. & A. 675 ;

Ex parte Bernasconi, 2 G. & J. 381 ;

Petersdorff's Abr. 2nd edit. 135, 136 ;

18th Gen. Ord. 12th Oct. 1861.

He also referred to the 183rd section of the Consolidation Act 1849.

Mr. Commissioner HOLROYD.—I do not think I ought to expunge this claim. Let the accounts be referred to the official assignees, with liberty to him to raise and state any question which may arise before him as to evidence or otherwise for the decision of the court.

Ordered accordingly.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Monday, Jan. 11.

(Before the LORDS JUSTICES.)

WILKINSON v. ROGERS.

Lessor and lessee—Breach of covenant—Conversion of premises—Acquiescence—Injunction.

In a lease granted to the deft. R. a covenant was contained on the part of the lessee to use the premises as a private dwelling-house only, followed by a proviso that if either of the adjoining houses (which were the property of the same lessor) should be converted into a shop, the lessee should be at liberty to convert his premises to a similar use. In June 1863 the premises were underlet to the deft. A., who placed in his window a blind or placard, bearing this inscription, "A. A., Coal-office, and at the Coal Exchange." Against this use of the premises the M. R. granted an interlocutory injunction ; but upon its appearing that the adjoining house had been let to a photographer, who upon the door-posts and elsewhere announced his calling, and sold photographs upon his premises,

Their Lordships dissolved the injunction.

The fact of the cessation of the photographer's trade before the bill was filed held not to be material in deciding upon the motion.

Per Turner, L. J. : Where the covenant and its breach are clear and distinct, and irreparable injury is likely to occur from it, the court will interfere by injunction before the hearing ; but if otherwise, the question becomes one of comparative injury, and the court will consider whether greater injury will be done by granting or withholding the injunction.

This was a motion by the deft. William Rogers seeking to discharge an interlocutory injunction which had been granted by the M. R., restraining the defts. William Rogers and Alpheus Andrews from using the house and premises No. 39, Westbourne-grove, for a coal office, and from carrying on, or allowing to be carried on, the business of a coal merchant therein, and from exhibiting a placard or notice in the words,

"Alpheus Andrews,
Coal Office,

and at the Coal Exchange ;"

and from using or allowing the said house and premises to be used other than as a private dwelling-house ; and from in any manner violating the covenants of a certain indenture of lease dated the 25th Jan. 1859.

The hearing of the application before the M. R. will be found at 9 L. T. Rep. N. S. 434, but as the decision of the Court of Appeal went upon somewhat different facts from those on which his Honour proceeded, a short statement of the circumstances is necessary.

By deed dated the 28th Aug. 1844, the premises in question were granted and demised to one Charles Hammond for a term of seventy-six years and a quarter, and the lessee, for himself, his executors, administrators and assigns, covenanted with the lessors (amongst other things) "to keep and use the said messuage and premises as and for a private dwelling-house only, and that he should not suffer to be done upon the said premises any act or thing which might be, or which might grow to be, an annoyance, damage, or disturbance to them (the lessors) or of the other tenants for the time being of the estate of William Kenard Jenkins (one of the lessors) at Westbourne-grove aforesaid."

The residue of this term was on the 12th Aug. 1857 assigned by Charles Hammond to one John Sperling, but subject to the payment of rents and the covenants in the former indenture contained.

By indenture dated the 25th Jan. 1859 John Sperling demised the premises to the Rev. William Garrett Lewis for twenty-one years, and Mr. Lewis covenanted "to keep and use the said messuage as and for a private dwelling-house only, and not to do or suffer to be done any act or thing which might be an annoyance to the said John Sperling or the tenants of the adjoining or adjacent premises." This was followed by a proviso, which was accidentally omitted from the statement which the bill contained :

"Provided always, that if any or either of the adjoining or adjacent premises now belonging to the said John Sperling shall be converted into a shop, the said Wm. Garrett Lewis shall be at liberty to convert the premises hereby demised to a similar use."

In July 1862 Mr. Lewis assigned all his interest under the last-mentioned lease to the deft. Rogers, and he in June 1863 sublet the premises to the deft. Andrews. Both of these defts. had notice of the covenants and provisos which were contained in the lease dated the 25th Jan. 1859, but it was alleged that they had entered into their agreement expressly in order that the deft. Rogers might carry on the business of a coal-merchant there. Soon after his tenancy commenced he accordingly put up in his window the inscription above stated, but he made no alteration whatever in the structure or appearance of the house ; nor did he at any time keep coals there for sale, or do anything more than receive orders on the premises, which he afterwards supplied from his other address.

At the date of the lease in Jan. 1859, Mr. Sperling was the owner or lessee of the adjacent houses, 37, 38, and 40, as well as of No. 39 ; but he, in Dec. 1860, assigned his interest in all of them to Mr. Wilkinson, who now filed this bill for the injunction already stated.

Upon the evidence it appeared that almost all the houses in the street called Westbourne-grove were occupied as shops : that No. 38 was occupied by a dentist, who had his name and calling in a brass-plate upon his door ; that No. 39 had previously been in the occupation of a Mr. Smith, a surgeon, whose name and profession had also been upon his door ; and that No. 40 had been let by the plt. in June 1861 to a Mr. Fisher, a photographer, who took portraits and sold photographs on the premises, and had the words "Fisher, photographer,"

painted on his door-post. Mr. Fisher had, however, given up his trade and left the premises before the bill was filed. The four houses belonging to the plt. were the only houses in the street which had not been actually converted into open shops.

The M. R. granted the injunction, from which order the deft. Mr. Rogers now appealed.

J. Hinde Palmer, Q.C. and Boyle supported the appeal.—The notice in the deft. Andrews' window was not a breach of the covenant; but, as the plt. had acquiesced in the use of the next house as a place for selling photographs; the express proviso of the lease came into operation, and the right to use No. 39 as a coal-office could not be denied. They referred to

The Duke of Bedford v. The Trustees of the British Museum, 2 Myl. & K. 552;

Roper v. Williams, Turn. & R. 18;

Child v. Douglas, 5 De G. M. & G. 739.

The plt., by acquiring the freehold, had lost the benefit of the covenants contained in the under-lease:

Co. Litt. 193 a, and 151 b;

8 & 9 Viet. c. 109, s. 9.

There was no substantial injury, and upon an interlocutory application at all events the injunction should have been refused:

The Attorney-General v. Nichol, 16 Ves. 333;

Johnson v. Wyatt, 9 L. T. Rep. N. 618.

Locock Webb, for the deft. Andrews, in the same interest, took no part in the argument.

Selwyn, Q.C. and C. Swanston, supported his Honour's order.—The conversion contemplated by the proviso was a structural conversion. No such conversion of any of the other houses had ever been made; but such as it was it had ceased, and the photographer had left the premises some months ago. The proviso had therefore no operation. There was a clear breach of a covenant entered into for valuable consideration. They cited

Kemp v. Sober, 1 S. & St. N. S. 517;

Johnston v. Hale, 2 K. & Jo. 414.

J. Hinde Palmer, Q.C. having been heard in reply, Lord Justice KNIGHT BRUCE.—Upon the present application it was not necessary to express an opinion on more than one of the points which had been raised in the argument, namely, as to the meaning of the concluding words in the covenant restrictive of trades—words which had been omitted from the bill, but, he was sure, omitted from no wrong intention. Those words were: "If any or either of the adjoining or adjacent premises then belonging to the said J hn Sperling shall be converted into a shop, the said William Garrett Lewis shall be at liberty to convert the premises hereby demised to a similar use." The first question to which he intended to address himself was, whether any of the adjoining or adjacent premises had been since converted into a shop. Was the house which was now occupied by a photographer part of the premises adjoining or adjacent? That it was so there could be no doubt. Then, had it been "converted into a shop," within the meaning of that term as used in the instrument before the court, since the lease had been granted? He was of opinion that there was, to say the least, ground for great and serious doubt whether it had not been so converted. It was true that there had not been any architectural or structural change, but the place had been used for the sale by Mr. Fisher of goods to a great extent, namely, of photographic drawings and works of a similar description. It would make no difference that the conversion was only of such a character as he had stated, for, as had been already intimated, the absence of architectural and structural change was not of importance. But the real question was, whether the premises had been converted into or used as a place for selling goods by Fisher. He thought that it had been so converted and used,

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and therefore that fact must be taken to be found for the deft. Next, what was the effect of the premises having been converted into a shop, or used as a shop, upon the case of the other lessee? It was, that he also was at liberty to convert his premises to a similar use. The word "convert" must be considered as bearing the same meaning in both parts of the paragraph, and therefore an architectural or structural conversion was not in question in the present contention: Had then the deft. obtained the liberty of using the property in his occupation for a similar use or purpose? He was of opinion that he had. Was the purpose for which he had been lately using the premises "a similar use?" They had been used as a place of business, not for selling goods, but only as a place of business for receiving orders for coals sold and delivered from another place, and to his mind it appeared that this was a "similar use," within the meaning of that expression contained in the lease. Therefore, if the case had to be decided at that time, his decision would be in conformity with that view. But the court was not obliged to decide the whole question at once. It was sufficient for the present purpose to say that there was great and serious doubt whether the plt. was right in his contention as raised upon the motion, and he was of opinion that the case could not possibly be presented more favourably for the plt. than as a case of grave and serious doubt. Irreparable mischief to the plt. was of course out of the question, and according to the present view which he had taken of the law and of the facts, a case for an injunction had certainly not been made out. It was, however, desirable that nothing should now be said or done which might prejudice the case of the plt. at the hearing of the cause, and he should therefore propose that, in discharging the order of the M. R., it should be without prejudice to any question. The costs at the Rolls and in this court would be made costs in the cause.

Lord Justice TURNER agreed with his learned brother that this injunction ought to be dissolved, and he also agreed with him in thinking that the costs ought to be left to be dealt with by the M. R. For the present purpose he would assume that there had been a breach by the deft. of the covenants contained in the lease, although he expressed no opinion on that point; and he would also, for the present purpose, further assume that the plt. had not debarred himself from his right to come to this court for an injunction; although he thought that much might be said upon that point, more especially with reference to his acquiescence as precluding an interlocutory injunction, although it might possibly not preclude him from obtaining an injunction at the hearing of the cause. But he felt by no means satisfied that the authorities referred to had a bearing upon the present case. Still he assumed all these points in favour of the plt., for it was sufficient to deal with the case upon the proviso at the end of the covenant contained in the lease. By that proviso, if any of the adjoining or adjacent premises should be converted into a shop, the deft. was to be at liberty to convert the premises demised to him to a similar use. It had been contended, on the part of the plt., that this conversion of the premises to which the proviso referred meant only a structural or architectural conversion—but he was not prepared to go that length. On the contrary, he thought that the premises might be "converted," either by the manner in which they were used, or by an alteration of the buildings themselves. The question to be decided at the hearing of the cause would be whether, on the true construction of that proviso, a conversion by user was intended, or only a structural conversion. He had felt himself pressed in the course of the argument by

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the direct covenant into which the deft. had entered, but he (the L.J.) had certainly misapprehended the law upon that subject, if it really were the law, that in all cases of absolute covenants the court will interfere by injunction to enforce them, without having reference to the circumstances of the case before it. He agreed that if the covenant was clear and distinct, and if the breach of it was also clear and distinct, and if also irreparable injury was likely to occur from a breach of it, it would be the duty of the court to interfere by injunction before the hearing; but, on the other hand, if the covenants were not clearly expressed, or if it was doubtful whether a breach had actually been committed, or if no irreparable injury was likely to be occasioned either to one side or the other, then, according to the whole course of this court, it became, in his opinion, a question of comparative injury—to which side the greater injury would be occasioned. In the present instance it was impossible to doubt, looking at the trade which the deft. was carrying on upon his premises, that great injury would ensue if the injunction were granted; on the other hand, he had looked through the affidavits in vain to discover any evidence of substantial injury which the plt. would sustain if the injunction were now withheld, and, upon these grounds, he was of opinion that the injunction granted by the M. R. must be dissolved.

Lord Justice KNIGHT BRUCE added, that he had omitted to comment upon the argument which the plt. had addressed to the court, founded on the fact of the cessation of the photographic business at Michaelmas last. In his opinion, however, the cessation of that business made no difference whatever to the case.

Solicitor for the plt., *H. J. Riches.*

Solicitors for the deft. Rogers, the app., *J. and IV. Butler.*

Solicitor for the deft. Andrews, *D. Alston.*

June 12 and Dec. 16.

(Before the LORDS JUSTICES.)

Re F—, AN ALLEGED LUNATIC.

Lunacy—Recovery of the patient—Costs of petitioner—25 & 26 Vict. c. 86, s. 11.

A lady, living apart from her husband, presented a petition for an inquiry as to the state of mind of her husband. The petition was ordered to stand over, and in the meanwhile the husband recovered:

Held, that, under such circumstances, the petitioner's costs must be paid by the alleged lunatic, unless there were grave reasons for refusing them.

Upon the 16th June 1863 a petition was brought on for hearing before their Lordships, praying an inquiry into the state of mind of a gentleman, whose wife by her next friend was the petitioner. At the date of the petition, and for some time previously, the petitioner was living apart from her husband.

It was proved that in the previous March the alleged lunatic had been removed by his brother and sister, representing his family, to a house which they took in St. John's-wood, where they resided with him, keeping him under personal restraint. He had had attacks similar to that which rendered his confinement necessary on several occasions, but he had always recovered, to all appearance perfectly, within a few months. The family physician was called in to attend him, but when the petitioner heard of his indisposition she sent two medical men of her own choosing to visit him, but they were refused admittance to the patient. Upon this the lady commenced proceedings in lunacy.

Messrs. Coutts and Co. were, it appeared, the bankers of this gentleman, and had been in the habit

of receiving money on his account, and managing his affairs for him.

Waller supported the petition.

Bedwell appeared for Mr. F—.

When the petition was brought on the brother of Mr. F— undertook not to remove him out of the jurisdiction, and Messrs. Coutts and Co. were stated to be willing to continue to manage his affairs, and upon this

Their LORDSHIPS ordered the petition to stand over upon the undertaking of the brother, and directed Messrs. Coutts and Co. to make a certain monthly payment out of the funds in their hands for the support of Mr. F.

On the 16th Dec. the case was again mentioned. It appeared that in the meantime the alleged lunatic had recovered, and the medical gentlemen certified that he was then of sound mind.

Bedwell, on his behalf, now asked that the petition might be dismissed. His client was willing to pay the costs of all parties except those incurred by his wife, for which, of course, the next friend was liable.

Waller, on behalf of the petitioner, submitted that she was entitled to her costs. He referred to the 11th section of the Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86), which provides that it shall be lawful for the court to order the costs of and incidental to a petition for a commission, &c., and of and incidental to the prosecution of an inquiry, &c., consequent thereon, to be paid either by the party who shall have presented such petition, or by the party opposing it, or out of the estate of the alleged lunatic, or partly in one way and partly in another, as the court shall think fit. The petition here was *bona fide*, it was warranted by Mr. F.'s condition at the time, and there was no just grounds for refusing his wife her costs.

Lord Justice TURNER said that, in his opinion, the costs of presenting petitions of this nature in lunacy ought not to be refused to the persons presenting them, unless for some serious reasons. It was very desirable that no one should be deterred by the fear of having to pay the costs from interfering on behalf of those unfortunate persons who were unable to protect themselves and their interests, and no obstacles ought to be thrown in their way. No such reasons as he had mentioned existed in the present instance, and he was, therefore, of opinion that the costs of the petitioner ought to be paid by the alleged lunatic. The order now to be made would so direct, and all proceedings under the petition would be stayed till further order.

Lord Justice KNIGHT BRUCE concurred.

Dec. 4, 11 and 18.

(Before the LORDS JUSTICES.)

Re WOOD (a Lunatic.)

BANNER v. ENGLAND.

Lunacy—Practice—Production of documents held in the lunacy.

In a suit by persons professing to be next of kin to a deceased lunatic, to establish their kindred against a person who, many years ago, was certified on the lunatic's death to be his sole next of kin, and who had in that character obtained administration to and possession of his estate, the plt. is entitled as of right to the inspection and production of the documents which have remained in the custody of the officers in lunacy.

This was a petition for leave to the petitioners to inspect certain documents which were in the custody of the Masters in Lunacy, under the following circumstances:—

The above-mentioned suit of *Banner v. England* was instituted on the 19th June 1862, by Edward Banner and Sarah Caroline, his wife, who by their bill

alleged that the female plt. was the representative of one of the next of kin of Isaac Wood, the lunatic, who had died intestate, and it prayed, amongst other things, "that it might be declared that Sarah Thompson, deceased (who was the mother of Mrs. Banner), as one of the next of kin according to the statute for the distribution of intestates' estates, of the said Isaac Wood, living at his decease, was entitled, and that the plt. Sarah Caroline Banner, as the legal personal representative of the said Sarah Thompson, deceased, is now entitled to a share of the whole of such personal estate of the said Isaac Wood, the said intestate."

In this suit replication was filed on the 6th Aug. 1853, but the time for closing evidence had not expired, as it had been extended by order.

Isaac Wood was duly found lunatic by inquisition many years ago, and he continued a lunatic to his death. He died intestate, and was possessed of considerable real and personal estate.

By a report bearing date the 12th Jan. 1849, which was made by the Master in Lunacy soon after the lunatic's death, it was certified that one Thomas Copeland was the sole next of kin of the lunatic. Mr. Copeland upon this finding obtained letters of administration to his estate and effects, and possessed himself of the personality to a very considerable amount.

Mr. Copeland died on the 12th Dec. 1850, having by his will appointed the defts. John England and Charles Bamford to be his executors. The will was proved by both, but subsequently thereto, and before the institution of the suit of *Banner v. England*, Mr. Bamford died.

These facts appeared upon the present occasion, and the prayer of the petition was, that the petitioners the plts. in the suit might be at liberty to inspect all the documents, papers, &c. in the matter of Isaac Wood, a lunatic, which were in the custody of the master, registrar and other officers in lunacy, and to take copies and extracts therefrom as they might be advised, at their own expense, and that the proper officers might be ordered to attend with such documents upon any examination of witnesses at the hearing of the cause of *Banner v. England*, as the petitioners might require.

Greene, Q. C. and Bowring supported the petition, and referred to

Re Fitzgerald, 2 Sch. & Lef. 432;

Re Clark, lb. 594.

Schomberg, Macnaghten and G. Osborne Morgan severally for the defts., opposed the application, and referred to

Bolton v. The Corporation of Liverpool, 1 Myl. & K. 88;

Greene, Q. C. was heard in reply; after which

Lord Justice TURNER said that the application was one of much importance as respected the rights of parties in a suit to the production of documents in the custody of the Masters in Lunacy. Since the petition was first brought on for hearing, he had communicated with the Registrar in Lunacy upon the subject, and had found that, previously to the year 1825, no person whatever had been debarred from inspecting the proceedings in lunacy, and in his opinion the question was concluded by that previous practice. The order for inspection and production would therefore now be made according to the prayer of the petition, and the costs of this application would be costs in the cause of *Banner v. England*.

Lord Justice KNIGHT BRUCE was of the same opinion. Ordered accordingly.

Jan. 23 and 25.

(Before the LORDS JUSTICES.)

RACKHAM v. DE LA MARE.

Will—Construction—Gift to one and his children—Gift over—Death of legatee without issue in testator's lifetime.

The testator directed that one-sixth of his residuary estate and the income thereof should be held upon trust for the benefit of his daughter H. during her life, and after her death for her children who should attain twenty-one, in equal shares as tenants in common. Other shares were given upon similar trusts for his other sons and daughters by name, and their children, and the will contained a proviso that if any one or more of his (the testator's) sons or daughters should die without having any child who under the trusts as aforesaid should become absolutely entitled to a share in the said residuary estate, then the shares of each of his sons or daughters whose issue should so fail, and his or her children, and whether original or accruing by survivorship under that proviso, should vest in, accrue and belong to the survivors or others of the sons and daughters for their lives, and after their deaths should be transmitted to their children, as was directed with respect to their original shares. H. having died without issue in the testator's lifetime, Stuart, V.C. decided that there was an intestacy as to her share; but on appeal

Their Lordships reversed that decision, being of opinion that the proviso must be construed as though the testator had declared that the gift over should take effect in the event of the death of any of the testator's sons or daughters, whether they survived him or did not survive him.

This was an appeal from a decision of Stuart, V.C., reported 9 L. T. Rep. N. S. 284, where the will upon which the question turned and the necessary facts are sufficiently stated. The plt. was the eldest son of the testator, and the defts. who appealed were his other surviving children and grandchildren, or some of them.

Mulins, Q.C. and Archibald Smith supported the appeal.

Greene, Q.C. and Edwin Ward appeared for the plt. to uphold the decree.

The following authorities were referred to:

Darrell v. Molesworth, 2 Vern. 378;

Ledsome v. Hickman, lb. 611;

Bretton v. Lethulier, lb. 653;

Willing v. Baine, 2 P. Wms. 113;

Walker v. Main, 1 J. & W. 1;

Humphreys v. Howes, 1 Russ. & Myl. 639;

Hannam v. Sims, 2 De G. & J. 151;

Ice v. King, 16 Beav. 46;

Re Sheppard's Trusts, 1 K. & J. 269;

Re Green's Estate, 1 Dr. & Sm. 68; 2 L. T. Rep. N. S. 791;

Bastin v. Wallis, 3 Beav. 97;

Smith v. Oliver, 11 Beav. 494;

Rider v. Wager, 2 P. Wms. 328;

Shergold v. Boone, 13 Ves. 370;

Christopherson v. Naylor, 1 Mer. 320;

Stewart v. Jones, 3 De G. & J. 532;

Re Wood's Will, 31 Beav. 323;

2 Jarm. on Wills, 3rd edit., 714.

Archibald Smith having replied,

Lord Justice KNIGHT BRUCE said, it appeared to him that, on the letter and spirit of the instrument before the court, independently of the authorities, and also on the great preponderance of authority, the words "provided always, that if any one or more of my said sons and daughters shall die without leaving any child who, under the trusts as aforesaid, shall become absolutely entitled to a share of the said trust-moneys,"

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&c., then the original shares, as well as the share accruing by survivorship under that clause, "shall vest in, accrue and belong to the survivors or survivor, or others or other of my said sons and daughters," ought to be read and understood as meaning, and equivalent to, "provided always, that if any one or more of my said sons and daughters shall, *whether surviving or not surviving me*, die without having any child who, under the trusts as aforesaid, shall become entitled to a share of the said trust-moneys," &c. He collected that the instrument had practically, before the institution of the suit, been thus construed, and if so, he thought it had been rightly construed and properly carried into effect. Harriet Rackham was living at the date of the will, and for some years afterwards, and in his opinion the plt., if entitled to anything as heir-at-law and one of the next of kin, was entitled to no more than if Harriet Rackham had survived the testator. He did not mean to give any opinion whether her having died before the date of the will would have made any difference. He thought the resp. ought to have no costs of the appeal.

Lord Justice TURNER said he was of the same opinion. This was not a case of substituted gift at all, and the cases relating to such gifts had no bearing upon it. It was a case of a gift to A. for life, and after her death to her children who should attain twenty-one, and if there was no such child to take, then over. The limitation over, in his opinion, was well made, and had taken effect by the death without issue of Harriet Rackham.

Solicitor for the plt., *Thomas Angell*.

Solicitors for the defts. who appealed, *Howard and Dollman*.

Friday, Jan. 29.

(Before the LORD CHANCELLOR (Westbury).)

FOLEY v. MAILLARDET.

Practice—Extra-territorial jurisdiction of the court—2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82—15 & 16 Vict. c. 86, s. 64—Consolidated Order 10, rule 7—Service on deflt.

The 7th rule of the 10th Consolidated Order, relating to service out of the jurisdiction, though in terms extending to "any suit," is yet to be strictly confined to those suits which are within the statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

Where a bill had been filed by a legatee against an administratrix resident in Scotland, alleging that the deflt. had in her possession or power divers sums of money and divers "parliamentary and other" stocks or funds, and real and personal securities belonging to or arising from the estate of the deceased, but without alleging that the estate of the deceased was in England, or that any of the estate in the hands of the administratrix was in England, and an order had been obtained to serve the deflt. in Scotland with a printed copy of the bill under the 10th Consolidated Order;

Upon a motion by the deflt. founded on an affidavit deposing that she had neither lands nor hereditaments, nor any charge, lien, judgment, or incumbrance thereon, nor any money vested in any Government or public stock or shares, &c., within the provisions of the above-mentioned statutes of Will. 4:

The order of service was discharged.

Cookney v. Anderson, 8 L. T. Rep. N. S. 295, followed and confirmed.

This was an appeal from an order made by Sir J. Stuart, V.C., refusing with costs a motion by the deflt. in the suit, *Maria Anne Maillardet*, to have an order made at the instance of the plt., to serve the

deflt., who was out of the jurisdiction, with a copy of the bill, discharged.

The suit was for an account of what was due to the plt. in respect of a legacy under the will of a Mrs. Foley, who died at Calcutta in 1844. Administration with the will annexed was granted by the Supreme Court of Judicature at Calcutta to T. E. M. Turton, Esq., the registrar of the said court.

On the 19th Aug. 1856 the will of *Eliza Foley* was proved in the Prerogative Court of the Archbishop of Canterbury, and the surviving executor having renounced the executorship, letters of administration with the will annexed were on that day granted to the deflt. Mrs. Maillardet, then the wife of John Wm. Maillardet. Mr. Turton, as administrator, accounted with Mrs. Maillardet and her husband, and paid over to them in 1844 the clear residue of the assets of *Eliza Foley* in India, which had come to his hands, amounting to 2000 rupees or thereabouts.

In 1860 Mr. and Mrs. Maillardet returned from India to England, and shortly after went to reside and took up their permanent abode in Scotland, where Mr. Maillardet died on the 19th Dec. 1862.

The bill alleged as follows:—

Par. 26. The deflt. is the legal personal representative in England and also in Scotland of the said John William Maillardet, by whom conjointly with his said wife, assets of the said *Eliza Foley* to a large amount were from time to time received.

Par. 27. The deflt. hath in her possession or under her control divers large balances or sums of money, and also divers parliamentary and other stocks or funds, and also divers real and personal securities belonging to or arising from the personal estate of the said *Eliza Foley*, and far more than sufficient for the satisfaction of the claim of the plt. in this suit.

Par. 28. The deflt. hath also in her possession or under her control assets of the said John Wm. Maillardet to a large amount.

The plt. having obtained the order for service of a printed copy of the bill (under the provisions of the Chancery Amendment Act, 15 & 16 Vict. c. 86, ss. 3, 5), upon the deflt. at Crail or elsewhere in Scotland, the deflt. made an affidavit to the effect that at the time of the institution of the suit she had neither "lands nor hereditaments, nor any charge, lien, judgment, or incumbrance thereon, or any money vested in any Government or other public stock or public shares in public companies or concerns, or concerning the dividends or produce thereof," within the provisions of the Acts of 2 Will. 4, c. 33, and the 4 & 5 Will. 4, c. 82, respectively; nor, to the best of her belief, did any part of the landed estate of John Wm. Maillardet come within the said provisions.

Upon this affidavit the motion was made before the V.C., as above stated, and his Honour, considering that it was not competent to a deflt., upon a mere question of procedure, to file an affidavit traversing allegations which put in issue the material questions to be decided in the suit, refused the motion: (see the report, *antè*, p. 643.)

Graham Hastings now supported the appeal.—He relied on the case of

Cookney v. Anderson, 8 L. T. Rep. N. S. 295, in which his Lordship held that the 7th rule of the 10th Consolidated Order, though in terms extending to "any suit," is yet restricted to those suits in which the court has extra-territorial jurisdiction conferred upon it by Act of Parliament, and that the limit of that jurisdiction is defined by the statutes of 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82. He further cited

Davidson v. The Marchioness of Hastings, 3 Keen, 509;

Innes v. Mitchell, 1 De G. & J. 423;

McLean v. Dawson, 4 De G. & J. 146.

The case of *Whitmore v. Ryan*, 4 Hare, 612,

which would probably be relied upon on the other side, was distinguishable from the present as having been decided upon the 33rd Order of May 1845, which was made subsequently to the passing of the Act of the 4 & 5 Vict. c. 52, in 1841, which Act by its 1st section enacted that every order made in pursuance of the 3 & 4 Vict. c. 94, should "be of the like force and effect as if the provisions therein contained had been expressly enacted by Parliament." Having subsisted for nearly five years, this order with the rest was abrogated in Feb. 1860, and the 10th Consolidated Order under which the order for service in the present case was obtained, had not had a similar statutory validity given to it. It was submitted that the order for service in the present case exceeded the jurisdiction of the court, and must be discharged.

Prendergast, contra, referred to the 64th section of the Chancery Procedure Amendment Act as to the making of general orders, which provides that if either House of Parliament should by any resolution within thirty-six days resolve that the whole or any part of such orders ought not to continue in force, the whole or such part should, from and after such resolution, cease to be binding; and argued that the necessary inference was, that orders made in pursuance of the Act, and not objected to, were absolutely binding. The present case, therefore, was not in substance different from *Whitmore v. Ryan*. The decision of his Lordship in *Cookney v. Anderson* had been commented on by the M. R. in the *Official Manager of the National Association v. Curstons*, 8 L. T. Rep. 717. His Honour considered that his Lordship could never have meant to decide that the court had no jurisdiction in cases where the property was within the description mentioned in the statutes of Will. 4, but where the creditors had no specific charge or lien on the property. Hence arose the disputed question of practice. It was to be observed that the words of the statute are, "All suits instituted concerning any charge, lien, judgment or incumbrance thereon, or concerning any money vested in any government or other public stock, or public shares in public companies, or concerning the dividends or produce thereof."

The LORD CHANCELLOR.—The allegation in the bill does not expressly state that the subject-matter is of the kind mentioned in the statute; and for the purpose of testing the jurisdiction, I think the truth or falsehood of the allegation may very properly be tried by affidavit. The importance of this preliminary question is very great. If I take the first step I must go on, and in the end make a decree against an absent man. The result may be, that I should be committing the greatest injustice.

Prendergast said, that after that expression of his Lordship's opinion, the only remaining question was whether the orders were within the statutory powers given by the Chancery Amendment Act of the 15 & 16 Vict. He referred to

Steel v. Stuart, ante, p. 644.

These orders had never been objected to by Parliament.

The LORD CHANCELLOR.—If general orders are not within the statutory jurisdiction, the consent of Parliament cannot sanction them. Can the court possess any foreign jurisdiction extra the statute? No; then the legislative authority must be pursued. But then it is said that, unless Parliament has checked the excess of the authority as inexpedient and unwise, whatever has been done in excess of that authority has become binding. But it is quite a mistake to consider that the excess is binding because Parliament has not interfered. No matter whether the authority has been wisely or expeditiously exercised, if the orders are in excess of the statute, they continue to be in excess, although they have not been objected to by Parliament.

Prendergast observed that, after what his Lordship

had said, he could not add anything about the expediency of allowing the practice to be extended.

The LORD CHANCELLOR.—No doubt if we were in Parliament a great deal might be said about the policy of extending these statutory powers. I think it has been already said that they fall short of what international law and the comity of nations would warrant. But since the Legislature has thought fit to stop short I cannot make the authority go further. Observe the way in which it acts. In the first instance the jurisdiction was made to extend only to suits relating to land, and that was construed not to include mortgages or charges on land. Then it was construed to include, not only mortgages and charges upon land, but personal property, which from its *situs* and locality might as well be treated as being in England, or Wales, or Ireland, as land. Accordingly the Legislature has expressly included all suits instituted concerning any charge, lien, judgment, or incumbrance on land, or concerning any money vested in the public stocks of this country or Ireland properly so called, or concerning shares in public companies domiciled in this country or Ireland. The caution, therefore, with which the Legislature has proceeded excludes any action of the power being capable of being extended simply by judicial order.

Prendergast said that this lady, being an administratrix, was liable to account for the assets. The mere circumstance of her being over the border ought not to exempt her from this liability.

The LORD CHANCELLOR.—It is a universal principle of all jurisprudence, that *actor rei forum sequitur*. Which is more reasonable, that you should go to Scotland, or that you should drag this debt here? It is not a question of denial of justice, because you can get justice as well in Scotland as here. I am sorry, however, that the Act of Parliament did not extend the extra-territorial authority to administration in cases where the *causæ* of administration would not be in kind different. I am sorry it did not extend to partnerships, where the domicile of the partnership is not in this country. But in the simple case of a man dying, or a lady dying, in India, and the representative constituted in India going to reside in Scotland, common sense dictates that the suit should be in Scotland.

Prendergast said that after his Lordship's ruling as to the limits of the statutory jurisdiction, which would have equal application had the allegation been more widely expressed than it was, he would not trouble his Lordship further.

The LORD CHANCELLOR.—I am much obliged to you for the argument, and I will briefly advert to the two points you have raised. It is my bounden duty to adhere to my decision in *Cookney v. Anderson*, and it is my determination not to attempt, nor to permit any attempt on the part of the court, to assume judicial powers, or to invest the court with judicial powers in cases where they do not exist. Mr. *Prendergast* has called my attention to the language of the Chancery Amendment Act. But I must give to these words a reasonable interpretation. I cannot say that they were intended to sanction the issuing of an order not warranted by authority, or to give to any order a binding force, because that order, and the excess committed by that order, was not noticed by Parliament, and no objection was taken to it. According to the language of the statute, if Parliament should by resolution within thirty-six days resolve that any part of the orders should not continue in force, then and then only they were to cease to be binding. But those orders only could "cease" to be binding which had been binding previously. The parliamentary sanction does not extend to such orders as never were binding at all. It is much to be lamented that the court should have made such an order as this. I have no fault to find with the conclusion that was arrived at in the case of

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Re FRANCES WHITE.

[CHAN.]

Whitmore v. Ryan, in which Wood, V.C. said it was his duty to obey the language of the order. But the construction of this language must be determined, having regard to the principle and purpose of the order. In the case of *Cookney v. Anderson*, I arrived at the conclusion that the language was in excess of the parliamentary power, and that consequently I ought to put a construction upon it which would reduce the order within the limits of the power prescribed by the Act. I must make the orders amount to a compliance with, and not to a transgression of, the parliamentary power. In the present case there is nothing at all to warrant an order bringing the debt before the court. If this first step be taken, it must be followed by a decree made in the personal absence of the debt., and that decree must be enforced by any available means in the power of the court; and if the person against whom it is made should at any time be found within the jurisdiction, the process of enforcing the decree will have to be carried out. This would be a course quite at variance with natural justice. The course pursued by this court would be plainly mistaken if, without the sanction of the Legislature, it were to afford power to bring persons in whatever part of the world they might be situate, within the jurisdiction, in order to determine a question which this court has no more natural right of determining than the courts of the country where the party to the suit is resident, and which relates to property over which this court has no right to assume any jurisdiction. I must discharge the order of the V.C., but it must be without costs, considering the impression which has prevailed on this subject. There has been a practice prevailing for some time which I have found it necessary to correct. After referring to the case of *The Official Manager of the National Association v. Carstairs*, his Lordship further observed that the present case fell under this observation, that the plt. had not shown by the bill that the property was in England; and again, if that had been shown on the face of the bill, it had not been shown that the debt had property in England. The allegation merely went to "parliamentary and other stocks or funds." The plt. would be at liberty to amend his bill by the ordinary process.

Solicitor for the plt., *W. M. Webster*.

Solicitor for the debt., *Frederick Rolt*.

Friday, Jan. 29.

(Before the LORD CHANCELLOR (Westbury.)

Re FRANCES WHITE.

Bankruptcy—Sect. 159.

The 159th section of the B. A. 1861 has no retrospective operation.

Hence, a bankrupt's order of discharge is not to be suspended on the ground that he has contracted a debt without reasonable or probable expectation of being able to pay the same, when the agreement in respect of which the debt arose was entered into before the passing of the Act of 1861.

Remarks on the necessity of preserving records of bankruptcy proceedings in the County Courts.

This was an appeal on behalf of a bankrupt, Miss Frances White, of Southampton, against an order of the County Court judge for Hampshire, made on the 15th Dec. last, whereby he suspended the bankrupt's order of discharge for twelve months without protection, on the ground that she had "contracted a debt" to the opposing creditor "without reasonable or probable expectation of being able to pay the same," within the 159th section of the B. A. 1861.

Cracknall, who appeared in support of the application, said that certain affidavits had been filed since the date of the order, which had been answered, but which

he believed it was contrary to the practice of the court to allow to be read.

Rozburgh, for the opposing creditor, said, that there was no record on the file of proceedings of what evidence had been taken before the County Court judge. Some portion of the evidence was "new" within the meaning of the 32nd General Order as to appeals, if his Lordship would direct it to be received.

The LORD CHANCELLOR said he was afraid he could not assist the resp. How could he determine what was new evidence, without knowing what the old evidence was?

Rozburgh admitted the difficulty, and suggested that the matter should be referred back to the County Court, or that a general order should be made requiring the officers of the court to make proper records of the evidence.

The LORD CHANCELLOR.—There are orders enough already, if there were any disposition to obey them.

Cracknall submitted that the matter was not of sufficient importance to be referred back to the County Court judge. This lady was a schoolmistress. The whole amount of her liabilities, including this debt of 107*l.*, was only 265*l.* The debt of 107*l.* was in respect of a sum of 100*l.* and interest which was advanced by one Sarah Blackmore, now the wife of Edward Charles Cole, the opposing creditor, to a person named Matilda Osgood, for the repayment of which Miss White and one Charles R. Coster became co-sureties. The proof for 107*l.* tendered by Cole and allowed by the registrar, after stating that the claim was in respect of the suretyship under an agreement of the 4th May 1861, went on to say, "Mrs. Cole states that at the time she lent the money she was an articulated pupil to the bankrupt; she had never seen Matilda Osgood; she paid 95*l.* to Charles R. Coster, the other surety, on his statement that Matilda Osgood had authorised him to receive it; she had never been able to find Mrs. Osgood since, and had lost sight of Charles R. Coster for more than a year."

Two objections were taken to the judge's order—one, that a liability as surety was not a "debt" within the language of the 159th section above; and the other that, as the agreement appeared in the proof to have been dated on the 4th May 1861, before the Act of 1861 came into operation, the court would not construe this, which was a penal enactment, as having any retrospective effect.

Rozburgh, for the opposing creditor, said he could state upon instructions, and was prepared to prove, if he had not been prevented by the neglect of the officer of the County Court from so doing, that Miss Blackmore advanced the money on the representation that Miss White was the owner of the furniture of the house in which she was living, whereas the fact was that this furniture had long before been mortgaged by bill of sale to a Mr. Hadden, who had since taken possession of the same. On the 4th May 1861 Miss Blackmore went to Coster's house to make the advance, when Miss White produced the agreement, and said that Mrs. Osgood had been called away about ten minutes before, and therefore she had signed in her absence. Miss White and Coster then signed the undertaking at the foot of the agreement; and Miss Blackmore advanced the money. She had received 5*l.* for interest from Mrs. Coster. Charles R. Coster, afterwards absconded. Mrs. Cole had made inquiries in vain to find any trace of Mrs. Osgood, and her belief was that she was a fictitious person, and that the signature of her name was in Mrs. Coster's handwriting. (The agreement was handed in for his Lordship's inspection.) The answers to the two objections taken by the bankrupt were—first, that the name of Mrs. Osgood was fictitious; and, secondly, that under the 256th section (now repealed) of the Act of 1849, the bankrupt was liable to have

[ROLLS.] *Re* WIMBLEDON AND DORKING RAILWAY ACT, *ex parte* THE SAID RAILWAY CO. [ROLLS.]

the certificate suspended, on the ground of her having contracted a debt by means of false pretences. It was admitted that there was no evidence on these two points which could be used, but the court was asked to draw these inferences. It appeared that Miss White's income from her business of schoolmistress had varied from 70*l.* to 140*l.* a-year; and that her only assets were some 30*l.* of debts due to her, stated to be bad.

No reply.

The LORD CHANCELLOR.—I am very unwilling to interfere with the order, because there are circumstances which appear to me of a very serious character, particularly having regard to the fact that the creditor was the pupil of the bankrupt. But I have not the power of trying the case, simply because there is no evidence of the charges against the bankrupt, or of the proceedings upon which the County Court judge has refused the order of discharge. Now, supposing that this is a debt within the description of debts comprised in the Act of 1861, it is quite clear that it was contracted; but it was contracted before the statute of 1861 came into operation. I do not think that a debtor can be held liable for a thing done before the statute making it a matter of delinquency was passed. I cannot hold the statute to be retrospective, so as to cover a transaction entered into before the law was passed, giving a criminal character to the acts specified in the statute. Upon that short ground I cannot reverse the order. I have a very strong impression that Mr. Roxburgh's client has been very hardly treated; but he has not brought grounds sufficient for me to act upon. I think there is reason to believe that the only valuable property of the bankrupt at the time of the agreement was comprised in a bill of sale made for more than the furniture was worth; beyond which the bankrupt had no means except the profits of her school, about 130*l.* a-year. If this transaction had been within the statute of 1861, I should not have allowed this appeal. But I must discharge so much of the order as suspends the bankrupt's order of discharge for twelve months.

Roxburgh asked for the costs of the opposing creditor out of such estate (if any) as might be realised.

The LORD CHANCELLOR assented, but made no order as to the deposit.

Crucknall asked for his costs out of any possible estate; but

The LORD CHANCELLOR refused, adding that the bankrupt was only saved by the circumstance that at the time of the agreement the matter was not one of criminal jurisdiction.

Solicitors: *Paterson and Son*, agents for *Mackay*, Southampton; *Westall*, agent for *Leigh*, Southampton.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Saturday, Dec. 12.

Re THE WIMBLEDON AND DORKING RAILWAY ACT 1857; *ex parte* THE SAID RAILWAY COMPANY.

Lands Clauses Consolidation Act 1845, s. 85—Railway company—Money in court—Payment out—Action at law—Costs.

A railway company took possession of land under the powers and for the purposes of their Act, and duly paid money into this court for the land, under the 85th section of the *Lands Clauses Consolidation Act*. The parties differed as to the completion of the contract; and a jury ultimately assessed the purchase and compensation money at a fixed sum. The vendor brought an action against the company for that sum with interest, and for certain costs due to him

from the company. Those costs were, however, disallowed by the taxing master. The company pleaded never indebted to the action, except as to so much as they paid into court, which sum did not include the amount of the disallowed costs. Issue was afterwards joined in the action, but no notice of trial given. The company then presented a petition praying payment out of this court to them of their deposit; but the vendor opposed them, on the ground that the disallowed costs were still unpaid, and the action pending:

Held, that the company were entitled to their deposit; and the vendor was not allowed any costs of the petition.

This was a petition presented by the above-named railway company, praying payment out of court to them of two sums of 460*l.* and 85*l.* 5*s.* which had been paid in by them under the provisions of the *Lands Clauses Consolidation Act 1845*.

The petition stated that the company was duly incorporated by Act of Parliament in 1857, and, having then occasion to take some land at Merton, belonging to a Mr. Blake, for the purposes of their railway, served him with the usual notice to treat. In the month of November of that year, before any agreement was come to between them and Mr. Blake, any award made or verdict given for the purchase or compensation money to be paid for the land, the petitioners, in pursuance of the 85th section of the *Lands Clauses Consolidation Act*, deposited in the bank, by way of security, the sum of 460*l.*, which had been duly assessed by a surveyor as the value of the land. The petitioners then also gave Mr. Blake the bond required by the Act, and entered into possession of the land. In Jan. 1859, the same course of conduct was pursued by the parties with respect to further land belonging to Mr. Blake; and in respect of which the petitioners in like manner paid into the bank the sum of 85*l.* 5*s.*, gave a bond, and entered into possession. Considerable correspondence ensued between the solicitors of the parties with reference to the completion of the contract, and ultimately the amount of compensation-money to be paid by the petitioners was fixed by a jury at 900*l.* The title of Mr. Blake to the lands was then duly investigated, and in March 1861 the draft conveyance was sent to him for approval; but in consequence of alterations made in it by him it was not then executed. In May 1863 Mr. Blake brought an action in the Court of Common Pleas against the company, to recover the following sums:—

Amount of the judgment recovered on the inquiry.....	£	s.	d.
Interest thereon at 5 <i>l.</i> per cent. per annum from the 12th Nov. 1857, when the company took possession of the lands.....	900	0	0
Costs of certain summonses and attendances before justices	255	0	0
Amount of costs disallowed on taxation of costs of inquiry as between party and party, but as Mr. Blake alleged recoverable on that action as consequential damages	84	4	10
	75	7	2
	1314	12	0

In Aug. 1863 the company pleaded never indebted to the action, except as to the sum of 1160*l.* 4*s.* 7*d.*, which they paid into court. That sum was made up of the following items:—

To judgment recovered as above stated	£	s.	d.
Interest thereon from the 12th Nov. 1857 to 8th Aug. 1863	900	0	0
Costs as awarded by the magistrates ...	258	4	7
	2	0	0

On the 14th Aug. 1863, that sum was taken out of court by Mr. Blake. Issue was subsequently joined in the action; but notice of trial had not been given when this petition was presented, praying to the effect already stated.

In support of the petition it was urged that the objects for which the two sums of 460*l.* and 85*l.* 5*s.* were paid into court had been in fact fully satisfied by the sum of 1160*l.* 4*s.* 7*d.* recovered by Mr. Blake in the action. The sum of 84*l.* 4*s.* 10*d.* had been included by Mr. Blake in his bill of costs, delivered by him to the company, but disallowed by the taxing master, on the grounds that if Mr. Blake had considered himself entitled to such costs, he should have applied to the magistrates for an order for them at the hearing of the summons, which he had not done; but as he had not done so, the master was of opinion that they could not be included as part of his costs on execution of the injunction to assess the compensation. The 75*l.* 7*s.* 2*d.* was a sum also included in his bill of costs, but taxed and disallowed as improper charges between party and party. Those sums, therefore, making together 159*l.* 12*s.*, were, it was contended, now irrecoverable by Mr. Blake.

In opposition to the prayer of the petition an affidavit was filed by the solicitor of Mr. Blake, entering into a long statement of the circumstances attending the correspondence between the parties already mentioned, in order to show that whatever expense or delay had arisen, or obstruction had been offered, to the due completion of the contract, it was to be attributed to the conduct, not of Mr. Blake, but of the company: that Mr. Blake claimed upwards of 159*l.* over and above the amount paid into court in the action, independently of heavy costs to which he had been put by the company: and the affidavit concluded by alleging that issue having been joined in the action, the cause was now ripe for trial; but that the petitioner's solicitor had not yet settled the action, nor made any proposal as to it; and that if the sums in this court were now paid out, as prayed, before the action was settled, the conveyance executed and the said costs before referred to, duly paid, there was great reason to believe that Mr. Blake would not only be put to much further expense in the matter; but there would also be much doubt whether he would ever receive such costs from the company.

Speed appeared for the petitioners; and
Selwyn, Q. C. for Mr. Blake.

The MASTER of the ROLLS.—I am of opinion, Mr. Speed, that you are entitled to the order you ask. With regard to the costs of the petition, I cannot give any to the resp. in this case.

Solicitor for petitioner, *W. Gascoigne Roy.*

Solicitor for Mr. Blake, *Frederic Augustus Snow.*

Dec. 11 and Jan. 12.

BARKER v. YOUNG.

Tenant for life—Power of appointment in case of leaving a child—No child—Appointment—Effect of.

A testator devised and bequeathed his residuary real and personal estate to his nephew H. B. C. for life, and after his decease, "providing he should leave any child or children him surviving, or who should be born within due time after his decease, lawfully begotten," as his nephew should by will appoint. The testator then went on to add, "but if his said nephew should die without leaving any child or children him surviving, or who should be born in due time after his decease, lawfully begotten, and the said H. B. C. his nephew should not previous to his decease make any such appointment, gift, or bequest as aforesaid," then the property was to go over to three other

parties. The nephew was the heir-at-law and sole next of kin of the testator. He survived his uncle; but he never had a child. He made a will, however, purporting to dispose of the residue of his uncle's real and personal estate; on the assumption either that he had, under the above-stated gift over, an implied power so to do, though he left no child, or that, in the events which had happened, there was an intestacy as to the residue of his uncle's property: Held, that, as the tenant for life never had a child, no power of disposing of the testator's property rested in him; and that in the events which had happened, the appointment which he had attempted to make was inoperative, and the property was divisible among those parties to whom it was given over.

This suit was instituted for the purpose of administering the trusts, and obtaining a declaration as to the construction, of the will of Francis Const, Esquire, late the Chairman of the Middlesex Sessions.

Francis Const, by his will, dated the 11th April, 1839, appointed his nephew Henry Beaumont Coles, William Dunn, and the deft. Henry Young, his executors, and devised and bequeathed all his estates and effects to them, in trust for the several persons and purposes therein mentioned. He then disposed of the residue of his estate as follows:—

"And as to all the rest and residue of my estate, both real and personal, including funds, stock dividends, bills, bonds, and securities of every sort, and all other my effects not hereinbefore specifically bequeathed, I hereby, as before, give, devise and bequeath the same to my said executors, their heirs, executors, and administrators, upon the trusts following (that is to say): first, to pay all the several legacies and annuities given by this my will or by any codicil or other testamentary paper hereafter given, and after payment thereof to permit and suffer my said nephew H. B. Coles to take and receive the rents, dividends, profits and interest thereof, for and during the term of his natural life, for his own absolute use and benefit: and from and after the decease of my said nephew, providing he shall leave any child or children him surviving, or who shall be born in due time after his decease lawfully begotten, then I declare and direct that my said executors shall stand and be possessed of my said residuary estate, upon trust for such persons and for such ends and purposes as my said nephew shall by his last will and testament direct or appoint, give, devise, or bequeath the same; but if my said nephew shall die without leaving any child or children him surviving, or who shall be born in due time after his decease, lawfully begotten, and the said H. B. Coles, my nephew, shall not previous to his decease make any such appointment, gift, or bequest as aforesaid, then I declare that my said executors shall stand and be possessed of all my said residuary estate, and of all rents, dividends, interest and profits of or arising out of the same, upon trust for and to be divided between the following persons (that is to say); Richard Barker, the said H. Young my executor, and James Ryland, and to and for their heirs, executors and administrators; and I hereby give and bequeath the same accordingly."

The testator died on the 16th Dec. 1839, without having revoked or altered his will; and at his death he was entitled to considerable real and personal estate. H. B. Coles was the heir-at-law and sole next of kin of the testator, and he and the other executors duly proved the will. W. Dunn died on the 3rd April 1855. R. Barker died on the 20th May 1856, having by his will devised and bequeathed his property to the pits. H. B. Coles, by his will, dated 23rd Nov. 1861, appointed executors and trustees thereof, and then purported to dispose of the residue of Francis Const's estate in the following terms:—"I am now in receipt of the income derived from the residuary real and personal estate of my said late uncle F. Const, and under

and according to what I believe to be the true construction and effect of his last will, the *corpus* of that estate will, on my decease, go over to other persons if I die without leaving any child surviving me, and shall not previous to my decease make some appointment, gift, or bequest thereof by my last will to the contrary; but that if I shall make any such appointment, gift, or bequest, although I may not leave any child surviving me (as would be the case were I to die at the present time) such estate will in fact either become subject to such appointment, gift, or bequest, or by reason of the defect or failure of the double contingency upon which the limitation over depends be undisposed of by my said uncle's will, and will devolve upon my real and personal representatives, in right of my having been his heir-at-law and sole next of kin at the time of his death, and become part of my estate passing under this my will:—Now, therefore, I do by this my last will and testament, as well in exercise of all powers as in right of all estates and interests vested in or exercisable by me or devisable under my said uncle's will, absolutely direct, appoint, give and bequeath the whole of my said uncle's residuary real and personal estate, from and after my decease, unto my trustees, their heirs, executors, administrators and assigns, to be held and disposed of by them upon the same trusts as those before declared of my own residuary estate, and in all respects as part of such estate." H. B. Coles never had any child. He died on the 23rd Nov. 1862.

The bill prayed a declaration that the will of H. B. Coles was an invalid appointment of the residuary real and personal estate of the said F. Const, and that the will of the said H. B. Coles was inoperative so far as it purported to be a devise and bequest of the said residuary real and personal estates, and that by virtue of the said will of the said F. Const, the said residuary real and personal estate became divisible upon the death of the said H. B. Coles between the said R. Barker the younger, H. Young and J. Ryland.

The *Attorney-General* and *J. L. Bird* appeared for the *plts.*, and contended that there were two contingencies, upon the happening of either of which the gift over in Mr. Const's will would take effect. The scope of that will was plain, viz., that if Mr. Coles left a child he should dispose of the property in any way he chose. But there was also an equally evident intention apparent on the whole of that will, that if the nephew left no child the property was to be divided between the *plts.*' father, Mr. Young and Mr. Ryland. To effectuate that clear intention the word "and" must be read "or." They cited

Maberley v. Strode, 3 Ves. 450.

Sir *Hugh Cairns*, Q. C., *Buggallay*, Q. C. and *She'beare*, for Mr. Young, contended that there was not, in fact, any necessity to change the word "and" into "or." It might be read "and also if," in which case the gift over was clearly intended to take effect if Mr. Coles died without leaving a child, and also if he died without making any appointment. His will was no appointment; for it could only operate as such if there were a child living at his death or born within due time afterwards. They cited

Dillon v. Harris, 4 Bli. N. S. 329.

James, Q. C., *Prendergast*, *Selwyn, Q. C.*, *Renshaw* and *Rendall* appeared for other parties in the same interest with the *plts.*

Sir *Fitzroy Kelly*, Q. C., *Hobhouse, Q. C.*, *Druce* and *Earle*, for the executors and appointees under Mr. Coles's will, contended that all who supported the *plts.*' view must hold that the words "and the said H. B. Coles, my nephew, shall not, previous to his decease, make any such appointment, gift, or bequest as aforesaid," were superfluous. They supported the views contained in the will of H. B. Coles, as above

stated; and argued that the word "and" must be read in its ordinary conjunctive meaning.

The *Attorney-General*, in reply, insisted that it was impossible to imply a power, as suggested, upon a will so plain and so clear as the present—and that, too, in direct contradiction to the express power expressly given to the tenant for life if he left a child, and in that event only. His having and his leaving a child formed the key to the construction of the whole will.

The following cases were also cited in the course of the arguments:—

Addison v. Bush, 14 Beav. 459;

Andree v. Ward, 1 Russ. 260;

Greene v. Ward, 1 Russ. 262;

Brown v. Higges, 8 Ves. jun. 562;

Secombe v. Edwards, 28 Beav. 440; s. c. 2

L. T. Rep. N. S. 622;

Jordan v. Fortescue, 10 Beav. 259;

Bibin v. Walker, Amb. 661.

Jan. 12.—THE MASTER OF THE ROLLS.—The question in this case arises upon the construction of the residuary devise and bequest of real and personal estate contained in the will of the late Francis Const, Esq. [The M.R. read the clause in Mr. Const's will as above stated and continued:] The testator died leaving considerable property, and also his nephew, Mr. Henry Beaumont Coles, his heir-at-law and sole next of kin. Mr. Coles is now dead, having made a will by which he has purported to dispose of his uncle's residuary real and personal estate. Mr. Coles never had a child; and the question is this: whether the devisees mentioned in Mr. Const's will, or those mentioned in the will of his nephew, are now entitled to Mr. Const's residuary estate? The *plts.* are the children of one of the devisees of the uncle, and they are supported in their case by two of the *defts.*, viz., by Mr. Henry Young and Mr. Ryland. The *defts.* who contest the *plts.*' claim, are the legal personal representatives of the nephew. The first argument which was adduced on behalf of the *plts.* was this: that the word "and" in the clause by which the property was given over should be read "or;" that is, that the clause should be read thus: "but if my said nephew shall die without leaving any child or children him surviving, or who shall be born in due time after his decease, lawfully begotten, 'or' the said Henry Beaumont Coles shall not, previous to his decease, make any such appointment, gift, or bequest as aforesaid," then the property was to go over as I have said. Now in support of that argument the case of *Maberley v. Strode*, and that class of cases, was referred to. But I am of opinion, as indeed I intimated in the course of the argument, that I could not accede to the view so taken by the *plts.*' counsel. In *Secombe v. Edwards* I had to consider the very same question. I felt in deciding that case, and when hearing the arguments in this, that I could not change the words used in a will without the clearest evidence, on the face of it, that to do so carried out the manifest intention of the testator. I saw nothing in *Secombe v. Edwards* to induce me to change that opinion. I still think the same, and I see nothing in this will to induce me to alter my opinion. Then it was argued by Sir Hugh Cairns for the *defts.* Mr. Young, that it was not in fact, in this case, necessary to read the word "and" as "or;" but that the true construction of it was "and also if." But, in my opinion, that is in effect the same thing as to make the alteration proposed. The words of this will are, in the gift in question, clearly conjunctive and must be so read: and if my decision of the case really depended upon my so reading them, I should do so, the result of which would be that both events must happen before the gift over could take effect. The question then would be whether they had both occurred? What has taken place is this; it is not disputed by either side that Mr.

V.C. K.]

FRAYNE v. TAYLOR.

[V.C. K.]

Coles never had a child. The real question, therefore, appears to me to be, whether, in the event which has occurred, Mr. Coles ever had in him the power to make such an appointment as that which was expressly given to him by his uncle's will? Now the power of appointment which was expressly given to him was in these words. It is very short, and I will read it again. [The M. R. read the clause creating the power above stated, and continued:] I am of opinion that, under those words, no power arose in Mr. Coles to appoint any part of this property, unless he left a child living at his decease, or born within due time afterwards. It was indeed argued, with great ingenuity, that if, under the words of the gift over, Mr. Coles had made a will either before the birth of a child, or during the life of a child, and the child had predeceased him, then the appointment would have been valid. In other words, the will having been once made, there was *de facto* an appointment which (the will not being itself invalid as such) would be a good appointment, and would continue so till displaced. But, in answer to that, it must be remembered that this is the case of a power of appointment by will; and the instrument which purports to exercise such a power is no instrument at all till the death of the donee of the power occurs to give it existence. The question here is, not whether the nephew by his will made a valid appointment of his uncle's property, but whether any power ever arose in him to make any appointment of it at all? I think no disposition of the property could be made by him till his death, and then only could he dispose of it if he left a child him surviving. I cannot strike out from the will of Mr. Const the clear and express words making the power which he gave his nephew conditional on the event of his leaving a child. That condition was a condition precedent; it has never been fulfilled, and the nephew therefore never had any power vested in him to dispose of the property. The result is, that there must be a declaration in the terms of the prayer of the plts.' bill. I was much impressed in the course of the argument with what seemed to me possible, I mean that there may have been some omission in the testator's will; but whether that be so or not—and we know it often does occur—I must construe the will as I find it, and the declaration must therefore be as I have stated, and the costs must be costs in the cause.

Hobhouse, Q. C. asked for the costs of his clients, as between solicitor and client.

The MASTER of the ROLLS.—No. It is not a case for costs of that sort, unless all parties consent so to take them.

Solicitors for plts. and for deft. Mr. Young, *Joseph Aldridge*.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, ESQs., Barristers-at-Law.

ERRATUM.—In *Allardice v. Onslow*, ante, p. 675, the following important words were omitted in the V. C.'s judgment. After the words "retain his original domicile," line 39, 2nd col. it should read, "In the present case there was clearly an abandonment of Scotch domicile, and an acquisition of an Anglo—"

Dec. 19 and 21.

FRAYNE v. TAYLOR.

Conversion—Carrying out intestate's parol contract by heir-at-law.

A person who died intestate as to his real estate entered into a verbal contract shortly before his death for the sale of certain freehold property, and died before the completion of the purchase; the heir-at-law, who was also administrator, carried

out the contract with the purchaser, and in the residuary accounts, which he subsequently passed, he treated the proceeds of the sale as personal estate of the intestate; he afterwards, however, claimed them as heir-at-law:

Held, that there was a conversion, and that the proceeds of the sale were personal estate of the intestate, inasmuch as the heir-at-law had voluntarily adopted the intestate's contract.

This was an adjourned summons, the question being whether the proceeds of the sale of certain real estate sold by the heir-at-law in pursuance of a verbal contract entered into by a person who died intestate as to his realty, formed part of the personal estate of the deceased. The sale was carried into effect under the following circumstances:

George Taylor, who died in Jan. 1855, entered into a parol contract with John Finzel, some time previously to his death, for the sale of six freehold houses in Bristol, for the sum of 800*l.*, and the title was under investigation at the time of Taylor's death.

George Taylor executed a will, but made no disposition of his real or of his residuary personal estate; the executors named in the will renounced probate, and letters of administration, with the will annexed, were granted to the deft. William Taylor, who was the brother and heir-at-law of the testator.

John Finzel, soon after the death of G. Taylor, applied to the deft. William Taylor to carry out the contract for the sale of the houses in Bristol, which the deft. agreed to do, and by an indenture dated the 18th May 1855 he conveyed the property to Finzel.

The deed recited several previous dealings with the property, whereby it had become vested in George Taylor absolutely; it also recited George Taylor's death intestate as to his real estate, and that the deft. was his heir-at-law; it recited G. Taylor's will and his appointment of executors, their renunciation of probate, and that administration of his estate had been granted to the deft. It also recited the parol contract which had been entered into between the deceased and Finzel, and that that contract was unexecuted and unperformed at the time of G. Taylor's death; that Finzel had applied to the deft. to carry the same into effect, and that the deft. had agreed to do so. The operative part of the deed was in the usual form of a conveyance from a person solely entitled, and the covenants for title were those of an absolute owner.

The deft. passed his residuary accounts in Nov. 1860, and he then entered the 800*l.* the proceeds of the sale of the six houses, as a part of the testator's personal estate. The item was as follows:—"Produce of houses and premises in Temple parish, contracted to be sold by the testator in his lifetime, and purchase completed after his death."

In March 1861 the deft.'s solicitor furnished the plts., as next of kin of the intestate, with an account of the residuary personal estate, and in these accounts the deft. divided the produce of the sale of the six houses between himself and the plts., one-fifth and a moiety of four-fifths to himself, and the other moiety to the plts.

In June 1863 the common decree on summons was made in the V. C.'s chambers for the administration of the personal estate of the testator, and under this decree the deft. brought in his account, giving credit for the proceeds as before. This account was considered insufficient, and the deft. therefore brought in a second account, in which he gave credit for the 800*l.*, but he now claimed to retain it as the heir-at-law of George Taylor. The question was therefore adjourned into court for the determination of this claim by the deft.

Osborne, Q. C. and *E. K. Karlake*, for the plts., cited

Attorney General v. Day, 1 *Yes.* 309. 218;

Mundy v. Jolliffe, 5 M. & C. 167;

Bowman v. Taylor, 2 A. & E. 278;

Lainson v. Tremere, 1 A. & E. 792.

Glasbe, Q. C. and *Everitt*, for the deft., cited

Sugd. V. & P. 13th edit. 362;

Dawson v. Ellis, 1 Jac. & W. 524;

Wallace v. Auldjo, 8 L. T. Rep. N. S. 688, 750;

Palmer v. Scott, 1 Russ. & M. 391;

Haynes v. Haynes, 1 Dr. & Sm. 426; 4 L. T. Rep. N. S. 199;

Harcourt v. Seymour, 2 Sim. N. S. 12.

As to whether the question was one which could be decided under an administration summons, they cited *West v. Laing*, 3 Drew. 331.

Osborne, Q. C., in reply, cited

Barkworth v. Young, 4 Drew. 1;

Collingwood v. Rowe, 36 L. J., N. S., 649, Ch.;

Lakes v. Bennett, 1 Cox, 167.

THE VICE-CHANCELLOR said that the case was a peculiar one, the question being whether a sum of 800*l.*, which unquestionably arose from the proceeds of the testator's estate, was to be regarded as part of his personality. He need not say that he repudiated all notion of acting merely upon moral grounds—upon the idea that because a certain course was fair and honourable, and consistent with the character of a good man, that therefore the case should be decided in accordance with that course. Moreover, he could not compel the deft. to complete the contract; the court could exercise no such jurisdiction. The pls., as it appeared to him, put the case upon no such grounds, or, if they did, the court could not recognise the fact. It was a question whether, on an account brought in by a legal personal representative, a certain sum of money received by him was, under the circumstances, personal estate. There was a verbal agreement. If the agreement had been in writing there would have been no question about the case; but it was verbal, and if either vendor or purchaser had chosen to refuse to carry it into effect, neither could have compelled the other to do so; but, if they were both willing, of course it could have been completed, and no doubt it would have been completed if the testator had lived. At his death it was unexecuted, the title being under consideration, and if the title turned out good, no doubt the contract would have been carried out; the testator, therefore, so far as lay in his power, showed his desire to convert this real estate into personality, but at the same time the completion depended upon the acceptance of the title. The position of the deft., the heir-at-law, was clearly this, that he had a right to say, "I don't care what the testator did, he had only entered into a verbal contract, and the Statute of Frauds enables me to say that the purchaser cannot sustain a bill against me if I choose not to carry out the contract." On the other hand, he had a right to consider—whether or not on moral grounds was immaterial—that he ought not to raise a question on that statute, but should carry into effect the testator's verbal contract, taking as his heir, and finding that the testator had entered into a *bond fide* contract with a *bond fide* intention, and he might not think it wise or proper to repudiate it. He might have said, "I repudiate the old contract, but I have entered into a new one with the purchaser, by which I shall be the vendor, and shall take the purchase-money for myself or the real estate." The only point which he had to decide rested upon the question what it was that the deft. had done. Had he completed the testator's contract, or had he entered into a new one, not on different, but on the same, terms? If he had merely sold as heir-at-law, and carried into effect a contract of his own, then the fact of his agreeing to throw the money into the personal estate did not bind him, and the court could not compel him to forego his claim; but it appeared to him

clear, on the whole circumstances, that there was no mistake on his part, that he was perfectly well informed and advertised as to its being a mere verbal contract, and one that he was under no obligation to perform; but that with deliberation and intention he desired to perform, and did perform it, and that it was not a new contract of his own, but the actual contract entered into by the testator, and if the contract were carried into effect, he could not understand how it was that the testator had not converted his real estate into personality. It was true that either the heir of the testator or the purchaser might set up the Statute of Frauds, but not if they chose to carry out the contract voluntarily. The mere statute itself did not make the contract void; it enacted only that no action or suit should lie to compel its being carried into effect, and if the parties chose to carry it into effect, was it not a contract? The deft., knowing what he was about, and having legal advice, chose to say, "I will carry into effect the contract of the intestate;" he did so, and the conveyance itself put the case beyond doubt. There was a recital that he was heir-at-law, and, if he were selling by virtue of a contract of his own, in the character of heir by descent, it would signify nothing who was the legal personal representative; he would have nothing to do with it, and the recital of administration being granted was useless, if the heir-at-law was not intending to carry into effect the very contract of the intestate. Then there was a recital of the verbal contract by the testator in his lifetime, pointing out that it was only verbal, and unexecuted and unperformed, "and that the said John Finzel hath applied to and requested the said William Taylor to carry the same (i. e. the testator's contract) into effect, which he hath consented to do." This recital was utterly inconsistent and contradictory with the supposition that the heir-at-law, taking by descent, was entering into a new contract with the purchaser, because the application was by the purchaser, who had entered into the contract with the testator, to perform that very contract, and the heir-at-law consented to carry into effect the testator's contract, which he was under no obligation to do. No doubt the covenants were against acts of some one claiming under the testator; but those covenants could not countervail the circumstance that the deft. was not carrying into effect a contract of his own. If that were so (and it appeared to him clear that it was), if the testator's contract, though verbal, was carried into effect, how could it be said that the proceeds were not personal estate of the testator? The subsequent conduct of the deft. was only consistent with such a state of things. There were matters unconnected with this which prevented the estate from being wound-up, and, wisely or unwisely, the administration summons was taken out. The deft. in his various accounts treated the 800*l.* as personality, and used the expression (quite consistent with his intention) "purchase completed after his death;" he also proceeded on the same footing as that which had governed his conduct from the beginning, and although, when he brought in his further account, he claimed the 800*l.* as the testator's heir-at-law, yet there was nothing as to the item having been erroneously introduced into the former accounts as personality. Even here he admitted it to be personal estate; but he claimed it as the testator's heir-at-law; and if the case turned on this point alone, he would allow the matter to be rectified, and would not decide upon a mere technicality. But, by the most solemn acts, his conduct showed that in every way he treated it as pure personality. If he had only wished to give it to his relatives, the court would not have compelled him to do so; but the principal question was, was this property personal estate, not previously so, but made so by the deft.'s own acts? By choosing to carry it out,

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he made it as good a contract and consideration as if it had been in writing, and, having a right to say, "It shall not be enforced against me," both he and the purchaser willingly carried it into effect. Under these circumstances, the property must be regarded as personal estate.

Solicitors: *Thos. White and Son, and Gosling and Girdlestone.*

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-Inn, Barristers-at-Law.

Jan. 12 and 13.

TRAILL v. BARING.

Policy of assurance—Re-assurance of policy—Misrepresentation—Obligation to retain part of the risk of the policy re-assured—Costs.

*The defts., an insurance office, having granted a policy of assurance for 3000*l.*, wished to dispose of part of their risk, and negotiated with the plts. for that purpose, representing that another insurance office, B., had offered to take 1000*l.*, that though a second medical examination could not be had, they considered the person insured to be a first-class life, and that it was their intention to keep the remaining 1000*l.* of the risk themselves. On these terms the plts. agreed to accept 1000*l.* of the risk, but before the making out of the re-assurance of the policy, the defts., instead of 1000*l.*, disposed of the whole of their risk in the 3000*l.* to insurance office B. Shortly after the completion of the re-assurance, the policy fell due, and the plts. filed a bill for the purpose of cancelling their liability under the re-assurance, on the ground of misrepresentation and non-fulfilment of the contract by the defts. in not retaining a portion of the risk on the policy:*

Held, that the defts., by their conduct, had vitiated the re-assurance, and the policy to insurance office B. was ordered to be cancelled.

This was a bill filed by three of the directors of the Reliance Mutual Life Assurance Society against the defts., the trustees and the secretary of the Provident Clerks' Mutual Life Assurance Association, for the purpose of obtaining a declaration by the court that a policy of assurance for 1000*l.*, dated the 18th May 1861, granted by the plts.' office, was fraudulently obtained, and that it ought to be set aside and delivered up to be cancelled; and that in the meantime an action which had been commenced by the defts. for the recovery of the sum of 1000*l.*, expressed to be assured by the policy, might be restrained.

In 1838 the International Life Assurance Society had insured the life of one Lydia Taylor for the sum of 14,000*l.*, and in the early part of May 1861 that society, in order to diminish their risk, proposed to re-assure a portion of the above sum with the defts.' office, which proposal was accepted.

The bill alleged that, in order to carry out the above arrangement, the secretary of the defts.' company, on the 10th May 1861, called on the secretary of the plts.' company, at their office, and proposed on behalf of the defts. that the plts. should take a part of their risk in the said life by way of re-assurance, alleging that the Victoria office had agreed to undertake the risk to the extent of 1000*l.*, and that the defts. would themselves retain 1000*l.* He proposed that the plts.' society should undertake, by way of re-assurance, the risk of the remaining 1000*l.*, and stated that Lydia Taylor was alleged to be in the 62nd year of her age; that the usual medical certificates could not be had, but that from the information the defts. had obtained the directors were satisfied that Lydia Taylor was a first-class life, and that they had accepted the proposal and

granted the assurance for 3000*l.* upon that footing. This verbal proposal of the defts.' secretary was entertained and accepted by the plts.' secretary on their behalf (as alleged) upon the distinct understanding, expressed by the former, that the directors of his association had the fullest confidence in the goodness of the life, and that they would retain 1000*l.* as their proportion of the risk of the 3000*l.* Relying on the representations made by the defts.' secretary, the proposal was accepted as a partnership risk by the society, without the usual investigation or inquiry into the age, health, or habits of Mrs. Taylor. On the 18th May 1861 the defts.' office paid to the society the sum of 79*l.* 13*s.* 4*d.*, for the first year's premium on the re-assurance. In Jan. 1862 Lydia Taylor died of apoplexy, induced, as it was said, by disease of the heart, but the plts. were not informed of her death by the defts. until the 21st May 1862. After her death the plts. discovered that the defts., instead of retaining a risk of 1000*l.* on her life, as they had represented they would retain, had assured, by way of re-assurance with the Victoria office, the sum of 2000*l.* instead of 1000*l.*, as represented to the plts., and that they had thus, by re-assurance, got rid of the whole of their liability in respect of the policy granted by them to the International office. After the receipt of the letter of the 21st May 1862, announcing the death of Mrs. Taylor, further correspondence was carried on between the secretaries of both offices, which resulted in the refusal of the plts. to pay the sum of 1000*l.* assured with them by the defts. and consequently in Oct. 1862 an action was commenced against them by the defts. to recover the amount of the policy of insurance.

The bill, afterwards amended, was filed on the 21st Nov. 1862, and a notice of motion for an injunction was given, but by mutual arrangement it was allowed to stand over to the hearing of the cause.

It was proved in evidence, on the part of the plts., that it was the custom and understanding upon such re-assurances at the present (in the absence of a special stipulation to the contrary) that the office effecting the re-assurance should itself retain a substantial portion of the risk covered by the original assurance, and for the office by which the re-assurance is granted to dispense with the usual medical examination on their own behalf of the person whose life is assured.

It was also proved that the directors of the Victoria office had paid the 2000*l.* assured by them.

The defts. by their answer admitted that the assurance was accepted by the plts. upon the proposal above stated to have been made on the 10th May 1861, and it also appeared therefrom that at a meeting of their board, on the 15th May 1861, the defts. abandoned their intention of retaining the risk of 1000*l.* on Lydia Taylor's life, in consequence, as they alleged, of the large amount of re-assurances accepted by their office in the course of the preceding week, and also on account of an objection taken by one of their directors, that no fresh medical evidence could be obtained on the life of Lydia Taylor.

Bacon, Q. C. and Dauney, for the plts., contended that the plts. would not have accepted the policy of assurance had they not distinctly understood that the defts. also intended to incur some of the risk. There had been a misrepresentation, induced by the defts., and the plts. were entitled to relief. They referred to the case of

Lincoln v. Wright, 4 De G. & J. 16.

[They were stopped by the Court.]

Malins, Q. C. and E. K. Karlake, for the defts., submitted that the plts. had entirely failed to make out a case of misrepresentation on the part of the defts. The defts. had acted in good faith throughout. They had fully intended to take a joint risk in the policy at the time of the re-assurance, and it was only subsequently, in consequence of the heaviness of the

liabilities, and a desire to lighten them, that they abandoned their original intention. This was not a material circumstance; but, if it was, why did not the plts. inquire for how long the defts. intended to retain it? Was the rule to be, that a company was not to be allowed to insure these risks? This would be a serious obstacle in the way of conducting insurance business. The defts. had withheld no information, attempted no concealment, and the most that the plts. alleged was, that there had been an untrue statement as to intention, but that had been decided in the case of *Money v. Jordan*, 6 H. of L. Cas. 185, not to be a sufficient misrepresentation to vitiate a contract, and they submitted that the plts. were not entitled to the relief they asked. They cited the cases of

Anderson v. Fitzgerald, 4 H. of L. Cas. 484;

Piggott v. Stratton, 1 De G. & F. 33;

Loffus v. Maw, 3 Giff. 592;

Wilde v. Gibson, 1 H. of L. Cas. 605;

Montefiore v. Montefiore, 1 W. Bl. 363;

Burdett v. Hay, *ant.*, p. 429.

[The V. C. mentioned *Hammerley v. De Biel*, 12 Cl. & Fin. 45.]

The VICE-CHANCELLOR.—The contract in this case is upon a policy of re-assurance, and as to that contract the plts. have stated that they entered into and executed it upon a treaty which took place between the secretary of the plts.' insurance society and the secretary of the defts.' association. One of the representations made by the secretary of the defts.' association, as stated by himself in his answer, after referring to a conversation as to the re-assurance, is in these terms: "I at the same time told him (alluding to the plts.' secretary) that the Victoria office had offered to take 1000*l.* or more of such 3000*l.*, but that it was the intention of the Provident Clerks' office to give the Victoria office 1000*l.* only of such 3000*l.*, and to keep 1000*l.* This statement was strictly true in all respects, and the intention of the Provident Clerks' office was then precisely such as I have represented it to be." And then he goes on to state that he believed Mrs. Taylor was sixty-two years of age, that a fresh medical examination of her could not be had, and that his directors were satisfied that she was a first-class life. This took place upon Friday, 10th May 1861, and upon the same day, in an acceptance (which was made upon that representation in writing), the plts.' secretary said: "This office will join you in the risk upon the life of Mrs. Lydia Taylor to the extent of 1000*l.*" There is no question as to the importance of the representation made by Mr. Jellicoe, an actuary of great experience, who has been examined and cross-examined at great length, and he says: "Upon such re-assurances it is the custom and understanding, in the absence of a special stipulation to the contrary, that the office effecting the re-assurance shall itself retain a substantial portion of the risk covered by the original re-assurance, and for the office by which the re-assurance is granted to dispense with the usual medical examination on their behalf of the person whose life is assured, and to rely on the retention, by such office, of their fair portion of the risk as a guarantee of their good faith in effecting the re-assurance merely as a diminution of their risk on the particular life, and not for the purpose of getting rid of their liability on a life in which they have not confidence." The importance of the representation is therefore beyond all question. The offer and the acceptance upon that representation took place upon the 10th May; but the policy was not then made, the contract was not completed, nor was any premium paid by the defts.' association until the 18th May, that is, eight days after the representations were made and the offer accepted. But in the meantime (*viz.* upon the 15th May) the directors of the association made up their minds not to retain any portion of the risk,

and not to have a contract for joining in that risk, but to transfer the risk to somebody else. That they made up their minds to do, and did, and it was upon the 15th May, before the policy was signed, that that change of intention took place. It was not merely a change of intention, but the transfer was effectuated. The defts. retained no liability whatever, but transferred it to the Victoria office, and that office took it upon themselves, and had paid the 2000*l.* There was therefore a representation made which was material as an inducement to the plts.' society to enter into the contract, and at the time when the contract was perfected that was no longer a true representation. The change of intention which made that representation no longer true was either accidental or designed, and, no matter for what purpose, it was concealed from the plts., who had accepted the offer and executed the policy, and in pursuance of such acceptance were about to join in the risk. The plts., however, by the policy effected, were joining in no risk whatever with the defts.' association. My opinion is, that upon every principle of the law of contract, and on consideration of the conduct of the defts.' secretary, however honest it may have been, whether by oversight, or whatever reason, this policy is vitiated, and I am bound to make a decree that the policy be delivered up to be cancelled, and that the defts. must pay the costs of the suit, including the costs incurred upon the notice of motion for an injunction.

Solicitors: for the plt., *Hook, Street and Gutters*; for the deft., *Henry Wansey*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

June 28 and 29, and Nov. 2 and 11.

BOUCAULT v. DELAFIELD.

*Injunction—International Copyright Act—7 & 8
Vict. c. 12, s. 19—Practice—Revivor.*

A British subject first produced for representation a dramatic piece or entertainment at New York, in America. He subsequently produced it in London: Held, that there being no international treaty or arrangement (which was alluded to by the 14th section of the Act) he had not obtained the copyright to such piece in England.

Where judgment has been reserved, and the plt. subsequently became bankrupt before judgment delivered, it is not necessary to revive the suit against his assignees.

This was a bill filed by the plt., the author of the dramatic piece "The Colleen Bawn," and other works, and a theatrical performer, and it prayed that the deft., the lessee of the Theatre Royal at Preston, might be restrained in the usual form from representing or causing to be represented the said dramatic piece or entertainment announced by the deft. for representation at such theatre.

The allegations in the bill were, that the plt. was the author and composer of the dramatic piece or entertainment entitled "The Colleen Bawn, or the Bride of Garryowen," which dramatic piece or entertainment was partly founded upon certain incidents in a novel or tale called "The Collegians," but was in other parts entirely new, and the sole invention and composition of the plt., and he had produced such dramatic piece or entertainment at the New Adelphi Theatre, in Middlesex, where it had been performed with great success for several months. The most important scene, and the one to which the success of the said dramatic piece or entertainment was to a great extent owing, was known as "The Water Cave." That such scene was entirely new, and the sole invention and composition of plt. From the 15th Sept. 1860 to the 20th July 1861 such

dramatic piece or entertainment was daily advertised in the *Times* and other newspapers, and in such advertisements such scene was announced as the "Water Cave," and a description of the incidents of such scene followed, in which the expression "what is called in the dialect of bathers a tremendous header" was used.

That on the 10th Sept. 1860, the day of the first representation of the said dramatic piece or entertainment in England, the copyright of the said drama was duly registered under the statute at Stationers'-hall, and the performance on the stage of the said dramatic piece or entertainment had been duly licensed by the Lord Chamberlain.

That plt. was solely entitled to said copyright and the right of acting, and of permitting to be acted, the said drama, and had given no licence or authority whatever to deft. to represent or use the same or any part thereof.

That deft. was lessee of the Theatre Royal in the town of Preston, county Lancaster, and being aware of the great success of the plt.'s said dramatic piece or entertainment, had given public notice of his intention to produce forthwith, at said Theatre Royal, a dramatic piece or entertainment entitled "The Colleen Bawn."

That such notice was, in fact, as follows:—"Theatre Royal, Preston, will open on Monday, Sept. 2, 1861. For four weeks only! For the purpose of producing, for the amusement of the public of Preston, the great sensation drama and London excitement of 'The Colleen Bawn!!' with new scenery, new dresses and appointments. The Water Cave!!! will be produced with all its original splendour of effect. The tremendous header (in the language of bathers), wherever the drama has been represented, has nightly brought down thunders of applause."

That plt. must inevitably sustain considerable pecuniary loss by the aforesaid piracy, if not restrained by the court.

The whole case turned upon the construction to be put upon the words of the 19th section of the International Copyright Act, 7 & 8 Vict. c. 12, which enacts, that "neither the author of any book, nor the author or composer of any dramatic piece or musical composition, &c., which shall after the passing of this Act be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

The plt. originally brought out the "Colleen Bawn" at New York. There was no treaty or arrangement between this country and America as to international copyright.

Sir H. Cairns, Q.C., Southgate, Q.C. and Dickinson for plt.

Willcock, Q.C. and Graham Hastings for the deft. Southgate in reply.

The principal case relied on and commented upon on both sides was

Jefferys v. Boosey, 4 H. of L. Cas. 815.

The case was heard in June, and the V. C. had reserved judgment. In the meantime the plt. became bankrupt, and on Nov. 2 *Hastings* applied for an order that the assignees might revive the suit. This was opposed by *Scanlon* for the assignees, who contended such an order was unnecessary, and he cited

Collinson v. Lister, 20 Beav. 355;

Davies v. Davies, 9 Ves. 461 ;

Belshaw v. Percival, 8 Hare, 157.

Nov. 11.—The VICE-CHANCELLOR now delivered judgment.—The bankruptcy of the plt. subsequently to the hearing was not such a difficulty as to prevent the court giving a judgment which was in accordance with its practice. The deft.'s representation of the "Colleen Bawn" was clearly an act of piracy. As,

however, that play had originally been brought out at New York, a serious question has arisen as to the construction to be put upon the 19th section of the International Copyright Act, the 7 & 8 Vict. c. 12. That Act enabled Her Majesty, by certain proceedings, to extend to persons who first printed works or represented dramatic pieces abroad the same rights and privileges as were possessed by those who first print their works or cause their dramas to be represented in this country, provided such persons complied with certain regulations therein mentioned. As there was no treaty or arrangement for international copyright between this country and America, the plt. could not comply with these regulations. The question then arose, in this case, whether the 19th section annihilated the privileges which previous Acts had conferred on dramatic authors and which the plt. by such Act would undoubtedly have possessed. It had been argued that the Act 7 & 8 Vict. c. 12, was intended, under certain circumstances, to extend to foreigners the privileges of British subjects, and could not have been meant to deprive the latter of any advantage previously enjoyed by them; still he should hold that the words of the 19th section were so clear and precise that they could not possibly be got over, and, besides, there was good reason for the construction to be given to them. At the time when the Act in question was passed, the law stood as it was subsequently determined to be in *Jefferys v. Boosey*. He, of course, must presume that the Legislature was cognisant of the law. It was decided in *Jefferys v. Boosey* that a foreigner, *bona fide* residing in England and publishing a work here for the first time, was entitled to the benefit of the copyright, just as much as a British subject, the House of Lords being of opinion that the Copyright Acts were intended to encourage literature in this country and in this country only. It was also decided in that case that a foreigner first publishing his work abroad would not be entitled to the benefit of the Copyright Act, or at least not of the original Act. That being so, if the plt. had been an American and had first represented his piece in this country, he would have been entitled to the benefit of the Dramatic Copyright Act. Again, if under the 7 & 8 Vict. c. 12 arrangements had been made for international copyright with America, the plt. would (but for sect. 19) have been entitled to the benefits conferred thereby, if he had represented his piece first in America. It had been clearly the object of the Legislature in sect. 19 to take away this double right; and it might perhaps reasonably have been thought that exact justice would have been more nearly met out if sect. 19 had been extended to all nations with whom arrangements pursuant to the Act had been entered into. That had not, however, been done. Sect. 19 expressly enacted that the "author of any dramatic piece" which should after the passing of the Act be first published out of Her Majesty's dominions, "should not have any copyright therein, or any exclusive right to the public representation or performance thereof otherwise than such (if any) as he might be entitled to under the Act." In other words, the Legislature had determined that, the Act having been made, if any person, British subject or not, chose to deprive this country of the first representation of his work, then he might obtain the copyright, if he thought fit, under the arrangements which should have been made with the country he so favoured with his representation pursuant to the Act 7 & 8 Vict. c. 12. But if he chose first to publish his work in a country which had not entered into any such arrangement, he did so at his own risk. The author was thus bound to elect under which of two statutes relating to similar subjects he chose to proceed. In the present case he had made his election by performing it in one country instead of another,

and was thereby excluded from all advantage of publishing in the other. There was no reason to restrict the operation of the Act 7 & 8 Vict. c. 12 to foreigners. If so, a foreigner residing here and publishing a work here would be deprived of his rights, which a British subject would not. But the object of the Legislature seemed to be to secure to this country the benefit of first publication; and when it extended like benefits to works first published in another country, it did so only on certain conditions that reciprocity should be afforded, so that works first published in England might be so afterwards published abroad with similar advantages. In his opinion the plt. had failed in establishing his right. The necessary consequence was that his bill must be dismissed, and the plt. must pay the costs of the suit. *Decree accordingly.*

Solicitors for the plt., *Hughes*; for deft., *T. B. Knight*.

Nov. 21 and 23.

LIGHTFOOT v. BURSTALL.

Will—Construction—Gift out of residue—Revocation—Lapse.

Where a testator has absolutely or in certain events revoked a gift of a share of his residuary estate, and has directed that this share fall into the residue and "be held," or "be disposed of accordingly:"

Held, that this is not a gift to persons to whom the other shares in the residue were given; but that, as to such share, there is an intestacy.

This was a suit instituted by trustees of a will, and now came to be heard on motion for decree. The testator gave his real and personal estate to the plts. upon the usual trusts for sale, and conversion and investment, and subject to payment of legacies, to the setting aside a sum to answer a terminable annuity, upon trust, as to one-third for a nephew, F. Burstall, and with remainder to such of his children as should attain twenty-one, "and if there should be no such child, then after the decease of the said F. Burstall, and such failure of his issue as aforesaid, the same trust moneys and premises shall sink into and form part of my residuary real and personal estates and be held and applied accordingly." Then followed gifts of the remaining two-thirds of the residue.

The share of F. Burstall lapsed by his death, after the death of the testator, without leaving issue.

Rendall for the plts.

Roll, Q.C. and Wickens, for the next of kin, contended that there was an intestacy as to F. Burstall's share:

Creswell v. Cheslyn, 2 Edm. 123;

Humble v. Shore, 7 Hare, 247.

Amphlett, Q.C. and Bristowe, for the donees of the other shares, relied on the intention of the testator, as deducible from the will, to give, in the events, to the other residuary legatees, F. Burstall's share. They cited *Evans v. Field*, 8 L. J., N. S., 204, Ch.;

Harris v. Davis, 1 Coll. 416;

Atkinson v. Jones, John. 246.

In *Humble v. Shore* neither the arguments of counsel nor the grounds of the decision were given.

Nalder and Jackson for other parties.

Roll, in reply, read the passages from the shorthand writer's notes in *Humble v. Shore* :—

March 19, 1847.—WIGRAM, V.C.—I will dispose of the question about the next of kin, the only point I doubt about, on Tuesday morning. With respect to the rest of the case, I can dispose of it now, and also in part dispose of the question even with respect to the next of kin, so far as stating the point, on which I think my judgment must eventually turn. The first question is as to Mrs. Sarah Whitaker's share. By the will, one-third of the residue was given to her absolutely. The testatrix, by her will (*sic*, but *qy* oddball), recites that she had, by her will or testamentary appointment, given and bequeathed one-sixth of the moneys constituting the residuary fund arising from her real and personal estate, unto, or in trust for, her

coffin, Sarah Whitaker, widow, her executors, administrators and assigns absolutely; "and whereas it is my will and meaning that the said Sarah Whitaker shall take and enjoy only a life-interest in the aforesaid part or share of the said residuary trust-fund, and subject thereto that the capital of the same fund shall be disposed of as herein-after mentioned, now therefore I direct." She then gives a direction, which I omit, because it is inapplicable to the ultimate disposition of the fund. She then goes on to say what the disposition of the capital shall be; and, importing that into the clause I first read, the case will be the same as if she had said, "I give her only a life-interest in the aforesaid residuary trust-fund, and, subject thereto, the capital of the same shall sink into the residue of my personal estate, and be disposed of accordingly." Now, if she had simply said, "I will that she shall take a life-interest only," that would be equivalent to a revocation of the bequest to her, except to the extent of the life-interest, and in that case *Creswell v. Cheslyn* would have been a direct authority for the proposition that the next of kin would be entitled to the property. The effect would have been that, in law, the share, subject to her life-interest, would have sunk into the residue, and would have been disposed of as such. If the testatrix, instead of revoking the bequest to her, except to the extent of her life-interest, goes on to say, "I will that it shall sink into the residue," she expressed no more than the law would imply, and the case would be precisely the same as it was before, and the estate would be distributed to the next of kin. The whole question turns on this, besides saying it shall sink into the residue, she gives a direction to her trustees that it shall be disposed of accordingly, and the question is, whether, having willed that it shall sink into the residue and be disposed of accordingly, those words, "disposed of accordingly," mean disposed of as residue, or whether they mean something else. On that point I will look into the will to see whether from any parts of it I can collect an intention or get any certain guide to go on.

Tuesday, March 16, 1847.—Now the question of *Creswell v. Cheslyn* is a direct authority that, where a share of the residue which is given absolutely by the bequest is revoked, that share becomes residue undisposed of, unless it is given to some one else. The question therefore is on the second codicil, whether there is a gift of Sarah Whitaker's share to anybody else. The first direction is that it shall sink into the residue of the estate. That of course is no gift to any one else. But then there is a direction that it shall be disposed of as after mentioned, and when you come to the words "after mentioned" the direction is, that it shall sink into the residue of the personal estate and be disposed of accordingly. The question is, whether the direction that a share of the residue previously undisposed of is to be disposed of accordingly, is a gift to the legatees. My opinion is it is not. I cannot find any gift to the residuary legatees in those words.

The VICE-CHANCELLOR thought that the principle laid down in *Humble v. Shore* was right. The whole of the argument on intention was based on the assumption that the words of the disposition "to be held and applied accordingly," meant something more than a mere direction that the share should sink into the residue. It might be said, that if these were not mere words of surplussage, they did show such an intention; on the other hand, if there had been such intention, nothing would have been easier than to use words which would indicate it, beyond possibility of misconstruction. The implication which would follow as a necessity from the first of these arguments was, he thought, too strong, and in so thinking he was borne out by the previous decision in *Humble v. Shore*.

Minute:—Declare that the gift of the one-third of the testator's residuary estate had fallen into the residue undisposed of.

Monday, Nov. 23.

SWABY v. SUTTON.

Pleading—Exceptions to answer—Discovery—Plea.

A deft. electing to answer is bound to answer fully; and therefore, where an answer set forth a deed which would have proved an effectual bar to the plt.'s title, and the deft., upon the assumption that this deed was valid, claimed to be relieved from answering interrogatories as to the state of investment of funds, the subject of the plt.'s suit:

Held, that for the purpose of exceptions, no part of an answer could be assumed as true, and that the plt. was therefore entitled to a full answer.

V.C. W.]

REG. v. D'EYNCOURT.

[Q. B.]

This was a suit instituted by one of six children of James and Elizabeth Swaby to obtain the benefit of certain settlements executed on the marriage of his parents.

The bill, filed on the 3rd June, stated the marriage on the 15th June 1829, the execution thereon of the settlements, and the death of J. Swaby intestate, leaving his widow and six children surviving, and then alleged that by the trusts of the settlements, then in the possession of the defts. the trustees, he had had an interest in a sum of about 22,000*l.* in the hands of the defts. The plt. then proceeded to interrogate as to the trusts of the settlements, and as to the amount and mode of investment of the trust-fund.

The defts. by their answer, filed on the 31st July 1863, after stating a deed of settlement as to which no question on the sufficiency of their answer arose, referred to a second settlement which had been executed on the 19th March 1829, whereby it was declared that the defts. and another should stand possessed of two promissory notes for sums of money making up 10,000*l.* altogether, and of a sum of 4000*l.* invested as therein mentioned, upon trust to pay the income to Elizabeth Swaby for life, with remainder to the children of the marriage in such shares as the husband and wife or the survivor should appoint. The answer proceeded to state that no joint appointment had been made, but that the widow, by a deed of the 31st July 1862, had irrevocably appointed all the funds subject to the trust of the settlement of the 19th March to three of her children, excluding the plt. from any interest. Under these circumstances the defts. submitted that they were not bound, and declined to answer as to such trust funds, and were to be treated as if they had pleaded the deed of appointment in bar of the plt.'s claim to discovery and relief.

The case now came on for argument of the plt.'s exceptions to this answer.

A. G. Lewis, for the plt., argued, first, that such a defence should have been raised by plea, but having elected to answer, the defts. must answer fully: (*Reade v. Woodroffe*, 24 Beav. 421.) Secondly, the appointment of the 31st July had been executed after the strict time for answering had elapsed, that time having been twice enlarged:

Lynch v. Loceane, 1 Hare, 626.

Rolt, Q.C., and Dickinson, for the defts., relied as to the first point on *De la Rue v. Dickinson*, 3 K. & J. 388; as to the second, it might be a reason for moving to take the answer off the file, but not to support exceptions.

The VICE-CHANCELLOR, without calling for a reply, said that upon an argument as to the sufficiency of one part of an answer, no other part must be assumed as true; so that the statement of the deed-poll must not be relied on as a traverse of the case set up by the plt.'s bill. In *De la Rue v. Dickinson* the strictness of the old rule, that a deft. answering must answer fully, had been somewhat relaxed, because there no discovery as to the items of accounts would have been of any assistance in establishing the plt.'s title. Here, however, an answer as to the accounts might possibly determine the suit. The defts. had admitted one part of the plt.'s case, and therefore this was very different from a claim made by one whose title was totally denied. Until the execution of the deed of appointment, the plt.'s title as to the whole of his claim was good. Now the time for answering had expired before that deed was executed, and had been enlarged only by the indulgence of the court. Again, there had in correspondence been an untrue denial of the plt.'s right. He thought that there were indications of a wish to evade inquiry; to follow the strict rule would prevent any such attempt.

Exceptions allowed.

Solicitors for plt., *Williams*; for defts., *Sutton* and *Ommanney*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS,
Esqs., Barristers-at-Law.

Wednesday, Jan. 20.

REG. v. D'EYNCOURT.

Benefit building society—Application of funds—Freehold land society—Arrears of subscriptions.

A society was registered under 6 & 7 Will. 4, c. 32, as a benefit building society, but was converted into and called a freehold land society, and a plot of land bought and allotted among its members. The land was paid for partly by members' subscriptions and partly by borrowed money, for which the society was liable. The society did not appear to have been conducted at any time in the usual way benefit building societies are:

Held, that though the funds had been misapplied, the society was not illegal, and that subscriptions due under the rules could be enforced from members:

Semble, that the remedy of members not assenting to the conduct of affairs by the society was in a court of equity for a breach of trust or injunction against future misapplication of the funds:

Held, that the shares of a member did not become forfeited on his merely ceasing to pay his subscriptions, &c., until so declared by the society in pursuance of the rules.

On the 10th May 1852 about 300 persons formed themselves into a society intended to be established under the provisions of the Benefit Building Societies Act, 6 & 7 Will. 4, c. 32.

At the first meeting held for the establishment of the society it was stated that the object of the society was to enable those persons who might join it to procure a vote for the county by obtaining the allotment of a piece of land. The deft. Mr. Layton was not present at the meeting, but he was aware at the time when he took shares in the society that one of its objects was the purchase of land.

Rules for the conduct of the society were prepared and certified by the barrister-at-law appointed to certify the rules of savings banks, &c., on the 20th May 1852, and the society was on the same day registered under the 6 & 7 Will. 4, c. 32, by the name of the North London Benefit Building Society.

The deft. joined the society as an investing member (there being at that time no other class of members) by subscribing for two shares on 31st May 1852, and he made payments on account of his subscriptions at various times up to the 9th Oct. 1854, amounting together to 4*l.* 7*s.*, when he ceased to make such payments, being then 8*l.* 1*s.* in arrear in respect thereof.

A freehold estate at Enfield was purchased for 8200*l.* under the authority of the directors by three persons named by the directors, and was conveyed to those three persons in July 1853. They were trustees appointed by the directors to purchase and take the conveyance, and although the name of the society does not appear in the conveyance, the land was bought partly with money belonging to the society and partly with money borrowed for this purpose by the directors from a banking firm.

The title of the estate was examined and approved, and the conveyance prepared by the solicitor of the society.

The land was paid for in part by the subscriptions of the members of the society, and in part from moneys borrowed from the bankers of the society.

The estate at Enfield was divided into allotments amongst such of its members as desired to have land, and the whole was allotted amongst the members, and many of the allotments have been conveyed to the

members, who thus became entitled thereto. The members who had no allotments made to them continued as investing members, as contradistinguished from the other members who were allottees.

On the 26th March 1855 Edward Layton became one of the allottees of the said land, and on that day he signed and delivered to the board of the society a memorandum, of which the following is a copy :

"No. of Register 501.—I, Edward Layton, of 12, Upper-street, Islington, do agree to take two allotments on the said society's land situate at Enfield.—Dated March 26, 1855. Edward Layton. The weekly subscription as usual."

This last memorandum was an answer to a question put upon the same paper to ascertain whether the deft. would complete at once by paying the remaining purchase-money due upon the allotments, or would continue his weekly subscriptions and give a mortgage. When the deft. signed this memorandum his subscriptions were twenty-four months in arrear, and such arrears, including fines, amounted to 8*l.* 1*s.*, and the same form part of the amount of the award hereinafter mentioned.

At an annual public meeting held on 23rd May 1855 the deft. was in his absence elected a member of the board of directors. Previously to his election he had, however, had notice from the secretary of the society that it was intended to place his name on a list of members, from which list it was usual to choose the directors. During the year ending in May 1856 he regularly received notice of each monthly meeting, and did not in any way assent to or dissent from such election. But in the autumn of 1855 he joined in the following requisition to the board which is entered on the minutes of the next meeting :—

"Islington, Aug. 27, 1855.

"Sir,—We the undersigned members of the North London Building Society hereby request you to convene a general meeting of the members of this society, to be held at the Denmark Schools, Pentonville, on Tuesday, Sept. 10 next, at eight o'clock in the evening, to take into consideration the following resolution :—'That Mr. Thomas Lewis, the purchaser of the Enfield estate, having stated to the meeting of members assembled at the Denmark Schools Aug. 14th last that he had received an indemnity with which he was satisfied, and was ready to convey to the allottees, hereby request the board of directors to cause the conveyances to be prepared for signature without delay, and hereby rescind any resolution passed contrary to the same.' (Signed) by E. LAYTON (and others.)"

This document refers to a dispute that had been originated by Lewis, who refused to convey to allottees unless he was indemnified against some fancied liability as to making roads and sewers.

Early in the year 1855 the deft. wrote and sent by post to the secretary of the society a notice stating his intention to withdraw from the said society, but it was never received by him.

On the 14th June 1858 the society sent to all its members who were not allottees, and to them also, when they happened to be also investing members, a circular, containing the following passage :—

"The directors have also decided not to receive any further subscriptions from investing members, but to consider such as withdrawing members in future, the same as if they had now given notice of withdrawal. For the convenience of those members who desire to sell or to purchase shares, and of withdrawing members who are prepared to purchase any plots of land that may be for sale, a book will be provided in which, on every subscription night, their wishes may be recorded."

Up to the 16th July 1862, the date of the award hereinafter mentioned, fines had accrued under the rules from the deft. (if he is to be deemed to have

continued a member) to the amount of 4*l.* 12*s.*; but the society has only charged against the deft. fines up to the same date to the amount of 3*l.* 6*s.* 10*d.* Since the date of the award additional fines, to the amount of 10*s.* 8*d.*, have accrued due and remain unpaid.

No act was done by the directors to forfeit the shares of the deft.

The amount borrowed by the society as aforesaid to pay for the said land was 4800*l.* This sum has been partly repaid, the amount now due being only 2020*l.*, for which sum the society is liable.

The society has no fund out of which it can pay off the above-mentioned balance except the subscriptions in arrear from the deft. and other allottees.

The deft. did not, after the said 26th March 1855, continue the payment of his weekly subscriptions, but he disputed his liability.

In order to obtain a settlement of the dispute between the society and the deft., and to obtain payment of what was alleged to be due from him, the said board proceeded to arbitration before the arbitrators who had been appointed in pursuance, as alleged, of the said rules, and the deft. was served with a notice of choosing arbitrators.

Three arbitrators were chosen, and notice of their meeting served on Mr. Layton, but he did not attend. They heard evidence and investigated the claim of the society, and made their award, ordering Mr. Layton to pay to the society 69*l.* 8*s.* 4*d.*

The award was served upon Mr. Layton personally, and the amount thereof demanded, but he has not paid the said amount or any part thereof.

A summons was afterwards, on the 29th Oct. 1862, taken out at the Clerkenwell Police-court, to compel performance of the said award.

The said summons, after several adjournments, came on for hearing before Louis Tennyson D'Eyncourt, Esq., and was finally disposed of on the 18th Dec. 1862. At the hearing of the summons the award and the refusal to comply therewith, and the other facts aforesaid were proved, but Mr. Layton objected to the jurisdiction of the magistrate to enforce the said award on the ground that the society was not a benefit building society within the meaning of the 6 & 7 Will. 4, c. 32, and that the said society had no power to buy land or to make its members contribute to the purchase thereof, and that he had ceased to be a member of the said society, and that the said notices of arbitration and of meeting were bad and insufficient, and that the said award was bad by reason of its including charges and matters not within the provisions of the said Act of Parliament, and generally that the said magistrate had no jurisdiction in the premises, and thereupon the said magistrate decided that he had no jurisdiction in the premises, and declined to make an order enforcing the said award.

The question for the opinion of the Court was, whether the said magistrate had jurisdiction.

The following rules of the society were cited during the argument :—

1. This society shall be denominated the North London Benefit Building Society.

2. The principal object of this society shall be to enable its members by weekly subscriptions to purchase freehold property in shares not exceeding in value the sum of 30*l.* each.

7. On every weekly subscription night each member shall pay at the rate of 1*s.* per week for every share he may hold, and on every subscription evening during the quarter an additional sum of not more than 1*s.* per share towards the necessary expenses of the society. Any member being in arrears to the amount of 6*s.* per share shall forfeit 2*d.* per share per fortnight until his arrears are under that sum; and the cash steward is hereby empowered to deduct the amount due for fines or expenses from the first money tendered by such

Q. B.]

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[Q. B.]

member; but should the member tender no subscription until his fines amount to the sum which he shall have already paid in, the same shall be forfeited to the society.

10. All advances on shares shall be made to the members according to the seniority of membership; but should the senior member prefer waiting until a future time, his allotment shall then be offered to the other members upon the subscription-book in order and according to their seniority of their membership. If all the members refuse to take such allotment, then the senior member shall take the same.

11. Every member upon receiving the money advanced to him shall execute to the trustees a mortgage of the property offered as security to secure to them all principal moneys, subscriptions, fines and other payments due and to become due according to these rules upon the share or shares in respect of which the money shall have been advanced. (The rule then specified certain provisions to be contained in the deed.)

15. This rule gave power to members to withdraw upon giving a month's notice, &c.

In the title-page of the rules the society was called "The North London Freehold Land Society."

Hayes, Serjt. (M. Lloyd with him) for the apps.—Assuming the change of the society to a freehold land society to have been an act *ultra vires*, it does not make the society illegal. It is like the case of the railway company which had applied part of its funds to the business of steamboat proprietors, which was held not thereby to lose its powers as a railway company. So here, also, it may be conceded that, according to *Grimes v. Harrison*, 26 Beav. 435; 28 L. J. 823, Eq., the application of the funds of this building society to the purchase of land was a breach of trust, yet it did not lose thereby the powers conferred on it as a building society under the 6 & 7 Will. 4, c. 32. Here the resp. has signed an agreement to take two allotments: (*Mullock v. Jenkins*, 14 Beav. 628.) Secondly, as to the forfeiture of the resp.'s shares. The shares are not by the nonpayment of subscriptions forfeited, but the society may elect to treat them as forfeited on that ground. (The Court intimated that the objection was untenable.)

M. Smith (Day with him).—The Building Societies Act, 6 & 7 Will. 4, c. 32, is the foundation of all these societies, and the case is the same as *Grimes v. Harrison*, where, after registering as a benefit building society, the directors took a fresh name, and inserted it on the title-page of the rules as a freehold land society. Here this society was never constituted as a building society, and the object of this award is to get money from Mr. Layton to pay off the money borrowed to purchase the land. Here there is no other class of members besides the allottees of land, the society having resolved not to receive any further subscriptions from investing members, but to treat them as withdrawing members. [CROMPTON, J.—That resolution was inoperative against a member not assenting to it.] The powers of the magistrate were sought to be used for a totally different purpose from that of a benefit building society. Mr. Layton was an allottee and not an investing member, and the subscriptions were not due from him in accordance with the rules:

Reg. v. Trafford, 4 E. & B.

COCKBURN, C.J.—I am of opinion that the rule ought to be made absolute, and that the magistrate ought, under the circumstances, to have made an order for enforcing payment of the money due under the award. This was a society registered under the Benefit Building Societies Act, and, according to the rules, certain subscriptions became payable by Mr. Layton which have not been paid. Two answers were given, and the main one was that the society was dissolved. It was said that the society was improperly registered

as a benefit building society, and that the members by an arrangement among themselves had converted it into a freehold land society. Now, if that is so, it is a misappropriation of the funds, and a matter for the intervention of a court of equity, but the society itself does not therefore cease to exist. Such a misappropriation of the funds may be prevented by an application to a court of equity, and the directors be restrained from perverting the funds. So long as the society exists its members are bound by the rules. If the society was in existence, the question whether or not the funds are about to be applied for the purposes of the Act is a matter for another court. Can it be said that because a benefit building society proposes to apply its funds to the purposes of a freehold land society, that puts an end to the benefit building society? I think not. Then it was said that the resolution not to call on the investing members for further subscriptions left no shareholders but those participating in the freehold land scheme. That might or might not have been within the scope of the power of the directors, but it did not dissolve the society, but only lessened the number of members. But I am inclined to think that it was inoperative. The members might say, "We insist on going on." Some of them might have stopped themselves from saying so by their conduct and acquiescence in the proceedings of the society. But all these considerations are matters for a court of equity. The question the magistrate had to consider was, whether the society was in existence, and whether the members were bound to pay subscriptions, and whether Mr. Layton was in default under the award. Therefore it seems to me that the magistrate ought to have made an order in this case.

CROMPTON, J.—I am of the same opinion. The prosecutor seems to me to have made out that the society had a legal right to have the money paid. He says this is a society under the Benefit Building Societies Act, and that Mr. Layton was liable to pay his subscriptions, and that he had not paid them, and that the arbitrators having awarded against him the society was entitled to call on the magistrate to enforce the award. It has not been made out to my mind that the society has been dissolved, or that it has ceased to exist. The turning it into a freehold land society is not in the nature of an illegal conspiracy to do an illegal act; it is rather like a contrivance to take whatever powers they could get under the Benefit Building Societies Act, and then to purchase land and allot it among the members. There is nothing immoral or illegal in that. It is true the Legislature only gives certain powers when the society is conducted in a certain way, but the converting this into a freehold land society does not make the society illegal from the beginning. The society could not compel a member to take an allotment: he has a right to say, "I do not claim at all through this contract for allotting the land, but under the rules of the society." This departure from the rules of the society is not like making a rate for an illegal purpose, which is wholly void from the beginning. Here, in its origin, it was a legal benefit building society, and I agree that under the rules the members are bound to make certain payments. The application of them is a different matter. It would be a monstrous thing to say that because one member chooses to take out his subscriptions in land, another is not bound to pay the subscriptions and fines that may be due from him. A court of equity is the proper tribunal to restrain the misappropriation of the funds. Then if the society was not illegal in its inception and is still in existence, it being conceded that the notice of withdrawal was inoperative, it follows that the magistrate ought to have made the order.

BLACKBURN, J.—I am of the same opinion. This was a benefit building society registered under the Act,

Q. B.]

HOPKINS v. CLARKE.

[Q. B.]

and by the 7th rule of the society the members were bound to pay weekly subscriptions, and in default fines. The resp. having become a shareholder, and become *primâ facie* liable to pay subscriptions, has not paid them, and thereby has incurred fines. The society referred the matter to arbitration, and the arbitrators have awarded that he should pay 69l., and the society sought to enforce the award before a magistrate. The magistrate had only to see whether this was a matter within the Building Society Act for reference to arbitration, and if it was, it was his duty to enforce the award. The magistrate had no jurisdiction to inquire into matters of discretion or propriety, but only whether the arbitrators had jurisdiction to make the award. In my judgment the award was properly made. It was objected that the society was dissolved, for, in point of fact, the members had agreed among themselves that the funds and credit of the society should be applied to purchasing a tract of land to be afterwards allotted among the members. The case of *Grimes v. Harrison* shows that this was not an illegal act in a moral sense, although it was one the members had no right to do, and a breach of trust. The resp., however, was a party to that proposition, and signed an agreement to take two allotments of the society's land at Eusfield on the terms of paying his weekly subscriptions as usual. If that agreement had been carried out, it would have amounted to this: it would have been as if he had paid down his money for the land and the society had returned it by way of loan. It was not carried out, and all remained *in fieri*. How does that prevent him being a member of the society and liable to pay subscriptions under the 7th rule? He was a party to an agreement which was *ultra vires*, but that does not prevent his being a member of the society and owing the money. The other point was, that the society had issued circulars to the investing members informing them that they would cease to be members of the society. This resp. is not within that class: this offer was not made to him, and was not acted upon by him. That does not amount to his not being a member, and did not, in my opinion, dissolve the society.

MELLOR, J. concurred.

Judgment for the app.

Attorneys for the society, *Hughes and Son*.

Attorney for Layton, *Wright*.

Friday, Jan. 22.

HOPKINS v. CLARKE.

Bankruptcy—Clergy—Profits of benefice—Bankrupt's estate.

The profits of the benefice of a bankrupt clergyman do not vest in his assignees under 24 & 25 Vict. c. 134, s. 135, until they have been levied by sequestration.

Therefore, where a judgment-creditor had obtained a writ of fi. fa. de bon. eccles. to the bishop before a clergyman's bankruptcy, and after the bankruptcy levied by sequestration, he was held entitled to hold the profits as against the assignees, who did not issue a sequestration until after the creditors' levy.

Special case for the opinion of the Court.

This action was brought by the plt., the creditors' assignees of one Rev. Arthur William Gregory, the vicar of Corley, in the county of Warwick, a bankrupt, against the deft., for a sum of 984l. 17s. 6d., received by the latter under a sequestration of the bankrupt's living, which sum the plt. claimed under a later sequestration issued by him as the creditors' assignee. On the 29th Oct. 1862 judgment was signed by the deft. against the Rev. A. W. Gregory for the above-mentioned sum, and upon the same day a writ of *fi. fa. de bonis* was lodged by him with the sheriff. On the 30th Oct. the sheriff returned to this *nulla bona*, and on the same day a writ of *fi. fa. de bonis ecclesiasticis* was

issued out of this court, directed to the Bishop of Worcester. On the 31st Oct., about half-past nine in the morning, this writ was lodged with the registrar of that diocese; and a little after twelve o'clock on the same day a petition for adjudication of bankruptcy by Gregory was filed. Upon the 1st Nov. a writ of sequestration was issued, and published on the following day (Sunday), by being affixed to the church doors. Upon the 17th Nov. the plt. was appointed creditors' assignee, and on 9th Jan. 1863 applied for a sequestration of the bankrupt's living. Accordingly, on the 10th Jan. the writ issued, and was published on the 18th of that month.

The questions for the decision of the court were—first, whether the plt. was entitled, as creditors' assignee, to the profits of the benefice as against the deft.; secondly, if so, whether from the date of the bankruptcy, or from the publication of the plt.'s sequestration.

The following are the enactments referred to during the argument:

1 & 2 Vict. c. 110, s. 55.—And be it enacted, that nothing in this Act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy for the purposes of this Act; provided always, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice for the payment of the debts of such prisoner, and the order appointing an assignee or assignees of such prisoner in pursuance of this Act shall be a sufficient warrant for the granting of such sequestration without any writ or other proceedings to authorise the same, and such sequestration shall accordingly be issued as the same might have been issued upon any writ of *levari facias* founded upon any judgment against such prisoner.

12 & 13 Vict. c. 106, s. 184.—That no creditor having security for his debt, or having made any attachment in London or in any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than the rateable part of such debt except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of or lien upon any part of the property of such bankrupt before the date of the fiat on the filing of a petition for adjudication of bankruptcy; provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, *cognovit*, or consent to a judge's order declared to be null and void by any provision of this Act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent, or to any execution or extent executed or levied under or by virtue of any such warrant of attorney, *cognovit*, or consent.

24 & 25 Vict. c. 134, s. 135.—If any bankrupt be a beneficed clergyman, the assignees may apply for and obtain a sequestration of the profits of the benefice of such bankrupt, which profits shall form part of the bankrupt's estate and be applied accordingly, and the certificate of appointment of such assignees shall be a sufficient authority for the granting of such sequestration, without any writ or other proceeding to authorise the same; and such sequestration shall accordingly be issued the same might have been issued upon any writ of *levari facias* founded upon any judgment against such bankrupt, provided always that the sequestrator shall allow out of the benefice to the bankrupt, whilst he performs the duties of the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situated shall direct, and it shall be lawful for the bishop to appoint to such bankrupt such or the like stipend as by law he might have appointed to a curate duly licensed to serve such benefice in case the bankrupt had been non-resident.

Mellish (A. Wills with him) for the plt.—Since 24 & 25 Vict. c. 134, a clergyman may become a bankrupt, and the question in this case is, to whom do the profits of the benefice of a bankrupt clergyman belong? It is contended that the profits belong exclusively to the bankrupt's estate by virtue of sect. 135 of 24 & 25 Vict. c. 134. The fact of the deft. having issued his sequestration first only puts him in the situation of a creditor having security under sect. 184 of 12 & 13 Vict. c. 106, which is unreppealed. At the time of the bankruptcy deft.'s sequestration was not issued or published:

Doe dem. Morgan v. Black, 3 Camp. 447.

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White v. Bishop, 1 C. M. & R. 507;
Bennett v. Apperley, 6 B. & C. 630;
Pack v. Tarpley, 9 A. & E. 468;
Bishop v. Hatch, 1 A. & E. 171.

Lush (Field with him) for the debt.—The rights of the assignees of a bankrupt clergyman under the B. A. 1861 are the same as those of the assignees under the Insolvent Act; and all that the new Act has done is to transfer the jurisdiction under insolvency in the case of a clergyman to the Bankruptcy Court. Under the Insolvent Acts, 7 Geo. 4, c. 57, and 1 & 2 Vict. c. 110, s. 55, ecclesiastical property did not vest in the assignees, but power was given to them to get possession thereof as if they had been judgment-creditors:

Arbuckle v. Cowton, 3 B. & P. 321;

Bishop v. Hatch (*suprà*).

Sect. 135 of the new Act was introduced for the same purpose, and its language does not extend the effect beyond what was previously enacted in the Insolvent Acts. It is conceded on the other side that, but for sect. 135 of the new Act, sect. 184 of the 12 & 13 Vict. would not apply. As sect. 184 originally stood, it clearly had no relation to ecclesiastical property, because a clergyman could not become bankrupt. And if so, its scope cannot be enlarged now to include it. That section was never intended to apply to property which could not be seized and sold by the assignees:

Holmes v. Tutton, 5 E. B. 65;

Parry v. Jones, 1 C. B. N. S., 339.

COCKBURN, C.J.—I am of opinion that our judgment should be for the debt. The question arises under sect. 135 of the B. A. 1861. Independently of the light thrown by the decisions on the corresponding enactments of the Insolvent Act, I should have put the same construction on this Act, and should hold that the property of a bankrupt beneficed clergyman did not vest in the assignees until they had brought it into the estate in the way pointed out by sect. 135. If the Legislature had intended that the profits of the benefice should form part of the bankrupt's estate at once, and that the sequestration was to issue for preserving the control of the bankrupt's ecclesiastical superior, the language of the enactment would have been entirely different. Here the language is the same as in the Insolvent Act, that the assignees may apply for and obtain a sequestration of the profits of the benefice, and it is then provided that the profits shall form part of the bankrupt's estate. That is analogous to the provision in the Insolvent Act. The Legislature intended that a clergyman should be in an anomalous position as regards the bankrupt law. I can understand why that species of property should be made available for the payment of debts, and yet not be placed on the same footing as other property. According to the decisions cited, and the authority of which is not questioned, a prior sequestration to one issued by the assignees of an insolvent debtor was valid as against the posterior one issued by the assignees. There is no distinction between the two statutes, the only difference is in the language. Practically they are the same, and the language is substantially the same, and those decisions therefore bind this court. On the other question, as to whether sect. 184 of the Act of 1849 applies, so that the sequestration creditor is to be considered in the light of a person having a security for his debt only, I think that the true exposition was submitted to us by Mr. Lush, that that section only applies to property which but for the creditor's security would pass by the adjudication to the bankrupt's estate. If in the present case the profits of the benefice would so pass, the section applies; but I think it does not, because, if the property passes to any one else previously, as I have already said it does, it is no longer within sect. 184.

FLACKBURN, J.—I am of the same opinion. The

24 & 25 Vict. c. 134 makes a clergyman liable to become a bankrupt, and thereupon all his estate vests in his assignees. It has been settled by the earlier decision of *Arbuckle v. Cowton*, 3 B. & P. 321, and the cases that have followed, that ecclesiastical property does not pass to an insolvent clergyman's assignees, for reasons which equally apply to the Bankruptcy Act. That being so, a sequestration creditor would have a right to the profits of the benefice, notwithstanding that the clergyman has become bankrupt. Sect. 135 of 24 & 25 Vict. is a protecting section, but a sequestrator who has seized the profits of the benefice does not need the protection of sect. 135. Then as to the construction of sect. 184 of 12 & 13 Vict. c. 106, it was plainly meant to apply to cases only where the creditor has a security over something which, but for his security, would go to the bankrupt's assignees, but it does not apply to property in which the assignees take no interest. That brings the question to the construction of sect. 135 of 24 & 25 Vict., which does not say at once that the profits of a benefice are to form part of the bankrupt's estate, but that the assignees may apply for and obtain a sequestration of the profits, which profits (that is, when levied) shall form part of the bankrupt's estate. The rest of the section follows almost literally the words of the corresponding enactment in the Insolvent Debtors Act.

MELLOR, J.—I am of the same opinion. I agree that we are to construe sect. 135 of the new Act with sect. 184 of the old Act, as if they had been contained in one Act. And so construing them, I think that sect. 184 of the old Act does not apply to this case. The effect of the new Act was not to make an alteration in the relation between a clergyman and his benefice, so as to give any different remedy to what was previously given under the Insolvent Act. But as it was necessary to introduce some clause in the new Act to meet the case of a clergyman, similar words were used in this clause to those in the Insolvent Act. That being so, I see no reason to depart from the decisions upon the Insolvent Act.

Judgment for the debt.

Wednesday, Jan. 27.

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Bankruptcy—Indictment—Not discovering estate on examination.

An indictment against a bankrupt under 24 & 25 Vict. c. 134, s. 221, for not upon his examination discovering all his property, alleged, that on, &c. N. was adjudged bankrupt by the Court of Bankruptcy for the L. district, the court duly authorised to adjudicate, and that the said N. upon his examination in the said court, to wit, on, &c., with intent to defraud and defeat the rights of the creditors, did not fully discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and in goods, and did not, as to part of his the said N.'s property not being sold in the way of trade or laid out in ordinary family expenses, fully discover to the best of his knowledge and belief how and to whom and for what consideration and when he had disposed of them, to wit, 1000*l.* sterling, 1000 sacks of corn, 10 horses, &c., &c.:

Held, a good indictment, on error after conviction and judgment:

Held, also, that the objection of duplicity to a count of an indictment is not open on a writ of error:

Held, also, that where the offence is charged in the words of the statute creating it, the want of averments specifying the property, or time, number and value, is cured, after verdict, by the 7 Geo. 4, c. 64, s. 21.

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The above indictment did not aver what the property was which the bankrupt did not disclose, or allege that he had property, although it charged him with not disclosing how he had disposed thereof:

Held, that the indictment was sufficiently certain after verdict.

Writ of error, after conviction and judgment, upon an indictment under the Bankruptcy Act (24 & 25 Vict. c. 134), s. 221.

The following was the first count of the indictment: Lancashire to wit.—The jurors for our Lady the Queen upon their oath present, that heretofore, to wit, on the 14th day of March 1863, Samuel Nash was duly declared and adjudged bankrupt by the Court of Bankruptcy for the Liverpool district, the said court being then the court duly authorised and competent to adjudicate as aforesaid. And the said jurors upon their oath present, that the said S. Nash having been so declared and adjudged bankrupt upon his examination in the said court, to wit, on the 18th day of March 1863, with intent to defraud and defeat the rights of the creditors of the said S. Nash, did not fully and truly discover to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods, and did not, as to part of his the said S. Nash's property, not being part fully and *bonâ fide* before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expenses of his the said S. Nash's family, fully and truly discover to the best of his knowledge and belief as aforesaid, how and to whom and for what consideration and when he had disposed of, assigned, or transferred such part thereof, to wit, 1000*l.* sterling, 1000 sacks of corn, 1000 sacks of flour, ten horses, ten carriages, five clocks, five boxes, and other goods and effects, being part of the property of the said S. Nash as aforesaid, contrary to the statute in such case made and provided, and against the peace of our Lady the Queen.

The indictment contained several other counts (not now material).

The prisoner pleaded not guilty and was tried, but convicted on the first count only, and judgment passed.

Whereupon the prisoner brought a writ of error upon the judgment, and assigned the following grounds of error:—

"The said S. Nash saith, there is manifest error in this, to wit, that the first count of the indictment charges that the plt. upon his examination in the Court of Bankruptcy for the Liverpool district, did not, as to part of the property of the plt., fully and truly discover to the best of his knowledge and belief how and to whom and for what consideration and when he had disposed of, assigned, or transferred such part of his property, whereas it is not alleged in such first count that the plt. had in fact disposed of, assigned, or transferred such part of his property; therefore in that there is manifest error. There is also error in this, to wit, that it is not alleged in the said first count that the plt. on the examination alleged in such first count was examined upon the matters in such first count alleged and referred to, or that on such examination he was required and bound to discover the matters and things which the said first count charges that the plt. did not discover. That it is consistent with the allegations in the first count, that the plt. was on the occasion alleged examined as to other matters and things and could not have discovered the matters and things which the said first count charges that the plt. did not discover; therefore in that there is manifest error. There is also error in this, to wit, that the said count is double and multifarious; therefore in that there is manifest error."

Jinder in error.

Attainall for the plt. in error.—It is submitted that

the first count is bad upon writ of error. That count is founded on the second clause in sect. 221 of the 24 & 25 Vict. c. 134, which, after enacting that a bankrupt who shall do any of the acts specified in the section with intent to defraud or defeat the rights of the creditors shall be guilty of a misdemeanor, provides in clause 2: "If he shall not, upon his examination, fully and truly discover to the best of his knowledge and belief all his property real and personal, inclusive of his rights and credits, and how and to whom and for what consideration and when he disposed of, assigned, or transferred any part thereof, except such part as has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expenses of his family, or shall not deliver up to the court, or dispose as the court directs of all such part thereof as is in his possession, custody, or power, except the necessary wearing apparel of himself, his wife and children, and deliver up to the court all books, papers and writings in his possession, custody, or power relating to his property or affairs:" This clause consists of three parts, and the first part is governed by the second. The first part is not disclosing all his property, and the second is the not disclosing how he had disposed, &c. of any part of his property. The first and second parts are connected by the conjunction "and," whereas in the commencement of the third part the disjunctive "or" is used. If the first and second parts are construed as distinct offences, then the count is bad for duplicity and multifariousness. If the first part is a distinct offence, that part of the indictment is bad for want of certainty and not giving reasonable information as to the charge. The specific thing must be charged which it is said has not been discovered. In cases of this kind, where the prosecution is ordered by the Bankruptcy Court, there are no depositions, and the first intimation is the notice of the bill having been found by the grand jury. As to the second part of the count, that the bankrupt did not discover how he had disposed of part of his property, it is not alleged that he had property to dispose of. [BLACKBURN, J.—Is not that cured by the verdict? The jury could not have convicted without finding that he had property.] Then, assuming the count to be double as containing two distinct offences, it is bad. Again, another objection is, that it does not appear on the face of the count that the bankrupt had been examined as was intended by the statute. The offence is not committed until the entire examination is over. The examination does not necessarily take place in the district court or the court where the adjudication takes place. The proceedings may be transmitted to other courts. [MELLOR, J.—Why are we to assume that the proceedings were transferred from the Liverpool Court?] Consistently with the averment there may have been other examinations of the bankrupt in other courts, and the bankrupt ought not to know in what count the offence is said to have been committed:

Courtieron v. Meunier, 6 Ex. 74;

Rez v. Walters, 5 C. & P. 138.

Milward (R. G. Williams with him).—This case falls within the intent of 7 Geo. 4, c. 64, ss. 20, 21. Sect. 20 specifies certain things, the want of which is cured by the statute after the verdict, &c., including time where time is not of the essence of the offence. And sect. 21 enacts that where the offence charged has been created by any statute, the indictment shall after verdict be held sufficient if it describe the offence in the words of the statute. No distinction is shown between the language of this count and the words of the statute creating the offence. The 14 & 15 Vict. c. 100, s. 24, was also relied upon. [CROMPTON, J. referred to *Reg. v. Forayth, R. & R. 274.*] In *Rez v. Varshauer*, 1 Moo. C. C. 466, where, upon an indictment for having in possession plates upon which was engraved a Polish promissory note for the

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payment of five florins, "purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicolas, then being king of a certain foreign country called Poland," and the objections were that the note ought to have been stated to be a note in the foreign language and then the meaning of it in English; that it ought to have been stated to be for the payment of foreign money, and that the value in English money should then have been stated: it was held that these objections were cured after verdict by the 7 Geo. 4, c. 64, s. 21.

Hamilton v. The Queen, 9 Q. B. 271;
Reg. v. —, 1 Clit. 698.

Here the count follows the language of the section, and charges the substance of the offence. As to the averment of the examination, that must be taken in the same sense as in the statute, and it will be assumed to have taken place in the Liverpool district court, as alleged.

BLACKBURN, J.—I think that in this case our judgment should be for the Crown, on the ground that the count in the indictment on which the defendant was convicted is good after verdict, and that the objections made to it are cured by the 7 Geo. 4, c. 64, ss. 20, 21. The offence for which the prisoner was indicted is created by the B. A. (24 & 25 Vict. c. 134), s. 221, which enacts, "that any bankrupt who shall do any of the acts following with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor;" and among the acts enumerated is this one, on which the indictment is framed: "If he shall not, upon his examination, fully and truly to the best of his knowledge and belief discover all his property, real and personal, inclusive of his rights and credits, and how or to whom and for what consideration and when he disposed of, assigned, or transferred any part thereof," &c. Now, the meaning of that, there can be no reasonable doubt, is, that the offence is complete if the bankrupt does not, with intent to defraud, on his examination, fully and truly discover all his property real and personal. And in order to commit that offence, it is plain that he must have property real and personal, and that he must keep it with intent to defraud his creditors; and probably no such offence could be committed until his examination is quite over, for it is also plain that if, during any part of his examination, he should make a complete discovery of his property, he has failed to commit the offence. The question now is, is the offence properly charged in the indictment? The old rules of pleading required that in every indictment you should state every matter with a certain accuracy as regards number, time and value; but in very early times it was held that it was not necessary to prove these averments exactly, except where number and value were of the essence of the offence. In the present case the count alleges that Nash was duly declared and adjudged bankrupt by the Court of Bankruptcy for the Liverpool district, the said court being then the court duly authorised and competent to adjudicate. The count goes on to allege that, upon his examination in the said court, with intent to defraud and defeat the rights of his creditors, he did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods. According to the rule, it would be necessary to allege with certainty the number, value and time, though it would not be necessary to prove them strictly, and so the count would be bad; but then arises the question, is the want of these averments cured by the 7 Geo. 4, c. 64? And does the indictment, as it stands, describe the offence in the words of the statute creating it? If the matter had to be considered now for the first time, a good deal might be said upon it; but in *Rea v. Warshaver* the question distinctly arose and was decided, and we

ought to follow and be guided by that decision. In that case a count was held good after verdict, which stated that the prisoner had in his possession two plates upon which was engraved in the Polish language "a certain promissory note for payment of five florins purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicolas, then being king of a certain foreign country called Poland." At first there was a difference of opinion among the judges—of seven to six—whether the count ought not to have shown what money florins were, and their value, but subsequently they all agreed that the defect was cured by the 7 Geo. c. 64, s. 21, the offence being described in the words of the statute. I do not think it necessary to say whether the objection is cured by Lord Campbell's Act (14 & 15 Vict. c. 100). Mr. Aspinall further contended that the offence was not described in the words of the statute, because the indictment alleges, that on his examination in the said court, that is, the Bankruptcy Court, and it might be that the examination took place in the County Court. The words of the statute and of the indictment seem also to point to the whole examination being over, and we are to assume rather that the normal state of things went on in the Bankruptcy Court at Liverpool than that the proceedings were removed into the County Court. Then it was objected that, because the count proceeded to state in the last part of the clause of the section, what was perhaps a distinct offence it was bad for duplicity. It may be urged that, in point of fairness, pleadings should not be double, and the prosecutor may be put to elect as to what part of the indictment he will proceed upon. After verdict, it must be taken that the jury found that all that was substantially part of the offence was proved, and though the jury do not know what is the substance of the offence, the judge must be taken to have told them. The latter part of the count may be treated as surplusage and may be struck out. For these reasons I think our judgment should be for the Crown.

MELLOR, J.—I am of the same opinion. No authority has been cited to show that duplicity is a fatal objection in a criminal case; but, whether that be so or not, I am not aware of any case that decides that the objection is open on a writ of error. It might be open to doubt whether the offence was properly laid in the count, if it had been necessary to decide on the objection before the verdict; but I think that the 7 Geo. 4, c. 64, was intended to cure objections to indictments for want of certainty, and objections that had no bearing on the merits of the case. It is sufficient after, if, in describing the offence, the language of the indictment follows the words of the statute. Then if the offence here is, as I think, sufficiently described in the words of the statute, the count is not rendered bad by what is added. It is admitted that, unless steps are taken by the creditors to remove the proceedings to the County Court, the examination of the bankrupt must take place in the Court of Bankruptcy. No circumstances are stated to show how the jurisdiction arose in this case; the count alleges the examination to have been "in the said court," which refers to the Bankruptcy Court in Liverpool, which, I think, must be taken to have been the right court. I also think that the entire examination of the bankrupt must have concluded before the bankrupt can be said to have committed an offence under sect. 221. We cannot say that the objections are not cured by the 7 Geo. 4, c. 64, without overruling *Reg. v. Warshaver*.

Judgment for the Crown.

Saturday, Jan. 30.

Ex parte A. S. VOSPER (an Articled Clerk).

Articled clerk—Exception from the full five years' service by virtue of a previous ten years' service—23 & 24 Vict. c. 127, sect. 4.

By sect. 4 of the 23 & 24 Vict. c. 127 (the Attorneys Act), it is enacted that any person who shall for the term of ten years have been a bond fide clerk to an attorney during that time, and shall have been bond fide engaged in the transaction and performance, under the direction and superintendence of such attorney, of such matters of business as are usually transacted and performed by attorneys, and who after the expiration of such ten years has served under articles for the term of three years, may be admitted and enrolled as an attorney:

Held, that the ten years need not be ten years next before the entering into the articles, but may be at any previous time, even though, after they had terminated and before the articles had been entered into, many years had elapsed during which the clerk had not been engaged in any legal occupation.

This was an application on the part of a Mr. Vosper, an articled clerk, for a rule directing the examiners to examine him under the 23 & 24 Vict. c. 127, s. 4.

It appeared from the affidavits that in the year 1839 this gentleman entered into the service of Mr. C. V. Bridgman, solicitor, of Tavistock, as his clerk, and continued in his service until July 1853, when he left it; that he was *bond fide* employed for ten years and upwards in the transaction and performance, under the direction and superintendence of the said C. V. Bridgman, of such matters of business as are usually transacted and performed by attorneys and solicitors. It further appeared that from the year 1853 to the year 1860 he was not engaged in any legal pursuits, but that in the latter year he articulated himself to Mr. Charles Willesford, solicitor of Tavistock, and that having completed a term of three years' service he applied to the examiners to be examined with a view to be admitted, but that the examiners having doubts as to the effect of the long interval between his service with Mr. Bridgman and his entering into articles with Mr. Willesford, declined to examine him, and directed their secretary to write him the following letter:

"Incorporated Law Society U. K.,

Chancery-lane, London, Jan. 16, 1864.

"Sir,—Without going into the question as to your antecedent service to Mr. Bridgman, the examiners direct me to inform you, after giving the matter full consideration, that in consequence of the long interval between the time of your leaving Mr. Bridgman and entering into Mr. Willesford's employment, they do not feel justified in allowing your claim to be examined, under the 4th section of the 23 & 24 Vict. c. 127.

"I am, Sir, yours obediently,

E. W. WILLIAMSON, Secretary.

"To Mr. A. S. Vosper," &c.

By sect. 4 of the 23 & 24 Vict. c. 127 (an Act to amend the laws relating to attorneys, solicitors, proctors and certificated conveyancers), it is enacted that "any person who either before or after the passing of this Act shall for the term of ten years have been a *bond fide* clerk to an attorney, solicitor, or proctor, or attorneys, solicitors, or proctors, and during that term shall have been *bond fide* engaged in the transaction and performance, under the direction and superintendence of such attorney, solicitor, or proctor, or attorneys, solicitors, or proctors, and who shall produce to the examiners satisfactory evidence that he has faithfully, honestly and diligently served as such clerk, and who after the expiration of the said term of ten years has been bound by and has duly served under articles of clerkship to a practising attorney,

solicitor, or proctor, for the term of three years, and has been examined and sworn in manner directed by the first hereinbefore mentioned Act, and by this Act, may be admitted and enrolled as an attorney and solicitor, or proctor," &c.

T. Jones now appeared for the applicant, and contended that the view taken of his case by the examiners was erroneous; for that, having served the ten years as provided for by the 4th section, it was immaterial how long since such service may have taken place, and that it was obviously the intention of the Legislature to put such persons upon the same footing as persons who had taken a degree at one of the Universities, or who had been barristers, who by the 2nd and 3rd sections were only required to serve three years irrespective of the time when they took their degrees or ceased to be barristers. [BLACKBURN, J.—The words in all three sections are certainly very much alike.] The object, no doubt, was to give a privilege to persons who had so long pursued the profession of the law.

BLACKBURN, J.—There is here no doubt a long substantial interval during which he was not engaged in legal pursuits. The subject is of too great importance to be decided by two judges only, and therefore we will take an opportunity of consulting the other members of the court. (a)

His LORDSHIP, later in the day, said, they had consulted the other judges, and they were of opinion that, having once served as clerk for the ten years, the party was in the same position as a person who had taken his degree or had been a barrister, and that, although a long interval had elapsed, he was entitled to be examined. *Application granted.*

REG. v. HEANE.

Indictment—Jurisdiction—Motion to quash—Perjury—22 & 23 Vict. c. 17, s. 1—24 & 25 Vict. c. 115, s. 57.

When an indictment is found by a grand jury having no jurisdiction, it may be quashed at any stage, at the instance of the deft., even after he has pleaded to it.

But where there is any doubt as to its validity, the court will not decide the question upon motion, but will leave the deft. to his writ of error.

By sect. 57 of the 24 & 25 Vict. c. 115 (an Act for the government of the Navy) it is enacted that "every person who upon any examination upon oath or upon affirmation before any court-martial held in pursuance of this Act shall wilfully and corruptly give false evidence shall be liable to the penalties of wilful and corrupt perjury."

Quare, whether this enactment makes the giving of such false evidence the offence of perjury?

On a former day *M. Chambers*, Q.C. obtained a rule calling upon the prosecutor to show cause why this indictment for perjury, found at the Central Criminal Court, should not be quashed upon the ground that "perjury" being one of the offences named in the 1st section of the 22 & 23 Vict. c. 17 (an Act to prevent vexatious indictments for certain misdemeanors), the indictment had been preferred at once before the grand jury without any preliminary authority.

By the before-mentioned section it is enacted that "after the 1st Sept. 1859 no bill of indictment for any of the offences following, viz., perjury . . . shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognisances to prosecute or give evidence against the person accused of such offence," &c.

(a) Cockburn, C. J. was engaged in the Court for Crown Cases Reserved, and Crompton, J. was sitting in the Ball Court.

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Ex parte THE GUARDIANS OF THE BRIDGEND AND COWBRIDGE UNION.

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By sect. 57 of the 24 & 25 Vict. c. 115 (an Act for the government of the Navy) it is enacted that "every person who upon any examination upon oath or upon affirmation before any court-martial held in pursuance of this Act, shall wilfully, wrongfully and corruptly give false evidence shall be liable to the penalties of wilful and corrupt perjury."

It appeared that the offence charged was committed upon a trial before a naval court-martial on board ship in the harbour of Malta.

The deft. had pleaded to the indictment, which had been removed at his instance into this court.

Ballantine, Serjt., *Giffard* and *Lewis* showed cause, and contended, first, that after pleading to the indictment it is too late to move to quash it, that such application should be made before plea, and that now the deft. should be left to his writ of error; secondly, that the 22 & 23 Vict. c. 17, s. 1, does not apply, inasmuch as this is not an indictment for perjury, but for giving "false evidence" under sect. 57, the offence of perjury not being one that can be committed in evidence before such a tribunal as a court-martial:

Archbold's Practice, p. 80;
Foster's Crown Law, 230;
Hookwood's case, 13 State Trials;
R. v. Fearnley, 1 T. R. 316;
R. v. Marsh, 6 A. & E. 236;
Johnstone v. Sutton, 1 T. R. 548;
R. v. Foster, 1 Russ. & Ry. 460;
Spicer v. Reed, Hobart, 62;
R. v. Chapman, 1 Den.;
 22 Geo. 2, c. 33, s. 17;
 17 & 18 Vict. c. 104, s. 520;
 7 & 8 Vict. c. 2, ss. 2, 3;
 12 & 13 Vict. c. 106, s. 250.

M. Chambers, Q. C. and *West*, in support of the rule, argued that the indictment was wholly void, as being found by a grand jury, who had no authority to deal with it; and that the deft. could come at any time to quash it, inasmuch as it would be idle to go on with proceedings which must in the end prove abortive, and also that the charge was in fact one of perjury:

Hawk. P. C. b. 2, c. 25;
 Com. Dig. "Indictment," H.;
 Bac. Ab., "Indictment," K.;
R. v. Williams, 1 Burr. 885.

Ballantine, Serjt. undertook to supply the deft. with a copy of all the intended evidence upon the trial.

COCKBURN, C. J.—If we quash this indictment it can only be upon the ground that we are clearly of opinion that it is bad, which we are not; but if we refuse to do so, and leave the deft. to his writ of error, then the question will be again fairly open to discussion. I think that it is open to considerable doubt whether this indictment is within the statute of the 22 & 23 Vict. c. 17. Then that being so, the question is, whether we are now to put an end to the indictment, and so prevent all further discussion upon it? Now, as this application is made to our discretion, we must see that we do not prejudice the parties. I think we ought to say, with reference to the preliminary objection, that it ought not to prevail. As regards that objection, that the motion to quash cannot be made after plea, pleaded, I think if it is made to appear clearly that there was no jurisdiction, we have power to quash the indictment at any stage; but when we come to consider whether the offence charged is within the statute, it turns upon whether this is an indictment for perjury or not. If the deft. had been indicted for perjury in the ordinary way, I think it doubtful if such an indictment could have been sustained. Formerly there was an undoubted right in the prosecutor to go before the grand jury in the first instance, but that right is taken away in certain cases, and we must see if it is taken away in the present one. I think that is a matter of much doubt, and it would not be right in

us therefore to do anything whereby the question may be prevented from being considered by a court of error.

BLACKBURN and *MELLOR*, JJ. delivered similar opinions. Rule discharged.

Monday, Feb. 1.

Ex parte THE GUARDIANS OF THE BRIDGEND AND COWBRIDGE UNION.

Poor law—Contribution from parish to the union—Refusal of overseer to pay—Discretion of justices.

Although this court will not interfere with the justices in the exercise of their discretion; yet where they have exercised that discretion by declining to execute a provision in an Act of Parliament, upon grounds manifestly unsound, this court will interfere.

An order of a board of guardians was made upon an overseer for contribution, which he refused to comply with, and upon an application to justices for a warrant of distress, they refused to grant it:

Held, that this court would review and control their discretion.

This was a rule calling upon *John S. Boteler* and *John S. Gibbon*, Esqrs., justices of Glamorganshire, and *Robert Charles N. Carne*, overseer of the poor of the parish of Nash in the Bridgend and Cowbridge Union, to show cause why the said justices should not issue their warrant to levy by distress and sale of the goods and chattels of the said R. C. N. Carne the several sums of 14*l.* 11*s.* and 3*l.* 10*s.* 11*d.* the amount ordered by the guardians of the poor of the said union to be paid by the said R. C. N. Carne from the poor-rates of the said parish towards the relief of the poor thereof, and to the contribution of the said parish to the common fund of the said union.

It appeared that the parish of Nash had been an extra-parochial place, and had been constituted a parish under the provisions of 20 Vict. c. 19, s. 1, and had by an order of the Poor Law Board been annexed to the adjoining Bridgend and Cambridge Union, and *Mr. Carne*, who was the sole proprietor of the land in such parish, and the overseer thereof, had been ordered to pay the before-mentioned amounts, which he had declined to do, whereupon application was made under sect. 1 of 2 & 3 Vict. c. 84, to the before-named justices for their warrant of distress, and upon the hearing it was urged, on the part of the overseer, that as there were no paupers it was unreasonable to make the demand; and that the ordering of the warrant being in the discretion of the justices, they should, under the circumstances, refuse to grant it. The justices thereupon considered their determination, and, by their chairman, said, "We have given the matter our best consideration, and think you have shown sufficient cause to justify us in refusing the warrant," and it was refused accordingly.

By sect. 1 of the 2 & 3 Vict. c. 84, it is enacted that in every case in which any contribution by overseers of manors required by the board of guardians shall be in arrear, it shall be lawful for any two justices acting within the district wherein such parish shall be situate, on application, to summon the said overseer to show cause why such contribution has not been paid; and after hearing the complaint "if the justices at such sessions shall think fit," by warrant under their hands and seals, to cause the amount of the contribution so in arrear, together with the costs to be levied and recovered from the said overseer.

Giffard now showed cause and contended that, as the statute 2 & 3 Vict. c. 84, s. 1, gave the justices a discretion, and as they had exercised it by refusing the warrant, this court will not interfere:

Reg v. Mills, 2 B. & Ald. 578.

Lush, Q. C. (Poland with him) argued that, al-

though in general the court will not interfere with the discretion of justices, yet if they do not exercise that discretion according to law, but wilfully refuse to carry out the provisions of the Legislature, and act obviously from mistaken or unsound motives, the court will interfere; that in the present case there could be no sufficient reason for withholding the warrant, the real reason being undoubtedly their feeling that it was unfair to call upon the parish of Nash, which had no paupers, to contribute to the union expenses:

Newbold v. Collman, 6 Ex. 189; 20 L. J. 149, M. C.;

Reg. v. Staples Inn, 32 L. J. 181, M. C.; 8 L. T. Rep. N. S. 464.

COCKBURN, C. J.—I certainly do not desire to trench upon the ordinary rule that where the justices have a discretion this court will not interfere; but here it is plain they have not really exercised it. Now this extra-parochial place having become a parish, and been annexed to the neighbouring union, it became liable to the expenses of that union, and the justices ought to have issued their warrant; but they declined to do so, and it is quite clear that they so decided because they thought the introduction of this parish into the union was unjust. It is quite clear that they had no right to enter into that question. They have acted upon the principle that as the law was unjust they would not execute it. That is a principle we cannot recognise. There being all the grounds upon which they ought to have issued their warrant, they seem to have declined because they thought the Act of Parliament a bad one. The rule, therefore, must be made absolute; and although it is unusual to give costs against justices, in this case I think the rule should be absolute, with costs.

BLACKBURN and MELLOR, JJ. concurred.

Rule absolute with costs.

REG. v. HARRINGTON.

Bastardy—Second application for an order after dismissal of the first.

Where an application for an order of affiliation is dismissed not upon its merits, the woman is not barred from making another application.

A dismissal upon the ground of there being no sufficient corroborative evidence is not a dismissal upon the merits.

This was a rule calling upon two justices of Somersetshire and one Sarah Burton to show cause why a *certiorari* should not issue to remove into this court an order of affiliation, whereby the said deft. was adjudged to be the putative father of a bastard child. It appeared that one Sarah Burton having been delivered of a bastard child, she applied to justices for an order of affiliation upon the deft., and upon the hearing she not being prepared with corroborative evidence the application was dismissed. Subsequently (within the twelve months) she made another application for a summons, which came on to be heard before other justices, but in the same petty sessional division, and upon the hearing an order of affiliation was made.

The present rule was obtained upon the ground that the dismissal of the first application was a bar to any subsequent application.

Holl showed cause, and contended that a prior application was no bar to a second application, if made within twelve months after the birth of the child, as was the case here. He referred to

Reg. v. The Justices of Buckinghamshire, 18 L. J. 113, M. C.;

Reg. v. Brisby, 18 L. J. 157, M. C.;

Reg. v. Machen, 14 Q. B. 74; 18 L. J. 213, M. C.;

Ex parte Westerman, 16 L. T. Rep. 420;

Reg. v. Pickford, 30 L. J. 133, M. C.; 4 L. T.

Rep. N. S. 210;

Reg. v. Myott, 32 L. J. 138, M. C.; 7 L. T.

Rep. N. S. 785;

Reg. v. Thomas, 8 L. T. Rep. N. S. 460.

H. T. Cole, contra, argued that the case was distinguishable from *Reg. v. Machen*, and that if not, the court should overrule that decision; that a decision upon the merits should be a bar to further applications, or the deft. may be continually harassed by fresh applications. He referred to the various cases already cited.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. In the first place I agree with the former decision in *Reg. v. Machen*, that where an application of this nature is dismissed upon the ground that there has been no sufficient corroborative evidence, it is not a dismissal upon the merits, and therefore a fresh application, if made within the statutable time, may be made. But it is not necessary to rest our decision upon that ground. If there has been a hearing upon the merits, and a dismissal upon the merits, and if that be brought to the notice of the justices upon a second application, and there is no other evidence produced, I think that ought to be a sufficient answer, and if in this case it had been brought to the attention of the justices that the case had before been dismissed upon the merits, and that there was no other evidence in support of the application than was before submitted to them, I should have been disposed to give effect to the present application. But that was not so in the present case.

BLACKBURN, J.—I am of the same opinion.—In *Reg. v. Machen* it was decided that a *mandamus* should go to the justices to hear the case on a second application, without regard to the former decision being upon the merits. The Court there said that the analogy was to a nonsuit. I by no means say that if it appeared that the former decision were really upon the merits, I should not hold that it was final; but as it appears that the first application was dismissed for want of sufficient corroborative evidence, we cannot, without overruling *Reg. v. Machen*, hold that they had not jurisdiction to adjudicate upon the second application. The case of *Reg. v. Thomas* has no application.

MELLOR, J.—We are certainly not justified in overruling *Reg. v. Machen*, and we must hold ourselves to be bound by it, and in this particular case there is not the slightest reason why we should not follow it; for although in one sense the former application was dismissed upon the merits—that is, not upon any merely technical grounds—they were not merits in the sense in which we understand them in relation to this question.

Rule discharged with costs.

COURT OF COMMON BENCH.

Reported by W. MAYN and LUNLEY SMITH, Esqrs.,
Barristers-at-Law.

Tuesday, Jan. 19.

GRELL v. LEVY.

Champerly—Agreement made in France—Attorney and client.

An agreement entered into in France, but intended to be carried out in England, of such a nature that, if entered into in England, it would have been void for champerly, cannot be enforced in England.

The plts., who were merchants residing in Paris, agreed in Paris with the deft., a solicitor residing and practising in London, that the latter should take proceedings in their names to recover a debt due to them from one W. The proceedings were all to be taken at the risk and expense of the deft., who

C. B.]

GRELL v. LEVY.

[C. B.]

was to have no claim for them against the *plts.* The *plt.* was to keep, for expenses and honorarium, one-half of the sum which he might recover from *W.* The *deflt.* sued *W.* in an English court of law, and he paid to him 500*l.* for the debt and 170*l.* for costs. The *deflt.* paid 300*l.* to the *plts.* and retained the remainder, whereupon the *plts.* brought an action against him for the balance of the 500*l.*:

Held, that the agreement was void, and that the *deflt.* was remitted to his ordinary rights of an attorney upon a valid retainer; that he was entitled to retain the 170*l.* paid to him for costs by *W.*, and also a further sum of 40*l.*, found upon taxation to be due to him from the *plts.* for additional costs as between attorney and client, and that the *plts.* were consequently entitled to a verdict for 160*l.*

The declaration was for money payable by the *deflt.* to the *plt.*, for money received by the *deflt.* to the *plt.*'s use, interest, and on accounts stated.

The fourth plea was as follows:—As to so much of the declaration as is for money received by the *deflt.* for the use of the *plts.* and for money found to be due from the *deflt.* to the *plts.* on accounts stated between them, the *deflt.* says that before the accruing of the causes of the action in the declaration mentioned a certain person, to wit, one K. Wilhelms, was indebted to the *plts.* then residing in and domiciled and carrying on business in Paris, in the empire of France, beyond the seas, in a large sum of money, for goods sold and delivered by the *plts.* to the said K. Wilhelms and for money paid by the *plts.* for the said K. Wilhelms at his request, and the said K. Wilhelms being resident in England, the *plts.* had great difficulty in recovering, and were unable to recover, they said debt, and thereupon in parts beyond the seas, to wit, in Paris, in the empire of France, it was agreed between the *plts.* and the *deflt.*, being an attorney of Her Majesty's Superior Courts at Westminster, that the *deflt.* should at his own expense use his best endeavours to recover the said debt in England for the *plts.*, and if necessary should bring an action in England against the said K. Wilhelms, at his own expense, in order to recover such debt, and that the *deflt.* in consideration thereof should retain a certain portion, to wit, one-half of the amount of the said debt which he might recover for the *plts.* from the said K. Wilhelms as aforesaid, and the *deflt.* says that the agreement was entered into according to the laws of the said empire of France, and was according to the said laws binding and valid between the said parties, and the *deflt.* says that he accordingly did bring an action in England in the name of the *plts.* against the said K. Wilhelms, and did receive from him a large amount of the said debt, and the *deflt.* thereupon and before this suit paid to the *plts.* one portion of the amount recovered, and did everything and all things happened to entitle him to retain, and he did retain, the other portion thereof, being the proper portion to retain according to the said agreement. And the *deflt.* says that the money received by him to the use of the *plts.* is the portion of money recovered which was retained by the said *deflt.* as aforesaid. And the *deflt.* says that the amounts alleged to be stated were stated of and concerning such money had and received as aforesaid.

The fifth plea raised in substance the same defence.

The agreement referred to in the fourth and fifth pleas was proved at the trial before Bramwell, B., at the last summer sittings at Croydon, to have been entered into in Paris, and to have been drawn up in French. The following translation of it was used at the trial:—

"The undersigned Jules Grell and Co., merchants residing in Paris, Boulevard Sebastopol, No. 48, on the one part, and Edward Levy, solicitor, 29, Henrietta-

street, Covent-garden, in London, on the other part, have agreed what follows:

"We Grell and Co. give authority to Mr. E. Levy, for us and in our name, to pursue by all the forms of law the recovery of the sum of twenty thousand six hundred and forty francs five centimes, which is due to us from M. Samson and Co., consequently to make all the necessary proceedings to obtain the recovery of the said sum, to receive the amount, to give a receipt, to restore every title and deed, to obtain an acknowledgment for them, to treat, transact, and generally do in our interest all that he may believe useful and proper, promising to acknowledge and ratify when called upon. We resign the power of making personally any arrangement with the said Mr. Samson and Co. without the participation and consent of Mr. Levy, and in case we should make any, contrary to our present engagement, we oblige ourselves to pay him in title of indemnity the sum of ten thousand francs.

"We allot to Mr. Levy, in title of expense and honorarium, the half of the sum he may recover, but it is well understood that he will have no expenses to demand from us, and that whatever he may advance, whether on his own account or that of any adversary, will be his own affair.

"I, Edward Levy, declare that I accept these present agreements and submit to them."

It was also proved that the *deflt.* did bring an action against Wilhelms as a partner in the firm of Samson and Co. on behalf of the *plts.* and that Wilhelms on the eve of trial paid him 500*l.* for the debt and 170*l.* for costs.

The *deflt.* handed over 300*l.* to the *plts.*, who now sued him for the balance of the 500*l.* The jury having found that the above agreement had been entered into by the *plts.* and the *deflt.*, a verdict was entered for the *deflt.* on the fourth and fifth pleas, the *plts.* having failed to move to enter it for them *non obstante veredicto*, on the ground that the agreement was illegal and void. A rule having been obtained for that purpose.

Hawkins, Q. C., Ballantine, Serjt. and Prentiss showed cause.—It was admitted that the agreement, if entered into in England, would be void in law as amounting to champerty (*Re Masters*, 4 Dowl.); but it was entered into in France, where such agreements were not contrary to law, and it did not appear from the words of the agreement that it was necessarily to be carried out in England. The money paid by Wilhelms to the *deflt.* was not paid to him for the *plts.*' use, but partly for his own use and partly for the *plts.* It is an agreement illegal the *plts.* cannot recover anything from the *deflt.* under it. [WILLIAMS, J.—The *plts.* make out a *prima facie* case by proving the relationship between the *deflt.* and themselves to have been that of solicitor and client. It is the *deflt.* who is obliged to set up the agreement as an answer to the *plts.*' case.] The jury have found that the relationship between the parties was not in fact that of solicitor and client, but that there was a special agreement between them. The law respecting illegal contracts and contracts entered into abroad is laid down in

Alexander v. Owen, 1 T. R. 225;

Bramly v. The South-Eastern Railway, 12 C. B.

N. S. 63; 6 L. T. Rep. N. S. 458;

Tenant v. Elliott, 1 B. & P. 3;

Palgart v. Leckie, 6 M. & S. 290;

Broom's Legal Maxims, 645;

Earl v. Hupwood, 9 C. B., N. S., 566; 3 L. I.

Rep. N. S. 673;

Loory v. Bourdieu, 2 Dougl. 468;

Merewether v. Nizan, 2 Smith L. C. 457 at note;

Lubbock v. Potts, 7 East, 449;

Story's Conflict of Laws, s. 282;

Santos v. Illidge, 6 C. B., N. S., 843; 3 L. I. Rep. N. S. 155.

M. Chambers, Q.C. (C. Pollock and Lucius Kelly with him) appeared to support the rule, but was stopped by the Court.

ERLE, C.J.—This rule must be made absolute to enter a verdict for the p^lts. for 160*l*. The agreement was made in France to be performed in England by an officer of an English court of law. It may be admitted that entering into such an agreement was not an indictable offence according to the laws of France, but by the laws of England such an agreement is illegal and void. The def^t. is employed by the p^lts. to recover a debt for them. When the p^lts. apply to tax his bill the def^t. sets up a special agreement which the p^lts. are justified in saying was illegal. The master, therefore, takes no notice of the agreement, but he gives the def^t. what he is entitled to as an attorney against his clients. The def^t. is remitted to his rights as an attorney, as upon a valid ordinary retainer. Then, in addition to the 170*l*. for costs which he received from Wilhelms, he is found to be entitled to 40*l*. for additional costs from his clients. Deducting this from the 200*l*. which he has retained in his own hands out of the 500*l*. paid to him by Wilhelms on account of his debt, there remains a sum of 160*l*. to which the p^lts. are entitled.

WILLIAMS, J.—According to the laws of this country an attorney is an officer of the court, and both he and the suitor are subject to certain rules and entitled to certain rights. The client has a right to call for the payment over to him of money paid to his attorney by the opposite party, subject to the attorney's right to his costs. We cannot allow these arrangements of the court to be controlled by such an agreement as the present, even though it be said to be not illegal in the place where it was made, that is, in France.

WILLES and KEATING, JJ. concurred.

Attorney for the p^lts., *Spier*.

Attorney for the def^t., *E. L. Levy*.

Friday, Jan. 22.

DODS v. EVANS.

Practice—Taxation—Costs of witnesses called to prove damage, jury finding no damage.

The def^t. having allowed judgment to go by default in an action on covenant, in which three breaches were alleged, the sheriff's jury, upon a writ of inquiry, gave damages on the first breach, but none on the other two. The master, in taxing the costs, allowed the expenses of two witnesses who were called to prove damage on the second and third breaches, which allowance was objected to on the ground that the witnesses were not material and necessary, because without them the p^lt. would have recovered precisely the same amount:

Held, that whether the witnesses were material or not did not depend upon the verdict; it was a matter for the consideration of the master, and he having decided that the expenses should be allowed, the Court would not disturb his decision.

This was a rule to review the master's taxation. The declaration, which was on a mining lease, contained three breaches: 1, for nonpayment of five half-yearly instalments of a sleeping rent amounting to 50*l*.; 2, for not working the mine; 3, for not keeping the mine in repair. The def^t. suffered judgment by default. Upon a writ of inquiry before the under-sheriff of Middlesex, the jury found a verdict for 50*l*. damages upon the first breach, and expressly found that no damages had been sustained in respect of the second and third, and the finding was so indorsed on the inquisition. Upon taxing the p^lt.'s costs the master allowed the expenses of two witnesses who (as sworn to on the part of the def^t.) were called to speak, and spoke exclusively to the supposed damages arising under the second and third breaches. The affidavit of increase produced before the

master did not state that the witnesses were material or necessary.

Granville Somerset showed cause and contended that, as the def^t. had suffered judgment by default to the whole declaration, the court ought to consider the case as if nominal damages had been given on the second and third breaches, and that the issue was indivisible, and cited

Anderson v. Chapman, 5 M. & W. 483.

Murray, contra, argued that the witnesses were not material and necessary, because without them the p^lt. would have received the same amount he did recover: (Gray on Costs, p^l. 41-42; and *Dellissers v. Towns*, there cited.) [**ERLE, C.J.**—The case comes to this: declaration on a covenant for non-repairs—judgment by default—verdict by sheriff's jury of a furthering damages: ought the p^lt.'s witnesses to be disallowed merely because the jury did not believe them?] They ought. The p^lt. went before the jury to prove substantial damages, and failed. He could have recovered nominal damages without giving any evidence. In *Reynolds v. Harris*, 3 C. B., N. S., 267 the costs were disallowed, although there was no divisible issue. Here the point is that the witnesses ought to be taken to be unnecessary, they not having succeeded in proving anything.

ERLE, C.J.—I am of opinion that this rule should be discharged. The question whether these witnesses were material and necessary did not depend upon the verdict. In the result, no doubt they were useless. Nominal damages ought to have been given on the second and third breaches, and we must consider the case as if they had been. That being so, it was for the master to consider whether the witnesses were material and necessary. He did consider this point. If the circumstance that the witnesses did not succeed in proving anything were conclusive that they were unnecessary, the case would be different. But that is not so. The rule therefore must be discharged without costs, as some encouragement was given to the application when it was moved.

WILLIAMS, WILLES and KEATING, JJ. concurred.

Rule discharged without costs.

COURT OF EXCHEQUEER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law.

Thursday, Jan. 21.

DAY (Administrator, &c.) v. VINSON.

C. L. P. A. 1852, sect. 117—Notice to admit—Refusal—Certificate of judge granted four months after trial—Document not proved—Costs of prof^r.

*P^lt., after notice under sect. 117 of the C. L. P. A. 1852, refused to admit a receipt purporting to have been given by his deceased intestate to def^t. for 100*l*. cash and a promissory note for 50*l*. The jury at the trial found that the receipt was valid as to the 100*l*., but were not satisfied as to the giving of the promissory note, and therefore found a verdict for def^t. as to 100*l*. and for p^lt. as to 50*l*. No certificate under sect. 117 was applied for or given at the time, but four months afterwards, and after taxation of costs, the learned judge who tried the cause certified, on an ex parte application of the p^lt., that "the refusal to admit was reasonable."*

The Court of Ex. refused a rule to set aside such certificate, inasmuch as a party is only entitled to costs if the document be proved; and here the verdict of the jury established that the document was not proved.

This was an action by p^lt., as administrator of one Sarah Frost, deceased, to recover a sum of 150*l*. The deceased had been shopwoman to the def^t., and had from time to time left moneys in his hands at

[Ex.]

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[Ex.]

interest as her banker, and the sum now sought to be recovered was alleged to be the balance of such moneys due to her from deft. at her decease. The deft.'s answer to the claim was, that he had paid 100*l.*, part of the amount, to the deceased herself, shortly before her death, and had given her a promissory note for the balance of 50*l.* payable to her order, six months after notice, and that no such notice had been given to him. The plt. denied both the payment of the 100*l.* and the giving of the promissory note.

In proof of his case, the deft. relied upon and produced the following receipt, due notice to admit which was served on the plt.'s attorney, under sect. 117 of the C. L. P. A. 1852, but the admission was refused to be made.

"Bideford, 2nd July 1862.

"Received of Mr. William Vinson, one hundred pounds, six shillings and one penny, also a promissory note (to self or order), payable six months after notice. Fifty pounds being balance of account,

"150*l.* 6*s.* 1*d.*

"SARAH FROST."

At the trial before Erle, C.J. and a special jury, at the last summer assizes for Devon, the jury found in express terms that the receipt was a valid one for the 100*l.*, and that 100*l.* had been paid, but they were not satisfied with respect to the giving of the promissory note, and thereupon they found a verdict for the deft. as to 100*l.*, and for the plt. as to 50*l.* No certificate that the plt. refused to admit the receipt was reasonable was applied for or given by the learned judge at the trial. Upon taxing costs the master allowed the deft.'s claim of the costs of proving the receipt, on the ground that no such certificate had been given at the trial in conformity with the above-mentioned section. The matter was discussed at several adjourned meetings before the master, and ultimately at a meeting before him on the 11th Dec. the plt.'s attorney produced the certificate of Erle, C.J., that plt.'s "refusal to admit the said receipt was reasonable," which certificate was obtained on the previous day (10th Dec.) on an *ex parte* application by plt. to the learned Chief Justice. Upon this the master adjourned the matter to enable the deft. to apply to this court to rescind such certificate.

The 117th section of the C. L. P. A. 1852, applicable to the question, is as follows:—"Either party may call on the other party by notice to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so rejecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal was reasonable."

Kingdon, on the 12th Jan., moved this court, on the part of the deft., for a rule to set aside the said certificate, on the ground of irregularity in not having been granted at the trial, in conformity with the above section of the Act; which rule the court refused to grant, on the ground that application should have been first made to the learned judge himself, to give him an opportunity to amend his own order if he thought fit to do so after hearing both sides: (see the case *Day (Administrator, &c.) v. Vinson*, ante, p. 654.) Application was accordingly made by summons, on deft.'s part, to Erle, C.J., for that purpose, when his Lordship, after taking time to consider, declined to set aside his certificate of the 10th Dec., and notified his decision in the following fresh certificate:—

"I certify that the receipt is found by the jury not to have been proved in the whole. The action was for 150*l.*; the receipt was for 100*l.* money repaid, and for 50*l.*, a promissory note. If the receipt had been proved, the verdict would have been for the deft. The jury found that the receipt was valid as to 100*l.*; and as to 50*l.* they found for the plt. I think the jury were right in finding so much for the plt., and

would have been more right if they had found more for the plt. The deft. is to have costs of proving the document; but the document was not proved. This may be certified at any time.

"W. ERLE."

Kingdon now renewed his application to this court for a rule to set aside the original certificate. The jury found, in express terms, that the receipt was a valid receipt for 100*l.*, and that 100*l.* had been paid, but that it was not a good receipt for the promissory note for 50*l.*, and thereupon there was a verdict for deft. as to the 100*l.*, and for plt. as to the 50*l.* The present certificate of the learned judge is unintelligible. His Lordship says nothing about his previous certificate of 10th Dec., which deft. seeks to set aside; but he now certifies that the document, the costs of proving which are sought to be recovered, was only valid in part. But the original certificate was given four months after the trial, whereas the Act directs that it shall be given at the trial. It is therefore void, and deft. is entitled to the costs as if no certificate had been granted. [MARTIN, B.—The receipt was not a genuine document, but false as to the 50*l.* promissory note. It should be a document altogether in your favour to entitle you to costs.] Plt. was required only to admit that the document was signed by the deceased, and that the jury have found. On plt.'s refusal to admit the signature, deft. was obliged to call witnesses to prove it. [MARTIN, B.—That is all right enough; but calling witnesses to prove a signature does not entitle the party to the costs of proving the document which, as to the 50*l.*, was a false document. I should say it was never proved at all. CHANNELL, B.—If plt. had admitted that document, the whole case would have been gone.] Had plt. admitted the fact he was required to admit, viz., the signature, he might have disputed any of the other facts. But the matter is not to be concluded by this fresh certificate of the C.J. If the master of this court has made a mistake, this court must review it, and not the C. J. of C. P. The costs have been taxed, and plt. has not attempted to review the taxation, which he may do if he chooses; but the C. J. of C. P. is not to sit in review of proceedings in this court. Deft. is entitled to a rule to set aside the first certificate as contrary to the 117th section of the C. L. P. A. 1852, and the C. J.'s refusal in his second certificate does not take away that right. When the first certificate is set aside, plt. may come to this court to review the taxation.

POLLOCK, C.B.—I am of opinion that there should be no rule in this case. The plt. was applied to, to admit the document in question, and he declined to do so. Thereupon the deft. put the document in evidence, but he failed to prove it at the trial. A party is only entitled to the costs if the document be proved, and here the verdict of the jury established that this receipt was not proved, and we ought not to interfere with what the Chief Justice has done.

MARTIN, B.—I am entirely of the same opinion. The opinion of the Chief Justice was very strong that to impose costs on the plt. in the present instance would be a gross injustice.

CHANNELL, B.—I agree with my Lord and my brother Martin that this rule must be refused, and for the reasons given. The certificate of the Chief Justice is a representation that the document was not proved.

BRAMWELL, B. concurred.

Rule refused.

Attorneys for deft., *Clarke, Son and Rawlins*, 29 Coleman-street, agents for *Buss*, Bideford.

Ex.]

WAYLETT v. WYNDHAM.

[Ex.]

WAYLETT v. WYNDHAM.

Action in Superior Court for sum beyond jurisdiction of County Court—Less than 20l. paid into court, and taken out by deft. in satisfaction—Costs of action—15 & 16 Vict. c. 54, s. 4—43 Eliz. c. 6, s. 2.

Plt., who resided more than twenty miles from deft., brought his action to recover over 200l. for jewellery supplied to deft.'s wife. Deft. paid 26s. into court, and pleaded never indebted as to the rest. Deft. being unable to meet the anticipated defence of the goods having been supplied to the wife whilst living in adultery apart from her husband, accepted the 26s. and withdrew his action, of which he now sought to recover the costs:

Held, that the plt. was entitled to his costs of the action under sect. 4. of 15 & 16 Vict. c. 54, and that the statute of 43 Eliz. did not apply.

This was an action to recover a sum of 200l. and upwards for jewellery supplied to deft.'s wife. A small item to the amount of 26s. had been supplied to deft. himself, and that sum was paid into court and a plea of never indebted as to the residue. Plt., understanding that the defence intended to be set up was that the goods were supplied to the wife whilst living in adultery apart from her husband, and not being prepared with necessary proof, the onus of which he found would lie on him, to meet that defence, took the 26s. out of court, and withdrew his action. It was admitted that at the time the action was brought the plt. resided and carried on business in London, and that deft. lived in the county of Norfolk. Plt. sought to obtain the costs of the action on the ground that the case was within the concurrent jurisdiction clause of the County Court Act (9 & 10 Vict. c. 95), s. 128, the parties living, admittedly, more than twenty miles apart. On an application by plt. to Keating, J., at chambers, for that purpose, his Lordship referred the matter to the court.

Holl accordingly now moved, on the plt.'s part, for a rule to show cause why the plt. was not entitled to have his costs of the action. Sect. 13 of 13 & 14 Vict. c. 61, on which he relied, was, he contended, imperative, and the matter was not in the discretion of the court. He cited, as bearing on the point,

Asplin v. Blackman, 21 L. J., N. S., 78, Ex.; 7 Ex. 386;

Crake v. Powell, 2 E. & B. 210;

Macdougall v. Paterson, 11 C. B. 753; 21 L. J., N. S., 27, C. P.; 2 L. M. & P. 681.

It would be objected in this particular case that the 43 Eliz. c. 6, s. 2, was applicable; but he contended that the words of that section were utterly inapplicable. [He read the section.] The cases show that it applied only to cases tried before a judge, and not to cases of payment into court.

Oppenheim, contra, for deft., showed cause in the first instance.—The question was, whether under the statute of Elizabeth the court, though there had been no trial, had power to deprive plt. of his costs. It was submitted the court had such power. The words of 43 Eliz. were not the same as the County Court Act. The action was going on in this court, though it had not been tried; it was now before the court, who had the same discretion as a judge at the trial. Was a plt. to bring an action for a large sum, knowing a very small sum only was due, and then, on the small sum being paid in, take it out and recover costs of the action? Had the case been tried, and 1l. 6s. only found due, the judge would have had a discretion, and so the court have now. [MARTIN, B.—What do you say to the case of *Richards v. Black*, 6 C. B. 443; 18 L. J., N. S., 17, C. P., where it was said the true test whether a case is within the

statute of Elizabeth or not, is whether the debt or damages for which the court can see the action is brought, do or do not amount to more than 40s.?] The cases cited contra are cases of judgment by default. [MARTIN, B.—How do you get over the words of the statute of Elizabeth: "If, upon any action, &c., it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried," &c.? It has not been so signified here, because no judge has ever tried it; and *Richards v. Black* holds that the statute does not apply.] It is submitted that the words "before whom the same shall be tried," &c., must be read in connection with the latter words of the same section, "the judges and justices before whom any such action shall be pursued." Here the action is now being pursued, if not tried, before the court. [MARTIN, B.—The judge who tries at Nisi Prius is no part of the court at Westminster; he sits under a commission from the Queen.] *Reg. v. Inhabitants of Haslemere*, 7 L. T. Rep. N. S. 382; 32 L. J. 30, M.C., is analogous as showing that the word "tried" does not always mean "tried before a jury." [CHANNELL, B.—In that case in a certain sense the case had been tried.] There was a distinction between the statute of Elizabeth and the County Court Act. [Gray, Q.C. (*amicus curiæ*) mentioned the case of *Webb v. Saunders*, 8 L. T. Rep. N. S. 464, where in an action for 6l. 4s. 6d., referred by order of the judge to the master who certified that 9s. 6d. only was due to plt., the court held plt. entitled to costs, the parties living more than twenty miles apart. And another case, not reported, in which 30s. was paid into court, and Martin, B. having refused to allow plt.'s costs, the plt. came to the court, who held he was entitled to them. POLLOCK, C.B. refers to 15 & 16 Vict. c. 54, s. 4, repealing sect. 15 of 13 & 14 Vict. c. 61.]

Holl in support of the rule.—Sect. 15 of 13 & 14 Vict. c. 61, has been re-enacted in terms by the repealing section, with the addition that for the permissive word "may," the imperative word "shall" has been substituted.

POLLOCK, C. B.—I think the plt. is entitled to have his costs of the action. No doubt the word "shall" has been introduced instead of the word "may" into the clause of the Act 15 & 16 Vict. c. 61, regulating the title of the party to costs, thereby rendering it imperative on the court or judge. But there are important matters introduced into the section besides the word "shall;" and if a plt.'s application be defective in them, then he will not be entitled to costs. The 4th section, which is the repealing section, says: "If the plt. shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaintiff could have been entered in any such County Court, or that such action was removed from a County Court by *certiorari*, or that there was sufficient reason for bringing an action in the court in which such action was brought, then, and in any of such cases, the court in which such action is brought, &c., the said judge at chambers shall thereupon, by rule or order, direct that plt. shall recover his costs, and thereupon the plt. shall have the same judgment to recover his costs that he would have had if the before-mentioned Act of the 13 & 14 Vict. c. 61, had not been passed." The plt., in the present case, comes within the first of the above conditions and, having made it appear to the satisfaction of the court that this action "was brought for a cause in which concurrent jurisdiction is given to the Superior Courts," he is entitled to recover his costs, and therefore this rule must be made absolute,

[Ex.]

MARCHMAN v. HUGHES (sued with BROOKES AND WIFE.)

[Ex.]

BRAMWELL, B.—I am of the same opinion. I have always entertained the notion that the statute of Elizabeth did not apply unless one of the judges of the Superior Courts had given a certificate. It is singularly worded: "If upon any action to be brought in any of Her Majesty's courts at Westminster . . . it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered," &c. My apprehension of the matter may be wrong, but the above is the construction I have always put upon this statute.

MARTIN and CHANNELL, BB. concurred.

Rule absolute for the plt. to have his costs taxed.
Plt.'s attorneys, *Dodd and Longstaffe*, 19, Great Portland-street, Oxford-street.

Def't.'s attorney, *J. P. Davis*, 15, Clifford-street, Bond-street.

Wednesday, Jan. 27.

MARCHMAN v. HUGHES (sued with BROOKES AND WIFE).

B. L. C. Acts 1849 and 1861—Debts contingent at time of bankruptcy—Administration bond—Intestate estate.

To an action on a bond given by an administratrix and sureties for not duly administering the estate of deceased by making and exhibiting inventories, paying the debts, rendering an account of the administration, and distributing the residue among the next of kin, def't. pleaded his bankruptcy before action. Replication, that def't.'s alleged bankruptcy was previous to the 24 & 25 Vict. c. 134 (the B. A. 1861), that the bond was not proveable under that Act, as plt.'s damages were unliquidated, and that he was entitled to a judgment to stand as a security against future breaches:

Held, on demurrer, that the replications were good, that the plea was bad, and that the plt.'s claim was not proveable under the def't.'s bankruptcy.

On the 9th Dec. 1858 letters of administration to the estate of Richard Baker, deceased, were granted to his widow Sarah Baker, now Sarah Brookes, wife of Henry Brookes. When the letters of administration were granted, a bond was executed by her (then Sarah Baker) and by def't. Hughes and one Joseph Taylor, since deceased, as her sureties in the penalty of 400*l.*, conditioned for the due administration of deceased's estate. On the 15th Feb. 1860 the Court of Probate ordered an attachment. Subsequently the administration bond was assigned to plt. by order of the Probate Court, and this action brought.

The declaration set out the administration bond, which was in the usual form, its breach and assignments.

Judgment was signed against Henry and Sarah Brookes for default of plea.

Plea by Hughes:—1. That said Sarah did make a true and perfect inventory, as required by the said bond, and did exhibit, and did make a just and true account of her said administration, according to the said condition, and did, as required by the said condition, duly administer and not waste the said personal estate and effects of the deceased, and did not incapacitate herself as alleged, and there was no such rest or residue as in the said condition mentioned. 2. That the said bond is not the deed of the said person as alleged. 3. That the said bond was not assigned as alleged. 4. That before action he became bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before the def't. so became bankrupt.

Replication.—And for a second replication to the fourth plea the plt. says, that the said John Hughes

so became bankrupt as therein is mentioned, and was adjudicated bankrupt thereupon and obtained his certificate, being the discharge on which that plea relies, before the passing of the Act of Parliament made and passed in the 24 & 25 Vict. for amending the laws relating to bankruptcy and insolvency in England. And for a third replication to the fourth plea the plt. says, that at the time of the said bankruptcy the said condition had not, nor has it now, wholly been performed, and it was then and is now, and always has been, possible that further breaches of the said condition other than those which had been committed before the said bankruptcy might and may be committed. And the plt. says, that the damages in respect of the breaches in the declaration mentioned were never ascertained or liquidated, and that if they had been they would not have amounted to the said penalty of the bond, and that the said penalty never was proved under the said bankruptcy, and that no proof in respect of the bond, or of anything secured thereby or payable thereunder, was ever made under the said bankruptcy.

Demurrer to the special replications, and joinder in demurrer.

Field for def't. Hughes.—This is an action upon an administration bond against the surety; and the breaches assigned are—first, that the administratrix did not make out an inventory; secondly, did not exhibit an inventory in the district registry; thirdly, nor make any account of her administration, although required, and wasted instead of administering a great part of the estate of the deceased. The bond was assigned to the plt. to sue as a trustee for all persons interested. The def't. Hughes's plea of bankruptcy is *prima facie* a good plea to the declaration; the special replications do not avoid the plea, nor amount to a traverse of it, and the def't.'s bankruptcy is an answer to the action. In *Hankin v. Bennett*, 8 Ex. 107, the def't. as surety entered into a bond in a penal sum with the condition that if he should pay plt. such costs as he should in due course of law be liable to pay in case of a verdict for def't. the bond should be void (*scire facias* on a judgment obtained by plt. and assigned afterwards to C., since deceased, of whom plt. was executor), a verdict was found for the def't. who afterwards became bankrupt, and subsequently obtained his certificate, after which the costs were taxed. It was held that at the time the flat issued the def't.'s liability was a mere contingent liability, and not a contingent debt within the Bankruptcy Act, 6 Geo. 4, c. 16, s. 56, and therefore that the plt.'s claim for the costs was not barred by def't.'s certificate. [MARTIN, B.—Is there no case upon this point? *Dowdswell*, for plt., referred to

Bannister v. Scott, 6 T. R. 489;

Hodgson v. Bell, 7 T. R. 97;

Longford v. Ellis, 1 H. Bl. 29, n.; and particularly

The Overseers of St. Martin v. Warren, 1 B. & Ald. 491.

In this latter case the obligee in a bastardy bond, after the bond had been forfeited, became bankrupt, and obtained his certificate: it was held that the parish officers were not thereby precluded from recovering upon the bond for the expenses incurred subsequently to the bankruptcy. The court said it was a debt upon a contingency, in its nature incapable of valuation, and therefore not proveable under the commission.] There was nothing to measure the debt there; here there is; the estate of the intestate could be very well ascertained; or if not, then the penalty is the debt.

Dowdswell, for plt., was not called upon.

The plt.'s points were—as to the second replication, that the bond was not proveable under the B. L. C. A. 1849, for two reasons; 1, because the claim is for

unliquidated damages; 2, because the plt. is entitled to a judgment to stand as a security against future breaches. As to the third replication, that the bond is not proveable under the Act of 1861 because the plt. is entitled to a judgment to stand as a security against future breaches.

By the COURT.—The plt. is entitled to judgment.

Plt.'s attorneys, *Hilleard, Dale and Stretton*, 3, Gray's-inn-square.

Def't.'s attorney, *J. E. B. Stevenson*, 12, Cook's-court, Lincoln's-inn.

EXCHEQUER CHAMBER.

Reported by H. LKIOR, Esq., Barrister-at-Law.

ERROR FROM THE EXCHEQUER.

Wednesday, Dec. 2.

(Before WILLIAMS, WILLES, BLACKBURN, KEATINGE and MELLOR, JJ.)

ORCHARD v. ROBERTS.

Fulse imprisonment—Notice of action—Apprehension on charge of felony without warrant—"Found committing"—24 & 25 Vict. c. 96, ss. 103, 113.

In an action for arrest and fulse imprisonment of plt. upon a charge of stealing his employer's money, where the evidence was that def't. gave plt. (his shopman) into custody within five minutes after finding a marked florin in plt.'s possession, which plt. had received ten minutes before, and which in due course of business he ought to have immediately handed to the def't.'s cashier, it was

Held, by the Ex. Ch., that the plt. was not "found committing" the offence under sect. 103 of the 24 & 25 Vict. c. 96, and that def't. was not entitled to notice of action under sect. 113 of the same statute.

The def't. in the above action pleaded "not guilty" (by stat. 24 & 25 Vict. c. 96, ss. 4, 68, 103, 113), and the learned judge directed the jury that under the issue and evidence aforesaid as to the circumstance of def't.'s not having had the notice of action provided for by the statute, was not an answer to the action, and that the bona fides or mala fides of the def't. was immaterial to the right to the verdict, although it might affect the amount of the damages in the event of a verdict for the plt., and the Court of Ex. Ch. held that this was no misdirection.

Where the question is whether a def't. is entitled to notice of action on the ground of his having acted in conformity with the provisions of an Act of Parliament, the proper mode of leaving the question to the jury is, "Did the def't. honestly believe in the existence of those facts which, if they did exist, would afford a justification under the statute and so be a defence to the action?"

Hermann v. Sussenschel, 6 L. T. Rep. N. S. 646; 13 C. B., N. S., 252; 32 L. J. 43, C. P., discussed and approved.

Error from the Ex. on bill of exceptions.

This was an action for assaulting the plt., and giving him into custody, and causing him to be imprisoned on a charge of felony, whereby plt. suffered pain of body and mind, and was injured in his credit, and prevented from obtaining a situation as a silk salesman, and incurred expense in obtaining liberation from the said imprisonment; and he claimed 200*l.*

Plea (by stat. 24 & 25 Vict. c. 96, ss. 4, 68, 103, 113.) not guilty. Issue thereon.

At the trial before Martin, B., at Westminster, on the 29th Nov. 1862, it was contended that the def't. was entitled to notice of action under the statute, sect. 113. The following, amongst other evidence, was given on the part of the plt. The plt. himself deposed

as follows:—I went into the def't.'s service as principal silk salesman on the 8th May 1861, at two guineas a-week, with perquisites and board. The salesman keeps a book numbered, in which he enters his sales, and on making a sale he takes a bill to the cashier with a duplicate, gives him the money, and gets the change, passing a piece of paper with the amount and number of the sale to the cashier. The salesman has to go to the desk himself. On 8th Feb. I sold to a customer to the amount of 8*s.* 5½*d.* I took a sovereign in payment and took it to the desk, and received the change and brought it to the customer without counting the change. The next sale was to the amount of 18*s.* or 1*l.*, for which I received a sovereign. I took it to the cashier and gave the change to the customer. The cashier could see the sale. In less than ten minutes after the def't. called out, "Mr. Roberts, I want to speak with you." He said, "Mr. Roberts, what silver may you have about you?" I walked into the counting-house and took from my pocket all the silver money I had loose in that pocket. It was half-a-crown, a two-shilling piece, one shilling, and threepence. He said, "You have more than this." I said I had not. He said, "Oh yes, you must have." I took my porthmonnaie out and showed it to him. There was 4*l.* 10*s.* in gold and 6*s.* in silver in it. He said "You must have more." I began to be anxious, and said, "Do you suppose I have anything belonging to you in my possession?" He said, "Well, I don't say so." He looked at the money. I said, "If you think I have you had better take the usual course, and I will remain here." The def't. took the florin and returned in about five minutes with a constable, and said, "I give this man in charge for purloining this" (the florin). The constable took me in custody to Marlborough-street Police-station, where I was searched. I was taken to the Marlborough Police-office, where the def't. attended and preferred a charge against me before Mr. Yardley. I was discharged. It was 4:30 p.m. before I was discharged. I had changed a sovereign at the desk for my own purposes the day before, and received half-a-sovereign and silver in change. This florin was part of the change. I received it from the cashier, a boy called Mills, who had come lately into def't.'s employ. It was alleged to be marked. The magistrate said he could find no resemblance in the florin to the marked money. Several mistakes had been made by a previous cashier. I mentioned three cases of wrong change being given to me by the cashiers. The last was three months before this charge.

On cross-examination plt. said:—I told def't. I had got the florin the day before. He did not say it had been marked. I put no portion of the customer's change that morning into my pocket. I did not look what the change was. Excess of change was often given. It is the salesman's duty to take it back directly. If too little change be given the salesman goes back to get it corrected. I got the change this morning from Gifford, and did not see Mills at the desk that morning. I have got perhaps twenty times change in excess, perhaps three times change short. Def't. examined the money carefully, and looked at the florin several times.

Two of def't.'s salesmen, who were called on plt.'s part, proved the fact of mistakes in change frequently occurring, and change being often given in excess, and that plt. had often taken money back.

On the part of the def't. the following evidence was given:—

John Orchard, the def't., deposed:—Gifford, a cashier in my employ, made a communication to me. I gave him marked money on the 8th Feb., all silver. I called plt. into the counting-house in consequence, and he showed me this florin. I recognised it with some little difficulty. This is the florin. I thought it had been purloined, I have delivered marked money before to

the cashier. The mark I made that morning was not the same I had made upon money before. I am not positive whether I marked money the day before. I had marked to the number of twenty pieces of money.

Charles Mills, one of deft.'s cashiers, said:—Plt. had applied to me many times on account of his alleging I had given him short change. He has done so fifty times. I and my brother cashier had conversations about this, and I communicated with my master, the deft. I received some money from deft. on 8th Feb. Gifford and I were at the desk.

The witness Gifford said:—I was one of the cashiers. I gave money to the plt.

Martin, B., in summing up, directed the jury that upon the issue and evidence aforesaid the circumstance of the deft.'s not having had the notice of action provided for by the statute 24 & 25 Vict. c. 96, was not an answer to the action, and that the *bona fides* or *mala fides* of the deft. was immaterial to the right to the verdict, although it might possibly affect the amount of the damages to be assessed by them in the event of their finding a verdict for the plt. Whereupon deft.'s counsel interposed and requested the learned judge to direct the jury that the question for them was whether the deft. honestly believed that the plt. had wrongfully taken the said florin, and that in giving the plt. into custody, he, the deft., was exercising a legal power, and that if they believed so, the deft. was entitled to the verdict, on the ground that the notice of action required by the statute 24 & 25 Vict. c. 96, had not been given to the deft. This the learned judge refused to do, and directed the jury that the *bona fides* or *mala fides* of the deft. was immaterial to the right to the verdict on the issue joined. To that rule the deft.'s counsel tendered this bill of exceptions. The jury found for the plt. with 200l. damages.

D. D. Keane (with whom was Ballantine, Serjt.), for the plt. in error (the deft. below), appeared in support of the exceptions.—The case of the deft. below was presented to Martin, B., at the trial, on the authority of *Hermann v. Seneschal*, 6 L. T. Rep. N. S. 646; 13 C. B., N. S., 252; 32 L. J. 43, C. P., which is applicable. There it was held that an honest and *bona fide* belief on a deft.'s part that he was acting in pursuance of the Act 24 & 25 Vict. c. 96, entitled him to notice of action for the thing so done. A deft. mistaken in supposing a person was "found committing" is nevertheless entitled to the benefit of the Act. [WILLIAMS, J.—A difficulty with me is, that counsel should have put it to the court at the trial below. If a felony in truth was committed, and there were reasonable grounds for giving the plt. into custody, it is not by virtue of the Act, but by a common law right, that he does so.] The attention of the judge having been drawn to *Hermann v. Seneschal*, it was misdirection to say *bona fides* was immaterial. Deft. found his servant (the plt.) with marked money in his pocket ten minutes after he had received it from a customer. His keeping it during that ten minutes was a continuing conversion up to the moment it was found on him, and he was therefore "found committing" within the meaning of sect. 113 of the Act. [BLACKBURN, J.—Would you say that a summary arrest would be justified upon the ground of a continuing conversion by the person keeping the stolen property in his possession during, say, a whole month?] As in embezzlement, concealment and not force, is the essence of the offence, so here the concealing the money and giving a false account was evidence of the felony. The words "Do you suppose I have any money of yours?" were equivalent to "I have no money of yours." *Cann v. Clipperton*, 10 A. & E. 582; 8 L. J., N. S., 268, Q. B., decided that a person was entitled to notice if he *bona fide* believed that a felony had been

committed. [WILLIAMS, J.—Did the deft. believe that the plt. was "found committing?" It would have been misdirection to direct the jury as contended for by the plt. in error, unless they had been asked whether deft. honestly believed that plt. was "found committing."] The only proper mode of putting it, so as to prevent the Act being a nullity, is "Did he believe he was exercising a legal right?" Sects. 68 and 69 are relied on, together with sect. 113. According to *Cann v. Clipperton* it is not material whether he was "found committing" or not. The result of that case is stated by Talfour, J., in *Read v. Coker*, 22 L. J., N. S., 204, C. P.; 13 C. B. 850. "Found committing" is involved in what is put as the proper direction in the exception. [MELLOR, J.—I take the term "found committing" to be equivalent to being found in the fact. What is there to show that this florin had not been stolen the day before?] WILLIAMS, J.—It is not enough that deft. should think him a thief simply, but a thief caught in the fact. It is not necessary the master should know his particular power or the section of the Act. Even if he believed he had the legal power to do what he did. [WILLIAMS, J.—Suppose a master is told that his servant stole an article two days ago, and finding it to be true, sends for a policeman, is he therefore entitled to notice?] I would not go so far as to say that. It is enough that he *bona fide* believed he was doing something protected by the Act, and that what the law is was found afterwards. [WILLES, J. refers to the case of a keeper giving a party into custody under the Fishery Act, where it turned out that the ground was not within the fishery, and yet the deft. was held protected and entitled to notice: *Hughes v. Buckland*, 15 M. & W. 346; 15 L. J., N. S., 233, Ex.]

Joseph Brown (with Laxton), contra, for the deft. in error, the plt. below.—The exception is not sustainable. It was not pretended, at the trial, nor is it here to-day, that plt. really committed the offence, and so *Hermann v. Seneschal* is not applicable. Where the case rests on a deft.'s belief, it must be such a belief as would bring it strictly within the Act. In *Hermann v. Seneschal* and *Read v. Coker*, it was an undisputed fact that the party was taken in the act. No question could be raised there as to the deft.'s belief. [WILLES, J.—The whole and real question, and the true test is, as put by Williams, J. in *Hermann v. Seneschal*, whether the deft. honestly believed in the existence of a state of facts which, if they had existed, would have justified the deft.'s action.] (He was then stopped by the Court.)

D. D. Keane in reply.—The circumstances here are similar to those in the cases cited, and such as to show that plt. was necessarily "found committing." It is enough to put the question generally, Did he believe he was exercising a legal right? and if so, it is fantastic hypercriticism to say that the question must be put specifically, Did he believe that plt. was "found committing." If those words are necessary, they are involved in deft.'s belief that he was acting legally; and it is for the judge to expand them. If deft. was bound to believe that the man was "found committing," he was bound to know the chapter and particular section of the Act which would protect him in giving him into custody.

WILLIAMS, J.—The court are all of opinion that the judgment of the Court of Ex. must be affirmed, inasmuch as there is no foundation for the errors assigned by the bill of exceptions. I apprehend that the result of the cases cited (and I believe most of the principal cases have been mentioned in the argument) is this, that where the question is, whether a deft. is entitled to notice of action on the ground of his having acted in conformity with the provisions of an Act of Par-

ment, the proper way of leaving the question to the jury is, "Did the deft. honestly believe in the existence of those facts which, if they did exist, would afford him a justification under the Act for what he had done, and so be a defence to the action?" I am reading the words of Erle, C.J. and my own words in the judgment in the case of *Hermann v. Seneschal* (*ubi sup.*), which have already been read by Willes J. in the course of the argument. I continue to think that case to be good law and the result of the authorities. It is said by Mr. Keane that it is enough if the deft. *bona fide* thought that he was acting according to law, and that it is not necessary that he should have any specific state of facts in his mind at the time. To a certain extent that argument is well founded; that is to say, it is not necessary that he should know of the existence of the statute or of the precise enactment under which he is entitled to notice. But all difficulties of that sort are gotten rid of by the rule laid down by Erle, C.J. in *Hermann v. Seneschal*, and which seems to me to be a very convenient rule and in accordance with the intention of the Legislature. Taking that, then, to be the law, how is it to be applied to the present case? The ordinary course is to suggest that a felony has been committed, and that the deft. had reasonable ground for believing the plt. to be the guilty person. That was not, however, the course taken in the present case. We have only to deal with the question raised on the bill of exceptions, namely, whether the deft. could avail himself of the want of notice. In the present case, if the deft. had chosen to raise that defence, it would be raised by the inquiry being submitted, not simply whether the deft. believed the plt. to be guilty of stealing the florin, but whether he believed that plt. had been "found committing" that offence. If that had been left to the jury, it is plain they might have come to a conclusion on one part of the inquiry in favour of the plt., and on another part of it in favour of the deft.; that is to say, they might find affirmatively that the plt. had committed the felony, but negatively that deft. did not believe that plt. was "found committing" it; and it is clear, on the doctrine of the cases, that on that finding the deft. would have been disentitled to notice of action. At the trial, in the present case, the learned judge was asked to leave to the jury, not both the questions, but whether the deft. honestly believed that the plt. had wrongfully taken the florin, or that in giving him into custody he, the deft., was exercising a legal power. Now, had the learned judge left the question to the jury in these terms, as it is suggested he should have done, it would have been wrong, and open, as a misdirection, to a bill of exceptions on the part of the plt., because then the inquiries of the jury would have been confined to the single fact of the theft, and their belief of deft.'s belief therein, and their attention would not have been directed to the equally essential inquiry whether the deft. honestly and *bona fide* believed that the plt. had been "found committing" it. If the facts of the case had been such that the jury could not possibly have thought that the deft. believed that the plt. had committed the felony without believing that he had been "found committing" it, I should be inclined to agree with Mr. Keane's argument that this exception would be good; but upon the facts of this case such an assumption cannot, I think, be made; because on the true facts of the case, if the jury had found that the deft. had chosen to believe in the existence of the theft, but on looking at the circumstances they did not believe that the deft. believed that the plt. was "found committing" the theft, it would come to this, that the learned judge is to be held to be wrong because he did not put to the jury a question which, if he had submitted to them, would have been misdirection, and an answer to which

would not have involved a reply to both branches of the question.

WILLES, J.—I am entirely of the same opinion, and I will only add that I concur in treating that part of the exceptions as immaterial which states the question deft.'s counsel urged the learned judge to leave to the jury. It would have been improper, in my opinion, and a misdirection, if the learned judge had so left the question to the jury.

The rest of the Court (BLACKBURN, KEATING and MELLOR, JJ.) concurred. *Judgment affirmed.*

Plt.'s attorney, Wm. Venn.

Deft.'s attorneys, Lumley and Lumley, 2, Clifford-street, Bond-street.

BAIL COURT.

Reported by T. H. JAMES, Esq., Barrister-at-Law.

HILARY TERM 1864.

(Before CROMPTON and SHEE, JJ.)

STUART AND OTHERS v. WAUGH.

Arrest—1 & 2 Vict. c. 110—*Unsuccessful claim in bankruptcy.*

The court will not discharge a bankrupt debtor out of custody under the 1 & 2 Vict. c. 110, although a commissioner in bankruptcy has refused to allow the detaining creditor to prove against the estate for the same debt.

Prideaux moved for a rule calling upon the plts. to show cause why the deft. should not be discharged out of custody.

The application was made under the 1 & 2 Vict. c. 110, s. 6 (an Act for abolishing arrest on mesne process).

The facts material to the present case were as follows:—

In the year 1857 the deft. was adjudicated a bankrupt, and in 1859 the plts., the official managers of the London and Eastern Banking Company, sought to prove against the bankrupt's estate for upwards of 250,000*l.*, which included a claim for 14,500*l.* for unpaid calls, and the balance was for money advanced on promissory notes, &c.

The commissioner in bankruptcy held that the plts., not having paid up the proportion of subscription money necessary to make them a trading company, could not prove on the estate for the sums advanced, but he admitted proof of their claim for the unpaid calls.

In the month of March 1863 the deft. was arrested by the plts. for a debt of 50,000*l.*, which included a portion of the money advanced to him by them, for which the commissioner had not allowed them to prove. In July 1863 the bankrupt surrendered.

Prideaux contended that the plts. could not have two remedies, and that the unsuccessful claim in bankruptcy was a bar to any further proceedings for the recovery of the same sum. [CROMPTON, J.—I cannot think, at present, that it is in any bar. It would not be a defence on the merits, nor an honest defence.] The bankrupt admitted that he had remained abroad for some time since his adjudication, and had travelled under a feigned name, but he had no intention of defeating or delaying his creditors. Moreover, the state of his health was very bad, and he had lost the total sight of one eye.

CROMPTON, J.—There can be no hardship on the bankrupt if this application is refused, for, if he deserves it, he will procure his discharge when he has passed his last examination in the Court of Bankruptcy. This application is grounded on the alleged insufficiency of the debt. The old rule was, that the court would not inquire into the sufficiency or insufficiency of the debt, if the detaining creditor saw

BAIL.]

REG. V. JUSTICES OF HAMPSHIRE—ELLISON AND OTHERS v. BRAY.

[BAIL.]

that one existed; but that rule has now been altered. The onus of proving that no debt exists, and that the debt. has no intention of leaving the country, lies on him; and I think that he has not yet done so. The fact that the commissioner rejected proof of this debt is, in my opinion, no bar to the arrest, nor would it be good if pleaded in bar to an action. However much we may regret the state of the debt's health, it is not a sufficient ground for our interference.

SHKE, J. concurred.—The plts. had not lost their remedy by the commissioner's refusal to admit proof of the debt. Although the debt. swore that he had no intention of permanently leaving the country, there was no doubt that he remained abroad for a long time; nor should it be forgotten that the debt. had been arrested for a very large sum. *Rule refused.*

REG. V. THE JUSTICES OF HAMPSHIRE.

Order of quarter sessions, quashing rate—New rate—Taxation of costs—Adjourned sessions.

The order of quarter sessions quashing a rate need not proceed to direct a new rate to be made.

Costs may be taxed at any time between the quarter sessions and the adjourned sessions.

Bullen moved for a rule calling upon the debts. to show cause why an order made by them on the 28th Dec. 1863 should not be quashed.

At the Michaelmas Quarter Sessions held at Winchester, an appeal against a poor-rate (*Thurlow v. The Churchwardens of Newport*) was heard, and the rate was quashed with costs. An entry to that effect was made in the minute-book of the court, but the costs were not ascertained and taxed at once, nor any order made for a new rate. The sessions were adjourned until the 19th Nov., but before that day the app. gave notice to the resps. that he would proceed with the taxation of his costs; they declined to attend, and the costs were accordingly taxed in their absence, and an order made at the adjourned sessions granting the app. a certain sum for his costs.

Bullen contended that the taxation could not take place between the quarter and the adjourned sessions, and that the order for quashing the rate was deficient because it did not proceed to order a new rate to be made. [CROMPTON, J.—The order for a new rate need not be in the order for quashing an old rate. SHKE, J.—If we quash the order, the app. would have to pay his own costs, although he succeeded before the justices. CROMPTON, J.—Another difficulty is this: if we quash the order by which the rate was originally quashed, the rate which is admitted to be bad would be left. The app. has brought up the order for execution; you might move for a rule *nisi* to set it aside.] He admitted that he could find no authorities or precedents in his favour.

CROMPTON, J.—No authorities have been cited in support of the proposition that the order for quashing a bad rate must contain an order for a new one, and I do not see why it should do so. The technical objection as to the taxation is also, in my opinion, bad, for the court is the same at the adjourned as at the quarter sessions, and the taxation of costs may take place at any time between the two.

SHKE, J. concurred.

Rule refused.

STYRLING V. LLOYD.

Practice—Service of rule—Execution against goods.

Where the debt. has left the country, and has not since been heard of, proof that a copy of a rule has been left at his place of residence,

Held sufficient service to entitle the plt. to issue execution against his goods.

Newton moved to make a rule absolute, which

called upon the debt. to show cause why he should not pay a sum of money under an award.

The arbitrator had made his award in favour of the plt., and shortly after it was made the debt. had declared he would never pay the money. A rule calling upon him to do so was obtained in the early part of this term, and the only question was whether the service of it had been sufficient.

Upon inquiries being made at debt's house, the servant said that he had gone to America; his wife's sister took a copy of the rule upstairs to his wife, who was ill, and returned, saying that it was of no use bringing any more such papers to the house, as the debt. went to America in July last, and had not since been heard of, and all the furniture in the house belonged to his father-in-law.

Newton submitted that the service was sufficient, the rule having been left at the debt's residence, in order to obtain execution on it against the goods which were in the house.

CROMPTON, J.—I doubt whether this service would be sufficient, if you wished for an attachment against the person; but I think it enough to entitle you to issue execution against the goods. The strong matter is what was said by his wife and sister-in-law.

Rule absolute.

ELLISON AND OTHERS v. BRAY.

Arbitration—Award "subject to opinion of" another—Substituted judgment.

Where an arbitrator made his award "subject to the opinion" of another:

Held, that this was a substituted judgment, and the award therefore bad.

This was a rule to set aside an award, on the ground that the umpire had acted upon the opinion of his attorney.

The action was originally brought for removing the barriers between the mines of the plts. and some other mines; and the question of right depended upon the legal construction of an agreement, and of a resolution by which the debts. were empowered to extend the drifts from their mines to those of the plts. Upon the cause being referred, it was agreed, that no counsel or attorney should attend on either side, but that the question should be decided by gentlemen skilled in engineering.

The affidavits showed that the umpire decided to make his award in favour of the plts., subject to the opinion of his attorney as to the legal effect of the agreement and resolution.

Milward showed cause.—The umpire, when he took the opinion of his attorney, had already decided to make his award in favour of the plts. He was at liberty to consult others; nor has there been any delegation here. He referred to

Russell on Awards, pp. 208 *et seq.*;

Goodman v. Sayers, 2 Jac. & W. 249;

Whitmore v. Smith, 29 L. J. 402, Ex.

Mellish, Q. C. (T. Jones with him) in support of the rule.—An arbitrator may read books or consult with others, so as to inform his mind, but the judgment must be his own. This was a reference to engineering gentlemen, and the intention of the parties was that no legal opinion should be taken.

SHKE, J.—I am of opinion that this rule should be made absolute. It is clear that an arbitrator or umpire is allowed to consult others if he wishes to inform his own mind, but he must not substitute the opinion of another for his own. From the affidavits it appears that the award is that of the umpire's attorney, not the umpire's. The latter acted on his attorney's advice without a moment's consideration or discussion, and has substituted the judgment of another for his own.

REG. v. THE WEDNESBURY LOCAL BOARD OF HEALTH.

Costs of appeal—Resp. not appearing.

Where an appeal is affirmed, the resp., though he does not appear, will be ordered to pay the costs.

The authority of *Lee v. Strain* questioned.

This was a rule calling upon the app. to show cause why a rule of this court should not be amended by striking out so much of it as ordered the resp. to pay the costs.

The apps. having made some alterations in or near the resp.'s house, under the powers conferred on them by a local Act, summoned him before the magistrates to pay the expenses of the same. An objection was then taken on his behalf, that the surveyor of the board of health was an interested party, and this objection was held good, and the summons dismissed.

Against this decision the Board of Health appealed, but the resp. was no party to the appeal and did not appear.

The Court held, that the decision of the magistrates was wrong, and affirmed the appeal with costs. A rule to that effect was accordingly drawn up, and it was to strike out of it so much as ordered the resp. to pay the costs, that this rule was obtained.

Gray, Q.C. showed cause.—This rule was moved for upon the ground that the court does not give costs where the resp. does not appear. [CROMPTON, J.—In this case, they were specially asked for.] The rule, if it is a rule, applies in cases of convictions only. 20 & 21 Vict. c. 43, s. 2, gives the court power to order the resp. to pay the costs: [*Moore v. Smith*, 28 L. J. 126, M. C.] [CROMPTON, J.—We cannot tell what may have been passing in the minds of our brother judges in the full court when they granted the costs; they may not have thought of the rule.] The costs were expressly asked for. [CROMPTON, J.—I do not know of the existence of any such inflexible rule as that alleged here.] *Robinson v. Lawrence* and *Hunt v. Ray* apply to convictions only. The general rule acted upon in appeals from the ruling of County Court judges ought to be applied here.

H. Mathews in support of the rule.—*Lee v. Strain*, 28 L. J. 221, M. C., is an authority directly in my favour. It is admitted that the court has discretion in the matter. The rule acted upon and laid down in *Lee v. Strain* was the foundation of the advice given to the resp. by his attorney. He was advised not to appear, because, on the authority of that case, unless he appeared he would have to pay no costs. [CROMPTON, J.—It would be a very dangerous practice to allow frivolous objections to be taken before magistrates, on the chance of getting a favourable decision; then not appearing in case of an appeal, and so paying no costs.] All that the court did was to remit the matter to the justices. No cases have been cited in which a distinction has been taken between civil and criminal cases, as affecting this rule. The statute makes no distinction. The board of health appealed; the resp. gave notice that he would not appear. [CROMPTON, J.—There is no rule such as you allege; it may be the ordinary practice.] In *Moore v. Smith* both parties appeared: [*Venables v. Hardman*, 28 L. J. 33, M. C.] The practice in the Ex. Ch. is analogous to this; if the decision of the inferior court is reversed, the app. gets the costs in the court below only. [Gray referred to *Schroeder v. Ward*, 32 L. J. 150, C. P.; 7 L. T. Rep. N.S. 825.] The reason why the party who appeals from the ruling of a County Court Judge gets his costs is, because the costs of the appeal are in many cases so much greater than the sum in dispute, that the power of appeal would be otherwise a *damnum hereditas*.

Jan. 30.—SHEPHERD, J. delivered judgment.—This was a rule argued before my brother Crompton

and myself, calling upon the apps. to show cause why so much of a rule of this court as ordered the resp. to pay the costs of it should not be struck out. [His Lordship then stated the facts.] The ground upon which it was asked that the rule should be amended was, that the case of *Lee v. Strain* had not been brought to the notice of the court at the time the order for costs was made. That was a case in which it was stated by the court "our practice is, where no one appears on behalf of the resp., not to give costs." Now we have consulted the other judges of this court, and they say the rule *nisi* was granted because *Lee v. Strain* had not been brought to their notice before, and they therefore thought that it was a matter which should be reconsidered. We do not mean to lay down any general rule that where the resp. does not appear the costs will follow the event; but, on the argument, cases of appeal from the decisions of County Court Judges were cited, in which it was held that, in such cases, as a general rule, the successful party is entitled to costs. We think these cases more analogous to the present one than that which was referred to and relied on. The rule will, therefore, be discharged.

Rule discharged.

REG. v. THIRLWIN.

Quo warranto—Relator—Affidavit.

The affidavit upon which the rule for a quo warranto is moved must show upon the face of it that the "relator" is duly qualified, and no amendment is allowed afterwards.

This was a rule calling upon the deft. to show cause why a quo warranto should not issue to show by what authority he exercised the office of a councillor in Bolton.

The grounds on which the rule was obtained was, that several persons who voted for the election of the deft. as councillor personated burgesses.

Manisty, Q.C. (with him Milward) showed cause.—The relator must be a Burgess, or subject to the jurisdiction of the borough:

Ree v. Cunliffe, 6 T. R. 503;

Ree v. Parry, 6 Ad. & E. 810;

Rule 8, Nov. 1839.

The affidavits state that the relator is a tailor in Bolton; they do not show, as they ought to do, that he is a householder, and subject to the jurisdiction of the corporation.

Welsby in support of the rule.—A man who is stated in the affidavit to be "a tailor in Bolton," must *prima facie* be assumed to be a householder there, especially as he goes on to say that "he applies as relator."

CROMPTON, J.—The rule is imperative, that there must be a good relator at the time the rule is moved for; therefore no amendment can be allowed.

Rule discharged without costs.

BRADFORD v. WOOLLEN.

Award—Enforcement of in favour of party charged with perjury.

The court will not refrain from enforcing an award, except for some defect manifest on the face of it. Therefore, where it appeared that the party in whose favour an award had been made was subsequently committed to take his trial for perjury in the matter of the award:

Held, not sufficient ground to prevent the court enforcing the award.

Rule to show cause why an award should not be enforced, by which the deft. was ordered to pay a sum of money to the plt,

[BAIL.]

GRIFFITHS v. JENKINS—*Ex parte* SIR G. EAST.

[BAIL.]

Coleridge, Q.C. showed cause.—The question between the parties was, whether a certain contract was entered into by the deft. on account of the plt., or on his own account. The plt. before the arbitrator swore that the deft. entered into it on his own account. The deft. charged him with perjury, and he had been since committed by the magistrates to take his trial for that offence. The point is, whether the court will enforce an award made in favour of a party charged with perjury. [CROMPTON, J.—You should have moved to set it aside. We cannot hear anything but what appears on the face of the award. You should have indicted him earlier. The invariable rule is not to interfere except where there is something bad on the face of the award. Here there is only an *ex parte* hearing before the magistrates.] The application now is to prevent the interference of the court in enforcing the award.

CROMPTON, J.—If an action were brought on the award, it would be no defence to plead that the party in whose favour it had been made had been since that time charged with perjury. Even if the grand jury had found a true bill, I doubt whether we could interfere.

Rule absolute

GRIFFITHS (app.) v. JENKINS (resp.)

Statute of Frauds—Interest in land—Mere licence—Surface-damage.

Where A. verbally agreed to allow B. to enter on his land, and erect a limekiln and work a quarry on it, on consideration of B. paying for the damage caused by passing and repassing:

Held, that this was a mere licence, not an interest in land, and therefore not within the Statute of Frauds.

This was an appeal, in the form of a special case, from the ruling of the County Court judge at Neath, in Glamorganshire.

The plt. below sued the deft. below, to recover damages for injury caused to the plt.'s land by the working of quarries and limekilns by the deft. on the land.

It appeared that in 1857 the app. informed the resp. that he wished to open a limekiln on his land, to which the latter replied, that he had no objection, provided he were paid for whatever damage might be done, and his landlord did not object. The resp. verbally agreed to these terms, and accordingly the quarries and limekilns were worked from that time to 1862.

In 1859 *Sl.* was paid for the damage so done, but in 1860 the app. refused to pay any more, on the ground that he had a grant of the quarries and limekilns from the landlord.

The case stated that there was no evidence of the grant, but that it was admitted. Upon these facts a verdict was entered for the plt., damages 25*l.*, which included a small sum for a fence which the resp. had been obliged to erect round the quarries.

Coleridge, Q. C., for the app.—First the parol agreement is void, as affecting an interest in land:

Carrington v. Roots, 2 M. & W. 248.

[CROMPTON, J.—Does any interest pass, or is it a mere licence?" Secondly, there was nothing said, at the time of the agreement, as to putting up a fence. The plt. cannot recover for that. Thirdly, the acts of the app. were committed in respect to an alleged title to land; therefore the County Court has no jurisdiction: (9 & 10 Vict. c. 95, s. 58.)] [CROMPTON, J.—The judge finds no question of title, but merely that the app. acted in respect of an agreement; he seems to have decided nothing in respect of the grant, the only question with him was whether there was a contract or not.]

H. James for the resp.—This is a mere licence to go on land and erect a lime-kiln thereon; therefore

the Statute of Frauds does not apply. There was no agreement for the payment for the stone, but merely as to the damages for passing and repassing over the land.

Wood v. Leadbitter,

Wright v. Stavert, 29 L. J. 161, Q. B.; 2 L. T. Rep. N. S. 175.

[CROMPTON, J.—The licence was revocable; if the licence was revoked, and an action brought for going on the land, there would be no defence to it.] The app. admitted his liability down to 1860:

Cockell v. Ward, 1 C. B. 158.

Coleridge, Q. C., in reply:

Carrington v. Roots, 2 M. & S. 248; per Parke, B.

[CROMPTON, J.—Where the agreement is that crops or potatoes shall remain on the land, it has been held that an interest passes, because they derive sustenance from it.] The contract here was that the app. should come on the land and erect quarries and lime-kilns on it; surely that was a passing of an interest which he would not otherwise have. [CROMPTON, J. referred to *Doe dem. Hanley v. Wood*, 2 B. & Ald. 724.]

CROMPTON, J.—I am of opinion that the judgment in the County Court was right. There was abundant evidence of a contract to pay for what is called surface-damage, in consideration of a licence to pass and repass. There is a great difference between this case and those which affect the right to take crops, &c. It may be that a licence to take sand or stone would not be within the statute; they derive no sustenance from the land.

SHKE, J.—The only way in which it could be said that this is an interest in land, would be by holding that the tenant parted with so much of his interest in the land as is occupied by the quarries and lime-kilns; but the case finds only an agreement to pay for the surface-damage. Mr. James withdraws the claim for the erection of the fence, which cannot be supported, therefore there will be

Judgment for the resp., with costs.

Ex parte SIR G. EAST.

10 & 11 Vict. c. 38—*Drainage—Costs—Inclosure Commissioners.*

The 10 & 11 Vict. c. 38, s. 6, authorises the Inclosure Commissioners to require such security to be given as they shall think fit for the payment by the applicant of all costs incident to the inquiries and proceedings in relation thereto:

Held, that the commissioners have no power under this section to direct the costs incurred by a party who successfully opposes the application, to be paid out of such security.

Cooke, Q.C. moved for a rule calling upon the Inclosure Commissioners of England and Wales, to show cause why they should not direct the costs incurred in a certain inquiry to be ascertained and paid. The owner of Castle-Eaton, a parish situate between Wiltshire and Gloucestershire, had applied under the 10 & 11 Vict. c. 38, to the Inclosure Commissioners, in order to have his land drained. Sir George East, the owner of land on the opposite side of the river, opposed the application, which was refused by the commissioners, after hearing both parties. The 6th section of the Act in question is as follows:—"And be it enacted, that the commissioners may in every case, before they shall proceed to act or inquire of or in relation to any such memorial as aforesaid, require such provision or security to be made or given as they shall think fit for the payment by the parties making the application, of all costs incident to or to be occasioned by the inquiries and proceedings in relation thereto." The commissioners were perfectly willing

direct the costs incurred by Sir G. East to be paid out of the security; but they doubted their power to do so under the Act. He submitted that the word "inquiries" refers to what is done preliminarily by the commissioners, and "proceedings" includes the subsequent steps, such as the opposition, &c. [SHEE, —The words "inquiries and proceedings" seem to me to apply to the words "before they shall proceed to quire."]

CROMPTON, J.—I think that the words are not strong enough to give the commissioners the power in would wish them to have. If the Legislature did wish to give the party who opposes successfully his costs, they might have said so in explicit terms.

SHEE, J. concurred.

Rule refused.

Ex parte MASTERS.

52 Geo. 3, c. 209—Newgate prison for criminal offenders—Civil process.

By the 52 Geo. 3, c. 209, Newgate is made a prison for the reception of criminal offenders only. Therefore a person, committed by civil process cannot be detained there.

This was a rule calling upon the Income Tax Commissioners for the parish of Kensington, the Commissioners of Inland Revenue, and the keeper of Whitecross-street Prison, to show cause why a writ of *habeas corpus* should not issue to bring up the body of George Masters.

The facts were these:—Masters was the collector the income tax for Kensington, and became a dealer. He was thereupon committed to Newgate, & removed himself by *habeas corpus* to the Queen's son.

Upon the passing of the Queen's Prison Discontinuance Act, he was removed by order of the Chief Justice to Whitecross-street. The question was whether the original commitment to Newgate was good. Keane showed cause.—The commitment took place under the 3 Geo. 4, c. 88, by which authority was given to imprison a defaulter and seize his estate.

A particular gaol is mentioned in the Act; therefore the common gaol of the county is the proper prison. By the 52 Geo. 3, c. 209, Newgate was declared to be the common gaol of the county of Middlesex; & before the commitment to Newgate was proper. By 4 Geo. 4, c. 64, s. 4, gives power to classify prisoners, and if there is any prison where there are means of classifying all the prisoners, such prisoners may be removed to other gaols, where they may be kept in particular classes; but it is not necessary to name the other gaol in the warrant. [CROMPTON, J.—The prisoner ought to be sent to a gaol where he has a right to detain him.]

Keane in support of the rule.—The question is, whether this person could lawfully have been committed to the gaol of Newgate. It was not a criminal process; it was a commitment under a civil process in which he had paid the money. The 3 Geo. 4, c. 88, gave the commissioners power to imprison a defaulting collector; if a person refused to pay the tax, they might commit him to the common gaol. It is added that Newgate is the common gaol for the county of Middlesex. There were other provisions for transferring prisoners who were not felons or other prisoners, from Newgate to other prisons. Newgate is a criminal prison only. Persons committed for contempt could not be kept there. The original commitment ought to have been to Whitecross-street.

CROMPTON, J.—I am sorry that this case has been argued before a single judge, for it involves the construction of difficult Acts of Parliament; but I have received much assistance from the lucid arguments of the learned counsel, and it is a case which

admits of no delay, as the liberty of the subject is involved in it. I am of opinion that Newgate is, under the Act, intended for criminal offenders only, and it is clear that the party in whose behalf this application is made was not committed as such. Then the question arises, was the warrant good when it issued? It can be good only if it issued to the proper gaoler and the prisoner was taken into the proper custody. Mr. Keane says, that when once the prisoner was in Newgate the sheriff could deal with him, but I cannot accede to that proposition. The preamble of the statute, the 52 Geo. 3, c. 209, shows that its object was to constitute Newgate a prison for persons committed for crime, while other prisons might receive persons committed under civil process. Sect. 56 refers to "felons and other persons not by this Act authorised to be confined;" but the "other offenders" must mean such prisoners as misdemeanants who are alluded to in the 1st section. Then the 57th section says that prisoners for contempt shall be treated as committed under civil process. I was perplexed at first with the language of the 58th section, but the words "or others" must mean persons charged with a *delictum* or crime; it cannot be intended that any persons may be sent to Newgate under civil process. The warrant, therefore, ought not to have been sent to Newgate, nor could the gaoler say that the prisoner was rightfully in his custody. He must therefore be discharged. It is practically of no great consequence to the prisoner, for I suppose he can be apprehended afresh on a good warrant.

Rule absolute.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 23.

(Before COCKBURN, C.J., CROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. v. EPHRAIM GRAY.

Indictment—Felony—Omission of "*feloniously*."

An indictment under the 24 & 25 Vict. c. 97, s. 15, for the felony of damaging a machine, with intent to destroy the same, charged the offence to have been committed "*unlawfully and maliciously*," in the language of the statute, but omitted the word "*feloniously*."

Held bad, as the word *feloniously* was a term of art and necessary in all indictments for felony, whether at common law or created by statute.

Case reserved for the opinion of this Court.

At the Michaelmas Quarter Sessions for Essex, held at Chelmsford, on Oct. 20, 1863, Ephraim Gray was put upon his trial upon the following indictment:

Essex, to wit.—The jurors for our Lady the Queen, upon their oath present, that Ephraim Gray, late of the parish of Romford, in the county of Essex, labourer, on the 29th Oct. A.D. 1862, with force and arms, at the parish aforesaid, in the county aforesaid, did unlawfully and maliciously damage with intent to destroy certain machines, then and there being and used for ploughing and performing other agricultural operations, to wit, two ploughs and one scarifier, the property of John Samuel Finch, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

He pleaded not guilty.

His counsel objected to the validity of the indictment that the word "*feloniously*" was omitted from it; and also contended that as the ploughs which he was charged with unlawfully and maliciously damaging were one of them a patent plough of Bastall, and the other an ordinary plough, both of them of a description commonly in use in agriculture,

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and worked by horses, and the scarifier alsowas of a description commonly in use, the damaging was not an offence within the statute 24 & 25 Vict. c. 97, s. 15.

The Chairm in left the facts to the jury, who found the prisoner guilty; and the Court directed that the prisoner should enter into a recognisance of bail, with a surety in the sum of 50*l.*, conditioned to appear and receive judgment when called upon, and reserved the two questions of law for the consideration of the Justices of either Bench and Barons of the Ex.

C. G. ROUND, Chairman.

Amended pursuant to the order of the court, bearing date, Nov. 21, 1863. C. G. ROUND, Chairman.

Murphy for the prisoner.—The indictment is bad for the omission of the word "feloniously." It is founded on the 24 & 25 Vict. c. 97, s. 15, which enacts that whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless any machine or engine, &c., shall be guilty of felony. This being a charge of felony, it is necessary to allege that the person charged feloniously committed the act. The old law, that all felonies must be laid to have been done "feloniously," is not altered by the Consolidated Criminal Statutes. (He was then stopped.)

Philbrick for the prosecution.—The indictment is sufficient, and follows the words of sect. 15, charging that the prisoner did unlawfully and maliciously damage, &c., and alleges what that section declares to be a felony. In a note by Hammond to Com. Dig. "Indictment" G. 6, "So an indictment for felony ought to say *felonice*," referring to *Rez v. Johnson*, 3 M. & S. 539, where the word feloniously was omitted before the word embezzle, it was doubted whether it was necessary to aver it if the offence was described in the words of the statute. [By the COURT.—But the indictment in that case concluded, "And so the jurors say that he did 'feloniously' embezzle," and that was held sufficient.] *Rez v. Crighton*, Russ. & Ry. 62. [WILKES, J.—In *Holford v. Bailey*, 13 Q. B. 426, the Court said, that where the words are words of art, you cannot use equivalent expressions. That was in a case where the argument was whether equivalent expressions would do. Parke, B. said: "If, indeed, the words 'several fishery' were terms of art, such as the words 'felony,' 'murder,' 'burglary,' equivalent expressions could not be used."] If this were an indictment at common law I admit nothing could cure the defect. [COCKBURN, C. J.—What distinction can there be between the unwritten law, which attaches the crime of felony to a given state of facts, and the statute law which does the same?] He referred to Hawk. P. C. "Indictment," ss. 55, 110.

COCKBURN, C. J.—All the text-books lay it down as a general rule, without any distinction as to felonies at common law or by statute, that in an indictment for felony the word "feloniously" must be used. I think that principle is well founded in substance, and that it is a wholesome rule that there should be on the face of the indictment an intimation whether the offence charged is a felony or misdemeanor. It would produce great confusion if it were not so, and it is safer to adhere to the old rule. Therefore the indictment not having laid the offence to have been "feloniously," it is bad.

CHUMPTON, J.—I am of the same opinion. This is not a mere technical rule. According to all the precedents and text-books it is necessary to show on the indictment whether a felony or misdemeanor is charged.

The rest of the Court concurring,

Conviction quashed.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs.,
Barristers-at-Law.

BRISTOL.

Oct. 26, Dec. 9, 16 and 24, and Jan. 12.

(Before Mr. Commissioner HILL.)

Ex parte GOSS AND ANOTHER (Trustees), *re* W. AND J. H. WILLMETT.

24 & 25 Vict. c. 134, s. 192—Deed of assignment Protection of creditors and *r*—Non-delivery of books to trustees—Adjudication of bankruptcy.

Creditors may be as amply protected under deeds registered pursuant to the 192nd section of the B. A. 1861, as under adjudications in bankruptcy, except in regard to transactions impeachable as acts of bankruptcy.

Where fallacious representations as to the amount of debts owing by a debtor are made to creditors as an alleged inducement to them to assent to a deed, the burden of proof is thrown upon the trustees seeking to uphold the deed, to satisfy the court that the requisite majority of assents has not been obtained by means of such representations.

A debtor having executed a deed of assignment for the benefit of creditors, neglected to give up to the trustees his books of account, the possession of which was necessary to enable the trustees to get in the debts due to the estate, until some time after execution of the deed:

Held, that the requirements of the 7th condition of the 192nd section had not been complied with.

Annulling adjudication. This was an application under the 199th section of the B. A. 1861, on behalf of Samuel Goss and Thomas Beynon, trustees under a deed of assignment executed by the bankrupts for the benefit of their creditors pursuant to the 192nd section, to dismiss the petition for adjudication and annul the bankruptcy. The circumstances were as follows:—

On the 22nd Aug. 1863 the bankrupts, who were shipbuilders at Newport, disposed of their dry dock, shipbuilding yard, stock and implements of trade, to a joint-stock company for a sum of 8000*l.* The purchase-money was received by Messrs. Baker, Greatrex and Co., bankers, of Newport, and by them applied in discharge of a debt due from the bankrupts. On the 19th Sept. the bankrupts executed to trustees for the benefit of their creditors, a deed of assignment of all their estate and effects, their joint estate consisting of debts due to the firm and the separate estates of the furniture of the bankrupts severally. On the 7th Oct. a petition for adjudication was filed, the act of bankruptcy being the deed of assignment. Upon the adjudication being made, an order was obtained to suspend the advertisement, upon the ground that time was required to complete the registration of the deed of assignment; and on the 26th Oct. the present application was made, on behalf of the trustees, to dismiss the petition for adjudication. The application was supported by an affidavit of the bankrupts, setting forth that the deed of assignment had been duly registered, and that all the other requisites had been duly complied with. On behalf of the petitioning creditors, it was proposed to examine witnesses, and to cross-examine the bankrupts. This being objected to, the court required the petitioning creditors to allege special ground for the application. Accordingly affidavits were filed in support, and on the 3rd Nov. the court pronounced an order that the petitioning creditors be at liberty to summon and cross-examine the bankrupts, and to summon and examine other witnesses *vidâ vocis* in opposition to the motion to dismiss the petition, and giving liberty to the trustees under the deed of assignment and the bankrupts to tender evidence

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viva voce, and to cross-examine the petitioning creditors' witnesses.

Several witnesses having been examined, the case now came on for argument.

Abbott appeared in support of the application.

Edlin, for the petitioning creditors, cited

Ex parte Harris, 9 L. T. Rep. N. S. 239; and

Ex parte Cockburn, Ib. 403 and 464.

Upon the point that literal compliance with the requisites of the section was essential. He referred to

Ex parte Grainger, 5 L. T. Rep. N. S. 464; and

Ex parte Bennett, Ib. 493.

Abbott in reply.

Jan. 12.—*Mr. Commissioner HILL*.—Upon this application it will not be necessary for the court to deal with all the points to which its attention has been drawn. During the argument it appeared to me likely that my decision upon one of these questions would of itself determine the whole case. It seemed to me that it might be found essential to the interests of the creditors that a judicial investigation should be had of certain claims of which the court could take no cognisance by virtue of its powers over the registered deed. Doubtless, by the 197th clause of the Act of 1861, the jurisdiction of the court in the administration of the debtor's estate under such deed is as extensive as that in bankruptcy. But bankruptcy is of two kinds, and the rights of creditors under the one are not so large as those under the other. Under an adjudication upon a bankrupt's own petition, to which I think a registered deed assimilates itself, the doctrine of relation has no place, and for want of the aid which such a doctrine affords it may sometimes happen that wrongful acts and contracts on the part of the bankrupt, which are injurious to his estate, cannot be impeached. Now, I was for some time under the impression that transactions of this nature had been shown to have taken place in the affairs of the Willmetts, but such is not my present opinion. The transactions to which I particularly refer are those between the Willmetts and their bankers with respect to the dry dock, and its appurtenances. With regard to the dry dock, I need say no more than that, after a very anxious consideration of that part of the case, I am unable to see how any legitimate use can be made of it, either on behalf of the estate or to raise objections against the deed. As respects several alleged fraudulent preferences to a considerable amount, these may be just as advantageously investigated under the deed as under the adjudication. This point is determined beyond all dispute by the case of *Stevenson v. Newnham*, 13 C. B. Rep. 285, where it was held in error from the Court of C. P. that fraudulent preferences might be impeached under a bankrupt's own petition, because, though not assailable as acts of bankruptcy, they were invalid as being in the nature of fraudulent conveyances. Consequently, upon the authority of that case, I hold that creditors may be as amply protected under registered deeds as under adjudications in bankruptcy, except where some transaction not otherwise obnoxious to law or equity is to be impeached on the ground of its being an act of bankruptcy. In the case before me I see no prospect of such a power being called into exercise. But the question upon which the judgment of the court will turn is, whether or not all the requirements of the statute necessary to bring dissentient creditors within the operation of the deed, and to bar their claims, as in bankruptcy, have been fulfilled. Among other objections it was urged that some of the assents had been obtained upon erroneous representations of the amount both of debts and assets. I see no reason to believe that these statements were wilfully false, though certainly the bankrupts or their agents cannot be acquitted of great negligence, when it appears that the amount of debts is stated at less than two-thirds of

the amount afterwards sworn to upon registration. On the other hand, the assets were estimated at an amount which it is not very probable they will ultimately realise. Still, as to them, there is no discrepancy between the amount represented to creditors and that afterwards sworn to on registration. But a very important portion of that amount consists of a debt of about 2600*l.* alleged to be due from Her Majesty's Government for the building of ships, whereof the Government disputes all but 700*l.* Passing, however, by that part of the objection which relates to the assets, I think that grossly fallacious representations as to the amount of the debts due from the bankrupts, though not open to reproach on the score of insincerity, are a matter of grave moment, and although it is not established that such representations were made to an extent which either, as to number or amount, would prove the proportion of assents required by the Act not to have been obtained, yet when it is shown that fallacious representations were made to certain creditors, the burden of proof is, I must think, thrown upon the trustees to satisfy the court that the assents of a majority in number, representing three-fourths in value of the creditors, are not tainted by the error to which I have adverted. This proof has not been given; and on that ground, even if it stood alone, I should feel compelled to find that the requirements regarding assents had not been fulfilled. But there is firmer ground behind. The seventh condition of the 192nd clause is "that immediately on the execution of the deed by the debtor, possession of all the property comprised therein of which the debtor can give or order possession shall be given to the trustees." Now the deed comprised all the property belonging to the arranging debtors; but it is in evidence that the books of the trade were not delivered up to the trustees until about a fortnight after execution of the deed, and that such non-delivery was not through inadvertence, although inadvertence would be no justification, but was persisted in notwithstanding remonstrances by the trustees against such delay, to which therefore they cannot be considered as giving even an implied consent, although until they had come into their possession they would have no authority to consent to their being in other custody than their own. In answer to this objection, it was argued that under the Bankruptcy Acts books of account are distinguished from property, and therefore do not fall within the terms of the seventh condition; to which it might be replied that by the 137th clause such books are in a certain event directed to be sold, and by the 121st clause it is provided that no lien upon them shall be valid in case of bankruptcy, sale and lien being notorious *indicia* of property. But a more satisfactory reply is, that books do not acquire their character of property from Acts of Parliament relating to bankrupts, nor indeed from any other statutes, but are property by the nature of things; and that, therefore, nothing less than the most stringent enactment to the contrary can prevent their being so treated. It will not be denied that they may be made the subject-matter of larceny, surely a severe test of their being property. The reason for distinguishing them in the Bankruptcy Acts from other kinds of property is probably because they are made objects of peculiar care, distinct provisions being introduced to ensure their prompt seizure and their safe custody. But the control of the books was most important to enable the trustees to take possession of the debts due to the estate, so far as possession can be had of such property, those debts forming by far the largest portion of the assets. The bankrupts gave no notice to their debtors of the transfer to the trustees, and consequently payment to the bankrupts themselves would have been a good discharge of such debtors as against the trustees. This omission would have made it imperative

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upon the trustees to require an instant delivery of the books, even if the books were not property, and therefore not within the seventh requirement. And such omission, or perhaps more properly such refusal, would, in my opinion, of itself support a finding that one of the requirements remained unfulfilled. It was alleged that the books were kept back for the purpose of making up the accounts, but it scarcely need be said that even if the alleged fact had been established it would not have altered the case. I could have wished I had been able to permit the creditors to persevere in a course of their own adoption; and this court will certainly never interpose to vary such a course without the most cogent reasons. For where the creditors retain the management of the estate which has become their property, even should they find in the end that it is not administered with greater economy than in a Court of Bankruptcy, yet being administered by themselves they will be content with what they have done, or at all events will feel that they have no right to complain of the law. But the Legislature, in giving to the majority of creditors the power to bind the minority, felt it necessary that strict requirements should be imposed upon the majority to guard the interests of the dissentients; and although these requirements ought not to be construed so as to make their fulfilment impracticable or extremely difficult, yet it is incumbent upon the court to see that they are fairly and substantially complied with. I am of opinion that in this case the requirements of the Legislature have been disobeyed, and therefore that the motion to dismiss the petition in bankruptcy must be dismissed.

Application refused.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON,
Esqrs., Barristers-at-Law.

Jan. 26, 27, and 29.

(Before the LORDS JUSTICES.)

BROUN v. KENNEDY.

Barrister and client—Deed by client in his favour—Undue influence.

*The deft., a barrister, acted professionally on behalf of Mrs B., one of the plts., then a widow, and by his services gained for her very large estates. Soon after the litigation was finally determined in her favour, and while the parties continued still on the most friendly terms, she executed a deed whereby, in consideration of his services, she conveyed to him all the estates to which her title had been thus established, to hold the same to him and his heirs, to the use of her, the grantor, for her life, and after her death to the use of him, his heirs and assigns, subject to a charge of her debts and of 10,000*l.* which was to be subject to her appointment. Difference having arisen between the parties, the lady (who had married again) filed her bill to have the deed set aside, and the reversion reconveyed; and the M. R. having made a decree according to the prayer, with costs, upon the pl't's appeal from that decree, Their Lordships dismissed the appeal with costs.*

This was an appeal by Mr. Charles Rann Kennedy, one of the defts. in the suit, against a decree of the M. R., ordering him to reconvey to the female pl't., Mrs. Patience Broun, formerly Mrs. Patience Swinfen, widow, and her heirs, the reversion of certain real estates in Staffordshire, reputed to be worth about 60,000*l.*, which were devised to her by the will of the late Mr. Swinfen, her first husband's father; and his Honour ordered that all costs of the suit should be paid

by Mr. Kennedy. The case is fully reported at 9 L. T. Rep. N. S. 302, and from that report, and especially from the elaborate judgment of the M. R., the circumstances so fully appear that no part of them, nor of the learned arguments, need be now stated. The deed (which is short) appears *verbatim* in that report, and the whole of it was read by Knight Bruce, L. J. in delivering judgment.

The appeal being from the whole decree, it was opened by

Cole, Q.C. and Kay on behalf of the pl'ts.—They referred to

Holman v. Lognes, 4 De G. M. & G. 270;

Wood v. Downes, 18 Ves. 120.

Kennedy in person supported his appeal.—During his argument he referred, but only generally and by name, to the authorities he had cited at the B.Ls.

Cole, Q.C. having been heard in reply, judgment was reserved till the 29th Jan., when

Lord Justice KNIGHT BRUCE said:—In this case of *Broun v. Kennedy* the deft., a barrister, acted during some part of the year 1856, and during the whole of the years 1857 and 1858, and at least the first four or five months of 1859, professionally on behalf of the female pl't., then a widow, by name Mrs. Swinfen, and as her confidential adviser. The relation between them was mainly, if not altogether, commenced for the purpose of supporting the strongly-opposed claim, which, as devised or alleged devise of her father-in-law, a gentleman formerly of Staffordshire, she made to real estate and property of considerable value. The deft. appears to have been an able and effectual adviser and advocate of the lady in this contest, which, after some years, in various shapes and with varied success, was brought to a termination in her favour very shortly before May 1859. In the early part of that month the lady and Mr. Kennedy executed at Birmingham the deed in question, which bears date the 10th May 1859, and is set out in the bill to the following effect: [Having read the whole of the deed, which will be found at p. 303 of the previous report, his Lordship proceeded as follows:]—This deed, I need scarcely say, has reference to the various and extensive litigation in which, and with reference to which, the lady had been by him as her professional adviser so materially assisted. The only question now before us, besides the costs of the suit, is, whether we should allow the deed to stand, or should set it aside with the consequential directions. The contents of the deed are alone sufficient to condemn it on the assumption that the recitals contained in it are true; but with respect to their truth the deft., who himself drew this instrument, certainly cannot complain. It is, however, not perhaps impossible to suppose the existence of circumstances in point of fact sufficient to support the deed in the deft.'s favour. Are there, however, any such circumstances in evidence before the court? In my opinion there are none. The deed was either a mere gift, or was executed in pursuance of a contract. As a gift of course it cannot be sustained between a client, whether man or woman, and the counsel of that client who had been so recently engaged in professional and legal matters such as have been mentioned for recovering for his client the real estate itself, of which so valuable a portion formed the subject of the gift. Then as to the question whether it was in pursuance of a contract, the draft of the deed was prepared by the deft. himself, and there was no professional person consulted on behalf of the lady before she executed it, except Messrs. Collis and Orr, of Birmingham, solicitors, in whose office and under whose directions the deed was executed on the 10th May 1859. They saw her and spoke to her before her execution of it upon that day, and they attended her execution of it. I am of opinion that, apart from all considerations of public policy, the lady had and has a

right to complain seriously and effectually that she laboured under a want of sufficient advice, information and assistance on the subject, before and when she executed the deed, which in my judgment was and is an instrument of great and substantial and manifest impropriety, one from which the lady who executed it, however clever she may be and probably is, has a plain right to be delivered, and against which relief could not be refused to her without manifest discredit to the administration of justice. There being nothing else in the question, the appeal of Mr. Kennedy must be dismissed with costs; for although there are some inaccuracies in the bill, they are all of such a nature in such a case as to be of no moment.

Lord Justice TURNER said:—I have no intention to say more than a very few words upon this case. The decree appealed from is in such entire conformity with the rules and principles and the decisions of this court, that its complete validity cannot be doubted for one moment. Although I thought it my duty to the deft. to suspend my decision for a short time, in order to give every possible consideration to the case, I did not do so from ever entertaining any doubt what the decision ought to be. To reverse the decree would be to unsettle the law and principles of the court upon a point in which the best interests of society require that they should be strictly adhered to. The deft., in the course of his argument, invited the court to express an opinion upon his conduct; I, however, advisedly refrain from doing so, except by saying that it has been wholly at variance with the principles of this court. The deft. also complained of some of the allegations of the bill as irrelevant or unfounded; but in my judgment, considering all the facts and circumstances of this case, they were not such as could be justly called irrelevant, nor do I think, having regard to the relation in which he stood towards the female plt., and the weight which would necessarily be given to his voice and opinion, that any of the allegations are shown so clearly to be unfounded as to relieve the deft. from the liability to costs which public policy demands should be attached to proceedings of this description. But any possible doubt upon this point would be entirely removed by a reference to the 98th and other paragraphs of the answer, in which the deft. insists on the entire validity of the deed. The appeal must be dismissed with costs.

Solicitors for the plt., *John and George Cole*, agents for *Charles Simpson*, of Lichfield.

Solicitor for the deft appealing, *Charles Harrington Rushworth*.

Dec. 7 and 8.

(Before the LORD CHANCELLOR (Westbury).)

SIDNEY v. WILMER.

Will—Construction—Rents and profits of real estate—Intestacy—Accumulation—Right to occupy mansion-house.

Testator devised his real estates to the use of trustees for a term of 500 years, and after the expiration or sooner determination of the same, to trustees during the lives of his two sisters and the survivor, to preserve contingent remainders, with remainder to the use of the first and other sons of his two sisters who should be born within fifteen years of the date of the will successively in tail male, with remainder to the use of the first daughter of L. for life, with remainders over. The trusts of the term were declared to be, that the trustees should enter upon the mansion at W., and thenceforth during the lives of his uncle and sisters, and the survivor of them, and during the minorities of persons beneficially entitled, to receive the rents and keep up the mansion-house, gardens, &c., with power to pull down and rebuild, alter, &c. "as might suit any tenant of the hall." The trustees

*were empowered to grant leases of the estates, to appoint bailiffs, &c., to cut timber, to expend 1000*l.* in management, and 2000*l.* in charity, and out of the residue pay an annuity of 1000*l.* to testator's uncle, and annuities of 500*l.* to his sisters. It was provided that the annuities were not to entitle the sisters or their husbands to reside at W., and testator declared that "during the minority of any person for the time being absolutely or presumptively entitled by virtue of the will to an estate for life or in tail immediately expectant" on the estate limited to the trustees to preserve, "a competent part of the surplus interest" should be paid during the lives of his sisters for the "maintenance and education, or otherwise for the benefit" of the person for the time being entitled thereto, the trustees "accumulating the surplus" and investing the same as they should think best.*

No sons of the sisters (one of whom was married and still living) were born within fifteen years of the date of the will, and the plt., the first daughter of L., attained the age of twenty-one before the death of the testator:

Held, first, that there was no intestacy during the lives of the sisters with respect to the surplus rents and profits:

Secondly, that the plt., as owner of the first vested estate for life, was entitled to the surplus rents:

Thirdly, that the directions in the will did not amount to a trust for the accumulation of the rents during the lives of the sisters:

Fourthly, that the plt. was entitled to occupy the mansion-house as a residence.

Decree of the M. R., reported 25 Beav. 260, reversed.

This was an appeal from a decision of the M. R.

The facts were shortly these:—Sir Henry J. J. Hunloke, the testator, by his will dated the 4th July 1845, declared as follows: "Looking at the state of my relations, my uncle a bachelor in years, and my sisters resident in France, and one of them married to a French gentleman, I have determined, subject to my sisters or either of them having issue, on settling my estate in manner hereinafter mentioned; but making provisions for my uncle and sisters in a way which I hope they will appreciate." He then devised his real estates to trustees for a term of 500 years, upon the trusts after mentioned, "and after the expiration or sooner determination of the said term, and in the meantime subject thereto," he devised the same to the use of the trustees and their heirs during the lives of the testator's sisters therein named and the survivor of them, to preserve contingent remainders, with remainder to the use of the first or other sons of the testator's sister Charlotte Hunloke, who should be born within fifteen years after the date of the will, successively in tail male; with remainder to the use of the first or other sons of the testator's sister Eliza (wife of the Marquis of Casteja) who should be born within eighteen years after the date of the will, successively in tail male; with remainder to the use of the first and other daughters of the testator's sister Charlotte Hunloke who should be born within fifteen years after the date of the will, successively in tail male; with remainder to the use of the first and other daughters of the testator's sister Eliza who should be born within eighteen years after the date of the will, successively in tail male; with remainder to certain uses (which failed), and then with remainder to the use of the sons (other than the eldest) of Philip Charles Lord de Lisle and Dudley, and the first and other sons of such sons, successively in tail male; with remainder "to the use of the first and other daughters of Philip Charles Lord de Lisle and Dudley, then born or thereafter to be born in the testator's lifetime (according to seniority of age), for her life; with remainder after the decease of each such daughter to the use of the first

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and other sons of each such daughter, successively in tail male; with remainder to the use of the first and other sons of such daughters successively in tail general; the testator's will being that the eldest daughter of Lord de Lisle and Dudley born in the testator's lifetime, and her sons and the heirs male and heirs of their respective bodies should take before the younger of such daughters and her sons and the heirs male and heirs of their respective bodies;" with divers remainders over.

The trusts of the term of five hundred years were declared to be, that the trustees should enter upon the testator's mansion-house called Wingerworth Hall and appurtenances, "during the lives of his uncle and sisters and the survivor and survivors of them, and during the minority of any person who, at the decease of the survivors of his uncle and sisters, might, under the limitations of his will, be entitled beneficially to the possession of his estates, and be under the age of twenty-one years, to receive and take the rents, issues and profits, and keep up the mansion-house, gardens and pleasure-grounds, &c., and manage his estates, and direct any repairs and improvements to be made thereon." He authorised the trustees to pull down and rebuild any of the buildings about Wingerworth Hall, and alter the gardens and shrubberies "as might suit any tenant of the hall, or with a view to ulterior beauty, utility, or accommodation." He also empowered the trustees to grant leases, to appoint receivers, bailiffs, &c., to cut timber and underwood yearly, to expend 1000*l.* a-year in improvements, to dispose of 2000*l.* a-year in charities, and then to pay an annuity of 1000 a-year to his uncle for life, and 500*l.* a-year to each of his two sisters, with other annuities. He provided that the gift of the annuities to the uncle and sisters should not entitle them to reside at his mansion-house at Wingerworth unless authorised to do so by his trustees or trustee, or in any manner whatsoever to interfere in the management of his estates. He also declared that "during the minority of any person for the time being absolutely or presumptively entitled by virtue of that his will to an estate for life or in tail immediately expectant on the will for the estates of his sisters, limited to trustees to preserve contingent remainders in the property thereby settled, it should be lawful for the trustees or trustee for the time being of the said term of five hundred years, but subject and without prejudice to the annuities under that his will, or such of them as should be payable, and to other charges, to pay and apply, during the lives of his sisters, a competent part of the surplus interest and income of the said estates to or for the maintenance and education, or otherwise for the benefit of the person for the time being entitled thereto, the said trustees and trustee accumulating the surplus, and investing the same as they or he should think best."

Testator declared that such accumulations should be subject to the same trusts as were thereby declared concerning the moneys to arise under the power of sale thereafter contained. The trustees were authorised to purchase other hereditaments, to raise money by mortgage to pay debts, and it was provided that the trusts thereby declared for the management of the estates should, after the death of the uncle and sisters, be suspended during the life of any adult who should become entitled thereto for any estate for life in possession by virtue of the will and should cease when, after the death of the uncle and sisters, an adult tenant in tail by purchase under the will should become absolutely entitled thereto.

Then followed a proviso for cesser of the term on full performance of the trusts, with a power to the trustees, during the lives of the uncle and sisters and the survivor of them, and during such further period as the estates should not be vested in possession in an

adult tenant for life or tenant in tail under the will, to lease the mansion-house for twenty-one years, to open and work mines, to grant mining leases, and to sell and exchange lands (with the exception of the mansion and appurtenances).

The testator died on the 8th Feb. 1856, leaving no children, and leaving the uncle and the two sisters mentioned in the will surviving. The uncle died on the 22nd June 1856. Charlotte Hanloke died without issue. The Marchioness of Casteja was living, but without children.

Lord de Lisle and Dudley died in the testator's lifetime. He had one son only, and three daughters.

The plt., who was the eldest daughter, and who attained twenty-one in the testator's lifetime, filed this bill, alleging that in "the events which had happened the first beneficial estate, both in the real estate and in the residuary personally devised and bequeathed by the testator's will, was the estate for life vested in the plt., subject nevertheless to be postponed in the event of any children of the testator's sisters Charlotte and Eliza being born within such period as would entitle them to take under the limitations prior to the plt.'s estate, which periods would expire respectively on the 4th July 1860 and the 4th July 1863," and claiming, as such first tenant for life, to be entitled, in the meantime, "to the surplus rents of the real estate, and the surplus income of the personal estate, and any accumulations thereof which might accrue or had accrued during the period of suspense from the testator's death until the contingency of any children capable of taking under the limitations of the will being born to the testator's sisters Charlotte and Eliza respectively should have been determined, and to have the option of immediately entering into the actual occupation of the said mansion, park, grounds, gardens and appurtenances."

The bill prayed for the administration of the estate: that it might be declared that the plt. was entitled to the surplus rents and income of the testator's estate (after keeping down the interest of the charges thereon, and the annuities given thereout by the testator's will) from the date of the testator's decease, and that the same might be paid accordingly; that it might be declared that the plt. was entitled to occupy the mansion house and grounds, and that all proper directions might be given and made for carrying into effect such declaration.

The M. R. on the 6th March 1858, upon the question, whether the plt., being then possessed of a mere contingent estate, was entitled to the profits, held that there was no case in which the estate of a remainderman had been accelerated for the purpose of giving him a right to rent accrued prior to the time when the estate took effect. The next question therefore was, whether she could take anything under the trusts of the will; and upon this, after reviewing the trusts for the term of years, his Honour was of opinion, first, that the plt. was not entitled to occupy the mansion-house, except with the express authority of the trustees; secondly, that the maintenance clause, whilst it extended to persons "absolutely or presumptively" entitled to an estate for life or in tail in the estates, and therefore would include the plt. had she been a minor, had no application beyond the plt.'s minority, and that upon and after her attaining twenty-one she had no right whatever to the rents and profits. His Honour further considered the construction of the will to be, that the trustees were to accumulate the surplus, deducting the maintenance if maintenance was allowed, and without such deduction if maintenance were not allowed: (see the report, 20 Beav. 260.)

The periods above mentioned having expired, and there having been no children of the sisters born within them, the present appeal was brought

by the plt., who had married since the death of the testator.

The *Attorney-General* (Sir R. Palmer, Q.C.), Sir H. Cairns, Q.C. and *Hemming* appeared for the plt. the app.

Roh, Q.C. and *F. Riddell* for the heir-at-law of the testator.

J. H. Palmer, Q.C. and *Knob Wigram* for remaindermen.

Everitt for the trustees of the plt.'s marriage-settlement.

Giffard, Q.C. and *Rasch*, for the trustees of the term of 500 years, supported the decree of the M.R.

The following authorities were cited and commented on:

Hopkins v. Hopkins, 1 Atk. 581; 1 Ves. 268;

Cas. t. Talbot, 44; 4 Bro. C. C. 390;

Sidney v. Shelley, 19 Ves. 352;

Tregonwell v. Sydennam, 3 Dow. 196;

Turton v. Lambardo, 1 De G. F. & J. 495; 2 L. T. Rep. N. S. 38.

THE LORD CHANCELLOR.—As this case has been very fully and ably argued before me, I shall not hesitate to give my opinion at once, though I desire it to be understood that, having regard to the magnitude of the interests and of the estate, if, on considering that opinion, any point should arise which counsel may deem deserving of a rehearing, I shall be quite ready to listen to any application for that purpose. Now, I will first take the case of the heiress-at-law. The heiress-at-law insists that all the rents and profits of this estate, not required for the purposes of the term, in the shape of management or in the shape of annuity, are undisposed of during the lives of the two sisters and the life of the uncle, and consequently belong to her. She claims, in the first place, an intestacy during that period of time. Now, so far as the intestacy is concerned, the chain of legal estates given by the will is quite complete and presents no chasm or opening whatever. There is a gift to the trustees for 500 years, with remainder to the trustees to preserve during the lives of the sisters, or until the expiration of eighteen years, if during that period of time no child be born to either of the sisters, remainder to the first and other sons of Lord de Lisle for life, remainder to their issue, remainder to the first and other daughters of Lord de Lisle in like manner. With regard to the devise of the beneficial interest, it is, in my opinion, equally unbroken, because, so far as the term is concerned, it is in fact declared, having regard to the settled rule of law upon the subject, that the term and the ownership by virtue of that term shall, subject to the express purposes of the term, accompany and be moulded so as to fit and go along with the dispositions made by the subsequent devisees. So much, therefore, of the beneficial interest as is required for the purposes of the term is first given away. Subject thereto, the beneficial interest follows the devisees and the legal term also accompanies those estates which are given by the subsequent devisees. But the claim on the part of the heiress-at-law is founded upon the peculiar language of the trusts of the term, and the proposition is this, that those trusts are so worded as to suspend any enjoyment or beneficial right of possession arising in favour of any individual during the lives of the sisters and the life of the uncle and the life of the survivor. If that be clearly and unmistakably said, of course effect must be given to it; but it is a proposition of the greatest singularity, and it would involve the most extraordinary consequences, because it calls upon the court to hold that, consistently with the declared intention of the testator, if there were a son of one of the sisters born immediately after the date of the will and attaining majority within a few years after the death of the testator, bearing the name

and arms of the testator, that son, his nephew, should not be admitted to have any enjoyment whatever of this estate, but that the estate should remain in reversion without any owner or representative under the will, during the indefinite period that might continue for the lives of the two sisters and the uncle and the survivor. That is a proposition which undoubtedly it is impossible to reconcile with the language with which the testator begins his will and his declaration of his desire that some person should reside on his estate, and keep up the same as his ancestors heretofore had done, and his expectation that a considerable period might elapse before any adult person would become entitled to the full benefit of his estates. Whom did he intend to favour? For whom was this anxiety shown, if not for the son of one of his sisters? And yet, according to the proposition, the son would be excluded entirely, as I have said, from all possibility of benefit during that indefinite period of time. If, therefore, we are to seek the interpretation of the will in conformity with the declared intention, and to find in it a rational and consistent, rather than in an extraordinary and irrational object, it would be impossible for me to countenance this interpretation on the part of the heiress-at-law, if any other interpretation can be reasonably put upon the words. But, in reality, the whole of the argument of the heiress-at-law proceeds upon this fallacy, that the will contains powers and directions for management, with a prohibition or a proviso suspending beneficial enjoyment. It was the evident purpose of this testator, for a certain period of time, to clothe his trustees with very large and extraordinary powers for the management and arrangement of his estate. But those powers are perfectly consistent with its being the duty of the trustees to hand over and account for the surplus rents and profits to the persons who are indicated as the individuals who are to take beneficially under the devise, and the power of management may possibly continue for a long period of time, until an adult tenant in tail has become absolute owner. And yet that power of management may be accompanied with the obligation, as I have already observed, to account for and pay over the surplus rents of the estate. Now the language is distinct that, during the lives of the sisters and the life of the uncle and the life of the survivor, the trustees shall have the management; but, in the detailed language of the will, that which the testator means to denote by the word "management" is very fully unfolded and explained. He enters at great length into what in his opinion constitutes management, and what he means by the term; and he explains that the trustees are to maintain the buildings, to alter the disposition of the buildings on the estate with the exception of the original hall, to pull down and build up, to cut timber, to hire the servants, to engage the gamekeepers, to regulate, in point of fact, the disposition of the whole of the estate, but at the same time, after they have applied the rents and profits which are required for those purposes, the remainder of the rents and profits is left, as I shall presently show, to follow the disposition made of the estate. But the distinction between the power of management and the power to suspend the enjoyment is clearly indicated at various parts of the will. One portion has been insisted on by the counsel for the plt., and very rightly; namely, those parts of the will in which the testator clearly contemplates a tenant for life being in the possession of the estate, and cutting down timber under the control of the trustees, acting with the consent and the approbation of the trustees—a state of things that contemplates the possibility of the continuance of the power of management consistently with the beneficial enjoyment of the possession of the property. There are other indications to the same effect, particularly in the direc-

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tions to take the name and arms, because there it is said that the husband of every daughter, either of the sisters of the testator, or of Lord de Lisle, shall take the name and arms within twelve months after the wife shall become entitled to the possession of the estates devised, but if the possibility of that right of possession be peremptorily and absolutely postponed until the death of the sisters and the death of the uncle, then it would follow that for a long period of time there would be no representative of the ownership, no person to keep up the name and family of the testator, and that the whole of the estate and the possession of the mansion-house, which he was anxious to keep in the line of his family, would pass away to a person not answering those conditions, for, as I have already observed, a period of time of which it was impossible to ascertain the extent, depending as it does upon the death of the survivor of three persons. It cannot be supposed that this obligation to apply for the name and arms was to be postponed until after the death of the sisters and of the uncle. Now the language of the will with regard to the management is very clear in the direction, that the trustees shall enter into possession and shall receive the rents during the lives of the uncle and sisters and the survivor, and during the minority of any person who at the death of the survivor may be entitled beneficially to the possession. The language is that, during this time, they are to receive the rents, and then it goes on, "and shall and do keep up the mansion-house and all the gardens and pleasure-grounds, offices and establishments belonging thereto, and manage my estates." It is impossible, therefore, to hold that management includes the receipt of the rents and the withholding of the rents. In fact, the argument before me may be reduced to this, that the counsel for the heiress-at-law insists that the direction to manage involves the direction to receive and withhold the rents; and the counsel for the trustees insists that management includes accumulation of the rents. Now I am of opinion that it does not include either the one or the other—that it includes nothing in the world more than the superintendence and control over the estate itself, but which is entirely consistent with a beneficial enjoyment and receipt of the rents by the persons taking under the devise. My opinion, therefore, is, that immediately, subject to the trusts of the term, the person entitled to the first vested estate for life, namely the plt., became entitled to the surplus rents of the whole of these estates not required for the exigencies declared of the term; and I am of opinion that the direction given to the trustees to manage the estate does not involve any suspension of the enjoyment of the estates themselves, or interfere in any respect with the right of those devisees, save thus far, that the devisee might not be entitled to claim the possession of the estates. Before I consider the question of who is entitled to the possession of the mansion-house, I will advert to the subordinate ground on which the heiress-at-law has put her claim, namely, a right to the rents during the period of time allowed by the testator for the arising of a contingent use in favour of any child of the sisters that might be born. Now the first vested estate of freehold, under the dispositions made by this will, is the estate that is vested in trustees during the lives of the sisters to preserve contingent remainders to the issue of those sisters. That estate of freehold would not entitle the trustees to receive and withhold or suspend the enjoyment of the estates until the contingency should arise. It is quite clear law that, until the contingency happens, until the executory limitation takes effect, that is, until the use arises, the ownership of the estate runs in the channel provided by the will. It takes effect and vests, subject to be divested, and, immediately that the contingent use arises, it divests the estate out of the antecedent owner under the subsequent limita-

tions, but it takes the estate and vests it in the person entitled, without any power in that individual of reclaiming and recovering the rents of the estates which have been received in that intermediate time, precisely in conformity with the intention and directions of the testator. If the testator intends that the limitations shall not take effect, subject to the contingency, it is necessary for him to provide a power to accumulate and to withhold the enjoyment until the contingency should arise. That power is not involved in the estate to the trustees to preserve. The estate to the trustees to preserve supports and maintains the possibility of the contingent use coming into esse and not being defeated by reason of the want of an estate of freehold to support it; but, beyond that, the trustees to preserve have no functions at all. Still less is it open to the argument that, during the period of time allowed for the occurrence of the contingency, there is no disposition of the estate. There is a disposition of the estate which takes immediate effect, namely, in the uses which are declared subject to the contingency; and, accordingly, the estate belongs to the person who has the first vested estate, subject to be defeated and divested by that contingent use when it shall arise. I am not, therefore, of opinion that there is any rule whatever for any claim by the heiress-at-law to a portion of the rents of the estate during that period of time, namely, the period of eighteen years allowed for the birth of any child of either of the sisters. We come in the third place to the question which has been decided by the M. R., namely, that there is here a trust and a direction for the accumulation of the rents during the lives of the sisters. That is a conclusion which cannot for a moment be made consistent with the principal topics of the argument which have been relied upon by the heiress-at-law, and also by the trustees; both of them relying upon that clause which declares that the trusts for management of the estate shall, after the death of the uncle and the sisters, be suspended during the life of any tenant for life. I am told that, upon the interpretation of that clause, his Honour has held it to be a clause of accumulation. But if that be true, it is perfectly irreconcilable with the language of the clause which it is applied to explain, because the clause itself, even if violence be done to it, as has been done (speaking with great respect of the judgment appealed from), directs accumulation during the lives of the sisters only; but if the direction for management involves the direction to accumulate, then the direction to accumulate must be coequal in duration with the direction for management, and the direction for management extends to three lives. But the alleged direction to accumulate extends only to two lives. It is impossible, therefore, to accept the two clauses as shedding any kind of light one upon the other. But I must take the clause (especially in an ill framed will as this is) according to its plain grammatical meaning. Now, there is a direction, certainly, to accumulate; but what is directed to be accumulated, and for how long? The period of time during which the accumulation is to continue, is that period of time plainly indicated in the commencement of the clause, and which grammatically governs the whole of the rest of the directions. The directions are to continue during the period of time indicated for their existence, and that period of time is pointed out by these words in particular, "during the minority of any person for the time being absolutely or presumptively entitled by virtue of this my will." The direction to accumulate, therefore, is a direction that lasts only during the minority, and a direction that cannot arise until the event of the minority arises. The accumulation must last whilst there be a person, an infant, who is absolutely or presumptively entitled for life, or in tail, immediately expectant on the estate limited to the trustees

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to preserve during the lives of the sisters. Now that is a very clear, definite and express direction. It is certainly true that the latter part of the clause is governed by the introductory words of direction. The language is, that the trustees shall "pay and apply during the lives of my sisters a competent part of the surplus interest." If those words have any intelligible meaning whatever, they must amount to this, that the direction to maintain during the minority is a direction intended to be applicable only to some minor absolutely or presumptively entitled whilst the two sisters or one of them are or is living, and then that the direction to maintain will cease, so far as this trust creates it, upon the death of the two sisters. That is the literal meaning of the words, certainly a singular direction. But it is very difficult, in a will constructed as this appears to have been, with imperfect information upon the subject of the law, to find a meaning in all cases consistent with the correct understanding of the law. I must, however, take the words, and if they are capable of an intelligible meaning, I must give them that intelligible meaning. Now these words do admit of that interpretation, and if they are so interpreted, they will be found to be a direction for maintenance, applicable to the case of a minority occurring after the death of the sisters—a singular direction, but an interpretation which satisfies the words, and renders it unnecessary to strain the clause in order to give those words another interpretation. Now the manner in which the words have been managed and dealt with by his Honour I understand to be this, that he takes the latter part of the clause as independent of the commencement, and holds that there is a direction to apply, during the lives of the sisters, a competent part of the income in maintenance, and then he takes the words "accumulating the surplus" as if they came after the words "during the lives of my sisters." Well, even that construction, with which I cannot at all agree, would not enable me to arrive at the conclusion that there was an absolute direction to accumulate the surplus during the lives of the sisters, because the direction to pay during the lives of the sisters is a direction to pay maintenance, a direction that would cease with the infancy of the object. The thing to be accumulated is the surplus. The surplus of what? The surplus of that which remains after the maintenance, and therefore the surplus or thing directed to be accumulated will also cease with the infancy of the object. It is impossible therefore to torture these words so as to bring them to signify an absolute trust for the accumulation of the surplus rents, meaning by surplus the surplus rents not required for the purposes of the term during the continuance of the lives of the sisters. That I understand, however, to be the conclusion at which his Honour has arrived, and the effect of that would be to suspend the beneficial enjoyment of this estate during the lives of the sisters so as to deprive an eldest son of one of those sisters who has attained twenty-one from becoming the occupier of this residence, and succeeding to the ownership and the enjoyment of the estate, as long as his mother or his aunt was alive—a most unreasonable conclusion, and totally at variance with the declared intention of the testator. I cannot, therefore, accept that interpretation. I must hold that this clause is limited to the period of time during which there shall be a minority, and that the accumulation is to last only during that minority, and comes into existence only in the event of there being a minority. I have, lastly, to consider whether, consistently with this interpretation, the tenant for life, namely, the plt., being entitled to the receipt of the surplus rents, is also entitled to the possession of the mansion-house—that is to say, can the trustees withhold from the tenant for life the possession of the mansion, letting

that mansion to another person? Now the tenant for life will be under the obligation—I do not know whether she is married or not—or her husband will be under the obligation, of bearing the name and arms, and inasmuch as I hold her to be entitled to the surplus rent, she will be entitled to the rent arising from the letting of the mansion. But it would be a very unreasonable thing to come to the conclusion that she is not to have the possession of the mansion, undertaking to perform all those things which the trustees have a right to require under their powers of management. It would be an unreasonable thing to say, that she shall not have that, and that she shall have, notwithstanding, the rents to be obtained from the letting of the mansion. When her husband shall have acquired the right to bear the name and arms of the testator, he will be entitled, I think, plainly, in right of his wife, upon the face of this will, to the possession of the mansion, subject to the control that I have already mentioned on the part of the trustees; and that that effect is so given to this will, is a result that is in perfect conformity with the intention of the testator as declared in the outset. The order, therefore, that I must make will be to reverse the order made at the Rolls, to declare that there is no intestacy, nor is any part of the rents and profits of the estate undisposed of; to declare that the plt., as being the person in whom the first estate of freehold was vested beneficially at the death of the testator, inasmuch as no child has been born since the death of the testator to either of his sisters, is entitled to the receipt of the surplus rents and profits of the estate not required for the purposes of the term from the time of the death of the testator; and to declare, also, that, subject to the obligation of performing the directions and requisitions of the trustees, which they are warranted to do under their powers of management, and subject to the further obligation on the part of the husband of the plt. of complying within one year from July 4, 1863, with the requirements of the will for the assumption of the name and arms of the testator, the plt.'s the tenant for life is entitled to the possession of the mansion-house, park and other appurtenances, and to the receipt of the rents and profits of the real estate devised by the will of the testator or the estates purchased under the directions therein contained, and to the income of the residuary personal estate of the testator for life, subject to the trusts of her marriage-settlement.

Solicitors for the plts., *Johnston, Farquhar and Leech*; for the heir-at-law, *Slaughter and Cullington*; for other parties, *Belfour and Bolton*.

Jan. 14, 15, 16, 18 and 23.
(Before the LORDS JUSTICES.)

Re HOOPER.

BAYLIS v. WATKINS.

Duties of solicitor—Suit for judicial separation—Wife's costs.

Where a solicitor is about to institute proceedings, on behalf of a married woman, to obtain a decree of judicial separation from her husband, the first duty which attaches to him, in all cases and under all circumstances, is to satisfy himself by all available and proper means that such proceedings are rightly and honestly instituted for good and sufficient causes, and that the great probability is that they will be ultimately successful; and unless he is prepared to show that he made all possible and proper investigation and inquiry into the circumstances of the case before he began proceedings, he will not be allowed to recover his costs as a legal debt from the husband or to prove for them against his estate. It is not sufficient

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that he acts upon the honest belief or impression in his own mind, if he has omitted these precautions; and where, from the circumstances, it is shown that he must have possessed knowledge of the sources from which he might have obtained authentic information as to the facts, and yet that he neglected to use the means thus within his reach, he will be treated as if the facts adverse to his client's case, which by such inquiries he might and ought to have learnt, had been within his knowledge before the suit began.

The sum which, according to the practice of the Court of Divorce, the husband had, at the outset of such a suit, been ordered to pay into court as security for the costs of his wife, together with the difference between that sum and the amount of costs due upon a strict taxation, had, however, been paid to the claimants before the adjudication upon this summons.

The above-mentioned suit was commenced by summons in the chambers of Stuart, V. C., for the administration of the estate of the late Mr. Francis Philip Hooper, a solicitor, who died in Sept. 1861, and who was in his lifetime a member of the firm of Messrs. Watkins, Hooper, Baylis and Baker, of Sackville-street, Piccadilly; and the present application was one by Messrs. Clarke and Mead, of Bury-street, St. James's, who were also solicitors, upon a summons to vary the chief clerk's certificate, which was adjourned for argument into open court, and was, at the suggestion of Stuart, V. C., brought before the L. J. in the first instance, instead of before himself. That certificate had disallowed to the apps., as against the estate of the testator, their claims for costs incurred on behalf of the wife of Mr. Hooper in certain proceedings which they, as that lady's solicitors, had instituted against him in the Court of Divorce for the purpose of obtaining for her a decree of judicial separation on the ground of her husband's cruelty. The circumstances of the case were as follows:—

Mr. and Mrs. Hooper were married many years ago, and appeared, so far as the voluminous evidence showed, to have lived together for several years upon good terms; but in the year 1851 or thereabouts serious differences began to arise between them, originating in the most unfounded jealousy on the lady's part. At that time Mr. and Mrs. Hooper were residing at Acton in Middlesex, and the lady was in the habit of charging her husband with infidelity, not with any woman in particular, but with all the female inhabitants of that village, whom she stigmatised as "the Acton gang." These charges were preferred and reiterated with violence of temper occasionally proceeding to overt acts, as upon one occasion when she was summoned before a magistrate and fined for breaking the windows of her next-door neighbour, a lady of perfectly irreproachable character, whom she accused of being Mr. Hooper's mistress. Mr. Hooper, however, generally treated his wife with due consideration. In order to relieve her from these delusions, he broke up his establishment at Acton, and removed to the house where he carried on his practice in Sackville-street; but this did not stop his wife's injurious assertions, and she repeatedly accused him of amours with various ladies residing in that street. Mr. Hooper and some of his friends, after a continuance of such conduct, and after experience that it was impossible to dispel such delusions, began to be alarmed as to the condition of her mind, and he expressed to some of his own friends, as well as to friends of his wife, his apprehension that he should be obliged to place her under personal restraint. For a short time about the year 1856 Mr. and Mrs. Hooper lived separate, but they were reconciled and again cohabited in April 1857; still the unhappiness and quarrels occasioned by the

jealousy of Mrs. Hooper never ceased, and in Dec. 1858 the husband and wife finally separated.

Before this second separation, Mrs. Hooper had privately and without her husband's knowledge consulted Mr. Samuel Thomas Clarke (who subsequently formed a partnership with Mr. Mead), upon the subject, and soon after she had quitted her husband for the second time the project was formed of taking proceedings in the Court of Divorce to procure a decree of judicial separation. For that purpose a case for the opinion of counsel was prepared from the lady's statements, and laid before Mr. Macqueen, and that gentleman being of opinion upon the facts stated therein that the lady would succeed in her object, proceedings were shortly afterwards commenced, and a petition was filed on her behalf, alleging acts of cruelty on Mr. Hooper's part, both before and after the return to cohabitation in 1857. It is proper to say that these alleged acts were chiefly Mr. Hooper's threats to put his wife in a lunatic asylum, but otherwise they were of a slight and frivolous character, and were either entirely disproved or explained away by the evidence laid before the Court of Ch. in the course of the present inquiry. In all these proceedings Mr. Clarke first, and later Messrs. Clarke and Mead, acted as solicitors for Mrs. Hooper.

Upon the institution of such a suit it appears to be the practice of the Divorce Court to compel the husband resp. to deposit a sum of money with the registrar of the court as security for the costs to be incurred by the wife; and accordingly in June 1859, in obedience to an order made upon him, Mr. Hooper paid into court 250*l.*, and he was also ordered to allow his wife alimony at the rate of 250*l.* a-year *pendente lite*. The suit was then proceeded with; but at the hearing an agreement was come to between the parties for a voluntary separation upon certain terms, which are mentioned below, and in consequence of this agreement all proceedings in the suit were ordered to be stayed. Fresh misunderstandings arose upon the agreement, chiefly upon the sums which were to be paid to Mrs. Hooper by her husband for alimony and costs, and upon this the petitioner applied to the court for leave to prosecute her suit, notwithstanding the compromise and the order staying proceedings. The application was refused by Cresswell, J. O., on the 25th Jan. 1860 (*Hooper v. Hooper*, 1 L. T. Rep. N. S. 522).

Mr. Hooper appealed against the Judge Ordinary's decision, but it was affirmed by the full court.

Matters remained unchanged till the death of Mr. Hooper in Sept. 1861. Messrs. Clarke and Mead then made out their bills of costs, which amounted to 57*l.* 12*s.* 2*d.*, and 63*l.* 16*s.* 6*d.* incurred on Mrs. Hooper's behalf, and made a claim upon the executors for the amount, alleging that their legal advice and assistance were "necessaries" provided for the wife, for which she had a right to pledge her husband's credit, and for which he had thus become liable. The executors resisted this demand, and the bills were taxed at 267*l.* 3*s.* 8*d.* on account of which the Divorce Court ordered the 250*l.* deposited to be paid by them. They then applied in chambers to prove for the sum alleged to be due to them as extra costs, but the chief clerk disallowed the proof, and ultimately certified that there had been no debt proved against the testator's estate. Messrs. Clarke and Mead then took out a summons to vary this certificate, which was adjourned into court and argued before Stuart, V.C. on the 14th Nov. 1862. His Honour was then of opinion that the claimants were bound to establish at law their right to these costs as a legal debt due from the estate, and he ordered that the application should stand over, with liberty to them to bring such action as they might be advised. The present resp. appealed against that decision, contending that, as the

matter had been brought on since the 1st Nov. 1862, upon which day Mr. Rolt's Act (25 & 26 Vict. c. 42) came into operation, it was no longer competent to the court to direct a trial at law, but that it was itself bound to decide all questions arising upon proceedings before it. The Lords Justices (*Re Hooper*, 7 L. T. Rep. N.S. 843) therefore discharged his Honour's order, and referred the matter back to chambers, with liberty to either party to adduce further evidence, if necessary.

Greene, Q.C. and *G. Osborne Morgan* supported the appeal, contending that the costs were "necessaries" supplied to the wife; that that being so, the husband was liable for them, and that the claimants were entitled to all the costs incurred, and not merely to the costs between party and party, as strictly taxed in the Court of Divorce. Mr. Hooper must in fact be considered as the client, and consequently liable. Again, the claimants were not bound to institute a quasi-judicial investigation as to all the circumstances before they instituted proceedings of this nature on behalf of a married lady; they were justified in believing her story and in acting upon it, and it was not asserted that Messrs. Clarke and Mead had acted from any improper motive, or from anything short of a reasonable belief that the suit would succeed. But at all events by compromising the suit Mr. Hooper had adopted the liability for the costs, and these costs would, they submitted, have been recoverable at law, as was shown by *Shepherd v. Mackoul*, 3 Camp. 326, where articles of the peace were exhibited by a wife against her husband, and this court was now clothed with the same authority as a court of law. They further referred to

Turner v. Rookes, 10 Ad. & Ell. 47;
Rice v. Shepherd, 12 C. B. Rep. N. S. 332;
Brown v. Ackroyd, 5 Ell. & Bl. 819; 26 L. T. Rep. 215;
Ridley v. O'Brien, 3 Mad. 43;
Davis v. Davis, 2 Atk. 21;
Sopwith v. Sopwith, 2 Sw. & Tr. 105; 2 L. T. Rep. N. S. 472;
Allen v. Allen, 2 Sw. & Tr. 107; 3 L. T. Rep. N. S. 480;
Harding v. Harding, 2 Sw. & Tr. 549; 6 L. T. Rep. N. S. 692;
Beeby v. Beeby, 1 Hagg. 793;
Westmeath v. Westmeath, 2 Hagg. 663; and
Macqueen on Divorce, 295.

Mulins, Q.C. and *Cracknall*, for the executors, contended that the evidence showed no ground whatever for the institution of Mrs. Hooper's suit, and such proceedings could only be considered "necessaries" where there was a case requiring the court to interfere for the protection of the wife. It was not justifiable in the solicitors to act upon such *ex parte* statements as an angry and jealous woman—possibly an insane woman—might choose to bring before them, nor to act upon their own impressions, however honest they might be, derived only from such statements; still less when they had the means of obtaining information and the impartial opinions of friends of the family. These means were in their hands, but had been wholly overlooked, and the consequence was that the husband had been already plundered by the system which the Court of Divorce pursued, in ordering a deposit for the wife's costs, when her suit might be as frivolous and unfounded as it proved to be in the present case. They referred to

Manby v. Scott, 2 Sm. Lead. Cas. 245;
Biffa v. Bignell, 7 H. & N. 877; 6 L. T. Rep. N. S. 248;
Curtis v. Curtis, 1 Sw. & Tr. 192;
Dickens v. Dickens, 2 Sw. & Tr. 103; 6 L. T. Rep. N. S. 639;

Hooper v. Hooper, 1 Sw. & Tr. 602; 1 L. T. Rep. N. S. 522; and
Shelford on Marriage, 446.

Greene, Q.C. having been heard in reply, judgment was reserved till the 23rd Jan., when

Lord Justice KNIGHT BRUCE said:—In this case Mr. Clarke, a London solicitor, who was instructed and employed by Mrs. Hooper, then a married woman, but now a widow, to institute and carry on proceedings in the Divorce Court for a judicial separation against her husband, also a London solicitor, on the alleged ground of cruelty, and who asserts, and I assume truly, that part of the costs so incurred remains unpaid, claims the unpaid portion of those costs from the estate of the deceased husband, on the ground that he, Mr. Clarke, had a right, as against the husband, to consider her as justifiable in the institution of the suit; and that Mr. Clarke's assistance to her, and the expenses, or a portion at least, of the expenses incurred on her behalf in and concerning it ought to be deemed necessities properly supplied to her to be discharged accordingly by the husband. His executors resist the demand, and it is proper, if not necessary, for us to pronounce our opinions on the question whether the cruelty suit, which was compromised in Mr. Hooper's lifetime, was instituted by her on such grounds as that she would probably, or properly, have succeeded in it, opposed as it was by him, if it had not been compromised, but had been adversely prosecuted to a regular termination. Having considered that question with the aid of all the evidence before us, and the able and prolonged—I do not say too long—arguments of the learned counsel engaged, I have come to the conclusion that it ought to be answered in the husband's favour. The point, indeed, is one upon which, in my judgment, not a rational doubt can be entertained. [His Lordship then stated and reviewed the facts of the case.] Coupled with the result of the evidence, I am thoroughly convinced that during the interviews (more than ten, I think, in number) which, in Oct. 1858, took place between the claimant and Mrs. Hooper upon the subject of her alleged grievances, her representations, language and demeanour must have been such as to render the exercise of great caution and a considerable degree of doubt as to the accuracy of those representations a positive duty on his part as between him and the husband. I am satisfied that they ought to have induced the claimant to pause, and not to commence litigation without taking much more pains to investigate the matter and ascertain the truth of the case than he appears to have done. He did not, in my opinion, take the steps which it was incumbent upon a professional man consult, as he was consulted, if desirous to do his duty, and intending to act fairly, to take. For every purpose in the present dispute there must, I think, be substantially imputed to him the possession of a knowledge which, in my opinion, he might and ought to have acquired, and which if he had acquired, the institution of the suit must, I conceive, or ought to, have appeared to him a highly improper measure. Upon the grounds that I have stated, then, without giving an opinion upon the other ground alleged, whether without or with good reason, to be fatal to his demand, I declare my conclusion to be that the claim, not in the least aided, as it appears to me, by the compromise of the litigation, fails entirely. The claimant has not, in my judgment, shown himself to be, and must, as I conceive, be taken not to be, a creditor of the late Mr. Hooper, who seems to me to have been a man most painfully perplexed and indeed afflicted by his wife, whether she was in or out of her senses. My impression from the evidence, however, is, that during a portion at least of the time that has been brought under our attention

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she was insane. I may add that what I have just said as to the compromise is founded, in part at least, on the consideration, not only that it was important to the husband's peace and comfort that the wife should be kept separate from him, but also that, if desirous or willing to live with him again, or insane, he was under a legal obligation to maintain her, either in his own house or otherwise. I think that the claimant should pay to the executors at least some costs, though possibly not the whole that is demanded as occasioned to them.

Lord Justice TURNER.—This case has been presented to us in many points of view; but, after fully considering it, I am satisfied that it may well be disposed of upon the single point, whether at the time of the institution of the suit in the Divorce Court there was reasonable ground for it, involving the consideration of what is to be considered as reasonable ground. Upon this point only, therefore, do I think it necessary to give any opinion at all. Now, if this is to be determined according to the facts as they stand upon the evidence before us, there cannot, as it seems to me, be any doubt whatever upon the case. I think it impossible to say that there was reasonable ground for the institution of this suit. [His Lordship then reviewed the evidence.] But it is said that it cannot, and that it ought not to be decided according to the evidence as it now stands, but that it ought to be looked at as the app., the solicitor of the lady, after due inquiry, had reason to expect that it would stand at the hearing. Possibly this may be right, although I rather incline to the opinion that the true view is that, there having been no trial, the case should be looked at, not as the app. thought it would stand, but as in our opinion it would probably have stood, at the trial of the cause. Adopting, however, the app.'s view, in my opinion the app.'s case is not in any way bettered. He is a solicitor. It is, in fact, an action by a solicitor to recover the costs of a suit instituted on behalf of his client in the Divorce Court. I take it to be the first duty of a solicitor not to institute such proceedings without previously taken proper steps to ascertain that they are rightly instituted. I think, quite independently of the position of these parties, which would render that duty more peculiarly incumbent upon a solicitor, it is a duty which the law attaches to him in all cases and under all circumstances. Now, how does this case stand in that point of view? The app. knew that the insanity of this lady was in question. He had before him two certificates of medical men stating that she was insane upon the point in question. He had other certificates upon which, although I do not think any great weight attaches to them, it does not appear that he had made any inquiries (of course I do not mean to cast any imputation on the professional gentleman) from the medical gentlemen by whom they were signed, and who seem to me to have given undoubted testimony as to the insanity of this lady. Now this gentleman, notwithstanding her sanity was in question, took and acted upon the representations of the lady only, whose sanity he knew to be impeached. He took no steps whatever for ascertaining whether the allegation of insanity was well founded or not. He made, as it seems to me, no inquiries whatever of any other person than the witnesses to whom the lady referred him. The evidence given by him—even his own evidence—proves, in my judgment, that he well knew that there were persons who could give him information upon this subject. It was argued on the part of the app. that it was not a material question to be considered whether the suit would have succeeded or not, if it had gone to trial, provided the app. thought that there were reasonable grounds for instituting it. Now I do not mean to give any opinion on that point; but I cer-

tainly do not desire to be understood as assenting to that view of the case, because the foundation of the suit, the right of the lady to recover in the suit, the right of the attorney to bring the suit, depends upon the lady having had power to pledge the credit of the husband; and if the suit would have failed when it was brought to a hearing, then it would appear that there was no foundation for the suit at all, and no right to recover. There can be a recovery only for necessities, and the attorney must show, as I understand the law on the subject, that the proceedings which he takes were for necessities. It would depend upon the result of the trial whether they were necessities or not. That seems to me the view which was taken by the court in the case of *Brown v. Ackroyd (ubi ante)*, and it is certainly the view taken by the courts in the ordinary cases of actions for necessities supplied to a wife. The court, in those cases, looks to the proofs as they stand at the trial, and not as they were supposed to stand, or as it was supposed they would stand upon the evidence at the time when the necessities were supplied. It is not, however, necessary to decide this question. Another argument that was urged on the part of the app. is, that all the earlier acts of cruelty which are alleged from the year 1851 to the year 1857 were admissible in evidence in this case, because the reunion of the parties in 1857 was only a conditional condonation. That seems to be to be an entirely false issue. The app. had reason to expect, and did expect, that the condonation was complete, and he therefore must have known that it would be incumbent upon him to show that there was cruelty after the year 1857; and he certainly has not proved any such act of cruelty; and if he had made any inquiries he would have found that no such act of cruelty could be proved. Some reliance was also placed by the apps. upon the fact of counsel having been consulted before these proceedings were taken. Of course the opinion of counsel proceeds on the facts as stated; and upon examining the case laid before counsel, it is plainly an *ex parte* case on the part of the lady. It was the duty of the solicitor, in stating that case, to have stated the facts as they stood, and as, upon inquiry, he might have found that they stood. He makes no inquiry, and I think, therefore, that the opinion can afford him no justification whatever. Another view of this case, which has struck me very strongly, is this: If this lady was not of sound mind, clearly the husband was, in my judgment, entitled to have had the question ascertained whether she was of sound mind or not. No other cruelty is proved subsequent to 1857; in fact, no cruelty is proved at all; but I do not think there is an allegation of cruelty subsequent to 1857, except the threat, as it is called, of putting this lady under medical restraint. This lady can only pledge the husband for costs if there was cruelty, and therefore, if the case failed in proof of cruelty subsequently to 1857, I have looked in vain for any authority on the part of the lady to pledge the credit of the husband for the costs of the suit. On the whole, therefore, it seems to me perfectly clear that this claim is altogether unfounded, and I think that the app. should pay the costs of all the proceedings, except, perhaps, the costs of the application before the V. C., and the costs of the appeal before us, on which we made the order, giving liberty to the parties to enter into further affidavits. That is my view, if it is not objected to by my learned brother.

Malins, Q.C. then said that his clients had felt it their duty as executors to contest the claim of the apps, but that they had no desire to exact costs from them. They would readily consent that the costs to be paid subsequently to the appeal which their Lordships had mentioned should be costs out of pocket only.

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Lord Justice KNIGHT BRUCE said that this offer was in his opinion handsome and liberal.

Certificate to be confirmed. No costs to either party up to their Lordships' order of the 10th Dec. 1862. The apps. to pay all costs from that time, but, by consent of the resps., those costs to be costs out of pocket only.

Solicitors: for the executors, *Watkins, Baylis and Co.*; for the claimants, *Clarke and Mead* in person.

Jan. 25 and 26.

(Before the LORDS JUSTICES.)

SWAYNE v. THE GREAT NORTHERN RAILWAY COMPANY.

Injunction—Nuisance—Legal rights—Acquiescence—Damages—21 & 22 Vict. c. 27; 25 & 26 Vict. c. 42—C. L. P. A. 1854—Effect of, on jurisdiction in equity.

The plt. was possessed of a house and premises within some 80 feet of a station on the defts.' railway. Before 1859 there had been only one siding at the spot, and this was on the opposite side of the line from the plt.'s property. In that year the defts. constructed a second siding, on the side of the line nearest to his house, and they used it chiefly for manure traffic, bringing down from London manure which was frequently of the most foul description. The traffic was at first comparatively unimportant, and for some time the plt. confined himself to general complaints; but in 1862 it had nearly doubled, and in May of that year he remonstrated in a more formal manner. Obtaining no redress after a demand by his solicitors, he filed his bill for an injunction, and for an inquiry as to damages, in Jan. 1863. Upon the hearing of the cause, Wood, V. C. thought that the plt. had, under these circumstances, no title to apply for an injunction till after he had proved his right by a trial at law, and he dismissed the bill with costs. But upon appeal it was

Held, that there had been no nuisance so continuous and systematic as to justify this court in granting an injunction.

The decision upon the question of damages in Johnson v. Wyatt, 9 L. T. Rep. N. S. 618,—that, under the former of the Acts there mentioned, the court had jurisdiction to consider the question, even where it refused an injunction, but was not compelled by the latter of them to do so,—approved and reiterated.

But in this case it appeared to their Lordships that it would be advisable not to consider the question, and the bill was, therefore, dismissed without costs, and expressly without prejudice to any action for damages which the plt. might be advised to bring for this court has power to conclude the question of damages also.

The court declined to express any opinion whether the C. L. P. A. 1854 had in any measure affected the jurisdiction of this court in cases of nuisance.

This was an appeal from a decision of Wood, V. C., who had thereby dismissed the plt.'s bill with costs under circumstances which fully appear in the previous report, 9 L. T. Rep. N. S. 571.

Willcock, Q. C. and Roxburgh supported the appeal, contending that it was not necessary, in order to warrant the interference of the court that the plt. should first establish his right by an action. Formerly such an action was necessary, because the question of fact had to be decided, but the court could itself inquire into the fact, and then exercise its jurisdiction by an injunction. The existence of a very serious nuisance was quite clear upon the evidence, but the V. C. had thought there was such acquiescence on the plt.'s part as ought to disentitle him to maintain his bill; but independently of the natural reluctance which a man

in the plt.'s position would feel to embark in litigation with a powerful railway company, the trade had increased enormously in the last few years. When the siding next the plt.'s house was constructed it was (in 1860) 695 tons, but in 1862 it was 1184 tons, and in the first five months of 1863 it was 642 tons. The acquiescence might have been a forcible answer upon an application for an interlocutory injunction, but not upon the motion for a decree, and yet the defts. insisted that the plt. must bring an action at law. [Lord Justice KNIGHT BRUCE.—It never was the right of the defts. in a suit for nuisance where the nuisance was clear to insist upon a trial at law.] This Court granted its injunction in such case:

Temple v. The London and North-Western Railway Company, 1 Rail. Cas. 133;

The Imperial Gas Company v. Broadbent, 7 H. of L. Cas. 600 and 612;

Soltau v. De Hied, 2 Sim. N. S. 133 and 151; *The Attorney-General v. The Sheffield Gas Consumers' Company*, 3 De G. M. & G. 304, 319 and 320;

Walter v. Selfe, 4 De G. & Sm. 315;

Gordon v. The Cheltenham Railway Company 5 Beav. 229 and 233;

Gerrard v. O'Reilly, 3 Dru. & W. 414 and 432, *Flight v. Thomas*, 10 Ad. & Ell. 590.

But even if the plt. had no right to an injunction, yet as he had filed his bill here, he had a right to have the question of damages decided:

21 & 22 Vict. c. 27;

25 & 26 Vict. c. 42;

Wedmore v. Mayor of Bristol, 7 L. T. Rep. N. S. 459;

Johnson v. Wyatt, 9 L. T. Rep. N. S. 618.

Lord Justice KNIGHT BRUCE said:—I doubt whether any of us yet see fully the proportions of these two Acts of Parliament.

Thomas Stevens (with whom was *Rolt*, Q. C.), for the defts., supported the order, contending that the evidence displaced the case made by the bill, and showed that the nuisance was far slighter in degree than it was alleged by the bill to be, and that such as it was it was only occasional and intermittent. The trade was a lawful one, which the defts. were reasonably carrying on on their own premises, and where that was so the plt. could not complain:

Bamford v. Turnley, 3 Q. B. Rep. 62, which overruled

Hole v. Barlow, 4 Com. B. Rep. N. S. 334.

The plt. had lost all right of asking for an injunction by his acquiescence for upwards of three years, the siding having been constructed in 1859, and the bill not filed till early in 1863. Mr. Rolt's Act in no way enlarged the jurisdiction of this court; it only provided that the court should determine all questions that might arise in the course of proceedings before it, and under Sir Hugh Cairns' Act the court had no authority to assess damages unless it was of opinion that the plt. was entitled to an injunction. Lastly, he contended that the case was one in which this court had now no jurisdiction, because under the C. L. P. A. 1854, sect. 79, the plt. could, without filing a bill, have obtained at law both damages and an injunction for the future, and in all respects the same relief as he could in a court of equity; that this court had never had a concurrent jurisdiction with a court of law in cases of nuisance, but merely an auxiliary jurisdiction in those cases where the remedy at law was inadequate. It was true that the C. L. P. A. 1854 did not interfere with any previous existing jurisdiction in equity, but that jurisdiction was always limited to cases where a court of law could give no sufficient relief; and such a disability no longer existed.

Willcock, Q. C. having been heard in reply,

Lord Justice TURNER said that upon one point

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which had been last argued by Mr. Stevens he should wish to give no opinion. That point was, whether the jurisdiction of this court was affected in cases of nuisance by the C. L. P. A. 1854 (17 & 18 Vict. c. 125). It was not necessary for the court to decide this, and it would not go out of its way to give a decision upon a question of such great importance. The two questions which, as it appeared to him, the court had now to consider were, first, whether the plt. was entitled to an injunction; and, secondly, if their Lordships should consider that he was not, whether he was in that event entitled to have damages awarded to him here. He did not understand it to be contended on behalf of the defts. that if the manure was what he would call "proper" manure, and if it was properly dealt with at the station, and properly removed thence, the plt. would have any case at all for the interference of the court; it was not attempted, on his behalf, to go to that length, but the case made by the bill and argued at the bar was in substance this—that the manure was not "proper" manure, and that when brought to the station it was not properly dealt with there. The first question upon these points was—how did the case present itself upon the evidence? Now, looking at the affidavits, he thought it could not be denied that dead dogs and cats, fish and other putrescent matter did get into this manure on some occasions, nor that on some occasions the manure had been allowed to remain at the station longer than it ought to have remained. Still the real question in disposing of this case was, whether there had or had not been a continuous practice or system of carrying manure of such a description as ought not to have been carried, and which proved to be prejudicial to the plt., his family and business, and such a continued system of keeping the manure brought for a longer period than was necessary or proper for the disposing of it. Although it could not be disputed that the manure was sometimes of such an offensive character, and that it was sometimes improperly left at the station, there must be a continued system in order to induce the court to grant an injunction against the traffic, rather than to interfere by awarding damages. The manure appeared to have been not proper; but that was only occasionally, and was not always its character, and that it should be sometimes left too long upon the sidings was probably an inevitable incident of the trade. It was brought down from London by the railway; the farmer to whom it was consigned would sometimes find himself unable to send for it on the day of its arrival, and it became necessary to unload it from the trucks and deposit it in some place or other. But when complaint was made of nuisances which were only temporary and occasional, there was no ground for the interference of this court except in extreme cases. He adhered to the principle laid down by Lord Cranworth and himself in the case of *The Attorney-General v. The Sheffield Gas Company* (*ubi ante*), that it is not in every case of proved nuisance of such a nature that the court will interfere by an injunction; and, looking at the whole of the present case, he was of opinion that there was not a sufficient case here for the plt. to ask for an injunction. Then, upon the question of damages, the court had recently to consider it, when *Johnson v. Wyatt* (*ubi ante*), the case of the photographic studio, was argued on appeal; but the court must consider it again upon the present appeal. The law, he thought, stood thus: according to Sir Hugh Cairns' Act the court had jurisdiction to give damages in a case where the bill was properly filed in this court; but upon Mr. Rolt's Act it was not compulsory upon the court to exercise that jurisdiction. The court had the power, therefore, but was under no compulsion. Then, looking at the nature of the case, it was in his judgment not one in which the court would be well advised in going into the question of damages. He thought

that the bill must be dismissed, as the bill in *Johnson v. Wyatt* had been dismissed, though not exactly upon the same grounds, for there the court was of opinion that the plts. were not entitled to any damages at all. That was by no means said here; but their Lordships thought that the case could be more effectually disposed of by a court of law than in a court of equity. It was perhaps somewhat unfortunate that Mr. Rolt's Act had placed the court in the position of being compelled to determine questions of fact upon the very insufficient statements of affidavits, or else by a *riid voce* examination of all the witnesses before itself. Upon the whole the bill must be dismissed, but it would be expressly without prejudice to the right of the plt. to bring any action he might be advised to bring, for without that declaration it might perhaps be thought that the court had by the dismissal of the bill concluded the question of damages, as it has the power to do. He agreed in substance with the V. C., but he thought that the dismissal should be without costs, and if any costs had been paid under the decree, the order now made would provide that they should be refunded to the plt.; otherwise the order would be simply a dismissal without costs, and there would be no costs of the appeal.

Lord Justice KNIGHT BRUCE.—I agree.

Solicitors for the plts., *Denton and Hall*.

Solicitors for the defts., *Johnston, Farquhar and Leech*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Monday, Dec. 21.

HAMMOND v. SMITH.

Statute of Limitations—Promise to pay debt "when able"—Bequest—Satisfaction.

Where a testatrix promised in writing, in March 1856, to pay a simple contract debt "when able," and she became enabled to do so in Feb. 1861, it was

Held, in Dec. 1862, that the debt was clearly not barred by the statute.

*After the testatrix became enabled to pay the debt, she wrote to her creditor stating her inability to pay it in full; but she offered to pay him half her income by way of interest, and to bequeath him 300*l*. The creditor, in reply, wrote to her, not verbally accepting her offer, but asking to have the 300*l*. secured; or for immediate payment of a sum, rather less than his debt. To that the testatrix did not accede, but the creditor took no further steps in the matter. The testatrix paid a small sum on account of the debt, and then died, having by her will bequeathed to the creditor 200*l*., a sum considerably less than the amount of his claim. On a bill filed by him for payment of his debt, and of the legacy, it was*

Held, that the legacy was bequeathed to, and must be taken by, him in part satisfaction of his debt.

The bill in this suit stated that in June 1853 Sarah Smith, the testatrix in the suit, was indebted to the plt. in a sum of 550*l*. and upwards, for goods supplied by him to her. She told the plt. that she was unable to pay the amount, but that she expected to come into property on the death of her father, when she would pay it. She then signed a memorandum stating the balance due, and that it was to be paid as soon as any property came into her possession. In Nov. 1853 the plt. wrote to her about the debt, when she sent him the following letter:—"As soon as I can get any money, you shall have it. At present I can get nothing. My father and mother are in a precarious state. The time may not be long before I shall be able to discharge my debt to you."

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In 1856 the plt. again applied to the testatrix, when she sent him the following letter, dated the 4th March 1856:—"My parents are both in the land of the living; therefore I have not had it in my power to pay you, or I should have done so. . . I will pay you as soon as I get it in my power. If my poor father knew it, he would never pay one farthing towards it; that I well know. You might prevent me from ever having it in my power to pay you; but with patience you will one day get your money." The plt. then forebore any proceedings against the testatrix.

The mother of the testatrix predeceased her father. He died in Feb. 1861 intestate as to his real estate and as to the residue of his personalty, which thereupon devolved upon the testatrix; and the plt. charged by his bill that she thereby became enabled to pay the debt.

In June 1861 the plt. again wrote to the testatrix on the subject of her debt. On the 9th July 1861 she replied by letter, alleging that she was still unable to pay him the debt in full; but she offered to pay him part of her income half-yearly, by way of interest. She added—"At my death you shall receive 300*l.*; I shall have it put in my will. I cannot pay you interest for more than the half, or there will be nothing left for me to live on."

In answer to that letter the plt. wrote on the 20th July as follows:—

"I received your letter of the 9th inst, respecting your affairs, for which I am much obliged. Of course I cannot expect you to give up all your interest to me: and if you will give me some security for the 300*l.* you name, bearing interest at 5 per cent., and for the 300*l.* to be paid six months after your death, I shall be satisfied, great as the loss will be to me and my family. As I am much in want of money at the present time, I will accept 400*l.*, and give you a clear discharge. Please write and let me know which of the two propositions you approve of in the course of a few days."

In reply to that letter the testatrix wrote to the plt., on the 30th July, stating that it was out of her power to do what he asked; and offering to pay him interest at 4½ per cent. She then also added: "Any security you want I will give you; but no one can take from you what is willed to you." The plt. did not reply to that letter.

On the 6th Sept. 1861 the testatrix sent the plt. 5*l.* on account of the debt and interest; but no further payment was made by her to him. She made her will on the 5th Oct. 1861 bequeathing a legacy of 200*l.* to the plt.; whom she described as her friend, but without expressing any reason or motive for the bequest. She died in May 1862. The debt was her executor.

The bill prayed a declaration that the plt. was entitled to be paid his debt with interest, and the legacy bequeathed to him by the testatrix.

Selwyn, Q. C. and *E. F. Smith* appeared for the plt., and cited

Waters v. The Earl of Thanet, 2 Q. B. 757;

Craumer's case, 2 Salk. 508.

Baggallay and *Pontifex* appeared for the deft., and insisted, first, that the debt was barred by the Statute of Limitations, as there was no sufficient acknowledgment of it in writing to take the case out of the operation of the Act:

Richardson v. Barry, 29 Beav. 22;

Hart v. Prendergast, 14 M. & W. 741;

Rickham v. Marriott, 2 H. & N. 196;

Nash v. Hodgson, 6 De G. M. & G. 474;

and, secondly, if the debt was not barred by the statute, the legacy was bequeathed to, and must be taken by the plt. in part satisfaction of the debt. His letters showed that he so considered the case to stand:

Russell v. Jackson, 10 Hare, 204;

Tee v. Ferris, 2 K. & J. 357;

Wallgrave v. Tebbis, 2 K. & J. 313.

E. F. Smith, in reply, contended that the plt.'s letters had not the effect stated concerning them by the other side.

The MASTER of the ROLLS.—With respect to the first point that was suggested in this case, on behalf of the deft., I am clearly of opinion that the debt is not barred by the Statute of Limitations. There was a distinct promise by the testatrix to pay it as soon as she should be able to do so. That promise was contained in the letter of March 4, 1856. That is a promise which, in my opinion, only took effect from the time when she became able to pay, viz., from the death of her father. She however did nothing more till 1861, when she wrote to inform the plt. of her situation. [The M. R. read the letter of the 9th July, as above stated, and continued:] The plaintiff then wrote to the testatrix, not indeed acceding verbally to her proposition, but, on the contrary, saying that she must pay him interest and give him some security for the money. He did not object to what she proposed, viz., that she should leave him 300*l.* by her will; he only wished that it should be secured. She did not, however, secure it; but she sent him 5*l.*, which was probably meant as part payment of the interest. The question really is, whether the 200*l.* legacy was intended to be given to Mr. Hammond on the faith of his receiving it in part payment of his debt? I think that the letter of July 9 shows that the testatrix intended to give it him in such part payment, and that she thereby communicated that fact to him. He received that information; he did not object to it; he only asked for something more. Can he now come here and say that the legacy was not given to him in consideration of, and for the purpose of paying, the debt? Can he be heard to contend that there was not, in fact, a trust created for payment of it? Whatever the plt. said to the testatrix, either expressly or by implication, may be regarded as evidence. Suppose, then, that one person says to another, "I will give you 1000*l.* if you will promise to apply it for the benefit of A. B.;" suppose that other person writes back in answer, "If you do that you ought to give some security;" and then suppose that no further reply is made to that. The sum of 1000*l.* is bequeathed to the party. Would he not be held to have tacitly acquiesced in the proposal made by the testator, that the legacy should be so received and so applied by him for the benefit of A. B.? I think so. I am therefore of opinion in this case that the letters of July 9 and July 20, 1861, followed by the bequest of the legacy of 200*l.* to the plt., constituted him a trustee of that sum, and that it must be applied by him in part payment and satisfaction of his debt.

Solicitors for the plt., *Senior and Attree*, for *Thos. Johnson*.

Solicitors for the deft., *Pontifex and West*, for *Greene and Partridge*.

Jan. 12 and 13.

JONES v. BINNS.

Plea—Averment—Bankruptcy of defts.—Leaseholds. Where mortgagees of leaseholds filed a bill against their mortgagors, and the latter put in a plea of their bankruptcy since the institution of the suit; but the plea contained no averment that the creditors' assignees had elected to take the leaseholds, it was, held, that the plea was nevertheless a good one.

This was a mortgagee's suit. The bill in it was filed the 17th Nov. 1863; and it prayed for the sale of certain leasehold premises. The defts. put in a plea to the bill stating that they were on the 20th Nov. 1863 duly adjudicated bankrupts; that an official assignee was appointed; that on the 15th Dec. 1863 a credi-

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tor's assignee was appointed; and that all the real and personal estate of the defts. had become and were then vested in such assignees. The plea, however, did not contain any averment that the assignees, or either of them, had elected to take the leasehold property. The question therefore was, whether the plea was good?

Tripp, for the defts., in support of the plea, contended that it was good without the averment. He cited

1 & 2 Will. 4, c. 56, ss. 22, 25;

12 & 13 Vict. c. 106, s. 145;

24 & 25 Vict. c. 134, ss. 108, 117;

Curtright v. Glover, 2 Giff. 620; a.c. 3 L.T. Rep. N. S. 880.

And as to the bankruptcy being subsequent to the filing of the bill,

Sergrave v. Mayhew, 2 M. & G. 97;

Lane v. Smith, 14 Benr. 49.

Baggallay, Q.C. and W. Forster, contra, cited

Copeland v. Stevens, 1 B. & Ald. 593;

Tripp in reply.

Jan. 12.—The MASTER of the ROLLS.—I am at present inclined to think the plea is a good one without the averment in dispute; but I will look into the Acts, and mention the case again to-morrow morning.

Jan. 13.—The MASTER of the ROLLS.—I have now considered the plea in this case, in connection with the statutes referred to in the argument; and I am still of opinion that this plea must be allowed as it stands. I can, however, make no order as to costs, and the plts. must have leave to amend their bill.

Solicitor for plt., *J. C. Meymott*.

Solicitor for defts., *John Trail*.

Friday, Jan. 22.

THE SOUTHAMPTON BOAT COMPANY (LIMITED)
v. PINNOCK AND OTHERS.

(No. 1.)

Joint-Stock Companies Act 1856—Directors—Power to mortgage.

Directors of a company cannot, as such, authorise a mortgage of the company's property at any time or place they please: but they must be duly summoned, and a resolution of the company properly passed for the purpose.

A projected sale under a beneficial mortgage to three of the directors of a company was restrained by injunction.

This was a motion for an injunction to restrain the defts., who were mortgagees with a power of sale of their security, from exercising their power.

The facts of the case were shortly these:

On the 10th April 1860 the above-named company was duly registered under the Joint-Stock Companies Act 1856. By the schedule to that Act, table B. No. 47, it was provided that the office of a director of the company should be vacated "if he is concerned in" or "participates in the profits of any contract with the company."

The original capital of the company was, in May 1861, increased from 15,000*l.* to 30,000*l.*, of which, however, only 20,000*l.* was actually subscribed and paid up. The company bought three steamboats, viz., the *Lord of the Isles*, the *Lady of the Lake*, and the *American*. The first two were built by contract; but the contractor then failed, and the *American* had to be finished by the company at a cost of nearly 12,000*l.* beyond the contract price. The company being in want of money for the completion of the *American*, applied to their bankers, but they refused to make any advance except on the personal security of three of the directors. Accordingly, in the months of April, May and June 1861 the defts. Pinnock, Rawlings and Muntz gave their bills for 3000*l.* to the bankers. A meeting of

the directors was held on the 17th June 1861, at which the three defts. and one other director alone were present. It was then resolved that the company should repay the said loan "and save harmless and keep indemnified" the three defts.

By an indenture dated the 26th July 1861, under the seal of the company, the ships and other property of the company were mortgaged (subject to a prior mortgage for 2000*l.*) to the three defts., and a trustee for them.

The plts. in this suit alleged, but the defts. denied, that the company was insolvent at the date of the mortgage. In the month of May 1862 proceedings were commenced for winding-up the company. On the 27th April 1863 the official liquidators of the company were served by the defts. with a notice of their mortgage, and of their intention to exercise their power of sale within three months, unless they were paid off.

The bill in this suit charged that the mortgage was "obtained by the defts. fraudulently and in collusion with the other directors of the company;" and that "no bond *vide* consideration was ever paid by or passed from the defts., or any of them, to the company in respect of the mortgage." It prayed that the mortgage might be set aside and declared void, that the intended sale might be restrained, and a receiver appointed.

Baggallay, Q.C. and Waller appeared in support of the motion, and contended that the defts. were trustees of the company, and could not be allowed to benefit themselves by such a transaction as the present. Moreover, the meeting of the 17th June 1861 was not, in fact, a meeting of the company, and the three directors who had convened it could not so authorise their own acts. They cited

19 & 20 Vict. c. 47, schedule, table B, No. 47, and the provision above stated.

Hobhouse, Q.C. and J. Napier Higgins, for the defts., insisted that they had a right to mortgage, and that this was a mortgage within their power, being really for the benefit of the company.

The MASTER of the ROLLS.—I think this mortgage cannot stand. Without expressing any opinion upon the 47th section of table B in the schedule to the Act of 1856, and assuming that the directors had power to mortgage the property of the company, I think that in this case they have not properly done so. Directors cannot, as such, authorise a mortgage at any time or place they please. They must be duly summoned, and a resolution of the company must be properly passed for the purpose. I find nothing of that kind here. I must, therefore, grant the injunction to restrain the sale until the hearing of the cause, or further order.

SAME v. MUNTZ AND OTHERS.

(No. 2.)

Joint-Stock Companies Act 1856—Directors—Power to mortgage.

Where four directors of a company, registered under the Joint-Stock Companies Act 1856, met together and passed a resolution to mortgage, and did mortgage, part of the company's property to themselves and another director, it was

held that a sale by them under the mortgage must be restrained by injunction.

It further appeared that on the 1st Sept. 1861 five of the directors, who, together with the defts. in the former suit, were defts. in this, gave a six months' bill for 5000*l.* to the company's bankers. At a meeting of the directors on the 24th Oct. 1861, at which four of the defts. were the only directors present, it was resolved that the defts. were "entitled to every security the company could give," and that their solicitor should prepare the same accordingly.

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By an indenture dated the 31st Oct. 1861, under the seal of the company, the ships and other property of the company were mortgaged with a power of sale to the five debtors, and a trustee for them. Notice was given by the debtors of their intention to sell the property comprised in their mortgage.

Baggallay, Q.C. and *Waller* now moved for an injunction to restrain the sale.

Cole, Q.C. and *J. N. Higgins* appeared for the debtors.

The MASTER of the ROLLS.—I cannot say that I feel a very strong opinion on this case, but there is too much doubt and difficulty in it for me to allow the sale. Four directors meet and agree to mortgage to themselves and another director, and that too under the Act of 1856. I must therefore grant the injunction.

SAME v. RAWLINGS AND OTHERS.

(No. 3.)

Joint-Stock Companies Act 1856—Directors—Power to mortgage—Secretary and solicitor.

Where directors of a company, registered under the Act of 1856, met together and passed a resolution that their secretary and solicitor "might take security" from the company's property for money advanced for them by him, and he prepared and the directors executed two mortgages, with powers of sale, to him accordingly; it was

Held, that a sale by him under the mortgages must be restrained by injunction upon the hearing of the cause.

The debt. Rawlings was the secretary and solicitor of the company. In March 1862 he paid certain sums required to complete a purchase by the company, and to discharge a pressing debt owing by it. A meeting of the directors only was held on the 25th of March 1862, when "the secretary was authorised to take a security from the company on any of its properties," without alluding to any mortgages. By two indentures, dated respectively the 25th and 26th March 1862, under the seal of the company, the ships and other property of the company were mortgaged, with power of sale, to Rawlings, subject to the prior mortgages. The deeds were prepared and the seal affixed by him. Notice was duly given of his intention to sell the property.

Baggallay, Q.C. and *Waller* moved for an injunction to restrain the sale. The directors were not qualified as such when the resolution was passed.

Selwyn, Q.C. and *J. N. Higgins* appeared for the debt. Rawlings, and contended that there was nothing in the Act of 1856 to prevent a solicitor or secretary to a company being a mortgagee of its property. Here money had been paid by him for the company. It was a different case altogether from the two former.

The MASTER of the ROLLS.—There certainly is a great difference between this and the former cases. The resolution of the 25th March authorised the secretary to "take security." The mortgages were then prepared, but it is somewhat strange that they were not alluded to in the resolution. It is not clear to my mind that they were the acts of the directors at all. If the directors were disqualified as such, under No. 47 of table B. schedule, when the resolution was passed by them, it was obviously worth nothing. At all events the debt. takes expressly subject to the prior mortgages. There must therefore be some further inquiries, and I think I cannot allow the sale to go on.

Solicitors for the plt., *Newbon, Evans and Co.*

Solicitors for the debts., *Harrison and Lewis.*

Wednesday, Jan. 13.

Re WATERLOO LIFE, EDUCATION, CASUALTY, AND SELF-RELIEF ASSURANCE COMPANY, *ex parte* PAUL AND BERESFORD.

Joint-Stock Companies Act (7 & 8 Vict. c.110), s. 29—Promoters—Directors—Contract.

The 29th section of the 7 & 8 Vict. c. 110 is a disabling clause, and must be construed strictly. It applies exclusively to the case of contracts made and entered into between the company on the one side, and the directors of the company on the other. Promoters of a projected company under the above Act assigned property to, and entered into an agreement with, the directors of it, and afterwards, when the promoters had themselves become directors of the registered company, relinquished their interests under the former agreement, and made a new one with their co-directors. The promoters received annuities under the subsequent agreement. Neither of the agreements had the sanction of a general meeting of the company. The affairs of the company were ordered to be wound-up, when two of the promoters claimed to prove as creditors against the company in respect of their subsequent agreement:

Held, that the subsequent agreement was invalid, under the above-stated section; but that, as the relinquishment by the promoters of their interest under the former agreement was the consideration for the later one, the former was revived, and they were allowed to proceed upon that, setting off what might be found due to them under it against what might be found due from them as contributories to the winding-up of the company, and accounting for the sums received by them in respect of the annuities.

By the 7 & 8 Vict. c. 110, s. 29 (A.D. 1844) it is enacted that if any director of a joint-stock company registered under that Act be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall on the subject of any such contract in which he may be so concerned or interested be precluded from voting or otherwise acting as a director; and that if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting, &c. &c.

In 1851 three gentlemen, named respectively Edwin Paul, William Beresford and Edward Baylis, were the registered proprietors, under the Copyright Act, 5 & 6 Vict. c. 45, of a work entitled "A Treatise on the New Application of the Principles of Life Assurance." In order effectually to realise the truth of the theories enunciated in their treatise, the three gentlemen promoted the company called the Waterloo Life, Education, Casualty and Self-Relief Assurance Society. They registered it provisionally on the 4th Feb. 1851. Under an agreement dated the 3rd Sept. 1851 they took a lease for thirty-five years of a house, No. 355 in the Strand, at a rent of 230*l.* per annum. No premium was paid for the lease. On the 16th Sept. 1851 a board meeting of the company was called at which the three promoters of it and four other

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persons, who were afterwards appointed directors of the company, were present, when it was resolved that a special clause should be inserted in the deed of settlement of the company, with reference to certain claims on the part of the three promoters of it.

By an indenture dated the 27th Oct. 1851, and made between the Messrs. Paul, Beresford and Baylis of the one part, and Joseph Deacon and John Teulon as trustees of the company of the other part, after reciting that Deacon and Teulon, as such trustees as aforesaid, had contracted with the three promoters of the company for the purchase from them of the leasehold premises and the treatise for the sum of 750*l.*, to be paid by the company on the complete registration of it, and that it had also been agreed that the company should pay the three promoters of it respectively, during their lives, if the company should so long continue, 2 per cent. commission upon all premiums received by the company in respect of life policies effected therewith, the three promoters, for the consideration thereinbefore mentioned, assigned to Deacon and Teulon, as such trustees as aforesaid, the leasehold premises and the treatise, and all their right, title and interest therein.

The deed of settlement of the company was dated the 10th Nov. 1851, but it did not contain the special clause as to the claims of the three promoters. Those gentlemen, however, were thereby appointed directors of the company. On the 24th Nov. 1851 the company was completely registered, and the 750*l.* paid to the promoters, in shares of the company, with 5*s.* credited thereon. On the 22nd Dec. 1851 a meeting of the directors of the company was held, at which the three promoters and five other directors were present, when a resolution was passed that the deed of the 27th Oct. 1851 should be confirmed. The commission of 2 per cent. was accordingly paid to the three promoters until Sept. 1856. On the 24th March 1857, by two letters signed respectively by the three promoters and directors and four of the other directors of the company, it was agreed between those parties, that in consideration of the former releasing all claims which they then had, or might have, against the company, the latter should secure to them the following life annuities: to Baylis, 200*l.* per annum; to Paul, 100*l.* per annum; and to Beresford, 100*l.* Those annuities were paid until Nov. 1860.

Neither the deed of the 27th Oct. 1851, nor the letters of the 24th March 1857, were submitted to any general meeting of the company. The payments of the 2 per cent. commission and of the annuities were entered in the accounts of the company, and submitted to the shareholders at the general meetings, but not in such a way as to make it perceptible that there was anything special in their nature. Edward Baylis died in 1861. In July 1862 the business of the company was sold; and on the 6th Dec. 1862 an order was made for winding-up the company under the Companies Act of that year. Those proceedings were still pending; and Paul and Beresford took out summonses therein, as creditors of the company, claiming a right to prove against its assets for the arrears of their respective annuities, or for the value thereof. Those claims had been allowed by the chief clerk; but the summonses were now adjourned into court for argument.

Selwyn, Q.C. and *W. W. Cooper* appeared for Messrs. Paul and Beresford, and cited

Burt v. The British Nation Life Assurance Society, 33 L. T. Rep. 74; a. c. on appeal, 1*b.* 191;

7 & 8 Vict. c. 110, s. 23.

They contended that the agreement of 1851 was valid, and that consequently, that and the later one of 1857, were binding on the company.

Baggallay, Q.C. and *Swanston* appeared for the

official liquidator of the company, and insisted that the agreement of 1851 was void. The leasehold premises were held at a rack-rent, and the treatise was of no value. There was therefore no consideration to support the transaction. If that of 1851 was void, it followed that the later one in 1857 was also a nullity. But that was also void under the 7 & 8 Vict. c. 110, s. 29 (as above stated):

Ernest v. Nichols, 6 H. L. Cas. 401;

The Leominster Canal and Navigation Company v. The Shrewsbury and Hereford Railway Company, 3 K. & J. 654.

Selwyn, Q.C. in reply.

Jan. 13.—The MASTER of the ROLLS said:—This case came on upon an adjourned summons from chambers. The question in it relates to a claim made by two gentlemen of the names of Paul and Beresford, to an annuity of 100*l.* per annum for each of them during their lives; such annuity to be set against the moneys which they may be called upon to contribute as shareholders of the company towards the liquidation of the debts of the company. The company was founded under 7 & 8 Vict. c. 110. It was provisionally registered on the 4th Feb. 1851, and completely registered on the 24th of the following month of November. The deed of settlement bears date the 10th Nov. 1851. Mr. Beresford and Mr. Paul, in conjunction with a gentleman named Edward Baylis (since deceased), were the promoters of the company, upon certain principles embodied in a work entitled "A Treatise on the New Application of the Principles of Life Assurance," of which they were proprietors. They had also taken a lease of a house, No. 355 in the Strand, for thirty-five years, at 230*l.* for the purposes of the company. At a meeting of the directors, on Sept. 16th, 1851, at which those three gentlemen were present, it was determined that clause 11 in the draft of the deed of settlement, as it then stood, referring to the claims of the promoters, should be assented to and incorporated in the deed. That clause was not, however, incorporated in the deed, because the Registrar of Joint-Stock Companies would not have registered it in that form. In consequence of that the substance of the clause was carried out by an indenture of the 27th Oct. 1851, which was to this effect. [The M. R. read the deed, as above stated, and continued:] At that time those three gentlemen were not directors of the company; but they were subsequently appointed directors by the deed of settlement, which was executed on the 10th Nov. 1851, and duly registered on the 24th of that month. On the 22nd Dec. 1851, at a meeting of the board, that indenture and assignment were adopted and confirmed by the directors for and on behalf of the company; but not submitted to or approved by any general meeting of the shareholders of the company. The first question is, as to the validity of that deed. The official liquidator insists that it is void; first, for want of a sufficient consideration; and next, because the 29th section of the statute under which the company was registered requires the approval of it, by a general meeting of the shareholders of the company; but no such approval was obtained. The want of consideration was pressed but lightly, and in truth it cannot be doubted that, even assuming the treatise itself in question not to contain any valuable suggestions, and also that the premises for which the parties had taken the lease are at a rack-rent, still a sufficient consideration is to be found in the deed to support the transaction. The assignment of the lease alone would be sufficient to support it. The real question is whether the 29th section of the statute applies to this case? I am of opinion that it does not. The clause is a disabling clause; it must be construed strictly, and it applies exclusively to the case of contracts entered into between the company on one side with directors of the

ROLLS.] COOPE v. CRESSWELL. CALDWELL v. ELLISON. GREGORY v. CRESSWELL. [V.C. K.]

company on the other side. It is true that, within a fortnight afterwards, the gentlemen became directors of the company, but they were not directors at the time; and unless I could find in the transaction some collusive acts entered into in order expressly to evade the statute, I must hold that the greater or lesser period which elapsed between the transaction and their becoming directors does not affect the contract itself. The owner of a large concern such as a mine or a brewery may, as I conceive, legally and properly sell that concern to an incipient joint-stock company for the purpose of its being made the subject of the business, to be carried on by the company when completed; and such purchase and sale would not, as I apprehend, become invalid by reason of the vendor subsequently joining the company and being made a director of it, even though the provisions of the 29th section were not afterwards complied with. The case of *Burt v. The British Nation Life Assurance Company* is, I think, an authority to support that view, and one which I should not hesitate to follow. Such, however, is not the exact contract in respect of which these gentlemen claim. They rely upon a subsequent indenture, which I think is of a most questionable character. On the 24th March 1857 an agreement was entered into by two letters, written by and between the three gentlemen in question and four of the directors. At that time the three gentlemen were unquestionably directors. That contract was, in effect, a very material variation from the original indenture; and though the surrender of their interest under the former agreement would have constituted a good consideration for the new one, yet, as it was, in truth, a distinct and perfectly new agreement entered into with the directors, I am of opinion that it required the assent and approval of the shareholders at a general meeting to give it validity. It was suggested that, in fact, that agreement was a beneficial one to the company; and that by it the gentlemen were abandoning to the company a part of what they had already got secured to them; for it was ascertained that 2 per cent. on the policies would have far exceeded the 100*l.* per annum. But assuming that to be so, still I am of opinion that it required the sanction of the shareholders in a general meeting. The clause of the statute draws no distinction between one species of contract and another. It makes no exception in the case where the contract is more or less beneficial to the company. It includes all contracts. It may well be that if the three gentlemen had singly given up 1 per cent. and agreed only to take 1 per cent. instead of 2 on the policies, that might not have required the assent of the shareholders; but if so, it would have been because it was no contract, and because no mutuality existed between them and the company. It would have been, in that case, a mere relinquishment to the company, without consideration, of a benefit of which they had the possession, and which benefit they might, if they pleased, confer on the company. But that is not the character of this transaction. The agreement of the 24th March 1857 is a new and distinct contract, made in consideration of the surrender of the former one. Whether it was or was not beneficial to the company is a question on which it might well happen that the shareholders, or any indifferent person, might have entertained very opposite views, and might have dissented from those held by the directors. It is to be observed that the contract of the 27th Oct. 1851 was to last only so long as the company itself lasted; the profit to the claimant was proportioned to the business done by the company, and consequently to the benefit obtained by the company. But by this latter agreement the claimants obtained a payment of an annuity of 100*l.* per annum, whether the business of the company was large or small; and the duration of the annuity was not confined to the period of the

existence of the company, but was extended to the lives of the claimants. I am therefore clearly of opinion, in this case, that in order to give the transaction validity the provisions of the 29th section of the Act of 7 & 8 Vict. c. 110, ought to have been followed, and that their not having been complied with renders this transaction invalid. The claimants cannot derive any benefit from it. The result of that (if I am right) will be, that the original indenture, which was abandoned only for the purpose of this new contract, will remain in force; and that Mr. Beresford and Mr. Paul will be entitled to 2 per cent. on all policies effected since the 24th March 1857 until the sale of the business in July 1862. An account must be taken of those, and against the amount to be found due on taking such account must be set off the 100*l.* annually received by them; and the balance ascertained to be due to them must be set off against the calls they are required to pay as contributors of the company.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, ESQTS.,
BARRISTERS-AT-LAW.

Dec. 17 and 18.

COOPE v CRESSWELL.

CALDWELL v. ELLISON.

GREGORY v. CRESSWELL.

Receiver—Specialty creditors—Mortgage.

The Court refused, upon motion by specialty creditors of a testator, to appoint a receiver of the rents of real estate, where the persons in possession and in receipt of the rents of the estate were the mortgagees of a devise for life of an equitable interest.

This was a motion by the plts. in the first of the above three causes (being specialty creditors of the testator and settlor of the property in question), that a receiver might be appointed, and that it might be referred to the judge in chambers in the first-mentioned cause to appoint a proper person to receive the rents and profits of certain hereditaments in the pleadings referred to as the Devonshire estates, that he might keep down the interest on a certain charge of 13,000*l.* thereon, and that the rest of the rents might be paid over to the credit of the first-mentioned cause.

The circumstances under which these suits arose were very intricate; but, so far as it is necessary to state them for the application of the principles of law discussed in the judgment of the V. C., they were as follows:

Estcourt Cresswell, being possessed of freehold estates in the counties of Wilts, Gloucester and Devon, by his will dated Feb. 21, 1821, gave and devised to Joseph Pitt and Charles Dewell, their heirs and assigns, the lands and hereditaments therein described upon trust for sale to pay mortgage-debts and funeral and testamentary expenses, and after giving various money legacies, left the residue to be divided amongst his sons as tenants in common. He also gave and devised to the same trustees and their heirs and assigns his Devonshire estates in trust for his grandson Thomas Estcourt Cresswell, for life, with various remainders over. The testator, Estcourt Cresswell, died on July 4, 1823, and the trustees, Messrs. Pitt and Dewell, having refused to act, Richard Hopkins Harrison and Francis Henry Thomas were appointed new trustees and executors by the Court of Ch. and duly approved the will. In 1834 the suit of *Gregory v. Cresswell* was instituted by the incumbrancers of one of the testator's sons, for general administration, and a decree was made in 1841 with the usual reference to the master,

At the time of the death of the testator there was a charge of 13,000*l.* for younger children under a certain settlement of the estates made on Sept. 17, 1814, remaining unpaid, and this was directed to be raised out of the Devonshire estates.

By an order made in the suit of *Gregory v. Cresswell* in 1858, the *plts.* in the suit of *Coope v. Cresswell*, which was a suit by specialty creditors of Estcourt Cresswell, the testator, were declared to be at liberty to attend the proceedings under the orders made in the cause of *Gregory v. Cresswell*.

By a deed dated Feb. 6, 1846, Thomas Estcourt Cresswell mortgaged his life-interest in the Devonshire estate to the English and Scottish Law Life Assurance Society, as represented by F. Caldwell and others, for certain sums not exceeding 10,000*l.* and interest. In respect of this mortgage the suit of *Caldwell v. Ellison* arose, and a receiver was appointed in that suit, who paid the rents to the mortgagees. Messrs. Harrison and Thomas, the trustees of the testator's will, and in whom the legal estate in the property in question was vested, were not parties to that security. Mr. Harrison was dead, and Mr. F. H. Thomas was the sole surviving trustee.

Under these circumstances it was prayed, in the suit of *Coope v. Cresswell*, that an account might be directed of what was due to the *plts.* and the other specialty creditors of the testator mentioned in the master's report, on account of principal and interest; it was also prayed that the Devonshire estate, or a sufficient part thereof, might be sold; that a receiver might be appointed, and that the suit might be taken as supplemental to the suit of *Gregory v. Cresswell*. The answer had been put in.

Evidence was gone into on the motion in respect of the title of the *plts.* as specialty creditors, and as to the condition of the estate with respect to assets and liabilities.

Bailey, Q.C. and *E. F. Smith* in support of the motion.

Schomberg and *Dalton*, for the mortgagees of the Devonshire estate, who were the *plts.* in *Caldwell v. Ellison*, opposed the motion.

Glassey, Q.C. and *Shebbeare* for Thomas Estcourt Cresswell.

Shapter, Q.C. for William Henry Cresswell, a remainderman.

Bailey, Q.C. in reply.

The following cases and authorities were cited:

- Bryan v. Cormick*, 1 Cox, 422;
- Jones v. Pugh*, 8 Ves. 71;
- Dixon v. Smith*, 1 Swans. 457;
- Walker v. Bell*, 2 Madd. 21;
- Daniell's Ch. Pr.* 1032;
- Stratford v. Ritson*, 10 Beav. 25;
- Owen v. Homan*, 3 M. & G. 378; 4 H. of L. Cas. 997; 17 Jur. 865;
- Jones v. Jones*, 8 Sim. 633;
- 2 Vict. c. 7, s. 11;
- 15 & 16 Vict. c. 86, s. 59;
- Mathews v. Jones*, 2 Ans. 306;
- Spackman v. Timbrell*, 8 Sim. 253;
- Dilkes v. Broadmead*, 2 De G. F. & J. 566;
- George v. Milbanke*, 9 Ves. 190;
- Richardson v. Horton*, 6 Beav. 185;
- Chalk v. Raine*, 18 L. J., N. S., 472, Ch.;
- Bingham v. Clanmorris*, 1 Moll. 514.

The VICE-CHANCELLOR said that, it appeared to him that the *plts.*, who claimed to be entitled to have a receiver appointed, had sufficiently established the fact that they were specialty creditors of Estcourt Cresswell, the testator; but it was not so clear that they were, in all other respects, entitled to come with their present motion. The suit of *Gregory v. Cresswell* having been instituted to administer the testator's estate, the specialty

creditors were entitled to be paid in the first place out of the personal estate; failing that, out of that portion of the real estate which had been devised to be sold for the payment of debts; and failing those, out of the real estate of the testator devised absolutely to devisees. At law a specialty creditor could bring an action against the devisee, and recover the debt to the amount of the assets devised to him; equity, in this respect, did not follow the law; for, when a creditor came upon the real estate, equity did not content itself with making the devisee personally liable, but it laid hold of the estate itself to pay the specialty creditors, and now by the recent law the simple contract creditors had also a like right. The first question in the present case was this: supposing Thomas Estcourt Cresswell, the tenant for life, to have been devisee in fee of the estate in possession, what course would this court have taken as against him? That was the case of *Jones v. Pugh*, before Lord Eldon, where creditors filed a bill and claimed satisfaction against the real and personal estate, and there was a motion for a receiver, on the ground that the personal estate was exhausted; and Lord Eldon said: "If the person in possession of real estate, which is assets, has in the answer stated the circumstances of the property to be such that the court cannot avoid seeing that in the administration both the real estate and the rents and profits must become responsible to the demand, the court will, in the first instance, put a receiver upon the estate, though certainly a delicate thing to do in this stage." If, therefore, the matter were as simple as he had suggested, he would have to consider whether, not merely by an admission in the answer, but upon the evidence before him, there must necessarily be, in order to satisfy the specialty debts, a resort to the real estate devised. Looking at the matter upon that question, there arose some difficulty, by reason of the peculiar position of the personal property of the testator. [His Honour then went into some details of the accounts in the administration of the estate, and then proceeded:] Upon the data found in the master's account of 1850, there was then a strong probability that the personal estate would not be sufficient to pay the debts; in other words, there would be a necessity to resort to the real estate, and whatever resort might be necessary, it would be such as the *corpus* of the real estate would be amply sufficient for. That would be a fair view, if that were the position of the question, as there was evidently a strong probability that the personal estate would be exhausted, and the court would be justified in granting a receiver as against Thomas Estcourt Cresswell. But the present was not the simple case he had supposed, but it was a devise to trustees upon trust for Thomas Estcourt Cresswell for life, with limitations over to his children, &c.; and Thomas Estcourt Cresswell, instead of being in possession, had assigned his equitable life-interest to Caldwell and others by way of mortgage, and they were in effect in possession, not personally, but through a receiver appointed in their suit. It was a very difficult question what the right of the specialty creditors was as against the estate itself, so devised, and in that condition; it was a question which must arise, and if he had only to determine it on the present motion, he ought not to determine it unjustly. If a specialty creditor brought his action at law against the devisee, he could not touch the real estate; and if the devisee had not aliened the estate, it was a personal action to recover the amount of the debt to the extent of the assets devised, and if he retained the assets, it was a case in which there would not be general execution, but execution limited to the extent of the assets devised. That being the common law view of the question, what was the position in equity? The specialty creditor had a right, not a mere person

debt against the devisee, nor only to execution on the estate, but equity laid hold of the identical estate, and in effect made the devisee or heir a trustee for payment of the debts (the expression was in constant use) to the extent of the devised or descended estate; but, it being admitted that, if the devisee had aliened the estate, the specialty creditors could not touch it, the creditor had only a personal right as against the devisee to the extent of the assets aliened. Therefore, if Thomas Estcourt Cresswell had been the direct devisee and had aliened to Messrs. Caldwell, there would have been no remedy as against them; but the difference in this case was, that it was not a direct devise to him, but to trustees in trust for him, and he was only equitable tenant for life, the trustees being the direct devisees. Mr. Thomas was the surviving trustee, and he was not an original trustee or devisee in trust, but had been subsequently substituted for the original devisee in trust; and it was, therefore, the case of an alienee, not for value. Assuming that Mr. Thomas was the original devisee in trust and that the right was against him, it did not then matter what Thomas Estcourt Cresswell had done; Mr. Thomas, his trustee, had not aliened. This, therefore, was a case in which there was a devisee for life of an equitable interest not in possession and specialty creditors moving for a receiver; it involved a question which he should certainly not decide upon motion, supposing the plt.'s contention to be well founded; and assuming the case to be within the principle laid down in *Jones v. Pugh*. As to the personal estate being insufficient, it might possibly be said, "You have here Mr. Thomas, the devisee of the real estate, and therefore you may appoint a receiver." The answer, however, to that seemed to be *Jones v. Pugh* itself: "If a person," said Lord Eldon, "is in possession of real estate, which is assets, &c., &c." Was Mr. Thomas in possession of the real estate, even supposing him to be the devisee? He was not; but an alienee of the tenant for life was in possession, and, therefore, without determining a question which might arise at the hearing, he thought he ought not to appoint a receiver, the exercise of the jurisdiction with respect to which must depend on the circumstances, the power of appointing a receiver being necessarily a discretionary power and one to be exercised carefully. It had occurred to him during the course of the argument that it might be a hardship that the tenant for life should receive the rents and should not keep down the interest on the debts; that, however, was a question between the tenant for life and the remainderman and one with which the specialty creditors had nothing to do, as they had a claim upon the whole estate. Between the tenant for life and those in remainder, there might be a reason on that ground for appointing or not appointing a receiver; but it was not so on this motion. The motion must be refused, the question of costs to be reserved till the hearing.

Solicitors: Blozam, Ellison and Blozam; Price, Bolton and Filder; Gibbs and Tucker; Capron and Co.

Wednesday, Jan. 13.

DILLON v. ASHWIN.

Practice—Disclaimer—Costs.

A party, properly made a deft. to a suit, who before answer gives notice that he has parted with his interest, and offers his consent to have the bill dismissed against him without costs up to the date of the notice, is entitled to his costs from the date of such notice where the plt. retains him as a party to the suit.

This was a motion for decree in a foreclosure suit. *W. M. James, Q.C. and Eddis*, for the plts., asked for the common decree.

Bevir, Batten and W. Pearson for different defts.

J. Cutler appeared for Mr. Holden, a deft., who, upon being served with a copy of the bill, had given notice that he had parted with his interest in the subject-matter of the suit, and he now asked for his costs from the 13th Feb. 1860, the day on which he had given such notice.

The facts which bear on this application are sufficiently referred to in the V. C.'s judgment.

Cutler cited

Talbot v. Kemshead, 4 K. & J. 93.

W. M. James, in reply, contended that the plt. was obliged to make Mr. Holden a party, and that the difference in expense between putting in a voluntary answer and the plts. dismissing him was trivial.

The VICE-CHANCELLOR. — The only point that arises in this case is with regard to the deft. Mr. Holden. At the time when the bill was filed, he had an interest in the subject-matter of the suit, and interrogatories were filed, which he as a party to the suit would be required to answer. But before his answer he parted with his interest, and as soon as he did so he gave notice to the plts.' solicitor that he had so parted with his interest, and was willing to be dismissed from the suit without costs, and had this been done it would have been the right course. The plts.' solicitor accordingly prepared the common petition to dismiss the bill as against Mr. Holden without costs, but, for some reason or other, he subsequently sent to Mr. Holden to say that it was a mistake, and that the plts. meant to keep him as a party, and that he must therefore put in an answer to the interrogatories. They seem to have been under the impression that Mr. Holden could not be dismissed from the suit, so long as there were interrogatories on the file to which he had not put in an answer. It is clear that the fact of interrogatories having been filed has not that effect. That was a misapprehension, though it is true that, as they chose to keep Mr. Holden a party, they could not afterwards get the certificate of the clerk of records and writs without his answer. They kept him as a party to put in his answer, and it appears to me that I must do what Wood, V.C. did in the case of *Talbot v. Kemshead*, namely, give no costs up to the time of the notice, and from the time of the notice Mr. Holden's costs must be paid by the plts. In other respects there must be the usual foreclosure decree for principal, interest and costs.

Solicitors for plt., *Sharpe and Parker*, Bedford-row.

Jan. 22 and 23.

WARDROPER v. CUTFIELD.

Apportionment—Exercise since the Apportionment Act of a power created before the Act.

There must be an apportionment of dividends between the representatives of a tenant for life and the remainderman, where the interests of the different parties arise under a power of appointment exercised since, though created before, the passing of the Act.

The case of Fletcher v. Moore, 29 L. T. Rep. 173, held to be rightly decided, though the grounds of the decision could not be supported.

This was a petition by the Equitable Reversionary Interest Society, which prayed that the share of Wm. Wardroper, under a certain appointment made by the will of Mrs. Eliza Geldart, might be paid over to the society as Wardroper's assignee, and that the other shares under the same appointment might be paid to the persons who were respectively entitled to them. The petition came on for further consideration on the chief clerk's certificate.

The principal question involved was, whether there should be an apportionment of the dividends which

became due at the end of the half-year at which the tenant for life died.

The facts of the case are sufficiently stated in the judgment of the V. C., and it is only necessary to give the dates of the different events to which the judgment has reference.

The settlement creating the power was executed in 1821. The Apportionment Act (4 & 5 Will. 4, c. 22) was passed in 1834.

The testatrix, Mrs. Eliza Geldart, died in 1838, having by her will executed the power of appointment created by the settlement of 1821. Dr. Geldart, the testatrix's husband, died in 1839. Charlotte Cutfield, the tenant for life, died unmarried in 1863.

Baily, Q.C. and B. R. Rogers, for the petitioners, argued against the apportionment of the dividends, and cited

Fletcher v. Moore, 26 L. J. 530, Ch.; 3 Jur. N. S. 458; 29 L. T. Rep. 173;

Lock v. De Burgh, 4 De G. & Sm. 470;

Plummer v. Whiteley, Johns. 585; 1 L. T. Rep. N. S. 230;

Bevir for a party who took a share in the residue.

G. Lake Russell and R. Horton Smith, for representatives of Mrs. Wardroper's children, also argued against an apportionment.

Oler, for the representatives of Charlotte Cutfield, claimed an apportionment.

Baily, Q.C. in reply.

Re Markby, 4 Myl. & Cr. 484, was also cited.

The V. C. having decided a question upon the construction of Mrs. Geldart's will, said that he would reserve judgment on the question as to whether Charlotte Cutfield's executors were entitled to an apportioned part of the income. He confessed that he felt great doubts whether *Fletcher v. Moore* was applicable, but before he expressed an opinion he would look into the cases and into the expressions used in the Act.

Jan. 25.—THE VICE-CHANCELLOR.—The question reserved in this petition is a question under the Apportionment Act. The facts are simple. On the marriage of Dr. and Mrs. Geldart a settlement was executed which was dated on the 5th May 1821, a considerable time before the passing of the Apportionment Act. By this settlement, in the events which happened, Mrs. Geldart had a power of appointment by will over a sum of 6000*l.*, the subject of the settlement. She had a life-interest in the fund, and her husband had also a life-interest. She died in the lifetime of her husband, a few years after the passing of the Apportionment Act. By her will she exercised the power of appointment, having declared her will to be a good execution of that power. By that will she appointed the 6000*l.* after her husband's death to her sister Charlotte Cutfield for her life if she remained single, with certain limitations over in case of her marriage, and the whole fund was eventually to go to the children of her deceased sister, Mrs. Wardroper. Dr. Geldart, her husband, died in 1839, and Miss Cutfield, under the appointment, became entitled to the fund. She never married, and she died in 1863. The question now arises between the representatives of Miss Cutfield and the children of Mrs. Wardroper, whether there is to be an apportionment of that half-year's dividend, in respect of the half-year which was current at the time of Miss Cutfield's death. The question depends on the language of the Apportionment Act, one of the most ill-drawn of the many ill-drawn Acts upon the statute-book. It is difficult to find a rational construction of the terms which are used. We have here to do with the 2nd section, which is the principal section of the Act. The exact question which presents itself is, whether Miss Cutfield's interest in the fund is to be considered as an interest which she had in dividends under an in-

strument executed or coming into operation after the passing of the Act. She was entitled for life under the will of her sister Mrs. Geldart, and Mrs. Geldart's will came into operation after the passing of the Act; but this bequest to Miss Cutfield was made in the exercise of a power, and the instrument creating the power was executed before the passing of the Act. [His Honour then read the 2nd section of the Act.] The judgment of Wood, V. C. in *Plummer v. Whiteley*, has drawn a distinction between two classes of subjects included in this 2nd section, and it is a sound and just view of the question, and a view on which I mean to act. The result of the V.C.'s opinion is, that in this clause which I have read, a distinction is to be made between rent service reserved on any leases, and between rent charges and other rents, annuities, pensions, dividends, moduses, compositions, &c. Where rent service is reserved in a lease, if the instrument creating the demise was executed after the Act, although the instrument creating the estates was executed before the Act, it is held that there must be an apportionment. But with regard to rents charge and other rents, annuities, pensions, dividends, moduses, &c., the instrument creating the beneficial interest must be subsequent in date to the passing of the Act in order to bring the case within the requirements of the section, and to make the payments apportionable. That is the sound view of the question, and I have no hesitation in adopting it. Here we have not the case of rents, but the case of dividends, and it comes within the second class. The case of *Lock v. De Burgh* was a question with regard to rent reserved by lease; the instrument creating the power by which the lease was granted was dated after the Act. We do not know upon what reason Bruce, V. C. proceeded, but he there held that there must be an apportionment. In the case of *Fletcher v. Moore*, which came before myself, *Lock v. De Burgh* was cited, and I assumed too hastily that the ground of the decision in that case was the assumption that, in construing the 2nd section, there was the same rule for ascertaining whether a case fell under the Act, both with regard to rents service, and also with regard to all the other payments referred to in that section. The point did not occur to my mind that Bruce, V. C. acted upon the principle which was subsequently enunciated in *Plummer v. Whiteley*; and the decision threw a doubt upon what appeared to me, at that time, to be the construction of the Act. There can be no doubt, however, that the decision in *Lock v. De Burgh* was in accordance with that view; and having the advantage of the light thrown upon the construction of the section by the judgment of Wood, V.C. in *Plummer v. Whiteley*, I am bound to assume that the ground upon which Bruce V.C. arrived at his decision was in unison with the division of the section into two parts, as adopted in *Plummer v. Whiteley*, as the point upon which his judgment turned could not otherwise be upheld. I am not, however, of opinion that Lord Cottenham, from his reasoning in *Re Markby*, can be supposed to have apprehended this division of the section into two parts. The case of *Fletcher v. Moore* related to the half-year's rent current at the period when the tenant for life attained twenty-one, and not to the rent for the half-year in which he died. The question arose between the trustees of a will who had the fund in accumulation so as to capitalise the interest which accrued during the minority, and between the tenant for life. The Apportionment Act had nothing to do with the question. It is true that the case was argued upon the Apportionment Act, and the Act applies where the interest of the tenant for life is determined. Without reference, however, to the Apportionment Act, a tenant for life is entitled to the whole of the rent payable for the half-year current at the time

of the attainment of his majority, and I am still of opinion that my decision in *Fletcher v. Moore* was right, though I am convinced that some of the reasoning then used by me cannot be supported. It is not now necessary to refer to the cases before Lords Langdale and Cottenham on this question. The present case falls under the latter of the two parts into which the section is divided. Is there an apportionment between Miss Cutfield's representatives and the remaindermen? It depends upon the question whether the dividends in dispute were (to use the words of the section) made payable or coming due at fixed periods under an instrument executed after the passing of the Act, or (being a will or testamentary instrument) coming into operation after the passing of the Act. Take the case of a modus, which is particularly mentioned in the Act amongst the payments coming due under an instrument; so far as relates to the person having to pay the modus, the liability to pay it has existed from time immemorial, and the Act must therefore have reference to an instrument under which the interests of parties in the modus were created. The question then in the present case is this—Under what instrument did Miss Cutfield's interest arise? were these dividends made payable under an instrument executed since the passing of the Act? Her interest arises under the exercise of a power contained in an instrument dated before the passing of the Act; the power which gives her that interest was exercised by an instrument dated since the passing of the Act. Under which, then, of these two instruments do the dividends in question become payable? It apparently never occurred to the framer of the Act to suggest which instrument was the one he referred to in such a case as this, and it is the more extraordinary, as he was evidently aware of the doctrine of powers, and the distinction between the execution and the creation of them. There is an excessive ambiguity of language in the Act, and this ambiguity I must endeavour to explain. If the word used here were "created," the meaning would be plainer; the interest in the dividends was clearly created by the instrument which created the power. Under what instrument, however, did Miss Cutfield's life-interest arise? I should say under *both* instruments, for without both she could have no interest. According to the law of powers, the interests created by instruments exercising the power have precisely the same effect as if they came into existence by the instruments creating the power: that is the law, and therefore in the same manner the same effect should be given to the interests which have been created in the present instance. Under what instruments do they exist? Under two instruments; what then ought to be the conclusion to which we should arrive? The words of the Act are too ambiguous to settle the doubt; and, under these circumstances, the intention of the Act may fairly be appealed to, and a little assistance may be derived from its general tenour. The intention of the Act, as appears from the preamble, was to cure the mischief of the old law, viz. that persons (and their representatives) whose income wholly or principally derived from some rent or other periodical payments might by the determination thereof before the period of payment be deprived of means to satisfy just demands, and there were also other evils which were thought sufficient to justify the intervention of the Legislature. Under these circumstances it appears to me that I cannot apply to cases under this statute the established doctrine that estates existing under an instrument exercising the power take effect in the same manner as though they were created by instruments creating the power, but I must hold that the instrument to be looked to is the instrument under which more immediately the estates exist. I feel some hesitation on the subject, but this decision appears to come within the scope and

spirit of the Act, and to be a fair conclusion to arrive at; and therefore let there be an apportionment of the current dividends.

Solicitors, *Bouth, Rowden and Stacey; Holmes and Impey; Clayton and Son.*

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW, Esqrs., of Lincoln's-inn, Barristers-at-Law.

Wednesday, Jan. 20.

MARGITSON V. HALL.

Will—Construction—Changing words.

Testator gave a sum of 1600l. unto and amongst such one or more of the children "or" grandchildren of his daughter A. M. that should be living at her death, equally to be divided among them, share and share alike. Testator's brother afterwards made a voluntary increase in the above provision by a bond in favour of all and every the child and children "or" grandchildren of the said A. M. that should be living at her decease, in such shares and proportions as she should by will appoint, with a proviso that each and every the children "and" grandchildren of the said A. M. that should be living at her decease should be entitled under such will to receive a share at least equal to the amount of the share to which he or she would have been entitled under the will of the testator. A. M. by will appointed to her four daughters (three of whom were married and the fourth of whom married before her death), who were her only children, in equal shares, and in the event of the death of any one of her said married daughters, her share to be divided between the children of such daughter. At her death all four were living, and three had issue living: Held, that the word "or" in the will must be construed strictly as excluding the grandchildren of A. M., and that the four daughters took absolutely in equal shares.

Mark Butcher, by a codicil to his will, dated the 28th June 1808, after bequeathing to his married daughter, Anna Maria Wadams, an annuity of 80l. in trust for her separate use, proceeded as follows:—"I give the principal sum of one thousand six hundred pounds unto and amongst such one or more of the children or grandchildren of her my said daughter Anna Maria that shall be living at her death, equally to be divided among them, share and share alike." If his said daughter should leave no children living at her decease, or if she left such and all of them were to die under twenty-one, and without issue, testator devised as follows: "I give the sum of 80l. a-year (being the interest of the said sum of 1600l.) to John Wadams for his life, and at his death I give the said principal sum of one thousand and six hundred pounds unto and amongst all my other children that shall be then living, equally to be divided between them, share and share alike, and the child or children of such of them as shall be then dead to have his, her, or their father's or mother's share." Testator appointed his son Robert Butcher executor and trustee of his will and codicil, and declared that his said son might cause the sum of 1000l. to be invested in the funds in the name of a trustee or trustees for the benefit of his daughter Mrs. Wadams, her children and husband, and eventually of his other children, upon the same trusts and in like manner as thereinbefore mentioned concerning the annuity of 80l. and the said sum of 1600l. and interest. The testator died on the 5th Jan. 1809.

By a voluntary bond, dated the 26th Feb. 1810, Robert Butcher agreed to increase the provision made by the codicil for his sister Mrs. Wadams and her children to the sum of 3000l., but this was to be considered in satisfaction and discharge of the annuity

and legacies given by the will and codicil. The condition of this bond was that the said sum of 3000*l.* should be paid within two months after Mrs. Wadams' death, or so soon afterwards as such children as thereafter mentioned should respectively attain twenty-one, with interest at 5 per cent. (which interest might be applied for the education and maintenance of such children or grandchildren being minors), "unto and amongst all and every the child and children or grandchildren (if more than one) of her the said Anna Maria Wadams, that should be living at her decease," to be divided in such proportions as she should by will appoint; with a proviso that each of "the children and grandchildren" that should be living at her decease should be entitled under such will to receive a share at least equal to the amount of the share to which he or she would have been entitled under the codicil of Mark Butcher.

Shortly after the date of the above bond Robert Butcher invested 1600*l.* in the purchase of consols upon the trusts of the codicil, and the plts. were the representatives of the surviving trustee of this fund. Two advances of 50*l.* were also made by Robert Butcher to Mrs. Wadams, and it was agreed by all parties that thereby the sum of 1300*l.* and no more was due from him on account of the bond.

Mrs. Wadams died in March 1860, having by her will dated the 24th Jan. 1853 bequeathed the amount of consols invested under her father's will to her four daughters, her only children (three of whom were then married, and the fourth afterwards married in the mother's lifetime) between them share and share alike; and the further sum of 1300*l.* secured by her brother's bond to the same four daughters, in manner therein mentioned; and in the event of the death of any one of her aforesaid married daughters, she gave the sum therein bequeathed to her children to be divided between them, share and share alike.

At Mrs. Wadams' death all four of the daughters were living, and three of them had children living.

The bill prayed that the rights and interests of the children and grandchildren of Mrs. Wadams, in the trust-fund, and in the moneys payable under the bond, might be declared, and that the trusts of the codicil and the bond might be executed by the court.

Mains, G.C. and *David G. Begg*, for the plts., the trustees contended that the children were entitled to the exclusion of the grandchildren. They cited *Montagu v. Nucalla*, 1 Russ. 171.

Upton appeared for the children, and supported the same contention.

J. Bird appeared for mortgagees.

Phear, for the grandchildren, argued that the proper construction of the words of the gift in question was, that the word "or" ought to be read "and." The gift was to one or more such persons being the children and grandchildren living at the death of Mrs. Wadams. The word *or* was not meant to signify a substitution of children for grandchildren, but as a description in the event of there being both of the classes of persons who were to take.

Eccard v. Brooke, 2 Cox. 214;

Richardson v. Sprang, 1 P. Wms. 434;

Blackler v. Webb, 2 P. Wms. 383;

Horridge v. Ferguson, Jac. 583.

The VICE-CHANCELLOR.—It seems to me that this is not a case in which the court is authorised to do that violence to any words of the will which has been done in some instances. The cases cited in argument in support of the construction, that the children and grandchildren take equally are those in which, to avoid some inconsistency or absurdity, and in order to give effect to what upon the whole will appeared to be the intention of the testator, the court read the word "or" as if it had been "and." That is taking a great liberty with the text of the will, and is only

justified where it is necessary for the purpose of preserving consistency, or avoiding what is manifestly absurd. In the present case, the plain and sensible meaning of the word "or" accords entirely with the whole scheme of the testator's will, and although it is true that the exercise of the power for the distribution of the funds among the donees of the power could not interfere with the construction of the will, it is satisfactory to find that the plain meaning of the will was that which was adopted by Mrs. Wadams when she exercised the power which had been given to her. It is a very dangerous practice to act upon the principle of doing violence to the language of a will in any case where it may be avoided. I do not think myself authorised to do so in this instance, and I shall therefore avoid it. I must give the natural meaning to the word "or," and the result will be, that the testator and the obligor of the bond, looking to what was a proper mode of providing for objects of their bounty, said that the children, at all events, should be the persons entitled to share in the fund. The word "or" being alternative in its meaning, the natural construction is that, where there are children living they should take, and that the grandchildren should take where children cannot take. There are cases in the books which have not been cited, and in which, in effect, it has been held that, where parents have died, the intention was, that their children should take in equal shares. Accordingly, that will be the decree in this instance.

Solicitors for the plt., *Clarke, Gray and Woodcock*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Thursday, Jan. 21.

WALTER v. TURNER.

Administration—Priorities—Unregistered judgments
—23 & 24 Vict. c. 38, s. 3.

In order to entitle a judgment-creditor to payment in priority over creditors by simple contract in an administration suit, his judgment must be registered. The intention of the 23 & 24 Vict. c. 38, s. 3, was, to restore, as to heirs, executors, and administrators, the rule as to priorities established by 4 & 5 Will. 4 M. c. 20, which had been disturbed by 2 & 3 Vict. c. 11.

This was an administration suit. In taking the accounts before the chief clerk two creditors, one by judgment of the Court of Ex., the other by County Court judgment, claimed to be paid in preference to simple contract creditors. The chief clerk had not made his certificate, and the matter now came on by motion for the direction of the court.

F. Shebbeare, for simple contract creditors, referred to 23 & 24 Vict. c. 38, s. 3, by which, he contended, the rule laid down in *London v. Ferguson*, 3 Russ. 349, became again applicable to the present case.

Pole, for the administratrix, commented on the changes that had taken place in the law since 4 & 5 Will. & M. c. 20, and the cases which followed: *Hickey v. Hayter*, 6 T. R. 364; *Steel v. Rorke*, 1 Bos. & Pull. 307. After the 2 & 3 Vict. c. 11, closing the docket, the case of *Fuller v. Redman*, 20 Bear. 600, decided that an administrator had committed a *devastavit* in paying simple contract debts before that of a judgment creditor which was unregistered, and of which he had no notice. Lord St. Leonards' recent Act was intended expressly to restore to heirs, executors and administrators the protection which they had thus been held to have lost.

Dryden, for the first of the judgment-creditors, argued that none of the cases under the old law were of administration suits, but of suits by creditors. It was a

rule of this court to give priority to debts of record. This was an administration by the court, and therefore the object of the recent Act, the protection of the administrator, was attained.

Bilton, for the County Court creditor, contended that the judgment, as such, of the County Court could not be registered, and the same rule did not therefore apply.

The VICE-CHANCELLOR, without calling for a reply, said that it did not appear that the question, as between two classes of creditors, had ever been decided; he thought, however, that the principle which should govern his decision was clearly established. The object of the Act 4 & 5 Will. & M. was to protect an heir, executor, or administrator from the consequences of *devastavit*, to which he would render himself liable at common law by paying a simple contract debt while a judgment remained unsatisfied. Then it was decided by *Steel v. Rorke* and *Hall v. Tapper*, 3 Barn. & Ad. 655, that notice of the judgment-debt was not sufficient to make the administrator of the estate liable; it must be such notice as the Act pointed out, i.e. docketing. Further, the former of these cases showed that it was even intended to interpose between two classes of creditors, for that was the case of an executor on an action for a simple contract debt pleading notice of an undocketed judgment, and the plea was held to be bad. Then followed the case of *Landon v. Ferguson*, carrying out the same principle in another branch of this court. So that it was clear that, so far as the statute of 4 & 5 Will. & M. went, there could be no priority without docketing. The decision in *Fuller v. Redman*, however, pointed out the omission that had been made when the old dockets were closed, and the object of Lord St. Leonards' Act being in terms to meet the difficulty so pointed out, that Act follows the wording of the old law and brings the whole matter within the principles which were formerly applicable to it. The only question therefore was, had anything been done in respect of these two judgments, to make them binding on lands? As to the judgment of the Court of Ex. nothing of the sort had been done; as to that of the County Court it might have been entered so as to make it the judgment of a Superior Court (18 & 19 Vict. c. 15, s. 7), and then registered: the only difficulty might have been in this latter case, if there had been no such means of registration. He must direct that no such priorities existed as had been contended for.

Jan. 29 and Feb. 1.

SMITH v. ETCHES.

Practice—Feme covert—Next friend—Security for costs.

In a suit for redemption of real estate of a feme covert suing by her next friend, although her husband was co-plt. in the suit:

Held, that the personal security of the next friend appearing to be insufficient, and the husband being a bankrupt, the former must give security for costs.

This was a suit by husband and wife (originally) as co-pts., for redemption of real estate of the wife. On the 8th Dec. 1863 his Honour had made an order that the bill be amended by adding a next friend for the wife (*Smith v. Etches*, 9 L. T. Rep. N. S. 476); this had been done, the name of the husband continuing on the record as co-plt.

Roll, Q.C. and *W. Morris* now moved to stay proceedings in the suit until the next friend had given security for costs. The motion was supported by an affidavit, stating that the proposed next friend, who described himself as a "gentleman," was an articulated clerk, living in lodgings, and other circumstances calculated to lead to the conclusion that he might be

unable to pay costs if awarded against him. A married woman might sue alone as *formâ pauperis*, but if she sued by a next friend, he must be a person of substance:

Pennington v. Alvin, 1 Sim. & St. 264;

Hind v. Whitmore, 2 K. & J. 458;

Stevens v. Williams, 1 Sim. N. S. 545;

Drinan v. Mannix, 3 Drn. & W. 154.

Cadman Jones (*Daniel*, Q.C. with him), for the plt., cited in opposition *Dowden v. Hook*, 8 Beav. 399, and urged, that it was not sufficient in support of this application merely to swear as to belief that the next friend was not a person of substance; both in *Pennington v. Alvin* and *Stevens v. Williams* the facts had been much stronger. But if this were not so, the husband was a co-plt., and there was therefore ample security for costs. The rule was the same as where some of the pts. were within the jurisdiction and others were not: (*Walker v. Easterby*, 6 Ves. 612.) No objection could be taken to the husband's remaining as co-plt. in the suit, on the ground of misjoinder; he still had a remote interest in the subject-matter:

Davis v. Prouz, 7 Beav. 288;

Maddowcroft v. Campbell, 13 Beav. 184.

Roll, in reply, contended that the bill was wrongly amended; the husband had no real interest in the suit, and ought to have been struck out as plt.; in both the cases cited he had a substantial interest. Then, the object of having a next friend being to ensure the proper conduct of the suit, how was that attained, the next friend being a person of no substance, and the co-plt. being a bankrupt and having no real interest?

The VICE-CHANCELLOR said, that he had on the former occasion decided that the husband had a sort of shadowy interest in the subject-matter of the suit; there was, therefore, no impropriety in his continuing as a plt. on the record; he did not, however, think it followed from this that the next friend of the wife must be exempt from giving security for costs. He thought that there was an analogy between this case and that of *Drinan v. Mannix*, in which the same person was next friend for infant pts. and for a married woman, and yet it was held that he must in the latter capacity give security. It was sworn in the case before him that the mortgaged estate was an insufficient security; if this had been otherwise, he might have referred the debts to the security of the estate; but as it was—as the suit was properly the suit of the wife and the husband's interest a mere shadow—he must order the proceedings to be stayed until the next friend should give security for costs in the usual amount.

Solicitor for plt., *S. W. Johnson*; for def., *Etches*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs., Barristers-at-Law.

Saturday, Nov. 19.

REYNOLDS v. HICKMAN.

Costs—New trial—Discontinuance.

Verdict for plt. on first trial, and rule absolute for a new trial. Nothing done for more than a year.

Def't. then gave a month's notice of his intention to proceed and takes the case down for trial by proviso. The plt. then discontinued:

Held, that the def't. was not entitled to costs beyond the period when issue was joined.

Nov. 5.—*D. D. Keane* obtained a rule nisi to set aside an order of Bramwell, B., directing the Master to review his taxation of the def't.'s costs.

[Q. B.]

Ex parte WILSON.

[Q. B.]

This was an action of ejectment by parish officers to recover the possession of certain tenements. At the trial in Cambridgeshire the verdict passed for the plts., and subsequently in 1860 a rule *nisi* for a new trial was made absolute. Nothing further was done in the action until the early part of 1863, when the deft. gave a month's notice of his intention to proceed and take the case down to trial by proviso. The plts. then gave notice to discontinue. The question was, what costs the deft. was entitled to. The master only allowed the costs down to the issue. The deft. then took out a summons before Bramwell, B., who was of opinion that the deft. was entitled to all the costs which would have been costs in the second trial had it taken place, that is, to all the costs in the cause:

Jolliffe v. Mundy, 4 M. & W. 502;

Freeman v. Springham, 8 L. T. Rep. N. S. 428;

Daniel v. Wilkin, 22 L. J. 73, Ex.

Douglas Brown showed cause.—It is conceded that the costs of the first trial are thrown away, but there are certain items, such as charges for advice on evidence, for searches, and for certificates, which are costs in the cause, which the deft. is entitled to. The deft. was entitled to give notice of trial by proviso, and to make preparations for the trial. The deft. is therefore entitled to all the costs but the actual costs of the first trial. [COCKBURN, C.J.—These expenses are incurred in preparing for trial and are incidental to the trial.] If the case stands, for the purpose of this question, as if there had been no trial, and the point is, would the deft. have been justified in incurring these expenses? He clearly would:

Lambert v. Lyddon, 4 D. & L. 400;

Daniel v. Wilkin, 8 Ex. 156;

Lord v. Wardle, 6 Dow. 174.

D. D. Keane.—The case of *Rigby v. Okell*, 7 B. & C. 57, is in point. There, after the first trial and verdict for the deft. and a new trial ordered, the action was referred, and the award was for the plt. By the submission the costs were to abide the event, and the court held that the Master was right in refusing to allow any costs to the plt. beyond the period when the issue was joined:

Earl of Macclesfield v. Bradley, 7 M. & W. 570.

By the COURT.—The deft. cannot be in a better position now than if plt. had discontinued before notice of trial given for the first trial, and he is, therefore, not entitled to these costs. *Rule absolute.*

Wednesday, Jan. 13.

Ex parte WILSON.

Articled clerk—Service—Fresh articles—Omission to stamp in due time.

An attorney, who had misconducted himself professionally, left the country, and W., his articled clerk, under advice, entered into an unstamped agreement to serve B. and Co. as an articled clerk, stipulating that he would procure an assignment of his articles from his former master to them. The master, however, refused to assign the articles, and W. then got himself discharged therefrom. The master was then struck off the rolls. Some time afterwards the agreement was stamped with a 35s. stamp, on payment of 10l. penalty.

Upon W.'s application, this Court granted a rule to enrol the agreement, and that service thereunder should be reckoned from the day on which he was discharged from his original articles.

Service will not, as a matter of course, be allowed to count from the date of articles not stamped in due time, even after the Treasury has allowed them to be stamped and the penalty paid, unless the circumstances satisfactorily account for the omission.

Nov. 21.—Gray, Q. C. applied on behalf of Mr. Wilson, an articled clerk, for an order of this court, directing that his articles of clerkship entered into with Messrs. Barnett, Marlow and Barnett, might be enrolled, and that his service might be reckoned from the 13th May 1862, the day on which he was discharged from his articles of clerkship to Mr. Sill, formerly an attorney of this court.

Mr. Wilson entered into articles of clerkship to Mr. Sill, an attorney, on the 21st Dec. 1859, and had duly paid the stamp duty thereon. The articles were enrolled, and Mr. Wilson duly served under Mr. Sill until May 1861, when, in consequence of misconduct, Mr. Sill left the country.

In June 1861 Mr. Wilson, under advice and with the consent of Messrs. Underhill and Co., who conducted Mr. Sill's business in his absence, entered into an unstamped agreement with Messrs. Barnett, Marlow and Barnett to serve them as an articled clerk and to procure an assignment of his articles to them from Sill. Mr. Sill refused to assign the articles of clerkship, and acting under advice Mr. Wilson then got himself discharged from his articles to Sill. Sill was subsequently struck off the rolls.

Mr. Wilson's agreement with Messrs. Barnett and Co. was locked up and forgotten until it was required for the purpose of serving as fresh articles to Messrs. Barnett and Co., and had not been executed on their part. The partner to whom Mr. Wilson was to be bound recently executed the agreement, and it was then stamped with a 35s. stamp and the penalty of 10l. paid.

The Court allowed the agreement to be enrolled, and took time to consider the other part of the rule as to the period from which the service was to count.

Cw. adv. vult.

Jan. 13.—BLACKBURN, J.—In this case an application was made on behalf of Mr. Wilson, an articled clerk, to direct that the articles under which he has served his present employers, Messrs. Barnett, Marlow and Barnett, should be enrolled, and that his service might be reckoned from the 13th May 1862, on which day he was discharged from his articles to his former employer Mr. Sill. The facts as disclosed upon the affidavit are, that the applicant had been bound to Mr. Sill, then an attorney in good position, and had duly paid the stamp duty on those articles, which were properly enrolled, and had duly served Mr. Sill till May 1861. In that month, by no fault of the clerk, though to his great misfortune, Mr. Sill misconducted himself and left the country, and in Nov. 1861 became bankrupt, and finally was struck off the rolls of this court in Hilary Term 1862. Under the circumstances, in June 1861 the applicant entered into an agreement in writing with his present employers to procure an assignment of his articles to them, and in the meantime to serve them as their clerk. This instrument ought to have been impressed with a 35s. stamp; but, as it was anticipated that there was to be an assignment of the original articles, the parties neglected to stamp it. Mr. Sill, however, declined to execute the assignment of the articles when required to do so, and Mr. Wilson is now driven to rely on this agreement as the articles under which he has served the latter part of his time. Upon the face of the instrument it does not appear that he had the consent of Mr. Sill when he entered on this new service; but that defect is satisfactorily supplied by affidavit. The articles have now been duly stamped and the penalty paid, though not till the month of Nov. 1863; and we last term granted the first part of the application that the articles should be enrolled, but took time to consider whether we could comply with the second part of his application, and allow a service from the 13th May 1862, though the articles were not then enrolled nor stamped. As there has been some difference of opinion

expressed in this court as to what is the duty of the court in this respect since the statute 19 & 20 Vict. c. 81, s. 3, and as the Court of C. P. has, in *Ex parte Edwards*, 8 L. T. Rep. N. S. 360, expressed an opinion differing from that expressed by the majority of this court in *Ex parte Herbert*, 31 L. J. 33, Q.B., we wished to learn what was the view upon this point taken by the Court of Ex. in a case pending before them. We find that their view agrees with that of the Court of C. P., and that, in their opinion, though the Treasury have been satisfied to accept the penalty for revenue purposes, yet that the court has a further duty, and that, both for the purpose of protecting the revenue and that of ensuring the respectability of those who are to become attorneys, the court, before the service under unstamped articles is allowed to count, should be satisfied that the circumstances are such as to account for the omission to pay the duty and enrol the articles in due form. It is important that the practice of all the courts should be uniform, and we shall, therefore, in this case, and in future, act upon the rule as laid down in the other courts; but consistently with that we think we may grant the application in the present case. No doubt, when Mr. Sill refused to assign the original articles, and the clerk was, by order of the court, discharged from them, he ought to have enrolled the fresh articles duly stamped. His excuse for not having done so is, that he had engaged to pay his present employer a considerable premium; that he was very short of money, and had great difficulty in paying it, which he could only do by instalments. Six months had elapsed since the execution of the agreement, which could therefore only be stamped on payment of the penalty of 10*l.*, as well as the 3*5s.* stamp, and the 10*l.* penalty would have increased the pecuniary difficulty. Had this been offered as an excuse for the nonpayment of the original stamp duty, we should have thought the reasonable inference was that the applicant, when entering on his clerkship, was not in a position to justify him in doing so, and we should not allow the service to count. But here the clerk had already, when entering into his former articles, given a guarantee for the *bona fides* of his clerkship and the respectability of his position, which is involved in the payment of the large stamp duty, and the subsequent difficulty in which he found himself arose from no fault of his own. He did wrong in not having the fresh articles stamped and enrolled, but it was not a fault of such a character as to affect his respectability. He has incurred considerable expense and probably undergone considerable anxiety in avoiding the consequence of the error he has committed; and we think this will be quite sufficient to prevent any others following the same course without our imposing any further penalty upon him. We therefore grant the application, that his service under his present articles count from the date of his discharge from the former articles. *Rule granted.*

Wednesday, Jan. 27.

STAFFORD (app.) v. PILCHER (resp.)

Vaccination—Neglect to have child vaccinated—
Second offence.

The 16 & 17 Vict. c. 100, s. 9, enacts that notice shall be given to the parent or guardian of a child, on the registration of the birth, that it is the duty of such parent or guardian to take care that the child shall be vaccinated in the manner directed by the Act; and if, after such notice, the parent or guardian shall not cause such child to be vaccinated, then such parent or guardian "so offending" shall forfeit a sum not exceeding 20*s.*

Sect. 2 directs the parent, within three months after the birth, and the guardian within four, to take

the child to the medical officer for the purpose of being vaccinated.

A father, having neglected to comply with the Act, was convicted and fined. He was, after the lapse of the time mentioned in sect. 2, summoned a second time in respect of the same child, for continued neglect to have the child vaccinated:

Held, that he could not be convicted of a second offence under the above enactment.

Case stated by Justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Margate, in the liberties of the Cinque Ports, on Nov. 25, 1863, an information was preferred by C. R. Pilcher, registrar of births and deaths, and the person appointed by the guardians of the Isle of Thanet Union (in which Margate is situate), pursuant to 24 & 25 Vict. c. 59, to institute and conduct proceedings for the purpose of enforcing obedience to the Vaccination Acts within Margate, against W. G. Stafford, under sects. 2 and 9 of the 16 & 17 Vict. c. 100 (a) alleging that the resp. on the 23rd Nov. 1863, at Margate aforesaid, in the liberties aforesaid, then being the father of a certain child called Albert Alfred Kennett Stafford, born after the 1st Aug. 1853, to wit, on the 16th July 1862, unlawfully did not within three calendar months after the birth of the said child take or cause to be taken the said child (which had not been previously vaccinated by some duly qualified medical practitioner) to one of the medical officers duly appointed in that behalf in Margate aforesaid, for the purpose of being vaccinated according to the 16 & 17 Vict. c. 100, although one Henry Wootton, the late registrar of births in Margate aforesaid, did on the registration of the birth of the said child give due notice in writing to the said resp. in manner and form directed by the said Act.

At the hearing it was proved that proper notice had been given to the resp. pursuant to the 9th section of the 16 & 17 Vict. c. 100, that he had failed to comply therewith in not having the said child vaccinated

(a) Sect. 2. The father or mother of every child born in England and Wales after the first day of August in the year of our Lord one thousand eight hundred and fifty-three, shall, within three calendar months after the birth of the said child, or in the event of the death, illness, absence, or inability of the father and mother, then the person who shall have the care, nurture, or custody of the said child, shall within four calendar months after the birth of such child, take or cause to be taken the said child to the medical officer or practitioner appointed in the union or parish in which the said child is resident, according to the provisions of the first recited Act, for the purpose of being vaccinated, unless he shall have been previously vaccinated by some duly qualified medical practitioner, and the vaccination duly certified, and the said medical officer or practitioner so appointed shall, and he is hereby required thereupon, or as soon after as it may conveniently and properly be done, to vaccinate the said child.

Sect. 9. The registrar of births and deaths in every sub-district shall on or within seven days after the registration of the birth of any child not already vaccinated within the said sub-district give notice in writing in manner hereinafter directed, and according to the form of schedule hereinafter inserted, marked C., to the father or mother of such child, or in the event of the death, illness, absence, or inability from sickness or otherwise of the father and mother, then to the person upon whom the care, nurture, or custody of such child shall have devolved, that it is the duty of such father or mother, or person having the care, nurture, or custody of such child as aforesaid, to take care that the said child shall be vaccinated in the manner directed by this Act, and shall together therewith deliver to such person a notice of the days, hours and places within the district of such registrar, at which the medical officer or practitioner as hereinbefore provided will attend for the purpose of vaccination, and if after such notice the father or mother of the said child, or the person so having as aforesaid the care, nurture, or custody of the said child shall not cause such child to be vaccinated, or shall not on the eighth day after the vaccination has been performed, take or cause to be taken, such child for inspection according to the provisions in this Act respectively contained, then such father or mother, or person having the care, nurture, or custody of such child as aforesaid, so offending, shall forfeit a sum not exceeding twenty shillings.

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within the three months allowed him for the purpose in sect. 2 of the said Act, and the deft. admitted that the said child had not even at the time of such hearing been vaccinated. The resp. then stated, and the fact was admitted by the app., that he the said resp. had already been previously convicted by certain justices for the liberties aforesaid at Margate, on the 18th Feb. 1863, upon a similar information laid by the said app. against him for not having the said child vaccinated, and that he was then fined and subsequently paid 2s. 6d. for penalty and 9s. 6d. for costs; he therefore contended that he could not again be punished for the same offence. In reply to this objection the app. referred to the concluding words of 24 & 25 Vict. c. 59, viz., "and proceedings for enforcing penalties under any of the said Acts on account of neglect to have a child vaccinated may be taken at any time during which the parent or guardian is in default," and submitted that it was the manifest intention of the Legislature, by a series of Acts, to make vaccination compulsory, and that the words "at any time" must be construed to mean that a parent so in default might be convicted again and again until he obeyed the directions of the statute, and he produced an opinion emanating from the vaccination department of the Privy Council in support of his view.

The justices however formed a different opinion and dismissed the information, and stated the grounds of their determination to be as follows:—That the resp. having been previously convicted for the same offence a second conviction could not take place, as the common law principle "that no man ought to be twice punished for one and the same offence" must prevail in the absence of any express legislative enactment to the contrary.

That the words "at any time" must be construed strictly, and are not sufficient to embrace the view contended for by the app., they appearing to them to be directed to the object of preventing the limitation of six months for proceeding summarily (as prescribed by Jervis's Act, 11 & 12 Vict. c. 43, which is incorporated in the Vaccination Acts) commencing to run. And hereupon the opinion of this court is requested as to whether they were correct in point of law as aforesaid, or as to what should be done in the premises.

J. Thompson for the app.—This case is stated for the opinion of the court as to whether the present Vaccination Acts are sufficient to compel the vaccination of a child. The title of the 16 & 17 Vict. c. 100 is "An Act to extend and make compulsory the practice of vaccination." And sect. 2 it is contended imposes on parents and guardians, as long as the guardianship of the child continues, the duty of having the child vaccinated. The periods of three or four months prescribed in the section as those within which the child is to be taken to the medical officer to have the operation performed are prescribed for convenience, and are not imperative conditions, so that the parent or guardian is relieved from the duty of having the child vaccinated by the lapse of those periods. There is no discharge of the duty of the parent until the operation has been successfully performed: (sect. 4.) The former Acts, 3 & 4 Vict. c. 29, and 4 & 5 Vict. c. 32, required unions and parishes to provide properly qualified medical practitioners for the voluntary vaccination of all persons, without regard to age, resident in such unions or parishes. The parents' duty to the child and to the public is to have the child vaccinated, and the object of the 16 & 17 Vict. c. 100, was to render that compulsory. The penalty provided by sect. 9 may be incurred as often as the parent has a reasonable opportunity of having the child vaccinated and neglects so to do. The 43rd Eliz. requires overseers to be appointed within a certain time, yet this court will enforce the appointment at a subsequent period; and so where a statute

directs a conviction to be sent to the next court of quarter sessions, this court will upon omission compel it to be sent subsequently.

No one appeared for the resp.

COCKBURN, C. J.—I am of opinion that our judgment must be for the resp. I agree that it is clear that the continuous omission of a parent or guardian of a child to get it vaccinated according to the duty imposed by the 16 & 17 Vict. c. 100, ss. 2 and 9, after the expiration of the prescribed time, is as much within the mischief which the Legislature intended to remedy as the not performing the duty within the prescribed time. But it is equally clear that this mischief is not reached by the 9th section of the Act as it stands. And I think that the only remedy is by application for further legislation on the subject. The 2nd section of the Act imposes the duty, and it also requires that, when a birth is registered, the registrar shall give notice to the parent or guardian of the child that this duty must be performed. And it provides, that if notice is given and the duty is not performed within the prescribed time, the offence punishable by the Act is created. But the duty prescribed by the Act, upon the non-performance of which the offence arises, is to get the child vaccinated within the prescribed time, and when once that offence is complete, and has been dealt with, and the party has been punished for the offence which this Act creates, no further offence can be committed. It is not enough to say that the case is within the mischief which the Act is intended to remedy. The answer is, that the Act has not provided a remedy for that case. The registrar cannot give a second notice, and the notice which he gives is to bring the child to be vaccinated within the prescribed time. If any other construction was held to be admissible, it would follow that for every day that the party whose duty it is to get the child vaccinated omits to perform that duty a new offence would be committed, and the penalty imposed by the Act for the non-performance of the duty would attach every day, and the penalties thus accumulated might amount to a very serious sum indeed, which the Act never intended. If it is absolutely necessary that this mischief (which I quite agree to be a very serious mischief) should be remedied, it must be so by further legislation. It cannot be done by creating a new offence which the Act of Parliament does not create.

BLACKBURN, J.—I am also of opinion that the justices have decided rightly. I think that there is probably a considerable mischief in existence; but it must be remedied by the Legislature.

MELLOR, J. concurred. *Judgment for the resp.*
Solicitor for the app., *T. H. Gore.*

Friday, Jan. 29.

MOBBS v. VANDERBRANDE.

Costs—Ejectment—Real plt.—Suing in another's name.

The C. L. P. A. 1852 has not taken away the jurisdiction of the courts to order the real plts. or defts., in actions of ejectment, to pay the costs, though not parties to the record.

Rule nisi to set aside an order of Mellor, J., made June 17, 1862, calling on Daniel Turton Johnson to pay the deft.'s costs, on the ground that he was the real plt., and also to set aside a ca. sa. under which Johnson was arrested for the costs.

It appeared that Mobbs was the claimant to considerable property at Bethnal-green, Middlesex, and had instituted divers actions of ejectment against tenants in possession, but had not succeeded in establishing his title. Mobbs had sold all his claim and interest in the property to Johnson for 50*l.*, and a memorial of the deed of transfer, dated Sept. 23,

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1859, was registered in the Middlesex Registry. Subsequently several actions of ejectment had been brought by Johnson in Mobbs' name, against the tenants of different portions of the property claimed, some in the Court of Ex., and the present action in this Court.

After notice of trial in this action, in Hilary Term 1861, a countermand was served. The case was again set down for trial, but the record was withdrawn at the last moment, and then the deft. obtained a judgment of *non pros*.

The deft. then obtained the order of Mellor, J. now sought to be rescinded. Although the fact of Johnson being the real plt., and Mobbs only a nominal one, was disputed, yet the court said it was too plain to admit of the slightest doubt. We therefore abstain from setting out the evidence thereof. The main point now contested was the jurisdiction of the court to make such an order on a person not a party to the record since the C. L. P. A. 1852.

Similar orders had been made in the actions in the Ex. by Bramwell, B., and remained unappealed against.

The *Solicitor-General* and *Hance* showed cause.—On the affidavits it is clear that Johnson was the real party in the action suing in Mobbs' name. Before the C. L. P. A. 1852 the court could always compel the real party in an ejectment to pay the costs, although not a party to the record:

Doe dem. Masters v. Gray, 10 B. & C. 615.

And this power still continues, and that Act has not taken it away:

Hutchinson v. Greenwood, 4 E. & B. 324.

No doubt, if the party is merely assisting the plt., and not in the position of a claimant of the property, the power will not be exercised against him:

Doe dem. Wright v. Smith, 8 Dow. 517.

There is no difference in principle whether the real party is in the situation of plt. or deft.; the power of the Court is the same:

Cole on Ejectment, 375;

Runnington on Ejectment, 460;

Adams on Ejectment, 292.

Pringleauz in support of the rule.—The court had no jurisdiction to make the order. The exercise of the power previously to the C. L. P. A. was limited to cases where the real party was in the situation of deft. only; and that because he might have himself entered into the consent rule and defended the action, but he chose to do it through a man of straw. The jurisdiction having arisen and been created by the consent rule, Johnson, under the old practice, would not have been a party to the consent rule. Then the old practice of entering into a consent rule was abolished by the C. L. P. A. 1852, and the parties to the record expressly made liable to costs, ss. 185-6:

Berkeley v. Dimerey, 10 B. & C. 113;

Thrustout v. Shenton, 10 B. & C. 110;

Goodright v. Badtite, 2 W. Bl. 763;

Smith v. Barnardiston, 2 W. Bl. 904;

Doe d. Vernon v. Roe, 7 A. & E. 14;

Doe v. Board, 10 M. & W. 675;

Doe v. Salter, 3 Taun. 485.

COCKBURN, C.J.—I am of opinion that this rule should be discharged. I agree that the origin of the equitable jurisdiction of this court in actions of ejectment arose from the circumstances of the parties on the record not being the real parties, and from its being necessary for the real parties to sign the consent rule. Being parties to the consent rule, the real parties brought themselves within the jurisdiction of the court, who could deal with them according to the equitable nature of the case. That jurisdiction was certainly extended to parties who were the real parties in the cause, although they had not entered into the consent rule. It is a most useful jurisdiction, and unless it has been taken away by the C. L. P. A. we ought

not to refuse to exercise it whenever the justice of the case requires it. Under the old procedure, the real parties to the suit must have been parties to the consent rule, and although the consent rule is now abolished, I think we may still exercise this jurisdiction over the real parties. This action of ejectment is for all purposes the action of Johnson. There was a transfer of all Mobbs' interest in the property to him. He felt that he might have a difficulty in suing in his own name, and he therefore sued in Mobbs' name. Under the old practice, either Mobbs or himself must have entered into the consent rule, and the jurisdiction would have attached. If that is so, then is the jurisdiction taken away by the C. L. P. A.? I think not, for although sect. 186 does provide, in the event of a verdict for the deft., for the issuing of execution against the claimants named in the writ of ejectment—that is only a provision relating to the new process—yet it does not oust the court of the equitable jurisdiction which it exercised over the real parties to the suit, and which is saved by sect. 221. That being so, this court will still compel the real party in an action of ejectment to pay the costs; and I can see no reason why the rule should not apply to a real plt. who is defeated in the action, as well as a real deft. who is defeated. The text-books and cases make no distinction in the language in which the rule is enunciated.

BLACKBURN, J.—I am of the same opinion. In ordinary actions, the court would have no jurisdiction, where there has been no abuse of the process of the court, to order a party not on the record to pay the costs of the action. An ejectment stands on a different footing to other actions. It has been held, in a series of decisions, that if the real parties had not entered into the consent rule, the court had jurisdiction to make them pay the costs, on the ground of the abuse of the process of the court by entering into the consent rule in the names of wrong persons. In *Evans v. Rees*, 1 Dow. N. S. 338, the court refused; in an action of replevin, to make the real party pay the costs of the suit, because he was not a party to the record, saying that there was a distinction between actions of ejectment and other actions. The C. L. P. A. 1852 abolished the fictitious mode of proceeding in actions of ejectment, but sect. 221 enacts that the courts may exercise over an action of ejectment the like jurisdiction as theretofore exercised, so as to ensure a trial of the title and of actual ouster when necessary, and for all other purposes for which such jurisdiction may at present be exercised. Therefore, if Johnson, as there can be no doubt, is the real party in the case, this court has jurisdiction to make him pay the costs, and the order of my brother Mellor was right.

MELLOR, J.—I am of the same opinion. Johnson was the party to whom all Mobbs' interest had been conveyed, and this action was brought to recover the property for Johnson. This court in ejectment has jurisdiction to make the real party pay the costs; and although the decisions are confined to cases where the real deft. has been made to pay, yet on principle the jurisdiction extends equally to the case of real plt. An action of ejectment is very peculiar in its circumstances, and, as has been said, it was the creature of the court.

Rule discharged.

Friday, Jan. 29.

REG. v. HODGSON.

Justices—Interested—Conviction—Certiorari—Time for moving for.

A prosecution under the *Salmon Fisheries Act* was instituted and conducted by the agents of a *Salmon Fisheries Preservation Society*, and a conviction was obtained before justices who were members and subscribers to the association.

This Court quashed the conviction on the ground of

the justices being interested parties as members of the association.

If a party attends with all necessary materials for making an application for a *certiorari* on the last day of the six months allowed by the 13 Geo. 2, c. 18, s. 5, for making such an application, and leaves his papers with the judge's clerk for the purpose of being laid before the judge, and states the nature of his application, the application will be considered in time, even though no judge should be at chambers on that day, and no decision given till a subsequent day.

Rule nisi for a *certiorari* to bring up a conviction of the deft. Hodgson, dated 23rd Feb. 1863, under the Salmon Fisheries Act (24 & 25 Vict. c. 109), s. 20, with a view to the same being quashed, on the ground that the justices before whom the case was determined were interested parties.

A rule was refused in the first instance (see *ante*, p. 290), but on a subsequent day a rule nisi was granted on its being more fully explained to the court what Byles, J. meant by his indorsement on the summons.

The deft. Hodgson was tenant of a mill and fishery on the river Tees (Durham), and had fish-locks there called Dimsdale Fish-locks. The information on which this conviction was founded was laid at the instance of a watcher of the Tees Salmon Fisheries Landowners' Association, and at the hearing the prosecution was conducted by the solicitor of the association, and it was not denied by the affidavits that the prosecution was at their instance. The justices before whom the information was heard, J. L. Smith, Esq., R. H. Allan, Esq., and H. Pease, Esq., were members of the association and subscribers to its funds.

The 13 Geo. 2, c. 18, s. 5, enacts, that no writ of *certiorari* shall be granted, &c., to remove any conviction, &c., had or made by or before any justice or justices of the peace, unless such *certiorari* be moved or applied for within six calendar months next after such conviction, &c., and unless six days' notice thereof be given in writing to the justices that they may show cause (if they shall think fit) against the issuing or granting of such *certiorari*.

On the 15th Aug. six days' notice was served in pursuance of the above enactment on the convicting justices. On the 21st the deft.'s attorney attended at the judge's chambers to apply for a *certiorari*, and the affidavits to be used were left with the judge's clerk, and the nature of the application explained to him, who said he would take them to the judge, as the judge was not in attendance on that day, it being vacation time, during which period attendance was given on Tuesdays and Fridays only, and he was told to call on the following day. He did so, and was told the affidavits were still before the judge. On the 25th the learned judge, on the application being made, refused to grant a *certiorari*, indorsing the summons "No order, without prejudice to any application to the court." It was afterwards explained by Byles, J., that he intended that the applicant should be in the same position before the court as if the application were made to him.

Division showed cause.—First, there is an objection to the issuing of the *certiorari*, as there is an appeal against the conviction under 20 & 21 Vict. c. 43, pending in the C. P. An appeal under the 20 & 21 Vict. c. 43, is analogous to an appeal to the quarter sessions:

Reg. v. Sparrow, 2 T. R. 196;

Paley on Conv. 361.

[COCKBURN, C.J.—The C. P. have only before them the facts as found by the justices, but if the justices have no jurisdiction to find the facts the *certiorari* must issue.] The deft. delayed until the last moment

the time for making the application; his attorney ought to have known and fixed a day when the judge was at chambers:

R. v. St. Mary, Whitechapel, 2 Dowl. N. S.

Manisty and *Matthews* in support of the rule.—There was an actual attendance at the judge's chambers within the limited time for making the application, and so far as could be done an application was made:

R. v. Abergeldie, 5 A. & E. 796 (note a).

(The argument on the facts is omitted.)

COCKBURN, C.J.—It is impossible to hold, consistently with established principles, that these magistrates were competent to exercise jurisdiction upon this charge. It appears that the prosecutors were an association of landowners who had an interest in the fishery of the river Tees. Of that association certain members were acting as magistrates upon the hearing of this case, although they were essentially the prosecutors, being a portion of the prosecutors. It is impossible to say that magistrates who are proceeding criminally as prosecutors can act as magistrates in their own case. The only difficulty is as to the time for moving for the *certiorari*. The statute says that the *certiorari* must be moved or applied for within six calendar months next after such conviction. It was intended to give the whole six months down to the last day to the party moving, and he is entitled to the last day. He must have all his tackle right so that he may be in a position to make the application either directly or virtually within that time. He is not to suffer because a judge may not be at chambers in the discharge of his duties on the last day of the six months; it is enough if he has all his machinery ready and makes known to the persons in attendance at chambers the object and purpose of his application. There is some dispute between the parties as to what took place. It is, however, positively sworn by the clerk who conducted the matter that he attended the next day after he had left the affidavits at chambers. It is not at all unlikely that the clerk considered it an *ex parte* proceeding, which it clearly is not. I think that a judge at chambers, in exercising this jurisdiction, should see that proper notice had been given to the justices, and if the parties do not appear before him he may direct that a summons should issue to those justices that they may have an opportunity of showing cause against the issuing of the *certiorari*. The application, however, is not the less made if within the prescribed time the party applying goes to the proper quarter and takes such steps as virtually amount to an application. On the whole, I think that enough was done here to make this an application within the six months, and this rule will therefore be absolute.

BLACKBURN, J.—I am of the same opinion. On the merits I entertain no doubt that the justices who sat and heard this case were some of the parties who instituted the proceedings. Magistrates who connect themselves with associations like this for prosecuting offences must not sit as justices on the hearing of the prosecutions instituted by the associations. Then, was the *certiorari* moved or applied for within the six months? Probably the clerk thought it was an *ex parte* application, and that there was no one to show cause. Then it is said that the justices are to have six days' notice of the application, that they may show cause against the granting or issuing of the *certiorari*. I think it has been determined, in a case *Re Flounders*, 4 B. & Ad. 865, that such a notice is not sufficient without letting the justices know when and where to show cause. (After recapitulating the facts.) I agree with my Lord that upon the whole the application was virtually made in time in this case.

MELLON, J.—I am of the same opinion. It is highly desirable that the proceedings of magistrates in such cases as this should be free from the suspicion of interested motives, and it would be very mischievous if

justices should act under such circumstances. On the other point, I think it would be very hard if we could not give effect to this application. It was no fault of the party that the judge was not at chambers. And what was done in this case amounted, I think, virtually to an application. *Rule absolute.*

COURT OF COMMON BENCH.

Reported by W. MAYN and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Jan. 12 and 16.

SKULL AND ANOTHER v. GLENISTER.

Trespass — Construction of deed — Right of way appurtenant — Colourable use of easement — Damages — Evidence.

In an action for trespass, q. c. f., the question being whether the defts. had encroached on the plts.' land, the plts. put in evidence a conveyance by which one M. conveyed to them "all that piece or parcel of land or ground situate, &c., measuring in width from east to west thirty feet, lately forming part of, &c., which said piece or parcel of land or ground is intended to be used as a roadway from, &c. to, &c., and is more particularly delineated and described in the map or plan thereof drawn in the margin, &c., &c., the fences of which said piece or parcel of land or ground thereby conveyed on the east and west side are to be made and maintained by the said M. (the grantor), his heirs, &c., together with all ways, &c. to the said piece, &c. belonging or appertaining."

Evidence was also given that the words "or thereabouts," were originally inserted in the draft after the words "thirty feet," but had been struck out at the instance of the grantor M., before the execution of the conveyance; that stakes marking out the intended roadway had been, before the execution of the conveyance, put down by one of the plts. under the superintendence of M., and that after the execution walls had been built on the outside of these stakes; and evidence was tendered and rejected that M. had subsequently conveyed the land on one side of the roadway, with the wall which had been built upon it, to the defts. It appeared, also, on reference to the plan and scale annexed to the conveyance by M. to the plts., that the land as marked on the plan measured exactly thirty feet from east to west. The piece of land staked out did not measure throughout so much as thirty feet in width. The judge left it to the jury to find whether the conveyance from M. to the plts. was of a piece of land thirty feet wide absolutely, or of the piece of ground as staked out, and the jury found that it was a conveyance of a piece thirty feet wide:

Held, that the proper question was not left to the jury; that the jury ought to have been asked to find the circumstances connected with the execution of the deed (if in dispute) and that after they had done so, the construction of the deed was for the court.

Semble, also, the defts. having pulled down the wall, and the plts. having claimed substantial damages for this trespass beyond the sum necessary to establish their right, that the subsequent conveyance by M. of the wall to the defts. was evidence, not of their property in the wall, but of their bona fide belief that the wall was theirs, and was admissible in answer to the plts.' claim for substantial damages.

The defts. justified the user of the plts.' roadway as the exercise of a right of way appurtenant to a close of land abutting on the roadway, of which close they were tenants to one W., to whom the close and the right of way had been previously granted by the plts. Evidence was given that the defts. carted building materials along the roadway,

deposited them on W.'s close, and thence removed them to another close belonging to one of the defts., on which they were then building houses. The judge left it to the jury to find whether the defts. really used the road as a way to W.'s land or as a way to the houses which they were building on the adjoining close, and whether in going first to W.'s land they were not making a colourable use of the roadway.

The jury found that the use was colourable:

Held, that the right of way, being appurtenant to W.'s close, could only be used for purposes connected with that close, that the question left to the jury was substantially correct and that there was no misdirection.

Trespass quare clausum fregit. The second trial in this case took place at Aylesbury at the last Summer Assizes before Wightman, J. The first trial had taken place at the same time before the same learned judge at the previous Summer Assizes, and a verdict had been obtained by the plt. for 40s. The Court of C. P. directed a new trial. A report of the argument in that court and the pleadings will be found in 7 L. T. Rep. N. S. 826. Previous to the new trial the defts. by leave of the court pleaded a fifth plea of payment into court of 10s. for the trespasses excepted in the 1st, 2nd and 3rd pleas, and the plts. received the same in satisfaction thereof.

It was proved at the trial that the plts. being possessed of some building land which was separated from the high road by land belonging to one Meyers, and being desirous of obtaining an access to their land from the high road, purchased from Meyers a strip of his land, extending from their land to the high road, for the purpose of forming a road to their land. Previous to the execution of the conveyance the strip was staked out by posts under the superintendence of the plt. Skull, acting therein as agent to Meyers. That having been done, a conveyance was executed on the 6th June 1860 by Meyers to the plts. Skull and Phillips of "all that piece or parcel of land or ground situate, lying and being in the parish of Chipping Wycombe in the county of Buckingham, measuring in width from east to west thirty feet, lately forming part of the two pieces or parcels of meadow or pasture land purchased by the said B. Meyers of, &c., which said piece or parcel of land or ground hereby appointed and conveyed is intended to be used as a roadway from the turnpike-road there to the property lying on the south side thereof, and is bounded on the north by the turnpike-road leading from High Wycombe to Oxford, on the west and east by other land belonging to the said B. Meyers, on the south side by property of the late Geo. Giles and contracted to be purchased by the said E. Skull and T. Phillips, and is more particularly delineated and described in the map or plan thereof drawn in the margin of these presents, that part thereof used as a garden ground being therein coloured yellow, and that part thereof now covered with water being therein coloured blue, the fences of which said piece or parcel of land or ground hereby conveyed on the east and west sides are to be made and maintained by the said B. Meyers, his heirs, appointees, or assigns; together with all ways, paths, easements, &c. to the said piece or parcel of land hereby appointed and released belonging or appertaining."

On the part of the plts. it was proved that the strip of ground did not, in fact, measure thirty feet from east to west, but rather less, and that the words "or thereabouts" were inserted in the draft of the conveyance immediately after the words "thirty feet," but struck out before the conveyance was executed. On the plan in the margin of the conveyance it appeared that the breadth of the land intended to be conveyed according to the scale was exactly thirty feet from east to west. The bounding walls were built by Meyers,

C. B.]

SKULL AND ANOTHER v. GLENISTER.

[C. B.]

The plts. laid out a roadway upon the strip and built a bridge over a little stream which intersected it. The defts. subsequently purchased of Meyers a portion of his land adjoining the roadway.

In Sept. 1861 the plts. sold a portion of their building land to R. and T. Wheeler, "together with a right of way and passage, ingress, egress and regress with horses, carts or carriages, or otherwise, through and over the said new road or way to and from the turnpike-road leading from High Wycombe to Oxford, to and from the said lane or highway called St. John's-lane or Water-lane."

This portion of land was, in Dec. 1861, demised to the defts. without any express assignment of the right of way over the plts.' roadway, and at the first trial the learned judge ruled that the right of way did not pass to the defts. It was held, however, by the Court C. P. in granting a new trial (7 L. T. Rep. N.S. 827), that the right of way granted to R. and T. Wheeler passed with the land to the defts. According to the plts.' evidence the defts. then commenced building upon their land and carting materials along the plts.' roadway, breaking down the wall which had been built by Meyers, and conveying materials to the adjoining land directly from the roadway and indirectly by the roadway to the piece of ground which formerly belonged to the Wheelers, and thence to the adjoining land of the defts. The plts. contended that, admitting that the defts. were entitled to use the roadway for carrying materials to what had been Wheeler's land, they were not entitled to carry them over Wheeler's land to defts.' land, and that although the materials might, in fact, be deposited at first on Wheeler's land, this was a mere colourable deposit of them resorted to for the purpose of concealing the fact that the materials were being carted over the plts.' roadway to the defts.' land, to which there was no right of way appurtenant. The plts. further claimed a strip of ground thirty feet in width, and asserted that the defts. had trespassed by coming up to the boundary of the roadway, which was not, in fact, thirty feet wide.

The defts. contended that the wall had been built by Meyers on his own land, and conveyed by him to them; that, as to the trespasses, they had paid into court a sufficient sum to cover any damages in respect of them, and that, as to the width of the roadway, the plts. had purchased a certain defined piece of ground, and that the statement that it was thirty feet in width was a mere misdescription or *fauxa demonstratio*.

Wightman, J. left the following questions to the jury:—

1. Was the conveyance from Meyers to the plts. of a piece of land thirty feet wide absolutely, or of the piece of ground as staked out? Answer: A conveyance of a piece thirty feet wide.
2. Did the defts. break down any portion of any wall standing on the plts.' land? Yes; damages 20*l*.
3. Did the defts. break up any land of the plts.? Yes; damages 1*l*.
4. Is 40*s*. sufficient damages for injuries sustained by the plts. in consequence of the defts. passing over the road with carts and carriages with materials that did not go on to Wheeler's land? No; damages 3*l*. in addition.
5. Did the defts. really use the road with carts and waggons as a way to Wheeler's land, or did they really use it as a way to the houses they were building, and was the going first on Wheeler's land a merely colourable use? Answer: It was a mere colourable use.
6. Is 40*s*. a sufficient amount for damages sustained by the plts. for the use of the way by the defts. as well in respect of the carriage of materials to Wheeler's land, and thence to the houses which the defts. were building, as with respect to the carriage of materials

which did not go on to Wheeler's land? No; damages 2*l*. in addition.

The verdict was accordingly entered for the plts. for 25*l*. beyond the amount paid into court.

A rule nisi having been obtained by the defts. for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence, *O'Malley, Q.C., Mellish, Q.C. and Keane* showed cause against the rule.—The question whether the wall knocked down was on the plts.' premises depends upon the conveyance of the 6th June 1860. By the terms of that deed the road was to be thirty feet wide, but it was proved that before the deed was executed the road was staked out, and there was less than thirty feet between the stakes. The wall was built within the thirty feet, but on or without the line of the stakes. It was left to the jury, on the first trial, to say whether the wall was or was not within the thirty feet which was conveyed, it being assumed that a piece of ground thirty feet in width was conveyed. A new trial being granted on another point, the judge at the second trial left it to the jury to say whether the property which passed under the conveyance was a piece of ground thirty feet wide, or the space between the stakes. The conveyance describes the strip conveyed as being thirty feet in width; and if it also described it as being the piece between the stakes, a question would arise as to which was the governing description; but there is no reference to the land as being between the stakes, and therefore the property which passed must be a piece thirty feet in width. The fences were not made, but they were to be made and maintained by the vendor. The stakes were put down, not to indicate the boundary of the land conveyed, but to show where the fence or wall was to go. If there were any reference at all in the deed to the stakes, and there were thus two descriptions, that would create merely a latent ambiguity. If there is nothing in the deed to show any ambiguity till parol evidence is adduced, then the deed may be explained by parol evidence; and there was strong evidence that at the time of the engrossment of the deed the land was described as being in width "thirty feet or thereabouts," which was objected to, and the words "or thereabouts" were struck out. The next question turns on the right of way granted by the plts. to Wheeler. The grant of the right of way would give a right to carry building materials to build on Wheeler's close, but not to carry building materials over Wheeler's close to the adjoining close.

The following cases were also cited:

- Doe dem. Norton v. Webster*, 12 A. & E. 442;
Lawton v. Ward, 1 Ld. Raym. 75;
Howell v. King, 1 Mod. 190;
Colchester v. Roberts, 4 M. & W. 769;
Dand v. Kingscote, 6 M. & W. 174;
Ackroyd v. Smith, 10 C. B. 164.

Lush, Q.C. and Stephenson supported the rule.—The construction of the conveyance from Meyers to the plts. was for the judge, and he was wrong in leaving it to the jury to say, whether a piece of ground thirty feet wide, or the piece of ground staked out, was intended to be conveyed by the deed. The construction of written documents is always for the court. The rule is laid down by Lord Wensleydale, in *Lord Waterpark v. Fennell*, 7 H. of L. Cas. 684. [*ELLIS, C.J.*—If you have a conveyance of Blackacre, and a conflict of testimony as to the position of Blackacre, it must be left to the jury to say which is Blackacre, and upon the finding of the jury the judge will construe the deed. The common, though perhaps not the strictly regular, way is for the judge to say to the jury that, if Blackacre is such and such a place, they are to find for the plt. or the deft., as the case may be.] However, if a man conveys "Blackacre, containing five acres," and in fact Blackacre contains only four and a half acres, the purchaser is not entitled to take an

additional half-acre from the adjoining land. The plts. are endeavouring to do something of that kind here. There was evidence that the specific piece of ground was staked out before the conveyance was executed, and before the plan in the margin of the conveyance was drawn, and it was staked out in order to guide the surveyor and the solicitor in preparing the plan and the conveyance. The description of the width as being thirty feet was *falsa demonstratio* only. Unless the land intended to be used as a roadway, bounded as described in the conveyance, be taken as the governing description, there is no means of ascertaining where the thirty feet is to be taken from. Thirty feet taken anywhere between the two turnpike-roads would satisfy that description. The judge ought to have told the jury that the conveyance passed the specific piece of ground. Next, as to the wall. By the deed it was arranged that it should be built and repaired at the expense of Meyers. [ERLE, C. J.—The deed speaks of “the fences of the land,” which would lead to the inference that they were outside the strip of land, and did not therefore belong to the plts.] *Allan v. Gomme*, 11 Ad. & E. 759, is in point. As to the right of way, it has been held already by the court that the right granted by Wheelers passed with their land to the defts. The defts. therefore had a right to cart along the road materials which were to be used on Wheeler's land. The fact that they were to be used on the adjoining close would not render this an abuse of the right of way. [WILLIAMS, J.—If a man has a right of way for carts with materials to Blackacre, he cannot use the road as a way to Greenacre by simply dropping the materials on Blackacre and then picking them up and carrying them on to Greenacre.] There cannot be such a thing as a colourable evasion of a right of way, any more than there can be a colourable infringement of a ferry. Lastly, the judge was wrong in refusing to allow the defts. to put in evidence a conveyance of the wall from Meyers to the defts. The case was opened as one of oppression, and the jury gave vindictive damages, viz. 25*l.* instead of 40*l.* The defts. were therefore entitled to prove that they had not acted from any malicious feeling, and the conveyance was tendered to show that the defts. believed that they had a right to pull the wall down as being their own property. They also referred to

Manning v. Fitzgerald, 29 L. J. 24, Ex.;

Henning v. Burnet, 8 Ex. 187;

Gerish v. Chartier, 1 C. B. 13.

ERLE, C. J.—This action is brought by the plts. against the defts. for an alleged trespass on a piece of land granted to the plts. by Meyers by a deed executed in 1860. It becomes necessary, therefore, to determine the boundary of that piece of land, which depends on the description in the deed, and its true construction. The judge left that question to the jury. There was evidence that before the execution of the deed, and the indorsement of the plan upon it, the plt. Skull and Meyers had driven stakes into the ground so as to mark out a piece of land. There was evidence from which the jury might have been able to ascertain whether the stakes were driven in for the purpose of indicating to the surveyor what was the piece of land described as “lately forming part” of the pieces on either side. The plts. claimed a piece thirty feet wide, and if they were entitled to it, an entry of the defts. upon a portion of the thirty feet would be an encroachment on the plts.' land. The jury found that the plts. were entitled to a strip thirty feet in width. I am of opinion that the correct question was not left to the jury. The construction of the deed was for the court. It was necessary for the court to be informed of the circumstances which attended the execution of the deed, and if any dispute arose respecting them it would be for the jury to find what they were. Now it was very material to

ascertain specially whether the stakes were put down by the two parties to the conveyance, to indicate to the surveyor and conveyancer the parcel of ground to which the conveyance was to relate. If the jury had found that they were, then it would have been for the judge to say that the specific piece of land staked out did in fact pass by the conveyance. Ulterior questions might have arisen, whether the boundary was midway between the stakes, or inside or outside of them; but that material question was not left to the jury, and the case must go down again to a new trial as to that part of it. Secondly, as to the right of way, I am of opinion that the ruling of the learned judge was right. The way granted to Wheeler's close was appurtenant to that close, and could be lawfully used only for purposes connected with it. If Wheeler had been in the habit of using the way for the purpose of depositing building materials upon his close, a use of the way by the defts. for the same purpose after the demise to them might have been a good use of the way; but if the defts. only used Wheeler's close in order to get to the adjoining close, they would not be making a lawful use of their right of way to Wheeler's close. The question respecting the admissibility of the conveyance which was tendered by the defts. becomes immaterial, as there must be a new trial. If the plts.' case was conducted in such a manner as to show that they asked for damages above the amount properly due for the trespass, the defts. would be entitled to show that they acted honestly. There must, however, be a new trial, unless the plt. will consent to keep his verdict for the trespasses to the roadway, and allow a verdict to be entered for the defts. for the trespasses to the wall.

O'Malley, Q.C., for the plts., agreed to this.

WILLIAMS, J.—The plts. are wise in consenting to this arrangement. It is unnecessary for the defts. to go so far as to prove that the stakes were put down to guide the conveyancer; it is sufficient for them to prove that they were put down for the purposes of the grant, and that, they being down, the grant was made and something existed on which the grant could operate. The difficulty in adopting the plts.' construction of the deed is, that if the plts. are entitled to thirty feet in width, it is impossible to say whether the roadway is to be augmented on the east side or on the west side. The description of the width was mere *falsa demonstratio*, and the judge should have told the jury that nothing passed but what was staked out. The plts. are, therefore, wise in acceding to the proposed arrangement, as they could not controvert the facts or the ruling of the judge, as it would be at a new trial. As to the second point, I am of opinion that the ruling of the judge was substantially correct. I have no reason to doubt that the law, as laid down in the cases collected in *Gale on Easements*, 451, 452, is correct, and they establish that, if the defts. used the road as a way through Wheeler's close to the adjoining close, it was in excess of their right of way to Wheeler's close.

WILLES, J.—The question is, what passed by the conveyance? My impression has varied during the argument; Mr. Stephenson's reasoning has made great impression upon me; and having heard the judgments already delivered, I concur with them. The passage in the deed speaks of the fences “of” the land, which at first sight is in favour of the plts.; but I think that it means the fences “of use to” the land. They are to be made and repaired by the defts., and, if anything, that expression is favourable to the defts. As to the rest of the case, I concur with what has been said by Williams, J. The damages have been assessed separately, and the verdict will stand for the plts. upon the first count, and will be entered for the defts. upon the second count as to the trespasses to the wall. There will, therefore, be no costs of the rule, and the plts. will have the general costs of the trial.

C. B.]

LISTER v. EASTWOOD—MACE v. PHILCOX.

[C. B.]

KEATING, J. concurred.

Rule accordingly for a verdict for the plts. upon the first count, and for a verdict for the defts. upon the second count as to the trespasses to the wall.

Attorneys for the plts., Fryer and Son.

Attorney for the defts., G. Cordwell.

Jan. 15 and 19.

LISTER v. EASTWOOD.

Patent—Combination—Infringement.

Where a patent is for a combination, a person who takes a new and material part of the combination, but does not apply it to a similar purpose to that for which it was applied in the patented combination, does not infringe the patent.

Lister v. Leather, 7 L. J. 295, Q. B., commented upon.

This was an action to recover damages for the infringement by the deft. of two patents for wool-combing machinery belonging to plt., one dated 20th March 1850, the other 24th Feb. 1851. The deft. had used a machine known as "The American Combining Machine."

The cause was tried before Erle, C. J., at the sittings after Michaelmas Term last, when the jury found a verdict for the deft.

Bovill, Q.C. now moved on behalf of the plt. for a new trial on the ground of misdirection, the misdirection complained of being that the learned judge who tried the case had told the jury that if the deft. had taken a new and material part of the plt.'s combination of machinery, it was necessary that the part so taken should be used for precisely the same purposes to constitute it an infringement of the plt.'s patent; and he also moved on the ground that the verdict was against the evidence. *Cur. adv. vult.*

Jan. 19.—WILLIAMS, J. now delivered the judgment of the Court.—In this case a rule for a new trial was moved for by Mr. Bovill, on the ground of misdirection, and that the verdict was against the weight of evidence. The action was for an infringement of two patents, the one granted in 1850, and the other in 1851. As to the patent of 1851, which was the principal subject of the application, the Lord Chief Justice, before whom the action was tried, told the jury that the plt.'s patent being for a combination, the deft. might be guilty of an infringement if he took a new and material part of the combination. So far the direction was in conformity with the decision of *Lister v. Leather*, though the deft. perhaps might have complained that, having regard to the circumstances of the cause, the direction was somewhat wider than was warranted by the judgment of the Court of Ex. Ch. in that case. But the plt., in whose favour the Chief Justice erred in this respect, if he erred at all, cannot complain of it. The Chief Justice, however, proceeded to tell the jury that in order to constitute an infringement the deft. must not only have taken a new and material part of the combination, but must also have applied it to a purpose similar or analogous to that which the plt.'s combination was intended to effect. It is this qualification of the Chief Justice's instructions to the jury which Mr. Bovill contended was a misdirection. We are of opinion that it was not, but that it was a correct exposition of the law. It is true that in the judgment of the court in *Lister v. Leather* this qualification of the doctrine was not superadded in express terms, but it appears to us to flow inevitably from the principles on which that doctrine was founded. As to the patent of 1850, the imputed misdirection of the Chief Justice consists of a remark which had not any direct bearing on the question which the jury had in hand, but it was merely an incidental observation relating to some expression the Chief Justice had made

use of in the course of the cause. Even if it were not strictly accurate, which we do not at all intend to assume, it would not be any ground for disturbing the verdict. With respect to the second ground of application, namely, that the verdict was against the evidence, we have fully considered the case, and have had the advantage of an ample statement of it by Mr. Bovill, assisted by the models produced in court, and we entirely concur with the Chief Justice in thinking that the verdict was supported by the evidence, and was quite right, and therefore there will be no rule.

Rule refused.

Attorneys for plt., Wilson, Bristows and Carmichael.
Attorney for deft., Johnson, agent for Wood and Killick, Bradford.

Monday, Jan. 25.

MACE v. PHILCOX.

Right of owner of the foreshore to prevent owners of bathing-machines to place them on the shore.

Before bathing-machines came into use, certain parts of the shore of Hastings had been used from time immemorial for the purpose of bathing. Subsequently an Act was passed prohibiting persons from bathing from the shore except from bathing-machines, the owners of which were obliged to obtain a licence from the local board for permission to ply for hire: Held, that this licence did not confer a right on the proprietors of bathing-machines to place them on the shore without the permission of the owner of the shore.

This was an action of trespass against the deft. for breaking and entering a close of land known as the beach or foreshore of the sea, and situate at Hastings, in the county of Sussex. The deft. pleaded not guilty by statutes 2 Will. 4. c. 91, s. 71, public Act; 10 & 11 Vict. c. 89, s. 69, public Act; 11 & 12 Vict. c. 63, s. 139, public Act; 14 & 15 Vict. c. 98, ss. 1, 2, 13, Public Act.

The cause came on to be tried before Wightman, J., at the Spring Assizes 1863, held at Lewes, when a verdict was found for the plt. for 40s. damages and costs of suit, subject to the opinion of court on a case the substance of which was as follows:

On the 15th Feb. 1862 the land on which the trespasses hereinafter referred to were committed by the deft. was demised by and on behalf of Her present Majesty the Queen, for a term of years which is yet unexpired, at a certain yearly rent and royalty, payable unto the Queen's Majesty, her heirs and successors, under the following description:

"All that piece or parcel of land or foreshore of the sea, containing in length from east to west 960 feet or thereabouts, and extending southwardly to low-water mark; which said piece of land, as to 950 feet, part thereof, adjoins the sea-wall erected in front of Carlisle-parade, in the town of Hastings, in the county of Sussex, and as to 10 feet, the residue thereof, is situate in front of the bench of the east end of the said parade and sea-wall."

The said piece or parcel of land upon which the said trespasses are alleged to have been committed is situate throughout its entire length from east to west, partly between high and low-water mark at average tides, and partly above high-water mark at average tides; and as to about 100 feet of its length from east to west, is sometimes, at spring tides, entirely between high-water mark.

For the purposes of this case it is admitted that, at the time of granting the said lease, the Crown was seized of the said land, and that the said lease was made by and on behalf of the Crown, and that the plt., before and at the time of the committing of the trespasses complained of had possession of the said land under the said lease.

It is not disputed as a fact by the deft., but its admissibility as evidence against him is disputed, that on the 19th April 1862 one George Dunn entered into the following agreement with the plt. :—

"Sir,—I hereby agree to pay you the sum of 5*l*. for permission to use machines for bathing during the bathing season of this year opposite Carlisle-parade.

"I am, Sir, your obedient servant,

"GEO. DUNN."

' And that the said Geo. Dunn did, after the making of the said agreement, use and place bathing-machines on the said land, and pay to the plt. the said sum of 5*l*. referred to in the said last-mentioned agreement.

The spot opposite Carlisle-parade referred to in the said agreement is the *locus in quo*.

Before the year 1854 no bathing-machines were used or placed on the sea-shore at Hastings, except between a point called Rockanore, referred to in the 2 Will. 4, c. 91, s. 77, and the mouth of the Priory Water, referred to in the said Act, and which did not include the *locus in quo*.

In the year 1854 and from that time and until the end of the bathing season of the year 1861 the said George Dunn used and placed bathing-machines on the *locus in quo* without any interference from the Crown, and without permission from any person except so far as the licence from the local board of health constituted permission.

In May 1862 and on divers days between that date and the commencement of this suit, the deft. placed and continued bathing-machines on the *locus in quo*, but since 1854 no other person but Dunn and the deft. have done so, and they have only done so under the circumstances mentioned in this case.

In Sept. 1851 certain bye-laws were made by the Local Board of Health for the district of Hastings, for the purpose amongst other things of regulating bathing-machines licensed to ply for hire within the district. In 1855 a bye-law was made by the said board, by which it was enacted that if any person should undress on the sea-beach or shore, should bathe from such beach or shore between the hours of eight o'clock in the morning and nine o'clock in the evening, except from a bathing-machine, at any part of the sea-coast between certain points within the district, should pay for every such offence any sum not exceeding 2*s*. In accordance with these and other bye-laws, bathing-machines have been placed at different points in the foreshore, by the authority of the local board; and on the 19th April 1862 a licence was granted by the board to the deft., authorising him to stand certain bathing-machines and ply for hire within the borough of Hastings, subject to the bye-laws and rules made or to be made by the local board, and also the bathing-machines hereinbefore mentioned as belonging to Dunn and to the deft., and plying for hire on the *locus in quo*.

The question for the opinion of the court is, whether the deft. is liable for placing and continuing, as before stated, his bathing-machines on the *locus in quo*.

Prentice (*F. M. White* with him) for the plt.—The *locus in quo* was derived by the Crown to the plt.; it is the foreshore at Hastings, opposite Carlisle-parade, which is the plt.'s property. The deft. contends that, as he has a licence from the local board of health, he has a right to put his bathing-machines there; but we say that the licence is merely to keep bathing-machines, and can confer no right which did not exist before the local Acts. Before these Acts there was no power to place machines on the *locus in quo*, but there has been a usage to place them on the shore not including the *locus in quo*. Until 2 Will. 4, c. 91, people bathed all along the shore; but by sect. 77 bathing between certain limits was forbidden, except from machines. *Blundell v. Blundell*, 5 B. & A. 268, decides that the public have no common law

right of bathing in the sea, or of crossing the shore to get at it. That applies *à fortiori* to bathing-machines. [ERLE, C. J.—Do you dispute that people have a right to bathe in the sea if they can get at it?] No; the right to the sea-shore is in question, and it would be more correct to say there is no common law right to go on the shore to bathe; and even if people have been in the habit of going there, it gives them no right. The meaning of 2 Will. 4, c. 91, is, that no person shall ply boats, carriages, machines, &c. without a licence, and it was not intended in any way to interfere with private property.

Lush, Q.C. (*Denman* and *Hunt* with him).—Until 2 Will. 4 all persons bathed from the shore at Hastings without machines, including the *locus in quo*. That Act substituted bathing from machines for bathing without, between certain points not including the *locus in quo*; on that part of the shore people still bathed as they liked. Then in 1851 came the provisional order of the Board of Health, afterwards confirmed by Act of Parliament; sects. 71 and 77 of the local Act remain unrepealed by that order, therefore these two so apply to the whole shore and include the *locus in quo*. It is immaterial whether the legal right to bathe can be supported or not. The Act says, you shall only bathe from machines; then another Act extends this along the whole coast; ergo, people must all along the coast bathe from machines, and 10 & 11 Vict. c. 89 says, wherever a part of the shore is 'used' as a public bathing-place, the commissioners shall place machines. The Acts do not take away the rights the public had always enjoyed, but only substitute another mode of enjoyment. If it meant that machines might be used where the public had a legal right to use machines, then they would use them nowhere; what was meant was a practical use, not a legal right.

Prentice replied.

ERLE, C.J.—I am of opinion that our judgment should be for the plt. The plt. holds land under the Crown at Hastings, and the deft. has put his bathing-machines upon it, and the question for us to consider is, whether the deft. has a right to do so or not. Nothing has been stated to show that he had such right, and although in giving my judgment I wish to guard against endangering the valuable usage which exists for the public to resort to the seashore for the purpose of bathing, yet the part of the shore in question belongs to the Crown, and has been leased to the plt., and I cannot see any reason why such usage should give the deft. a right to bring his bathing-machines, with everything appertaining thereto, on to this land. The statutes relied on are only prohibitory, and were enacted for the sake of decency, and for regulating the bathing in this populous neighbourhood, and I cannot find that the restrictions take away any private right which the owner of the seashore may have, and it would be exceedingly dangerous if these exceptions should give a right to persons to bring their bathing-machines on to private property.

WILLIAMS, WILLES and KEATINGE, JJ. concurred.

Judgment for the plt.

Saturday, Jan. 30.

MORRIS v. LAUTOUR; COX Garnishee.

Foreign attachment—Jurisdiction of Lord Mayor's Court—Garnishee order under C. L. P. A. 1834, s. 6—Account stated.

Money in the hands of an army agent belonging to L., was attached by C., who had sued L. in the Lord Mayor's Court, under a foreign attachment issuing out of that court. It was subsequently attached under a garnishee order made by a judge of a superior court, on the application of M., a judgment

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creditor of L. The debt from L. to C. was not contracted within the limits of the city of London, and both C. and the garnishee resided out of the city. L. had become bankrupt in London, and had signed and filed in the Court of Bankruptcy in London a schedule of his debts, including C's debt, and the proceedings in bankruptcy had been signed by C. as a creditor. It was contended that this was a statement of account within the city sufficient to give the Lord Mayor's Court jurisdiction:

Id., that, without deciding the question whether the Lord Mayor's Court had jurisdiction to attach money in the hands of a garnishee residing out of the city, where the cause of action arose within the city, there was no sufficient evidence of a statement of account within the city to support the action in the Lord Mayor's Court, and, therefore, that the attachment from that court was overridden by the judge's order.

Messrs Cuff and Co., residing and carrying on business out of the city of London, having sued Lautour for debt in the Lord Mayor's court, attached money belonging to Lautour in the hands of Cox, the army agent, who also resided and carried on business out of the city of London. After the attachment, and before the garnishee had pleaded in the attachment, money belonging to Lautour more than sufficient to satisfy the attachment came into his hands. Morris having brought an action against Lautour in the Court of C. P., obtained a garnishee order against Cox under the C. L. P. A. 1854, attaching the money belonging to Lautour in his hands. This money was insufficient to satisfy the combined claims of Cuff and Morris. Each of these claimed the amount of his debt, Morris contending that the attachment from the Lord Mayor's Court was invalid, in consequence of there having been no debt in the case of *Cuff v. Lautour* arising within the city of London, and of the garnishee's residing without the jurisdiction. Cox thereupon took out an interpleader summons at chambers, and the matter was referred to the court, but stood over for the decision of the Ex. Ch. in the case of *Cox v. The Lord Mayor of London*, 32 L. J. 282, Ex., 8 L. T. Rep. N. S. 700.

Lautour had previously to Cuff's action become bankrupt, and had signed and filed in the Court of Bankruptcy in London a schedule of his debts, in which he had included the debt to Cuff, and had verified the truth of the schedule by affidavit. The proceedings in bankruptcy had been signed by Cuff.

Henry James showed cause against a rule directing Cox to pay the money in his hands to Morris. In the first place, the Lord Mayor's Court had jurisdiction; and in the next place, the proper remedy of Morris was to apply to this court for a writ of prohibition, and not for this rule. The objection to the jurisdiction might have been raised by Lautour in the Lord Mayor's Court by plea. The debt was contracted without the city of London, but it has always been considered a good custom of the city of London that where there has been such an admission of the debt as constitutes a statement of account within the city, the Lord Mayor's Court has jurisdiction in an action upon an account stated. The insertion by Lautour of the debt in his schedule was such an admission: (*Porter v. Cooker*, 1 C. M. & R. 395). [WILLES, J.—The admission must be made to the creditor, and not to a third person.] In *Eily v. Nokes*, 1 Moo. & Rob. 359, it was held that such an admission would not take a debt out of the operation of the Statute of Limitations, but that was because no promise to pay could be implied from it:

Verral v. Robinson, 2 C. M. & R. 495;

Webb v. Hurrell, 4 C. B. 287;

Cooking v. Ward, 1 C. B. 858;

Holl, for Morris, supported the rule.—This is the

only way of raising the question whether the judge's garnishee order overrides the attachment out of the Lord Mayor's Court. There is no evidence that Cuff signed the proceedings in the city. His place of business is out of the city. There is no evidence even that Lautour signed the schedule of his debts in the City of London.

J. O. Griffiths appeared for Cox, the garnishee.

ERLE, C. J.—Upon this interpleader rule respecting money in the hands of Cox and Co., Morris claims, on the one hand, as a judgment-creditor of Lautour, under a garnishee order; Cuff, on the other hand, on the ground that he had issued an attachment out of the Lord Mayor's Court before the garnishee order had been made. The claim of Cuff is impeached in respect of matters discussed in the case of *Cox v. The Lord Mayor of London*, inasmuch as the parties resided and the cause of action arose without the limits of the City of London. There is put before us now a new ground of jurisdiction, that there is evidence of an account stated in the city upon which the jurisdiction of the Lord Mayor's Court may attach. I wish as little as possible to adjudicate incidentally what the effect of such a statement of account would be, but I have come to the conclusion that there is no satisfactory evidence of a statement of account within the city such as to create a new and distinct cause of action. The rule must therefore be for Cox to pay over the money to Morris.

WILLIAMS, J.—I am anxious not to decide upon the motion what is the jurisdiction of the Lord Mayor's Court; but although the court have decided that there is no sufficient evidence of a statement of accounts within the city, we do not wish to concede that it is enough to give the Lord Mayor's Court jurisdiction if the cause of action arise within the city, though the garnishee does not reside there. The question of jurisdiction has given rise to great discussion in the cases of *Traub v. Schmidt*, Manning's Index, Appendix, "Foreign Attachment," p. 350; and; *Reg. v. The Lord Mayor and Aldermen of London*, 13 Q. B. 1; *Crosby v. Hetherington*, 4 M. & G. 933.

WILLES and KEATING, JJ., concurred.

Rule absolute with costs.

Monday, Feb. 1.

BROWN v. CARBERY; ROSE, GRAHAM AND COMPANY
Garnishees, COCHRANE Approver.

Bankruptcy (India)—11 § 12 Vict. c. 21—*Liability of separate estate of member of bankrupt firm.*

On the insolvency of a firm in India, both the separate estate and the joint estate of the partners pass to the assignees under the 5th section of the Insolvent Debtors (India) Act, the 11 § 12 Vict. c. 21.

The plt. Brown, being a *bond fide* creditor of the deft. Carbery, attached 600*l.* in the hands of Messrs. Rose, Graham and Co., as the proper and separate moneys of Carbery the deft., upon which Cochrane, the approver, filed a bill of proof in the Lord Mayor's Court, claiming the money as assignee under the bankruptcy in India of a firm in which the deft. Carbery was a partner. At the trial it was admitted that the property attached came into the hands of the garnishees in the name of the deft., and it was admitted for the purposes of this case that it was part of the separate estate of the deft., and that the deft. and Ann Carbery (the other member of the firm in India) were insolvent in Calcutta. The Recorder directed a verdict for the plt., on the ground that only the debts due to the deft. and Ann Carbery jointly passed to the assignee, and gave the approver leave to move to set it aside and enter it for himself, if this view of the law should be erroneous.

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H. James having obtained a rule, *Philbrick* now showed cause.—By 11 & 12 Vict. c. 21, s. 5, it is enacted that “any person who shall be in prison within the respective limits of the towns of Calcutta, Madras and Bombay, upon any process whatsoever, for or by reason of any debt, damages, costs, or money which such person is solely or jointly with any others liable to pay, or for or by reason of any contempt of any court whatsoever, for nonpayment of money only, or of costs taxed or untaxed, either ordered to be paid or to the payment of which such person would be liable in clearing such contempt, or in any manner in consequence of or by reason of such contempt, or who shall reside within the jurisdiction of any of the supreme courts at Calcutta, Madras and Bombay respectively, and, being indebted on account of any such liability as aforesaid, shall be in insolvent circumstances, may at any time apply by petition to the court for the relief of insolvent debtors within the presidency where such insolvent debtor shall then be for the benefit of the provisions of this Act . . . and if any such person as aforesaid shall be jointly indebted, it shall be lawful for (*sic*) them to apply jointly by petition in such manner as is hereinbefore mentioned, and under such joint petition the joint estate and the separate estate of such petitioners shall be dealt with and distributed.” This is a petition by the firm on the insolvency of the firm. I contend that under the Act the separate estate does not vest; and secondly, assuming that it would, it did not under this vesting order, as it is limited to the joint estate. There is nothing which shows that the debt came within the description “any such person.” It is perfectly possible that a man may be solvent in his private and separate estate while the firm is insolvent. This section is meant to meet the case where a firm is insolvent and also the individual members, so that all the property may vest in one assignee. There must at least be one of the firm insolvent.

H. James in support.—The whole question turns on the proviso, “And if any such person as aforesaid shall be jointly indebted, it shall be lawful. . . . and the joint estate and separate estate of such petitioners shall be dealt with and distributed.” It makes it compulsory. The vesting order vests as much as by law could be distributed.

ERLE, C. J.—This was an attachment on money due from *Rose and Co.* to *Carbery* and *Cochrane* came in and said that it was not due to *Carbery* but to him, as assignee under the Indian insolvency, *Carbery* being in partnership with another person, and the question is whether the separate estate of *Carbery* passed to the assignees? I am of opinion that both the joint and separate estate passed. The 5th section of the statute contemplates the insolvency of two partners, and says when they shall apply jointly by petition both the joint estate and the separate estate shall vest. It seems to me that the vesting order intended to give effect to the rights of the parties under the statute, and must be construed as passing both the joint and separate estates, and I am therefore of opinion that this rule should be made absolute.

WILLIAMS, WILLES and KEATING, JJ. concurred.

Rule absolute.

Friday, Feb 5.

HACKETT (app.) v. THE CHURCHWARDENS AND OVERSEERS OF LONG BENNINGTON AND J. W. ANDREWS AND C. ANDREWS (resps.)

Parochial assessment—Poor-rate—Annual value—Corn rentcharge payable to vicar in lieu of tithes—Union Assessment Act 1862—Costs.

By an Act passed in 1794 commissioners for inclosing the parish of L. B. were directed to set out from the lands to be inclosed a certain portion to be taken

and accepted as full compensation for and in lieu of all tithes both great and small; of this portion they were directed to allot thirty acres to the vicar and his successors, and all the residue to the rector and his heirs, subject to a corn rentcharge payable out of the same to the vicar and his successors, the amount of which was to be estimated in the following manner: the commissioners were required to ascertain what part of the lands so to be set out for tithes should, with the above-mentioned 30 acres, be a fair and equitable compensation for the vicarial tithes, and to ascertain what quantity of wheat at an average price, based upon the prices during the last twenty-one years, was equal to the yearly value of that part of the land, exclusive of the 30 acres. A corn rent equal to the value of the quantity of wheat so to be ascertained was to be paid annually to the vicar and his successors clear of all parochial rates and taxes. It was further enacted that the tithes should be for ever extinguished. After the passing of the Union Assessment Act 1862, the resps., who were occupiers of the lands so allotted to the rector, were assessed at the full annual value of the lands, less the amount of the corn rent charged on the land and payable to the vicar. On an appeal against the rate, on the ground that the resps. were underrated:

Held, that, according to the terms of the Act, the vicar was not liable to be rated on the amount of his rentcharge, and that the resps. were rateable at the full annual value of their lands, without deduction for the rentcharge charged thereon.

Special case stated pursuant to 11 & 12 Vict. c. 45, s. 11, with the consent of the parties, and by order of *Willes, J.*

This is an appeal against an assessment for the relief of the poor of the parish of Long Bennington, in the county of Lincoln, made the 16th July 1863, against which assessment the applicant duly gave notice of appeal to the resps. the churchwardens and overseers of the poor of the said parish, and *John Wood Andrews* and *Cyrus Andrews*, both of Long Bennington aforesaid, on the ground that the resps. *John Wood Andrews* and *Cyrus Andrews* were underrated in respect of the yearly value of the house and land occupied by them the said *John Wood Andrews* and *Cyrus Andrews* in the said parish.

The parish of Long Bennington was inclosed under an Act, the 34 Geo. 3, entitled “An Act for dividing, allotting and inclosing the open fields, meadows, pastures, commonable lands and waste grounds within the parishes of Long Bennington and Foston, in the county of Lincoln.” This Act is to be taken as forming part of this case, and may be referred to by either party.

By that Act, after reciting that *Sir W. Manners, Bart.*, was impropror or owner of and entitled to receive and take such tithes arising within the said parishes of Long Bennington and Foston, or customary payment in lieu thereof, as were of right due and payable to the impropror of such parishes, and that the *Rev. R. Lock*, clerk, was vicar of the vicarage of the said parishes, and as such was entitled to receive and take such tithes arising within the said parishes, or customary payment in lieu thereof, as were of right due and payable to the vicar of the said vicarage for the time being, it was enacted that the said commissioners should, and they were thereby required as soon after the survey therein previously mentioned should have been laid before them as conveniently might be (after setting out public drains and public and private roads and ways, and lands for getting materials for repairing thereof, as thereinbefore was mentioned), to set out from the then residue of the lands and grounds by that Act directed to be divided and inclosed, two or more plots or parcels of

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land in the parish of Long Bennington aforesaid, and one or more plot or parcel, plots or parcels of land in the parish of Foston aforesaid, which in the judgment of the said commissioners should be equal in value to one-fifth part of all the lands that were open and uninclosed lying within the respective boundaries of the then open arable fields, and to one-fifth part of the several ancient inclosures and homesteads within the said respective parishes that were arable, and to one-eighth part of the residue of the lands and grounds (except glebe land) lying and being within the said parishes respectively, subject or liable to the payment of tithes in kind, or to any modus or composition in lieu thereof, and that the lands so to be set out as aforesaid should be deemed, taken and considered as equal to the value of, and should be accepted in full bar, satisfaction and compensation of and for all tithes, both great and small, and all compositions and payments in lieu of tithes arising, renewing, or payable within the said parishes of Long Bennington and Foston (Easter offerings, mortuaries, and other surplice fees, which were thereby reserved to the said vicar of Long Bennington and Foston, only excepted). And it was thereby also enacted that out of the same lands so to be set out in lieu of tithes in the said parish of Long Bennington as aforesaid, the said commissioners should and they were thereby required to allot unto the said R. Lock and his successors, vicars as aforesaid, two plots or parcels of land in the parish of Long Bennington aforesaid, containing together 30 acres statute measure, 5 acres whereof should be situate in a place called the Green (to adjoin the turnpike road) opposite or nearly so to the dwelling-house of John Bennington, and the residue thereof at no greater distance than half a mile from the said five acres, and that all the residue of the said land to be set out for tithes as aforesaid should be allotted to the said Sir W. Manners or his heirs, subject nevertheless to the payment of the corn rents thereafter reserved, and the said commissioners were thereby required to ascertain what part of the said lands so to be set out for tithes as aforesaid within the said parish of Long Bennington should (with the said thirty acres thereinbefore directed to be allotted to the said R. Lock and his successors vicars as aforesaid) in their judgment be a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes arising or payable within the parish of Long Bennington aforesaid to the said vicar of Long Bennington and Foston aforesaid, and what part of the same lands within the parish of Foston aforesaid should in their judgment be a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes arising or payable within the parish of Foston aforesaid to the said vicar; and it was further enacted that the said vicar, in lieu of such parts or proportion of land and of the vicarial tithes appertaining to the said vicarage, should have and be entitled as well to the said thirty acres thereinbefore directed to be allotted to him, as to the corn rents to be ascertained and paid in manner thereafter mentioned (that is to say); the said commissioners should from the *London Gazette* and by such other ways and means as they should think most proper, inquire what had been the average price of good marketable wheat, in the county of Lincoln, during the term of twenty-one years next preceding the passing, of that Act, and should in and by their said award ascertain and set forth what respective quantities should in their judgment (according to such average price as aforesaid) be equal to the yearly value of the lands in each of the said respective parishes (except the said thirty acres thereinbefore directed to be allotted to the said R. Lock), to be ascertained as the fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes appertaining to the said vicarage, and that

there should be paid and payable to the vicar of the said parishes of Long Bennington and Foston, and his successors, for ever, out of the whole of the lands thereby directed to be allotted to the said Sir W. Manners for tithes within the parish of Long Bennington aforesaid, according to the value of the vicarial tithes and other payments in lieu of tithes arising within the same parish, and appertaining to the said vicarage, such sum of money as should be equal to the value of the quantity of wheat so ascertained according to the average price aforesaid, and out of the whole of the lands thereby directed to be allotted to the said Sir W. Manners for tithes within the parish of Foston aforesaid, according to the value of the vicarial tithes and other payments in lieu of tithes within the same parish, and appertaining to the said vicarage such sum of money as should be equal to the value of the quantity of wheat so to be ascertained according to the average price aforesaid, which said respective rents or sums of money should be payable and paid to the said vicar and his successors, either at the vicarage house in the parish of Long Bennington aforesaid, or at such other place or places within the said respective parishes, or either of them, as the vicar thereof for the time being should appoint by four equal quarterly payments in every year for ever, that is to say, the 25th Dec., the 25th March, the 24th June, and the 29th Sept., clear of all parochial taxes, rates, dues and assessments whatsoever (and the amount of the land-tax to be paid in respect thereof to be ascertained according to the proportion in which the lands respectively thereinbefore contribute), the first payment whereof should grow due and be made on the 25th Dec. next after the execution of such award, or such earlier quarterly day of payment as the said commissioners should by any writing under their hands direct or appoint. And it was enacted that the tithes in lieu whereof the said 30 acres of land were thereinbefore directed to be allotted and such rents were to be paid should cease and be for ever extinguished on or before the 29th Sept., or such earlier quarterly day as should next precede the first quarterly payment.

The commissioners accordingly, by their award, set out 684 acres 2 roods and 28 perches in the parish of Long Bennington, being, with certain herbage also awarded to the impropriator, in their judgment equal in value to one-fifth part of all the lands that were then open and uninclosed, lying within the boundaries of the then open arable fields, and to one-eighth part of all the residue of the lands and grounds lying and being within the said parish, subject or liable to the payment of tithes in kind, or to any modus or composition in lieu thereof (none of the titheable parts of the ancient inclosures and homesteads being then arable), and declared that the said lands so set out were, according to the directions of the said Act, to be deemed, taken and considered as equal to the value of and to be accepted in full bar, satisfaction and compensation of and for all tithes both great and small, and all compositions and payments in lieu of tithes arising, renewing, or payable within the said parish of Long Bennington (Easter offerings, mortuaries and surplice fees, which were by the said Act reserved to the said vicar of Long Bennington and Foston, only excepted).

The commissioners allotted to the vicar of the said parishes 30 acres, part of the said 684 acres 2 roods and 28 perches, and they awarded the residue of the said last-mentioned lands to Sir W. Manners, as impropriator, subject nevertheless to the payment of the sum of 147*l.* 16*s.* 6*d.* by the year to the said Robert Lock and his successors the vicars as aforesaid, as a corn rent or yearly payment of money to be paid by four equal quarterly payments, clear of all parochial taxes, rates, dues and assessments whatsoever, except the land-tax, which said yearly sum of 147*l.* 16*s.* 6*d.*,

together with the said 30 acres awarded to the said vicar, they declared to be in their judgment a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes appertaining to the said vicarage, arising or payable within the parish of Long Bennington aforesaid, to the said vicar.

The commissioners further declared that 70 quarters 3 bushels 4 quarts and 1 pint of good marketable wheat were, according to the then ascertained average price of 5s. 3d. per bushel, equal to the said yearly sum of 147l. 16s. 6d., and in further pursuance of the said Act, they declared the mode in which the value of the said corn rent should be re-ascertained from time to time.

From the making of the said award the vicar of Long Bennington and Foston has always been assessed to the poor-rate for the parish of Long Bennington in respect of the 30 acres so awarded to him as aforesaid, but he has not of late years been assessed to the poor-rate for the parish in respect of his said corn rent. The occupier of the land allotted to the impropricator as aforesaid has always been assessed to the said poor-rate in respect of the said land since the said award, but it cannot be ascertained whether, in estimating the rateable value of the said land, any deduction has ever been claimed or made in respect of the corn-rent so charged thereon as aforesaid.

The present value of the said corn rent, ascertained by the mode prescribed by the said Act, is 204l. 14s.

At the time of the coming into operation of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), the land so allotted to the impropricator was in the occupation of the resps. John Wood Andrews and Cyrus Andrews, and is the land mentioned in the notice and ground of appeal already referred to.

In pursuance of the last-mentioned Act, the churchwardens and overseers of the poor of the parish of Long Bennington made a list of all the rateable hereditaments in their parish, with the annual value thereof respectively, including therein the house and land in the occupation of the resps. John Wood Andrews and Cyrus Andrews, which were assessed at the full annual value of the said house and land, without making any deduction or allowance in respect of the corn rent charged on the said land by the said Inclosure Act. The parish officers, in fact, valued the house and land just as if they were tithe free, and were not charged with any corn rent.

The resps. John Wood Andrews and Cyrus Andrews, gave to the assessment committee of the Newark Union, in which Long Bennington is situate, and to the overseers of the parish, notice in writing that they objected to the valuation-list, and claimed that in assessing the rateable value of the said house and land, the amount of the corn rent which they paid to the vicar under the Inclosure Act should be deducted.

The committee admitted the objection, and amended the valuation-list by reducing the assessment upon the house and land occupied by the resps. John Wood Andrews and Cyrus Andrews, by the said sum of 204l. 14s. the present value of the said corn rent.

The churchwardens and overseers of Long Bennington thereupon made the rate appealed against, and assessed the resps. John Wood Andrews and Cyrus Andrews thereto at the said reduced sum.

The question for the opinion of the court is, whether, in estimating the annual value of the said house and land for the purpose of ascertaining the gross estimated rental, or the net annual value thereof under 25 & 26 Vict. c. 103, s. 15, and 6 & 7 Will. 4, c. 96, s. 1, the amount of the said corn rent ought to be deducted.

If the court should be of opinion that the amount of such corn rent ought to be deducted, the rate is to be confirmed; but if the court should be of opinion that it is not to be deducted, then the rate is to be amended by

increasing the rateable value of the said house and land by the said sum of 204l. 14s.

A judgment in conformity with the decision of the court, and for such costs as the court shall adjudge, is to be entered on motion by either party at the sessions next or next but one after such decision shall have been given.

Case appeared for the app., and contended that the tithes had been extinguished by the statute, and that the occupiers, J. W. and C. Andrews, were liable to be assessed at the full value of their lands on the ground that they were tithe free; and that even if the tithes had not been extinguished they were the occupiers of the lands which had been substituted for the tithes, and were, therefore, occupiers in fact of the tithes themselves. He cited

6 & 7 Will. 4, c. 96, s. 1;

6 & 7 Will. 4, c. 71, ss. 17, 37;

23 & 24 Vict. c. 93, s. 1;

Reg. v. Shaw, 12 Q. B. 419;

Lowndes v. Horne, 2 W. Bl. 1252;

R. v. Boldero, 4 B. & C. 467;

Chatfield v. Ruston, 3 B. & C. 863;

Charter v. Glubb, 9 B. & C. 479;

R. v. Wilson, 5 Nev. & Man. 119;

R. v. Great Hambleton, 1 A. & E. 145.

Poland for the resps. J. W. and C. Andrews.—The corn rentcharge is a tithe commutation rentcharge within the meaning of 6 & 7 Will. 4, c. 96, s. 1, and 25 & 26 Vict. c. 103, s. 15, and ought to be deducted from the annual value of the rectorial lands. In addition to the above cases, he referred to

R. v. Jodrell, 1 B. & Ad. 403;

R. v. Lumsdaine, 10 A. & E. 157;

R. v. Copel, 12 A. & E. 382, 402;

R. v. Adams, 4 B. & Ad. 61.

ERLE, C. J.—I am of opinion that the app. in this case is entitled to succeed, and I say this after listening to an able argument on behalf of the resps. by Mr. Poland, in which every argument of which the case was capable was brought forward. In the parish of Long Bennington thirty acres of land were by the statute allotted to the vicar in addition to a corn rent issuing out of certain other lands in the parish in lieu of all vicarial tithes, which were thereupon to cease and be for ever extinguished. The statute provides, that the corn rent is to be paid to the vicar "clear of all parochial taxes, dues and assessment rates." One thing is clear, that if this last clause had not been inserted in the statute, the corn rent would have been rateable as being a parliamentary compensation in lieu of tithes, which has been held by many decisions to be rateable as the tithes themselves would have been. Mr. Poland said that there was a strong analogy between this case and the case of a tithe commutation rentcharge, which is by statute subject to rates, and which by the Parochial Assessment Act is to be deducted from the amount upon which the occupier of lands is charged. But my judgment turns entirely on the effect of the statute creating the corn rent here in question. It clearly would be an unjust thing in the Legislature, when a large fund has to be made up by contribution, to exempt any person from contribution, and it would be inequitable to the other persons who would have to make up the deficiency. There is a presumption against the Legislature's doing this, and where it has been possible to put a construction on a statute so as to avoid such an injustice, it has always been done. Mr. Poland says that the object of the Legislature was to benefit the vicar. Now, the thing to be done on the inclosure was to give a portion of land in lieu of the tithes rectorial and vicarial of the parish. The whole of this was to go to the owner of the rectorial tithes, for we may keep out of question the thirty acres which were convenient to the vicar's occupation, and which do not

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bear upon this question of rentcharge. How, then, was the vicar to be compensated for the loss of his tithes? The effect of the arrangement is this: The commissioners are to find out the ratio of the value of the vicarial tithes to the value of the rectorial tithes; to pick out so much land as bears the same ratio to the remainder, and go through the ordinary process of estimating the quantity of corn equivalent to the money rent, and to allot to the vicar so much as is equal to the yearly value of the lands so to be ascertained, as a fair and equitable compensation for vicarial tithes and other payments in lieu of tithes. The commissioners were bound, as between the vicar and the rector and the rest of the parish, to treat the arrangement made by the Legislature to be in accordance with the Tithe Commutation Act, that the vicar should not have the anxieties of agricultural speculation accompanying the holding of much land. The rector has a statutory lease of the land for ever, and it is the duty of the commissioners to ascertain the fair rack-rent to be paid as if the vicar had let the land to the rector. In that case the rector would have been the occupier, and would have had to pay the rates. It would be an injustice, after the Legislature had exempted the vicar, for us to shift the burden on to the vicar from the occupier of the vicarial lands. Upon the special terms of the statute our judgment ought to be for the app.

WILLIAMS, J.—It was not the intention of the Legislature to give a bounty to the vicarage. The tithes are to be rated in some manner or other for the benefit of the parish. The Act exempts the vicar from the payment of rates in respect of tithes, but the corn rentcharge is to be measured on the foundation of what would be a quantity of land which would be a fair and equitable compensation for the tithes, to be ascertained plainly, not by giving the vicar the full value of the tithes, which would be to make him a present of the rates, but by deducting the amount of the rates. He receives compensation for the tithes *minus* the rates, and there is no hardship in assessing the rector's lands to the full value, for the rector has been compensated for the payment of rates for the vicarial tithes, inasmuch as the burden on his land is so much the less. The proper arrangement is that the lands which the lay rector gets should be charged on their annual value, without any deduction for the rates for which the vicarial lands were liable. If the Parochial Assessment Act had never been passed, it would not have been right to take the value otherwise, and that statute does not affect the present case, as the corn rent here is not a tithe commutation rentcharge within the words or spirit of the Act.

WILKES, J.—The local Act, passed in 1794, deals with the tithes and not with the rates, and it does not interfere with the ordinary rule that the occupier of tithes should be rateable in respect of them. There was no intention on the part of the Legislature to benefit the vicar. The compensation could not be ascertained without considering the deductions to be made for rates, which must be paid by some one unless the statute expressly enacts that they shall drop. Our judgment will be, that the rate be amended as stated in the words of the 15th paragraph of the case.

Case applied for costs. [ERLE, C.J.—The respas. have come here to support the decision of the assessment committee.] In reality the overseers took the same view of the matter as the app., and no one supports the rate besides J. W. and C. Andrews.

By the COURT.—Practically it is a litigation between two individual ratepayers, and the ordinary rule is that the party who succeeds should have his costs.

Judgment for the app., with costs against the respas. J. W. and C. Andrews.

Attorney for app., P. Hodgkinson.

Attorney for resp., T. Roberts.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, Jan. 25.

IRWIN v. BRANDWOOD AND UX.

Slander—Imputation of drunkenness against certificated master of a vessel—Merchant Shipping Act 1854 (17 & 18 Vict. c. 96), s. 242.

On demurrer to a declaration, which alleged that plt. was a duly certificated master mariner in command of a foreign-going ship within the meaning of the Merchant Shipping Act 1854, as the master of the said ship for hire, &c., and that the said vessel sailed to and stayed at Nassau, under the command of plt. as such master as aforesaid, and that the female deft. falsely and maliciously spoke and published of plt. as master mariner as aforesaid the words following, that is to say, "During his stay at Nassau he was frequently drunk, and in that state he had to be carried to his boat to reach his vessel, which was standing out several miles:" it was

Held, that such words so spoken of the plt. while the master of and in command of a vessel were the subject of an action, and therefore judgment was given for the plt.

Declaration.—That before the speaking of the words hereinafter mentioned, the plt. had duly obtained such certificate for competency as is required by the Merchant Shipping Act 1854 to be obtained by persons intending to become masters of foreign-going ships, and possessing the said certificate, commanded a vessel called the *Nelson*, being a foreign-going ship within the meaning of the said Act, as the master of the said ship for hire and wages payable to him in that behalf, during a foreign voyage, in the course of which the said vessel sailed to and stayed at Nassau, within Her Majesty's dominions in the West Indies, under the command of the plt. as such master as aforesaid, and at the time of the speaking of the said words the plt. still retained such certificate as aforesaid, and exercised the employment or profession of a certificated master mariner, and sought his livelihood thereby. Yet the deft. Jane, then being the wife of the deft. William, false and maliciously spoke and published of the plt., as master mariner aforesaid, the words following, that is to say, "During his stay at Nassau he was frequently drunk, and in that state he had to be carried to his boat to reach his vessel, which was standing out several miles" (meaning that the plt. whilst he was master of the said vessel aforesaid, contrary to his duty as master of the said vessel, during the stay of the said vessel at Nassau, had been frequently drunk, and had been guilty of a gross act of drunkenness), whereby the plt.'s character and reputation as a master mariner as aforesaid has been injured, and the plt.'s said certificate became liable to be suspended or cancelled if the said charge had been true; and the plt. claims 300*l.*

Demurrer and joinder in demurrer.

Def't's points:—1. That the words spoken are not actionable without special damage. 2. That the words are not shown to have been spoken or to apply to plt.'s occupation as master mariner. 3. That notwithstanding plt.'s drunkenness ashore during the stay at Nassau, the words spoken charge no inefficiency to discharge his duties as master of a ship, or injury or inconvenience arising therefrom, which would subject the plt. to be discharged, or to have his certificate suspended or taken away under the Merchant Shipping Act 1854, or otherwise.

Plt.'s point.—That it is actionable, even without special damage, to charge a master mariner with such drunkenness as would, if the charge were true, render

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him liable to have the certificate of competency suspended or revoked.

The following sections of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) were referred to in the argument:

Sect. 239. Any master of any British ship who, by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of such ship, or tending immediately to endanger the life or limb of any person belonging to or on board of such ship, or who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such ship from insured loss, &c., shall, for every such offence, be deemed guilty of a misdemeanor.

By sect. 241 power is given to the Board of Trade or any local marine board to investigate cases of alleged incompetency or misconduct on the part of any master, &c.

By sect. 242 the Board of Trade has power to suspend or annul the certificate, whether of competency or service of any master, &c., in the following cases, that is to say: first, if upon any investigation made in pursuance of the last preceding section, he is reported to be incompetent, or to have been guilty of any gross act of misconduct drunkenness, or tyranny.

Baylis, for deft., in support of the demurrer.—Words imputing drunkenness to a master mariner generally are not actionable without special damage unless they impute misconduct in the discharge of his duties. To charge drunkenness *per se* at Nassau is not actionable, nor if said of a master mariner. He might innocently have been enjoying himself ashore. Nor is it said that the boat was the boat of the vessel. It might be a hired boat, which would be "his boat" just as a cab hired by a man is "his cab" for the time. To be the subject of an action, it must be drunkenness in the discharge of his duty, which this is not alleged to be. So in *Ayre v. Craven*, 2 A. & E. 2; 4 L. J., N.S., 35, C. B., it was held not actionable to charge a physician with adultery (Lord Denman's judgment, 2 A. & E. p. 7), for though said of him as a physician, it was not shown how it was connected with the discharge of his duties. *Lumby v. Allday*, 1 Cr. & J. 301; 9 L. J. 62 Ex.; 1 Tyrwh. 217, shows the slander must be spoken in relation to a man's office, and connected with his profession: (per Bayley, B.) So also in the case of a clergyman (*Gallwey v. Marshall*, 9 Ex. 294; 23 L. J., N. S., 78, Ex.). [Pigott, B.—In the case of a clergyman having cure of souls, it would be actionable if spoken of him either in his duty or out of it, because it would be an ecclesiastical offence. May we not assume that the vessel in the declaration is the vessel of which plt. was the commander?] Yes; but it is not to be assumed he was drunk when on board; he might have jumped on board from the boat quite fresh. The declaration says, "being master of the said vessel." No doubt he is always "master of the vessel," but is he never to get drunk ashore? The allegation "contrary to his duty," &c., is nothing unless it was shown how it was contrary. [MARTIN, B. put the case of saying of a coachman that he was habitually drunk. PIGOTT, B.—Or, which would be nearer to this case, that he was drunk when about to be put upon the box.]

Day contra for plt.—Unless the court be of opinion that *in point of law* the plt. cannot by possibility have been injured in his professional character, then they will let the case go to a jury. [POLLOCK, C. B.—Not by possibility. It must be a reasonable probability.] The declaration, it is submitted, sufficiently alleges a slander of the plt. in the discharge of his duty. It

alleges that the vessel was under his command as master. [POLLOCK, C. B.—Does it say, "As deft. well knew?" No. Master mariners are not expressly mentioned, but would be included in the enumeration given by Starkie in his treatise on the Law of Libel. In *Gallwey v. Marshall* (*ubi sup.*) the plt., though a clergyman, had nothing to lose in the nature of temporal profits; he had no benefice. [POLLOCK, C. B.—It would clearly prevent him from ever getting one; and so here, if the charge were true, it would be the cause of deprivation of the plt.'s command. CHANNELL, B.—Should not your innuendo have gone further, and in addition to saying "while he was master of the said vessel," have said also, "while he was so acting?" Take the case where the innuendo is not definitely clear, but may or may not apply to the plt., is that for the court or the jury?] I say it is for the jury. In *Pemberton v. Colls*, 10 Q. B. 462; 16 L. J., N. S., 403, Q. B., words charging an imputation on plt., a clergyman, in his professional character were held actionable, and the distinction in *Gallwey v. Marshall* between that case and *Pemberton v. Colls* is the same as that pointed out by Mr. Starkie, viz., the absence of professional profits in the case of an unbeneficed clergyman. So, in *Ayre v. Craven* (*ubi sup.*) it was not necessarily injurious to plt. in his profession. [CHANNELL, B.—Does your declaration import that he was drunk whilst acting in command of the vessel?] It alleges him to be in command at the time, &c. "While at Nassau" is all the time the ship was there, and plt. was in command all the time, whether on board or on shore. [POLLOCK, C. B.—You do not allege that he was drunk in the discharge of his duty.] Being drunk at Nassau whilst the ship was lying off there under his command is an offence for which, under sect. 242 of the Merchant Shipping Act (17 & 18 Vict. c. 96), he was liable to have his certificate suspended or annulled. If it be really possible that a man may be damaged in his professional prospects, then the court is bound to leave it to the jury, who alone can determine what are the duties of the master of a ship lying off Nassau. [POLLOCK, C. B.—But before it goes to the jury the court may decide that there is nothing to go to them.]

Starkie on Libel, 126, 130, was also referred to.

Baylis in reply.—A jury may find that words which at first sight may be actionable, are not so, as not spoken in that sense, but they cannot make non-actionable words actionable. [CHANNELL, B.—If words are clearly actionable no innuendo is wanted. If they are clearly not actionable an innuendo cannot make them so; but take the intermediate case where they may be actionable, then the innuendo is for the jury. POLLOCK, C. B. referred to *Wetherhead v. Armitage*, in which it was held that to say of a dancing mistress, "She is as much a man as I—she got a woman with child—she is an hermaphrodite," was not actionable without showing special damage. "It was no scandal to her profession, for girls were more frequently taught to dance by men than women:" (2 Lev. 233.) (a)] That case and all the others show that the declaration must be precise and certain, and connected with the discharge of duty.

Cur. adv. vult.

Jan. 28.—POLLOCK, C. B. now delivered the judgment of the court (Pollock, C.B., Martin, Channell and Pigott, BB.) as follows:—This was an action of slander against the wife of the deft., who had imputed drunkenness to the plt. while in the command of a vessel that was then at sea in Central America. We are all of opinion that such words, so spoken of the plt. while the master of, and in command of a vessel, are

(a) S. c. Freeman, 277, nom. *Witherby v. Hermitage*; and 2 Show. 18, nom. *Wetherhead v. Brookborne*.

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STURGIS v. EVANS.

[Ex.]

the subject of an action. Therefore the judgment of the court will be for the plt. *Judgment for plt.*

Plt.'s attorneys, *Lloyd and Chevalier*, 30, John-street, Bedford-row.

Def't.'s attorneys, *Gregory and Rowcliffes*, 1, Bedford-row.

Wednesday, Jan. 27.

STURGIS (Provisional Assignee of Cheselden Inman Browne, an Insolvent Debtor) v. EVANS.

Insolvent Debtors Act (1 & 2 Vict. c. 110) ss. 42, 48—Bankruptcy Act 1861.

The provisional assignee of an insolvent debtor can sell by auction reversionary interests of the insolvent, and sue for breach of the contract, without first obtaining from the Insolvent or Bankruptcy Court an "order" to sell, under the 1 & 2 Vict. c. 110, s. 42, or the B. A. 1861.

The assignees of C. I. Browne, an insolvent debtor, caused to be put up to auction certain reversionary interests of the insolvent. The def't. was declared the highest bidder, and paid the deposit, but did not complete the purchase. This action was brought to recover the amount.

Plea (amongst others).—Def't. says that the Court for the Relief of Insolvent Debtors of England did not, nor did the Court of Bankruptcy, order the plt. to sell or dispose of the said properties or any or either of them.

Demurrer to that plea and joinder.

M. Smith, Q.C. (Wm. Paterson with him), for the plt. in support of the demurrer.—By the 1 & 2 Vict. c. 110, s. 37, upon the filing of a petition in the Insolvent Debtors Court, that court is to order all the estate, &c. of such prisoner to be vested in the provisional assignee, and such order when made is, without an assignment or conveyance, to vest all such estate and effects in the provisional assignee, and by sect. 42 he is to take possession thereof by virtue of that order; and then it says, "and if the said court shall so order, to sell or otherwise dispose of such estate," &c., and that the provisional assignee may sue in his own name, if the said court shall so order, for recovering debts and enforcing rights of such prisoner. The section does not relate to anything more than the assignee can take possession of. [CHANNELL, B.—When assignees bring actions of trover, it is always usual to have an order to do so.] When goods were in the possession, order, or disposition of the bankrupt as reputed owner, then such an order to vest the property was no doubt requisite (12 & 13 Vict. c. 106, s. 125); but not so here under the 1 & 2 Vict. c. 110. The insolvent's estate and interest in the property in question having vested in the plt. by the vesting order under the 1 & 2 Vict. c. 110, s. 37, the plt. had a right to sell such property, and no provision of that statute or of the B. A. 1861 interferes with such right. Sect. 42 of 1 & 2 Vict. c. 110 does not apply to reversionary interests of the insolvent. The provision of the statute requiring an order to sell relates only to the creditors and assignees of the insolvent; the absence of any such order cannot be taken advantage of by strangers like the def't., and the absence of any such order to sell as mentioned in the plea is no defence to the action:

Dance v. Wyatt, 6 Bing. 486;

Lee v. Sangster, 2 C. B., N. S. 1; and

Doe v. Evans, 1 C. & M. 450, are almost conclusive upon the present case;

Healop v. Baker, 6 Ex. 740, is distinguishable.

Pren'ce for def't. in support of the plea.—This is an action by a vendor against a purchaser, and it is impossible for the vendor to make a good title without an order of the court authorising or directing a sale by

the provisional assignee. The absence of such an order to sell as mentioned in the plea is a defence to the action, and the plea shows that the vendor is not in a position to make a good title. The want of an order was an objection to the title, and justifies the breaches complained of. Sect. 42 of 1 & 2 Vict. c. 110 does apply to the reversionary interests of the insolvent. The provisions of the statute requiring an order can be taken advantage of by a stranger like the def't. and by the def't. The sale was of the insolvent's expectant interest in certain property of very trifling value, and this class of property is particularly provided for by sect. 48 of the 1 & 2 Vict. c. 110, and shows still more strongly that an order of the court is necessary before he can sell or compel a purchaser to pay for such an interest as this bought of him as assignee. Suppose the case of a trustee authorised to sell with the authority and consent of the *cestui que trust*. It would be a good answer to the trustee in an action for the purchase-money, or nonfulfilling a contract of sale, to say that he had not obtained the consent to sell from the *cestui que trust*.

Maberley v. Robins, 5 Taunt. 625;

Ellist v. Edwards, 3 B. & P. 181;

Sug. Ven. & Pur. 203 (10th edit.);

This property vests in the plt. merely as a trustee for the creditors, and he cannot sue in the present action because he cannot sell or make a title: (*Sug. on Powers*, p. 266.) [MARTIN, B.—Sect. 48 is for the benefit of the insolvent, and the order there is to mortgage. FIGOTT, B.—Do you contend that after this sale the court could disavow the sale?] Yes; and if there were no such order the Court of Ch. would not decree specific performance, but give the def't. relief against it.

M. Smith in reply (stopped.)

POLLOCK, C. B.—The cases cited on behalf of the plt. I think, show that the order of the court insisted on by the def't. is not necessary in order to enable the assignee to sue a purchaser, as in the present case. No doubt, if a contract of sale be made, and the buyer, before the completion of his purchase, asks for the order of the court directing a sale, and it turns out that the assignee could not get the order, there might then be something in the objection; but the assignee has power to sell under sect. 42, and if the order therein referred to be produced before the completion of the purchase, it would be sufficient. As to the 48th section, that gives the court a discretion as to the disposal of the insolvent's property, and authorises it to be mortgaged if more beneficial to the estate, or "where, under such circumstances, the immediate sale thereof for payment of debts may be very prejudicial." It appears to me, upon the authorities cited by Mr. Smith, the plea is bad, and the plt. is entitled to our judgment.

MARTIN, B.—I am of the same opinion. The question entirely depends on sect. 42, and sect. 49 has nothing to do with it. The cases cited by Mr. Smith show that the words used as to obtaining the order of the court are not conditions precedent to bringing the action. It is difficult to see how it is a condition precedent to making the sale. The plea is evidently one to endeavour to escape from the contract only, and it is a bad plea. The assignee sells by virtue of his title of ownership under the vesting order of the court, sect. 48, is only for the protection of the interests of the insolvent, and where it would be more advisable to mortgage, and has nothing to do with this matter, or the protection of the rights of a purchaser, who must stand on his own contract.

CHANNELL, B.—I am of opinion the plt. is entitled to the judgment of the court upon this demurrer. The def't. says the plt. cannot make out a good title as he did not obtain nor was there any order of the Court of Insolvent Debtors or of Bankruptcy authorising him to sell. If the plea had stated that the court

had made an order not to sell, under sect. 48, then I am not prepared to say that might not have been an answer to the action, but that is not this case. The general property of insolvents vests under the Act of Parliament in the assignee for sale and distribution of the produce among the creditors; and it appears to me the two sections referred to do not show that the assignee had no power to sell without previously obtaining an order for that purpose from the court. I agree with the decisions cited by Mr. Smith, and if the assignee wanted to mortgage the insolvent's property, then he should go to the court for an order under sect. 48.

PROCTOR, B.—I am of the same opinion. Looking at sect. 48, I think it is clear if the insolvent wants such an order as provided for by sect. 48 he must apply to the court for it; but I do not think the commissioner would make any such order after there had been a sale. Practically it does not vitiate, I think, the title of a purchaser. *Judgment for plt.*

Attorneys for plt., *Walker and Twyford*, 5, Southampton-street, Bloomsbury.

Attorney for deft., *J. Evans*, 10, John-street, Bedford-row.

EXCHEQUER CHAMBER.

Reported by F. BAILEY, Esq., Barrister-at-Law.

Tuesday, Dec. 1.

ERROR FROM THE EXCHEQUER.

(Before WILLIAMS, WILKES, KEATING, BYLES, BLACKBURN and MELLOR, JJ.)

DUMERGUE V. RUMSEY AND ANOTHER.

Landlord and tenant—Right of landlord to tenant's fixtures as against execution-creditor of tenant.

In a lease of premises to a tenant for ten years, it was stipulated that, in case the term should regularly determine by effluxion of time, it should be lawful for the lessee, within twenty-one days after such its expiration, but not at any other time, to remove any tenant's fixtures which he might have attached, unless the lessor should elect to purchase them; and if the lessee became bankrupt, or had an execution levied by seizure on the premises, that the lessor might re-enter, take and retain as her own all fixtures whatsoever, whether tenant's or trade fixtures, which should then be upon the premises, and on such re-entry the term should be absolutely determined. The lessee entered upon the premises and annexed certain fixtures (which a jury found to be tenant's fixtures only). Shortly afterwards the whole were seized on the premises by an execution-creditor of the lessee, whereupon the lessor gave the sheriff in possession notice, and claimed all the fixtures as being her property:

Held (reversing the judgment of the court below), that, under the particular terms of the lease, the lessor was entitled to retain such tenant's fixtures as against the execution-creditor.

This was an appeal from the decision of the Court of Ex. An interpleader issue had been directed to try whether certain fixtures at St. Martin's hall, Long-acre, let to one W. G. Flint, by Mrs. Dumergue, and seized in execution by the sheriff under a *fi. fa.*, against Flint, at the suit of Rumsey and another, were her property as against the execution-creditors. The cause was tried on the 30th April 1862, when the following facts appeared:—

On the 28th Nov. 1861, by an agreement in writing made between the said Anne Dumergue and W. G. Flint, it was stipulated that she should give Flint immediate possession of St. Martin's-hall, Long-acre, that he should directly commence fitting it up for public musical performances with seats and other

moveable effects for opening the place in the month of March then next following, upon which he was to lay out 1000*l.*; that upon his complying with the terms of this agreement, in respect to that arrangement, the plt. Mrs. Dumergue, should grant him a lease in a form given in a schedule to the agreement, and that in the meantime he should observe and perform and be bound by all the stipulations and provisions to be therein contained. In the schedule to the agreement the works and fittings were specified, and included the laying necessary gas-piping, putting up and fixing chandeliers, sun-lights and star-lights for lighting the hall, &c.

The form of the lease was set forth in the schedule, and by that intended lease, Flint covenanted that he would at the expiration or other sooner determination of the term, surrender and deliver up to Mrs. Dumergue, her executors and administrators, &c., all the door locks, &c., leaden pipes, tubes, gutters of lead, and all other things which now are, and which from time to time during the said term shall be fixed or fastened within or about the said buildings and premises thereby demised, or any part thereof, whole and fit for use, reasonable wear and tear only excepted. That it should be lawful for the plt., her executors, &c., at all times to take a schedule of all fixtures and things in, upon and about the premises. That Flint, his executors, &c., would use his and their best endeavours to maintain and improve the character of the premises as a superior place of public musical entertainment, and will at all times during the said term keep sufficient and suitable fixtures and moveable furniture and effects in and upon the public part of the said premises for the use thereof for musical entertainments as aforesaid, and which moveable furniture and effects shall always be of the value of 500*l.* at the least, and that none of such moveable furniture and effects shall be removed therefrom save for the purpose of being repaired, or of being immediately replaced by others of equal or greater value. It was thereby agreed between the parties that in case the term should determine by effluxion of time, and should not be sooner determined under either of the provisions for re-entry thereafter contained or otherwise, then, but in no other case, it should be lawful for the said W. G. Flint, his executors, &c., within twenty-one days next after the expiration of the said term, but not during any other period, to remove such fixtures, if any, other than gas pipings, which it was agreed as aforesaid should be left on the said premises, as he or they may have attached to or placed on the premises, and as may lawfully be removed notwithstanding and without breach of any of the covenants contained in the lease under which the said premises "were held of the Mercers Company," unless Mrs. Dumergue should elect to purchase the same, which it should be lawful for her to do for 300*l.* or such lesser sum as should be their full value. It was also thereby further agreed that if the several rents thereby reserved, &c., should be behind or unpaid for fourteen days, &c., or in case of the breach or nonperformance of any of the covenants or agreements, clauses and things therein contained, and which on the part of, &c., or if the said W. G. Flint, his executors, &c., shall become bankrupt or insolvent, or make any composition with or assignment of his or their estate for the benefit of his or their creditors, &c., or if any distress or writ of extent or execution shall be lawfully levied or executed by seizure on the said premises, or if he or they shall permit any of his or their lands or goods elsewhere to be sold under any other extent or execution, &c., or shall lawfully be taken in execution under any writ of *ca. sa.*, then and in any of the said cases, and at any time thereafter, and notwithstanding any subsequent receipt of rent, &c., it should be lawful for the said

Anne Dumergue, her executors, &c., into the said premises thereby demised, &c., to re-enter and the same to have again, &c., and the said W. G. Flint, &c., to expel, put out, &c., and also to seize and retain for her and their use, and as her and their own, all fixtures whatsoever, whether tenant's or trade or otherwise, and all gas chandeliers and other gas fittings whatsoever, which should then be in or upon the said demised premises, or any part thereof, whether public or private, and that upon any such re-entry as aforesaid the said term granted should be absolutely determined, and that no relief at law or in equity should be given on any terms against such re-entry for nonpayment of rent, &c. I'roviso, that "in addition and without prejudice to the conditional proviso for re-entry thereinbefore contained," it shall be lawful for the said Anne Dumergue, her executors, &c., at any time before two years from the 19th Dec. 1861 and after six months' notice, and if the lessee Flint should not previously to the expiration of such six months' notice have elected and agreed in writing to purchase the premises, to re-enter the premises, and to determine the term, and "in that event shall take and retain for her and their own absolute property all the tenant's fixtures and moveable fittings and effects in, about, or belonging to the said hall, or any of the public portions of the demised premises, inclusive of gas chandeliers, gas pipes and all other gas fittings, and she or they, &c. shall pay for such tenant's fixtures and moveable things so taken and retained, such sum not exceeding 1500*l.* as should be the fair value thereof," &c.

There were some goods and fixtures upon the premises before and at the time of the before-mentioned agreement. Afterwards Flint brought others, and affixed therein other fixtures and things in and upon the premises.

On the 5th Feb. 1862 a *fi. fa.* was issued at the suit of the present defts. Rumsey and another, on a judgment recovered by them against Flint for 293*l.* 8*s.* It was handed to the bailiff, and he levied the same day and seized the whole of the fixtures and things then being in and upon and affixed to the premises, whereupon the claimant and lessor, Mrs. Dumergue, on the 14th Feb. then next, caused the sheriff to be served with notice claiming "all the fixtures whatsoever and all gas chandeliers and other gas fittings, and all the seats in and upon the said premises" as her property. The sheriff then applied for an interpleader summons, and a judge's order was made directing an issue to try whether all the fixtures, &c., in and upon the premises as particularised in Mrs. Dumergue's claim were at the time of the said seizure by the sheriff the property of the said claimant Mrs. Dumergue as against the execution-creditors, Rumsey and Co., the now defts.

The cause was tried on the 30th April 1862. The jury found that all the goods, &c., seized by the sheriff were tenant's fixtures, that such as were affixed to the premises were articles that could easily be detached from the premises, and that any injury in detaching them could be repaired without much trouble, and at a very trifling expense, and that they were brought on or put up for the purpose of the business to which the place and building were to be applied.

A verdict was, by the learned judge with the consent of the parties, directed to be entered for the plt., leave being reserved to the defts. to move to enter the verdict for them. A rule nisi was subsequently obtained for that purpose, upon the ground that there was not sufficient evidence to support the plt.'s claim to the property against the defts., and that upon the facts in evidence and the finding of the jury, it appeared that the goods in question were the property of the defts., as against the plt. Cause was shown against that rule, but the Court of Ex. made that rule absolute.

This was an appeal by the plt. against that decision.

Raymond, for the app. Mrs. Dumergue.—The jury found that all the goods seized by the sheriff under Rumsey's execution were tenant's fixtures, and probably the tenant Flint would have had a right to remove them if that right had not been controlled by the special agreement between lessor and lessee. An execution-creditor might seize such fixtures as belong to a tenant, or as a tenant is justified in removing; but here the very terms of the lease were, that the lessee should not remove them; and as they were irremovable by him, they were not liable to be taken by any execution-creditor of his. In fact, the execution put an end to the term, so that these fixtures became the property of the lessor when the execution against the lessor was levied by seizure on the premises; that was the object and intention of the parties expressed by the lease. The provisions of it are legal, and the court will construe it so as to give effect to the intention. In *Davis and another (Assignees) v. Eyles*, 7 Bing. 154, a lease had been granted on condition that if the lessee contracted a debt on which he should be sued to judgment, which should be followed by execution, the lessor should re-enter as of his former estate, and the lessor having re-entered after a judgment and execution, it was held he was entitled to the emblements. In *Rees v. Topping*, 11 C. & Y. 544, a lease contained a clause of re-entry in case the term of years thereby granted should be extended or taken in execution. Before the end of the term the sheriff entered the premises under a writ of extent against the lessees at the suit of the Crowe, held an inquisition and seized the lessee's interest into the King's hands: it was held that this proceeding was a taking in execution within the latter clause of the conditions, and that the term was determined and forfeited to the lessor.

Minshall v. Lloyd, 2 M. & W. 450; and

Beeston v. Marriott, 8 L. T. Rep. N. S. 690, before Stuart, V.C., were also referred to.

W. G. Harrison, contra, for the execution-creditors.—The jury found all the goods to be tenant's fixtures, but some of the articles were not fixtures at all, such, for instance, as the chandeliers and seats, &c. These were moveable goods, and the lessor acquired no property in them under the lease, any more than ordinary chairs and tables in a sitting-room. In *Hellawell v. Eastwood*, 6 Ex. 295, spinning-mules were held distrainable for rent, and were chattels. The lessee has covenanted only that he will not remove; nevertheless, these articles belong to him: the matter as between lessor and lessee rests in covenant only. (He referred to *Amos on Fixtures*, 321.) [BYLES, J.—These are all cases where the fixtures were removable by the tenant; but it is said here the tenant is prevented by his own agreement from removing.] *Lunn v. Thornton*, 1 C. B. 379, decides that a grant of goods not in existence, or which do not belong to the grantor at the time of executing the deed, is void unless subsequently ratified. These fixtures were brought upon the premises and annexed after the agreement between these parties was entered into. [WILLES, J.—If Flint had become a bankrupt would you say that the assignees could remove?] Yes; the lease shows the lessor had no property in them at that time. [MELLOB, J.—Is there any case in which goods covenanted not to be removed until the end of the term have been held seizable in execution?] No express decision; but they were tenant's fixtures and tenant's chattels, and his property until the end of the term.

WILLIAMS, J.—We are all of opinion that the lessor is entitled to recover, and that the judgment of the court below must be reversed. The question turns entirely upon whether the tenant was entitled to remove certain fixtures. The jury found that the goods were tenant's fixtures, although some of them were annexed to the freehold, and not landlord's fixtures.

Had then the tenant any right to dis-annex them; and if he had the right, could a sheriff under a writ of *fi. fa.* against his goods at the suit of one of the tenant's creditors have the same right to take them in execution? That depends chiefly on the agreement between the landlord and tenant, whether, according to the terms on which the tenant held the premises, he had or had not the ordinary right as tenant to dis-annex; and, looking at the terms of this lease, we are of opinion that the tenant had deprived himself of that right. The lease contains a covenant by the tenant to deliver up to the plt. all doors, &c., and other things which should be upon the premises during the term, but the court do not assent to the entire argument for the plt. founded on that part of the lease, although *Elliott v. Bishop*, 11 Ex. 113, shows that the clause is a landlord's clause. The next clause on which the plt. relies is that which provides that the tenant shall during the term keep sufficient fixtures and moveable furniture upon the public part of the premises of the value of 500*l.*, and not remove such moveable furniture, &c., save for repairing and being immediately replaced, but the court do not think the app.'s case is forwarded by that clause. Is it a mere agreement by the tenant not to remove or a renunciation of his right to those articles? If that clause stood alone it would rather appear to rest in agreement, and I should incline to the opinion that the moveable furniture might be removed. Then comes a clause much more stringent: that in case the term should determine by effluxion of time, then, but in no other case, it shall be lawful for the lessee, within twenty-one days after notice, but not during any other period, to remove fixtures attached by him. If the words "but not during any other period" are to be construed to mean any other time before or after the lease, that would show an express intention that these fixtures should not be removed; but the strongest expression of intention is that which provides that, in the event of the bankruptcy of Flint, or an execution levied by seizure on the premises, the landlady shall have power to re-enter and seize as her own all the trade and tenant's fixtures. That clause is almost conclusive to show that the intention of the parties was that the fixtures, &c. should not be taken in execution. It would be inconsistent with the right of a landlord for goods such as these to pass to assignees in the case of the tenant's bankruptcy, and a right for an execution-creditor to dis-annex and sever them is equally inconsistent. Looking, then, at all these clauses, we think they are inconsistent with the ordinary right which a tenant has to remove such property. It was contended that there is nothing in the lease to show that it was the intention of the parties that any property in these goods should rest in the landlord except upon the happening of the events mentioned; but the fallacy of that argument arises from a misapprehension of the nature of fixtures, which, until severed, are not chattels. A tenant would have a right to remove tenant's fixtures during his term; but they are not goods and chattels. They are, as fixtures, parcel of the freehold, and, as such, not recoverable in trover (*Mackintosh v. Trotter*, 3 M. & W. 184), and there is nothing inconsistent in a tenant, during his lease, abandoning that right. It was also contended that the annexation of these fixtures was made by the tenant subsequent to the agreement; but it is still a question, what are the terms between landlord and tenant, and if those are that the tenant is to hold upon the terms of his renouncing during the term the ordinary right which a tenant has in respect of such fixtures, the court must give effect to that intention. The app. is therefore entitled to this property.

The other learned Judges concurred.

Judgment of the court below reversed.

Attorney for app., *Roberts*; for resp., *Mellon*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 23.

(Before COCKBURN, C.J., CROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. v. FUIDGE.

Vexatious Indictments Act—Indictment preferred without leave—Quashing objectionable part—Inadmissibility of evidence thereon.

A prisoner was committed upon one charge only of false pretences, but an indictment was preferred without leave as required by 22 & 23 Vict. c. 17, s. 1, and found by the grand jury containing a second charge of false pretences. The prisoner refused to plead and the Court directed a plea of not guilty to the whole indictment to be entered for him, and received objection of both charges: Held, that the proper course was to have quashed the part of the indictment relating to the second charge: Held, also, that as evidence upon that charge would not then have been admissible, the conviction could not be supported.

Case reserved for the opinion of this court.

William Varley Fudge was tried before me at the Quarter Sessions for the town and county of the town of Southampton, holden by me on the 11th Jan. 1864, on an indictment containing two counts. He was charged in the first count of the indictment with having obtained on the 26th Sept. 1863 a shawl from Henry Smart by false pretences, and in the second count with having obtained on the 29th Sept. 1863 another shawl from Henry Smart by false pretences.

The false pretences were in each case similar.

When the prisoner was placed at the bar his counsel applied to have the indictment or its second count quashed on the ground that the order of committal reciting only one case of obtaining a shawl by false pretences, namely, the one on the 26th Sept., the prisoner could not be tried for the subsequent false pretence, the subject of the second count, because the prisoner had not been committed for that specific offence, but only for the one of the 26th Sept.

None of the other provisions of the Vexatious Indictments Act had been complied with (22 & 23 Vict. c. 17.)

I refused to quash the indictment or its second count, and ruled that the trial should proceed.

On the prisoner being called on to proceed he refused to do so, whereupon I directed the proper officer of the court to enter a plea of not guilty.

When, on the trial, evidence was tendered by the counsel for the prosecution in support of the second count it was objected to by the counsel for the prisoner, but was admitted by me.

In summing up I left the evidence on the two counts to the jury, as evidence in two separate and distinct cases; and I asked them to return a separate and distinct verdict on each of the counts. They did so, and returning a verdict of guilty on the first count I sentenced the prisoner on that count to three months' imprisonment, and returning a verdict also of guilty on the second count I sentenced the prisoner on that count to a week's imprisonment, to commence at the expiration of the sentence passed on the former count.

The questions for the consideration of the Hon. the Justices of either Bench and the Hon. the Barons of the Exchequer are:

1. Ought the indictment or its second count to have been quashed?

2. If the second count ought to have been quashed or not proceeded upon, was evidence relating to it admissible or inadmissible on the trial of the first count, and if inadmissible can the conviction on the first count be upheld or not?

Jan. 16, 1864.

MONTAGUE BARR, Recorder of Southampton.

C. CAS. R.]

REG. v. BUCKNELL.

[C. CAS. R.]

No counsel was instructed on either side.

Yonge, who had been counsel for the prisoner at the trial, by permission made the following suggestions:— It was clearly wrong and contrary to the Vexatious Indictments Act to try the prisoner upon the indictment. Leave should have been obtained to insert the second count: (*Reg. v. Bray*, 9 Cox C. C. 218.) The trial was *in invitum* so far as the prisoner was concerned, he having refused to plead. [CROMPTON, J.— In a case tried before me at the Monmouthshire Assizes I, on a similar objection, after consulting my brother Channell, quashed the objectionable counts, leaving the good counts standing. (a) The great error was in directing a plea of not guilty to the whole record to be entered for the prisoner. COCKBURN, C. J.—I doubt whether this is not a matter for the discretion of the court, and whether all that a prisoner could ask was that the objectionable count might be quashed.] Then, assuming that the second count ought to have been quashed, the prisoner was entitled to be in the same position, as if there had been but one charge before the court, and if so the evidence on the objectionable count could not have been given, and was inadmissible: (*Reg. v. Holt*, 8 Cox C. C. 411; 1 Bell C. C. 280.) There the prisoner was charged with obtaining a specific sum from A. by false pretences, and it was held that evidence of obtaining another sum from B. by similar pretences within a week was inadmissible to prove guilty intent. The reception of evidence of the charge in the objectionable count operated to the prejudice of the prisoner.

(a) The following is the case alluded to:—
OXFORD CIRCUIT.

MONMOUTH, March 31, 1862.

David Davies, Edward Davies, John Evans, Thomas Phillips, John Williams, and Isaac Vaughan surrendered to take their trial upon a charge of riot and assault, and destroying furniture, &c., on the 12th Sept. 1861, at Abercorn.

The indictment contained a great many counts, including several which charged a conspiracy.

Huddleston, Q.C., W. H. Cooke and H. James conducted the prosecution; R. Surger defended David and Thomas Davies; Symthies defended Evans and Phillips; and J. J. Powell defended Williams and Vaughan.

When the defendants were arraigned *Symthies* objected that the indictment was bad, upon the ground that it contained counts for conspiracy, without showing that such counts were admissible under the recent statute (22 & 23 Vict. c. 17), passed to prevent vexatious indictments for certain misdemeanours. The 1st section of that statute enacts that no indictment for certain offences therein named (including conspiracy) shall be presented to or found by a grand jury, unless the prosecutor has been bound over to prosecute or the defendant has been committed or bound by recognisance to appear to answer to an indictment for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a judge of a superior court, or of the Attorney or Solicitor-General.

It was admitted that the counts in question had been improperly introduced into the indictment, but, after a long discussion,

CROMPTON, J. decided that he had power to quash the objectionable counts, and ordered them to be quashed accordingly.

Powell (on the part of Williams and Vaughan) then pleaded a plea to the jurisdiction of the court to try the indictment, alleging that the indictment, as found by the grand jury, contained the objectionable counts, which had been introduced without the necessary legal authority.

Huddleston, on the part of the prosecution, then handed in a demurrer to the defendants' plea.

A discussion then took place upon the demurrer, but CROMPTON, J., after consulting Channell, B., gave judgment for the Crown. His Lordship said he thought he had power to quash some of the counts without quashing the whole indictment, though there was no authority for so doing.

Powell said it was the intention of the prisoners whom he represented to sue out a writ of error.

The four prisoners, David and Edward Davies, Evans and Phillips, then pleaded "not guilty," and the trial proceeded as to them, the judgment given by the court upon demurrer being conclusive as to the other two prisoners.

A writ of error was not sued out.

COCKBURN, C. J.—We are of opinion that the first question asked of the court, whether the second count ought to have been quashed, must be answered in the affirmative. As regards the second question, we are of opinion that the evidence relating to the second count was inadmissible on the trial of the first; and the majority of the court are of opinion that the conviction upon that count cannot be upheld.

Conviction quashed.

Jan. 23 and 20.

(Before COCKBURN, C. J., CROMPTON and WILLES JJ., CHANNELL, B. and KEATINGE, J.)

REG. v. BUCKNELL.

Larceny—Bailee—Purchase by agent of goods for prosecutor—Appropriation to prosecutor.

A person was employed to fetch home coal from the depot in his own horse and cart, for remuneration. The prosecutor gave him 8s. 6d. to buy and fetch for him half a ton of coals. He went and told the coal merchant to load 9 cwt. in the cart, and 1 cwt. in a sack, and paid 8s., and subsequently the other sixpence. He delivered only 9 cwt. to the prosecutor, retaining the other 1 cwt.:

Held, that there was evidence of appropriation of the coals so as to vest the possession in the prosecutor, and support a conviction for larceny as bailee.

Case reserved for the opinion of this court.

The prisoner was indicted at Swaffham Seasious, on the 28th Oct. 1863, for embezzling eight stone of coals, the property of his master. A second count charged a larceny of the same, laid also as the property of his master.

The prisoner, who had a horse and cart of his own, used from time to time to bring small quantities of coals for the prosecutor and others from the coal merchants at a railway-station, and he received at the rate of 4s. per ton from the prosecutor by way of remuneration.

On one occasion the prosecutor asked the prisoner to fetch him half a ton of coals, and on the morning after a servant of the prosecutor's, by his master's orders, gave the prisoner 8s. 6d. of his master's money to pay for them.

The prisoner went to the station with his own horse and cart, and there saw a man in the employ of the coal merchants. This man's evidence was to the effect that the prisoner came to him and said, "I want half a ton of coals; put nine hundredweight in the cart and one hundredweight in a sack," as he said the cart "would hang;" that he paid 8s. and since paid 6d. more, which was the full price.

In cross-examination the witness said that he sold the coals to the prisoner, and gave him credit for the balance: nothing was said as to the coals being for anybody else than the prisoner, nor was the name of the prosecutor mentioned, and the receipt was made out to the prisoner.

The prisoner delivered 9 cwt., and the prosecutor, on weighing them, found them 1 cwt. short. On the same evening the prisoner confessed to taking the coals, and afterwards pointed out 1 cwt. of coals in his shed of the same kind as those delivered to the prosecutor as his (the prosecutor's) property.

The prosecutor's evidence was to the effect that the horse and cart were the property of the prisoner, and that he was at liberty to fetch the coals when and how he liked, and that save as aforesaid he had never been in any way in the employment of the prosecutor or received any wages from him.

His counsel objected that he could not be convicted of embezzlement, as he was not employed as a servant, nor were the goods delivered to him on account of the prosecutor as his employer within the 24 & 25 Vict. c. 26. Nor of larceny, as the goods had never been in

the possession, constructive or otherwise, of the prosecutor; nor was he bound to deliver the specific goods.

On the facts the prisoner was convicted of larceny on the second count, the point being reserved as to whether he could be rightly convicted of larceny under the above circumstances.

Draks for the prisoner.—It is submitted that the conviction for larceny cannot be sustained, as the coals had not been in the possession, actual or constructive, of the prosecutor. In *Reg. v. Reed*, 1 Dears. C. C.; 6 Cox C. C. 284, the coals were placed by his servant, the prisoner, in the prosecutor's own cart. And in *Spear's* case, 2 Leach, C. C. 962, the oats the subject of the larceny, were put in the prosecutor's own barge, and the prisoner was the servant. Here the coals were bought by the prisoner, who was not the servant of the prosecutor, and put in his own cart, over which the prosecutor had no control. In *Rez v. Walsh*, 4 Taunt. 276, Heath, J. said: "*Spear's* case, on which *Reg. v. Reed* a good deal depended, went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary." The case finds that the prisoner was to fetch the coals how and when he liked; and credit was given to the prisoner. In *R. v. Reed* the coals were expressly bought for the prosecutor, and credit given to him. It may be contended, in this case, that the prosecutor not only had not possession, but not even a property in the coals. [CROMPTON, J.—If I remit to my agent, and tell him to buy and send me timber, and he does buy timber, but misappropriates, could I not sue for it as a bailee? It comes almost within the principle of *Sir Thomas Plumer's* case, *Taylor v. Plumer*, 3 M. & S. 562.] It is submitted that, until the prisoner had done something more than put the coals in the course of transition no property vested in the prosecutor. [COCKBURN, C. J.—There can be little doubt that when he took the cart of coals he meant to take them as part of the prosecutor's property.] It is by no means clear that the coals were bought with the identical money given to the prisoner by the prosecutor; he paid for part and part was on credit. Secondly, with reference to the Bailee Act, 20 & 21 Vict. c. 54, s. 4. Notwithstanding that Act, the goods must have been in prosecutor's possession to support larceny. Again, he was not bound to deliver this specific half-ton of coals, which he must have been to support larceny as a bailee:

Reg. v. Hassanli, 8 Cox C. C. 491; 1 L. & C. 58. There was no bailment here at all.

No one was instructed on behalf of the prosecution.

Curr. adv. vult.

Jan. 30.—COCKBURN, C. J.—We have considered this case, and think the conviction good. It turns on the construction of the 20 & 21 Vict. c. 54. Sect. 4 provides: "If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." The prisoner was entrusted with money to buy coals, and to bring them home to the prosecutor, for remuneration, with the prisoner's own horse and cart. The prisoner having purchased coals and loaded them, on his way home abstracted part, with intent to convert the same and to deprive his master of the same. Some members of the court think that if even there was no evidence of specific appropriation by the prisoner, yet the coals having been purchased with the money, given for that purpose to the prisoner, would *ipso facto* vest the property in the prosecutor, and there would be a bailment within the terms of the statute. Others are of opinion that a specific appropriation is necessary, but that there is evidence here of such appropriation. Here the prisoner goes with the prosecutor's money to buy the coals, puts them into a cart

and takes a portion for himself, pretending to the prosecutor that he had brought him all the coals. We are all of opinion that there is sufficient evidence of appropriation to warrant a jury in coming to the conclusion they did.

Conviction affirmed.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABBY, of Doctors'-commons.

July 11, Nov. 7, Dec. 8 and Jan. 16.

(Before CRESSWELL, J. O., and a Special Jury; and before WILDE, J. O., on rule for new trial.)

BOULTING v. BOULTING.

Wife's suit for judicial separation—Adultery of husband—Connivance—Delay.

A. married B. in 1833. A. since 1835 lived apart from B., her husband, under an ordinary separation deed. About 1842, A. commenced an adulterous cohabitation with C., which continued to the date of the trial. A. was aware of the fact of the adulterous cohabitation in 1843, and thenceforward. A. petitioned for judicial separation, and issues of connivance and undue delay were found against her by the verdict of a special jury. A rule nisi for a new trial, on the ground of insufficient evidence of connivance, was granted, but discharged on argument.

Seem, undue delay cannot be pleaded in bar to a suit for judicial separation; but lapse of time between knowledge of the conduct complained of and the commencement of the suit requires explanation, and may, along with the circumstances of the case, induce the court to withhold the relief sought. In such cases the court will require to be satisfied of the sincerity of the complaint of the petitioner.

This was the wife's petition for judicial separation by reason of the husband's adulterous cohabitation, since the year 1839, with one Ann Attfield. The resp. answered, that he had been ever since the year 1842 living in adultery with Ann Attfield, and that the petitioner knew ever since the year 1843 that he had been so living in adultery, and that the petitioner had acquiesced in and connived at such adultery, including the adultery alleged in the petition, and that the petitioner had been guilty of unreasonable delay in presenting the petition. The replication traversed knowledge in and since 1843, and acquiescence and connivance and unreasonable delay; and these issues were tried before Cresswell, J. O., by a special jury, on July 11, 1863, when the following facts were proved:—The petitioner, then Ann Saul, was married to the resp. in March 1833, Boulting's father being an iron-monger and smith, which business he (the resp.) had since followed, the wife's father being a greengrocer and coaldealer. The parties finally separated under an ordinary separation deed, dated 14th Nov. 1835, by which the husband agreed to allow the wife 7s. a-week. About five or six years after the separation, the husband began to cohabit with Ann Attfield, and had continued to do so since. From July or August 1843 the wife was aware, from the information of persons who asserted a direct knowledge of the fact, and that they would swear to it, that her husband was living with Ann Attfield. During part of the interval between the separation and the petition, both parties and their families were living not far from each other, in the neighbourhood of the Middlesex Hospital; but it did not appear that the wife had ever entered the husband's house since 1835, or in any way consorted with him or Ann Attfield.

The *Queen's Advocate* (Sir R. J. Phillimore), II. Mills, Q.C., and Dr. Swabby, for the petitioner.
A. Staveley Hill and Cohen for the resp.

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BOULTING v. BOULTING.

[Div.]

Cresswell, J. O. in substance told the jury that if they thought, from the facts proved, that the wife had given a willing consent to the adultery of which she now complained, that was in law connivance; and the jury found all the issues in favour of the resp.

Nov. 7 (before WILDE, J. O.).—The *Queen's Advocate* (*Swabey* with him) moved for a rule nisi for new trial, on the ground of misdirection, and that the verdict as to connivance, which they submitted was the only material issue in a suit for judicial separation, was against the weight of evidence. *Cur. adv. vult.*

Nov. 12.—WILDE, J. O. granted a rule for a new trial, on the ground that there was not sufficient evidence to go to the jury on the issue of connivance.

Dec. 8.—Cause was shown by *Hawkins*, Q.C. and *Cohn*.—They submitted that at least there was evidence to go to the jury as to connivance, and it could not be said, on the facts proved, that their verdict was wrong. The inference was one which it was peculiarly their province to draw; but, further, the question of undue delay is one to which sufficient weight has not been given. The Ecclesiastical and this court, up to the present time, has always taken into consideration delay in bringing forward the complaint in cases of judicial separation, and it would seem that where the delay is considerable and unexplained the court is not bound to entertain the suit or grant relief. As to connivance, they cited

Phillips v. Phillips, 4 N. C. 523;

Thomas v. Thomas, 3 L. T. Rep. N. S. 180 ;
2 Sw. & Tr. 113.

As to undue delay:

Walker v. Walker, 2 Phil. 153 ;

Angle v. Angle, 6 N. C. 192 ;

Matthews v. Matthews, 1 Sw. & Tr. 499.

In *Cooke v. Cooke*, 8 L. T. Rep. N. S. 26, on appeal Ib. 644, and s. c. 3 Sw. & Tr. 130, though Cresswell, J. O. considered undue delay as not of itself a bar to the suit, yet, as combined with other circumstances, he said it might be a sufficient reason for dismissing a petition.

WILDE, J. O.—If there is such delay, taken with the other circumstances of the case, as to induce the court to refuse the relief prayed, there would certainly be no use in sending the issue of connivance to be tried by a fresh jury.

The *Queen's Advocate* and Dr. *Swabey* in support of the rule.—None of the cases cited, nor those decided in the present court, go to the extent that connivance is constituted by a bare knowledge of the misconduct of the other party. There must have been an intention that the guilt complained of should follow the course of action or inaction of the party against whom connivance is alleged:

Allen v. Allen and D'Arcy, 2 Sw. & Tr. 108, note;

Marris v. Marris and Burke, 5 L. T. Rep. N. S. 768; 2 Sw. & Tr. 530.

Again, more stringent proof of such guilty intention or consent is necessary where the adultery did not take place during the cohabitation of the husband and wife: (*Rogers v. Rogers*, 3 Hagg. 72.) As to unnecessary delay, in some of the cases cited the remarks of the learned judges apply to delay in the prosecution of a suit after proceedings commenced, or the cases are cases of cruelty where the cohabitation and acts of cruelty had ceased for various periods before the complaint made. In *Angle v. Angle* (which is a case of adultery), 6 N. C., at p. 198, Dr. Lushington said, "As to delay, if the husband had been resident in England the delay would have been no bar." But whether weight may have been given in other cases to delay, the present is a case of a continuing injury; the husband is now living in adultery, and in regard of that adultery the wife must be entitled to a decree of judicial separation, unless her conduct amounts to a legal bar. Unless, then, the delay since the wife first knew of a

fact of adultery amounts, with other facts proved, to connivance, it is immaterial in the present case, for she complains of adultery of quite recent date. In the cases of *Baker v. Baker* before the court in 1859-60, unreported, and *Wilcock v. Wilcock*, Nov. 1859, reported on a question of alimony only, 32 L. J. 205, Prob. & Mat., the wives obtained a decree of judicial separation in circumstances very like those of the present case. *Cur. adv. vult.*

Jan. 16.—WILDE, J. O. gave the following judgment.—This is a suit promoted by the wife against the husband for a judicial separation on the ground of adultery. It was commenced on the 20th Dec. 1861. The adultery was proved at the trial, when the following facts were also established. The resp. was by trade an ironmonger, at first in partnership with his father. His marriage with the petitioner took place in 1833. After one or more previous separations, attributed by the husband to the drunken habits of his wife, they finally agreed to live apart, he allowing her 7s. a-week. This took place in 1835. As early as 1841 the resp. commenced living with a woman named Ann Attfield. This woman lived with him at his lodgings in all respects as his wife, in the same street and within a few doors of the petitioner, who had taken up her abode with her relatives. It was proved that, as early as 1843, and probably earlier, Mrs. Boulting was aware of this circumstance, and on several occasions between 1843 and Oct. 1861 the persons who took her weekly allowance from her husband conversed with her, or in her presence, about this adulterous connection. These conversations as detailed by the witnesses were in terms of complete indifference on her part. It thus appears that, for a period of seventeen years, the illicit cohabitation on which the petitioner grounds her suit as an intolerable grievance, existed under her close observation; never at any considerable distance; for long in the same street, when she resided with her relatives, and within a few doors of her abode. With what feelings did she regard it? This is the all-important question. Did she resent it as an outrage on her marriage rights? Did she chafe at the idea of her place being occupied by another? Was she angry? Was she jealous? Was she moved by a consciousness of indignity, or stung by a sense of wrong? Perhaps not; for she had long since voluntarily withdrawn from cohabitation with her husband and was living apart upon an allowance he made her. But if she felt none of this, was the converse her condition of mind? Did she view with apathy and indifference a relation set up with another which had ceased to exist for herself? Was she willing that her husband should continue his mode of life, provided he gave her the means of continuing her own? Was she satisfied, acquiescent, content, well pleased, *quiesca non morere*,—not averse to maintain her separation and allowance and accept the condition of things? I know of no tests of inward feelings but the outward signs of act and speech. How did she act? What did she say? For seventeen years the petitioner did nothing to abate the evil, and took no steps, legal or otherwise, to assert her rights. She did not apply to the ecclesiastical tribunal. When this court was established she forbore to apply to that. She made no complaint and offered no remonstrance to her husband. She had friends and close relatives, but she did not invite their intervention. Nay more, she does not appear to have uttered to any human being a single word of anger, reproach, or even displeasure when the subject was mentioned in her presence. And yet she was living among her own family and subject to no restraint. Fortified by the sure sympathy of those around her, she was exactly in the position in which one would expect her natural feelings to break from her in speech or find vent in action. It is said that, as a poor and ill-educated woman, legal proceedings

were scarcely within her reach. But an angry ejaculation, a menace or a hard word, levelled at her husband or the woman with whom he was living, these, alas! are within the reach of all, and too natural for their absence to be overlooked, if she were really outraged by her husband's misconduct. The case was submitted to a jury. The judge told them, that if the conduct of the party shows that she has no objection to it, that is willing consent. Was she willing to accept a provision and that her husband might live with that woman provided he paid the allowance? And they found that the petitioner connived at this adulterous connection. Now, connivance is an act of the mind; it implies knowledge and acquiescence. I prefer the word "acquiescence" to "consent," because the latter in some respects carries with it an idea of leave or licence conveyed or signified to the erring party. As a legal doctrine, connivance has its source and its limits in this principle, *volens non fit injuria*: a willing mind, this is all that is necessary. Such is the result of the decisions. They are brought together in Sir Herbert Jenner's judgment in *Phillips v. Phillips*, 4 Notes of Cas. 528. But how is knowledge and acquiescence to be proved? The answer is, like any other conclusion of fact. It may be proved by express language or by inference deduced from facts and conduct. And so in this case, the jury having all the circumstances before them and looking to what the petitioner said and did, and perhaps still more at what she forbore to say and do, were convinced that she did in fact connive and acquiesce for a long time in that connection which she now after seventeen years denounces. In this conclusion I cannot say that they were wrong, and the verdict must therefore stand. I might stop here, but other ground has been opened in argument—the long delay. This has been argued as a bar to the suit. I agree with the Queen's Advocate that it is not so. But it is a most material matter which unexplained would lead the court to conclusions fatal to the petitioner's relief. The true effect of delay in these suits is well expounded by Lord Stowell in *Mortimer v. Mortimer*, 2 Consist. 313. The first thing which the court looks to "when a charge of adultery is preferred is the date of the charge relatively to the date of the criminal fact and knowledge of it by the party, because if the interval be very long between the date and knowledge of the facts and the exhibition of them to this court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them, and it will be inclined to infer either an insincerity in the complaint or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay in order to take it out of the reach of such interpretations." Thus, though delay of itself goes for little, the conclusions to which it may give rise may go the full length of barring the remedy. All depends on the other facts of the case. And in this case it had its effect no doubt on the jury in determining the question of connivance. A wider ground remains. It is impossible to read the judgments of those who have administered the ecclesiastical law without appreciating the jealous care and reluctance with which they interfere with the obligations of the marriage vow. They never lose sight of the fact that, as cohabitation is the first object of marriage, separation should be the last expedient of the law. This expedient they therefore applied with a large and cautious discretion. Hence the doctrines of condonation, connivance and recrimination. Before the court interfered, it ever insisted upon clean hands—a real grievance—a very present wrong—and above all, sincerity. Sincerity in the purpose for which the suit is instituted. The petitioner must feel and suffer under the wrong of which complaint is made, and the court must be satisfied that the remedy is sought as a genuine relief

from the pressure of that grievance. Such is the beaten track of the decisions. It is impossible to tread too faithfully in footsteps so wisely placed. For seventeen years has this wife been passive. What is the cause of her present attitude? It may be that a judicial separation would yield an alimony, in her husband's present circumstances, greater than the allowance she has been content to receive so long—or there may be other reasons. But the court looks in vain for any legitimate cause why she should suddenly regard her husband's conduct now in any different light from that of past days. Her husband has not interfered with her, has not changed his conduct towards her, or his own mode of life. So far as the evidence went, the entire situation of the parties has remained wholly unchanged. Does the wife desire separation? She has it, in fact, already. Does she require support? She has that too, and upon terms arranged by herself. The court cannot believe in the sincerity of such a suit, and must withhold from Mrs. Boulting any relief now founded upon an adulterous connection over which for years she seems to have "slumbered with sufficient comfort."

Begbie, solicitor for petitioner.

Jennings and Son, proctors for resp.

ADMIRALTY COURT.

Reported by ROBERT A. PRITCHARD, D.C.L., Barrister-at-Law.

Dec. 1 and 21.

(Before the Right Hon. Dr. LUSHINGTON.)

THE EUROPA.

Damage—Sale of vessel by decree of the court—Deductions from gross proceeds.

The debts of vessel having remained under arrest was subsequently sold in satisfaction of the plts.' claim for damage, to discharge which the gross proceeds were insufficient:

Held, that as against the plts.' claim the expenses of sale and possession fees formed a proper deduction from the gross proceeds, and that the debts could not, therefore, be called upon to repay them:

Held, also, that the plts. were entitled to interest upon the net proceeds and costs.

This was originally a damage suit, and was brought by the owners of the brig *Integrity* against the *Europa*, by reason of a collision which occurred between the two vessels in Dec. 1859, off Cape St. Vincent.

The *Europa* subsequently changed owners, and was arrested on the 14th Jan. 1863 and left under arrest. On the 13th May 1863 she was condemned in the damage by decree of the High Court of Admiralty (see 8 L. T. Rep. N. S. 363), and subsequently by the Judicial Committee on appeal from the decision of the court below.

The vessel was sold under decree of the court for the sum of 960*l.*, and the marshall's expenses and other fees amounted to the sum of 74*l.* 1*s.* 1*d.* for disbursements, &c., and the sum of 60*l.* for possession fees, the vessel having been under arrest from the 14th Jan. 1863 to the 10th Sept. 1863.

The gross proceeds were insufficient to satisfy the plts.' claim, and by reason of the vessel having changed her owners since the collision no freight was recoverable by the debts.

Milward and Pritchard, on behalf of the plts., now moved the court to order that the gross proceeds be paid out to their clients (i.e., that the above sums for disbursements and possession fees should be paid by the plts.) together with interest upon the gross amount from the date of the arrest of the vessel in this cause and costs:

The Dundee, 1 Hag. 109;

The Wild Ringer, 7 L. T. Rep. N. S. 795,

The John Dunn, 1 W. Rob. 159;

The Volant, 1*b.* 390.

ADM.] THE KATE—*Ex parte* COMMERCIAL BANK OF LONDON, 78 J. AND R. HILLS.

[BANK.]

Potter for the debts., in opposition to the motion.

THE COURT was of opinion that the plts. were not entitled to this gross proceeds of sale, and that therefore the sum of 134l. 19s. 1d. was a proper deduction from the plts.' claim, and that they were entitled to interest upon the net proceeds from the date of the collision, and to costs.

On a subsequent day *Fritchard* renewed the motion, and cited the case of *Leycester v. Logan*, 4 Kay & J. 725; but the COURT considered that the principle laid down in that case had reference only to the peculiar relief afforded by the ninth part of the Merchant Shipping Act 1854, and to similar cases under the subsequent Acts, and the motion was refused, with costs.

Jan. 26 and Feb. 2.

THE KATE.

Salvage—Property saved not of the value of 1000l.—Jurisdiction to give costs and damages.

Vessel arrested in a cause of salvage, and subsequently, on affidavits that her value was under 1000l., released by the plts.:

Held, that the court had jurisdiction to give costs and damages.

Under the circumstances of the case, costs given, but not damages.

A cause of salvage having been instituted against this vessel, she was arrested on the 3rd Dec. ult., and on the 12th Dec. an appearance on behalf of the owners was given, and affidavits were thereupon filed showing her value to be less than 1000l. On the 16th Dec. the vessel was released by the plts., and

Lushington, on behalf of the debts., now moved the court to condemn the plts. in costs and damages. The plts. have been guilty of laches in having arrested the vessel and proceeded in the Admiralty Court without having previously had a valuation made of the property in accordance with the Merchant Shipping Act Amendment Act 1862, s. 50.

Milward, for plts., admitted that the court had no jurisdiction, and that, that being so, the court could not take any further steps. It could neither award costs nor damages for the detention of the vessel. A prohibition would issue to restrain it. [Dr. LUSHINGTON.—Do you go the length of saying that I cannot give costs?] Yes. After a prohibition the court to which it issues can give no costs:

Tenniscoorde v. Pattison, 3 C. B. 243;

Lawford v. Partridge, 1 H. & N. 622.

V. Lushington in reply.—This court is only debarred of jurisdiction to assess salvage services. It cannot be deprived of all jurisdiction, because it must determine whether the property saved does or does not exceed 1000l.

Dr. LUSHINGTON.—The court has in this case to determine whether it has authority to decree to the debts. costs and damages as prayed, and if it has authority so to do, whether the circumstances of the case would justify it in making such an order either as prayed or in part. The debts. pray a decree for costs and damages, but the plts. who arrested the vessel now say the court has no authority to comply with their prayer, no jurisdiction whatever, and therefore none to give costs and damages, though they themselves resorted to that jurisdiction, and that under these circumstances the debts' remedy, if any, must be by action at common law. The practice at common law, in certain cases where a court has no jurisdiction, has been alleged and two or three cases have been cited. There, after plea of *liberum timentum*, the County Court continued to entertain the cause, and it was decided that the court could not proceed, and of that I really see no reason to doubt at all, but that was a question of proceeding with the cause, not of costs only. *Lawford v. Partridge*, 1 H. & N. 622, is substantially to the

same effect; perhaps it goes further, for there Pollock, C. B. states, what is no doubt true, that after prohibition the court prohibited cannot give costs. I have no disposition to assume a right to question these authorities, but I will observe that they are all founded on express enactment, declaring that in given cases the court below shall not proceed further. The present case, however, appears to me to be in some respects different. The court had original jurisdiction in all cases of salvage. The 460th section of the Merchant Shipping Act 1854 regulates the exercise of that jurisdiction, and the 49th section of the Merchant Shipping Act Amendment Act 1862 also does so. Now a direction that the magistrates shall take cognizance appeared to me, looking at the whole, to be equivalent to a prohibition to this court to exercise jurisdiction. But admitting that the law is truly laid down as stated by Mr. Milward in argument, and the cases cited by him, neither that state of the law, nor any authority of which I am aware, applies to the present proceeding, which is of a totally different nature, a proceeding *in rem*, the arrest of the ship. How can the court order the release of the vessel if its bonds are tied altogether? And if it is incompetent for the court to make such an order, the vessel must remain under arrest, as without the directions of the court the marshal cannot release her. Again, unless the court can proceed thus far, who is to pay the legal expenses of the custody? The case must remain *in statu quo*, and nothing could be done to set the matter right. Redress, in the form of costs and damages, is a just remedy approved by the Judicial Committee in the case of the *Evangelismos*, 12 Moore, P. C. C. 352, and as far as I am able to discover, and as far as my recollection goes, has been the undisputed and uniform practice of this court from the beginning down to the present time. For these reasons I do not consider that I am prevented by what has occurred from doing what I apprehend to be justice in this case; but I shall look to all the merits of the case and decide accordingly. I am of opinion that the court ought to decree the costs, but with regard to damages, I think the court ought not to give them. I have no reason to doubt that the arrest was *bona fide*, but I agree again with the principles of the *Evangelismos*: indeed, they are principles which must govern my decision, because they have been laid down by the Superior Court, namely, that unless there has been *mala fides* or gross negligence, the Court of Appeal considers that no damages should be given. I shall make an order that the plts. shall pay the costs in the case, but not give damages.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORRIS, Esqrs., Barristers-at-Law.

Tuesday, Jan. 26.

(Before Mr. Commissioner HOLROYD.)

Ex parte THE COMMERCIAL BANK OF LONDON, 78 J. AND R. HILLS (the Dartford Bank).

Equitable mortgage—Sale by mortgagee—Leave to bid—Terms upon which granted

Where an equitable mortgagee is allowed to conduct the sale, and wishes to bid and become the purchaser of the premises comprised in his mortgage, the court will, before giving leave, ascertain the value of the premises and fix a reserved bidding.

Equitable mortgage. This was the petition of the Commercial Bank of London, by their registered officers, praying to be declared equitable mortgagees of certain promissory notes, and for leave to sell the freehold hereditaments comprised in certain mortgage-deeds deposited with the Commercial Bank as collateral security for advances made to the Dartford Bank, and

that the petitioners might be allowed to bid at the sale.

The facts, as stated in the petition, were somewhat peculiar. Jonathan and Robert Hills, who were bankers at Dartford and Gravesend, were adjudicated bankrupts in Dec. 1857.

H. M. Jackson appeared for the bank, and asked for leave to bid at the sale, the object being that the highest price might be obtained, and that the property might not be sold under its value. The bank had, he contended, by far the largest interest in an advantageous sale and in preventing a sacrifice of the property and the expense which would result from an inoperative sale. This was in accordance with the custom of the Court of Ch., to allow equitable mortgagees to bid. The bank was willing to resign its position as seller, and assume the position of buyer. He referred to the 132nd section of the B. A. 1861, and cited

Domville v. Berrington, 2 Yo. & Col. Ex. Ch. 723.

G. W. Lawrence, for the assignees, resisted the application.—It was not the ordinary case of mortgagees of a bankrupt's estate, who were usually allowed to bid upon paying the costs of the application. In this case the power of the assignees was transferred by a mortgage-deed which was in the hands of the Commercial Bank, and upon which there was a sort of sub-mortgage. Under those circumstances no purchaser would complete upon the conveyance of the assignees alone without the concurrence of the Commercial Bank. Substantially, therefore, the bank was the vendor. If under the proposed sale the party who was declared the purchaser refused to complete, the assignees, if the sale went off and a loss accrued in consequence, would probably have to pay the costs. The case of *Domville v. Berrington* referred to a foreclosure suit, and did not therefore apply. Any bidding by the bank would invalidate the sale, and the mortgagee might some years hence contend for its invalidity on that very ground, and it would be difficult for the assignees to successfully answer such a complaint. Moreover the court had no power to make the order asked, as other parties had an interest in the property. [The COMMISSIONER.—Has the Commercial Bank been declared equitable mortgagees of the property?] No, not of the property, but only of the notes. [The COMMISSIONER.—I am not in the habit of making orders of sale unless all the parties are before the court.] Substantially they are all present, for there is evidence of the assent of all. [The COMMISSIONER.—As to any objection to the proposed mode of sale, I suppose that might be met by the Commercial Bank giving an indemnity.]

Plene (solicitor).—The Commercial Bank as such no longer exists. It is amalgamated with another body.

Mr. Commissioner HOLROYD.—I would only make the order asked for after conferring with the assignees and having the value of the property ascertained.

Jackson.—And a reserved bidding put upon it.

The COMMISSIONER.—Yes, the order will be, leave to sell with a reserved bidding, and the Commercial Bank to be permitted to bid at the sale.

Lawrence asked that the bank might pay the costs of the application.

Jackson.—No, not for an order of course.

Mr. Commissioner HOLROYD.—The Commercial Bank applies for leave to bid, and they must pay the costs of the application.

Ordered accordingly.

Equity Courts.

V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and E. T. EDWARDS, Esqrs.
Barristers-at-Law.

Dec. 9 and 10.

SWEETING v. SWEETING.

Will—Secret trust—Charity—Mortmain—Legal estate.

II. devised real estate to his wife for her life, and after her decease unto S. and S. in fee, with an understanding that they should convey the same in favour of a charity. Upon the death of the wife, the devise of the surviving trustee filed his bill, praying for the direction of the court:

Held, that the legal estate was vested in the plt., that the secret trust was void, and that there was a resulting trust in favour of the heir-at-law of the testator.

The bill in this case stated that Robert Hicks, late of Godmanchester, in the county of Huntingdon, esq., was, at the date of his will hereinafter mentioned, possessed of three houses in Godmanchester, and by his will, dated the 13th July 1825, after making divers specific devises and disposing of his personal estate, he devised all the residue of his messuages, lands, tenements and hereditaments, situate in Godmanchester, unto his wife Mary Hicks for her life, and after her decease unto Henry Sweeting and John Sweeting, their heirs and assigns for ever.

The bill further alleged that this devise was made to Henry and John Sweeting upon a secret trust and understanding that they should convey and make over these houses in favour of the Free Grammar School of Godmanchester, which they consented to do. Robert Hicks died on the 30th July 1825, and Henry Sweeting and John Sweeting, with the view of carrying into effect the intentions of the testator, shortly after his decease caused a draft of the conveyance of these messuages for the benefit of the school to be prepared, but it was not executed, as they were advised that under the law of mortmain a conveyance for the benefit of the school would have been void in consequence of the prior estate for life of Mary Hicks then subsisting in the said messuages.

Robert Hicks died without having ever had any issue, leaving his only brother, John Hicks, his heir-at-law, who died in Sept. 1827, without issue and intestate, and it was not known who his heir-at-law was. John Sweeting died in 1838, leaving his co-trustee surviving. Henry Sweeting made his will, dated the 2nd Nov. 1847, and thereby, after making certain bequests and devises, gave and devised all his freehold and copyhold messuages, lands, tenements and hereditaments unto his brother, the plt., and his son, the Rev. Henry Sweeting, upon the trusts therein mentioned. The testator died in 1848, without having revoked or altered his will, and the plt. and the Rev. Henry Sweeting thereupon undertook the trusts thereof, and dealt with the property, except the three aforesaid messuages, nor did the plt. sell or mortgage them after the decease of the Rev. Henry Sweeting.

The Rev. Henry Sweeting died in 1836, leaving three children, namely, the defca., Margaret Julia Sweeting, Henry Edward Sweeting, and Alfred Charles Sweeting, all under the age of twenty-one; Henry Edward Sweeting being the heir-at-law of Henry Sweeting, the testator, as well as of his son, the Rev. Henry Sweeting.

Mary Hicks, the tenant for life under the will of Robert Hicks, died in Dec. 1862, and after her death the plt. entered into the receipt of the rents and profits of these messuages, which he was desirous of disposing of in favour of such persons as were entitled thereto.

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but he was advised that he was unable to do so, except under the direction of the court. There being no heir-at-law of Robert Hicks, the Attorney-General claimed on behalf of the Crown. The plt. prayed that the rights of all persons in the said three messuages might be determined by the court, and for an account.

Baily, Q.C. and *Renshaw* appeared for the plt.

G. Osborne Morgan for the deft.

Wickens for the Crown.

Baily, Q.C. in reply.

The following authorities were referred to in the course of the argument:

Wallgrave v. Tebbs, 2 K. & J. 313;

Tee v. Ferris, 2 K. & J. 357;

Addington v. Cunn, 3 Atk. 141;

Muckleston v. Brown, 6 Ves. 52;

Strickland v. Aldridge, 9 Ves. 516;

Burdett v. Wright, 2 B. & A. 710;

Burgess v. Whente, 1 Eden, 223;

Payne v. Hall, 18 Ves. 475;

Barrow v. Wadkin, 24 Bear. 23;

Lewin on Trusts, 3rd edit. 50;

Statute of Mortmain, 9 Geo. 2, c. 36;

Statute of Frauds, 29 Car. 2, c. 3.

The VICE-CHANCELLOR (after stating the facts of the case) said, that Henry Sweeting and John Sweeting, being joint tenants in fee under the will of Robert Hicks of the messuages in question, and John Sweeting dying, it survived to Henry Sweeting, and at the time of his death he was apparent owner of the property, but no doubt he had agreed (as was in fact admitted) to hold it on what was called a secret trust. This was subject to a life-estate, and as the tenant for life survived Henry Sweeting, the plt., as surviving devisee of all his real estate, came into possession of the property in question with respect to which there was this secret trust. What did the term "secret trust" mean? It was when there had been a contract or understanding on the part of a devisee that if the property passed to him he would deal with it in a particular manner, and it was called a secret trust simply because it was not expressed in the will, not that it was never heard of, because it might have been arranged before fifty witnesses; it was something *dehors* the will, so that on the face of the will the devise might be simply absolute, but *dehors* that there was something either *vice voce* or written constituting an engagement by the devisee not to avail himself of the devise, but to apply it in a particular manner. Suppose this case. A testator devised to A. B. in fee, A. B. having arranged with the testator that he would apply the property for the benefit of C. D. Of course C. D. could not go to a court of law and say, "I am entitled to recover by ejectment;" he must come into this court even if in the will of A. B. it was stated that C. D. was the person for whose benefit the devise was made. He could not import into the will under which A. B. took that which was not in the will; but the court held that it was against conscience, it was a breach of faith between man and man, that A. B., who accepted the devise on a certain agreement for the benefit of C. D., should turn round and say, "I am the owner, look at the will, you cannot import anything which you do not find within the four corners of the will." But it was obvious that it did not depend upon the mere fact that the testator's intention was that it should be so held. Because, if a testator, without any understanding with A. B., devised his estate to A. B., and expressed in writing by a codicil not duly executed that his intention was that he should hold it for the benefit of C. D., it was clear that would not operate to enable C. D. to say that A. B. was a trustee for him. In that case A. B. was entitled to say, "There is the will; if you come and bring parol evidence of intention to make the devise for the benefit of some one else, you import just the will that which is not in it." The expression

by "parol" meant not merely that which was verbal, but it might be in writing. But no court either of law or equity could look at it as to intention, unless you could make out an engagement or understanding on the part of the devisee to accept it on such a footing, or, what was tantamount to it, that he was aware of it and accepted it, either in words or by tacit acquiescence, with the knowledge of the intention of the testator, which *per se* had nothing to do with it. That was the simple course. Now, import into it that the understanding with the devisee was that the property devised was to be given to a charity, the same principle applied. It was against conscience, as much in this case as in the other, that the devisee should hold for his own benefit, unless the Statute of Mortmain contained expressions clearly altering that state of things from that which existed in the simple case, or unless there was a decision on the subject. Here, if it were not for the Statute of Mortmain, it seemed that the charity would be entitled to come to this court and say, "It is against conscience to hold this property, there being an undertaking to apply it for our benefit," not because it was the intention of the testator merely, but because of the arrangement by the devisee, which this court would not allow him to depart from, and a court of law could not declare such a trust nor look at such a state of things as constituted it; it had no jurisdiction, and could allow nothing to be imported into the will. With regard to the Statute of Mortmain, the 3rd section of which applied to this case, it was provided "that all gifts, grants, transfers, settlements of lands, or any interest in lands (which words had been held to include gifts by will) to or in trust for any charitable use whatsoever, &c., should be absolutely void." What on the language "to or in trust for any charitable use" was the effect of going to a court of law or equity? At law it would be said, if there is a devise to a charity, to find it out you must look at the will; but there was no such thing here, the intention of the testator was proved by parol, and that it was acquiesced in by Henry Sweeting. It had been suggested that in some of the cases the Statute of Frauds and the Statute of Mortmain were conflicting, but he did not see how this could be. If it was so, Lord Hardwick said that weight must be given to the Statute of Frauds. That statute enacted that there should be no parol evidence; the Statute of Mortmain, that if there were such a devise, it should be void. How could they come into conflict? You could not look to see whether there was a devise to a charity except by looking at the will. If it was said there was a devise to a charity, and that so it was in direct violation of the Statute of Mortmain, because the testator's intention was that the devisee should so apply it; that was in point of fact saying that Henry Sweeting agreed with the testator that, if the devise was made in this mode, he would hold it for the benefit of the charity. A court of law could not touch it, because it was on the devisee's conscience. If it was a case for an action at all (on which he said nothing) it would be for damages; there could be no question of conscience. But when it came to a court of equity, this court, like a court of law, said, "You cannot import anything into the will," but it looked at it in this way: If the party coming here was entitled, it was not on the ground that there was a devise to a charity, but that it was against conscience that the devisee should hold the estate for his own benefit, having agreed to hold it on behalf of a charity, and it being intended for a purpose which the law did not allow, the court held that there was a resulting trust in favour of the heir-at-law. What was remarkable and strongly confirmatory of this view, not now suggested for the first time, but to be found running through all the cases, was, that in not one of

them (and they were very numerous) had the heir-at-law attempted to proceed by ejectment. On the other hand, there was case after case—many of which had not been cited—where he had come into equity to get a declaration that the devisee ought to be considered as a trustee for him, and where there was a decree for a reconveyance. The view he had taken might be a technical one, but every one of the cases was wrong if this was a case for a legal remedy. The case of *Jones v. Jones*, 3 Mer. 161, correctly stated the law of this court. If the heir could proceed at law, he could not come into equity, for if he did, a demurrer would lie to his bill. It was said, and truly, that in *Addington v. Cann* it would appear that there was the idea in the mind of the learned judge that there was a legal remedy. But that was a case, not only of real estate, but of leasehold and personal estate, and the devisee was executor, and this court would entertain a bill in such a case, because there might be an account of the personal estate; therefore, there did not appear to be anything in the cases conflicting with his Honour's view, and his opinion was confirmed by the recent cases, and by the general feeling of the Profession as expressed in the text-books. The title of the Crown of course depended on there being a legal estate, as there could be no escheat of an equitable interest, and therefore his Honour's wish would have been to leave the Crown to recover at law; but he was precluded by the recent statute, and if not by its letter, certainly by its spirit, because the intention was that the judges of this court should determine legal questions. It appeared to his Honour that the plt. had vested in him a legal estate, in respect of which he had a right to come to this court and say: "I am the trustee of this legal estate for the beneficiaries or the Crown; if I am not that, the devisee, and not the Crown, are entitled; but being so, I ask the court to assist me, being willing to do what is right, and claiming no interest." He could only refuse relief if he thought there was no legal estate, but here he thought there was. With regard to the law as laid down in *Burgess v. Wheate*, it might be desirable that a different law should exist; but he could not determine, after a decision that established a most important point of law for a hundred years, upon which so many titles depended, that it should be reversed. The conclusion was, that the plt. was entitled to a decree, and there must be a declaration that the legal estate was vested in the plt., that the trust upon which the property was held by John Sweeting and Henry Sweeting was void, and that there was a resulting trust for the heir-at-law of the testator (Robert Hicks), with an inquiry as to who was such heir, if he could be found; or if not, who was his personal representative. As the Crown had opposed the plt.'s right, the bill must be dismissed against the Crown without costs.

Solicitors: *Elsdale and Byrne*, 3, Whitehall-place.

Nov. 3, 4, 7, 9, and 10, and Dec. 22.

ERNEST v. VIVIAN.

Lease—Acquiescence—Agent—Laches.

A testator gave to his daughter all his estates for her life, with remainders over, with power to grant mining leases for twenty-one years. In 1840 the daughter granted a lease for twenty-one years and died the same year. In 1846 the next tenant in tail attained twenty-one, and executed a disentailing deed. He then gave notice to the lessees to give up the lease, alleging that it was invalid, but took no further proceedings, and in 1852 he sold the estate to the plt., who was his agent. In 1860 the plt. filed his bill against the lessees to have the lease declared void, on the ground of there being no power under the will, that it was obtained by fraud, and

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that, if valid, the consideration was so grossly inadequate that it was not binding:

Held, that the plt. was disentitled to relief, on the ground of laches alone, no proceedings having been taken until fifteen years after the tenant in tail attained twenty-one.

This was a bill filed by Henry Ernest, praying that it might be declared that the hereinafter-mentioned lease granted by the late Countess de Winty was not authorised by the will of her father Leonard Bileon Gwyn, or if the court was of opinion that there was power to grant it that it might be declared it was obtained by fraud; and in any event that it might be declared that it was not binding upon the plt. or those interested in the estate in remainder, for an account and damages, and payment of what was due to the plt.; that the defts. might be decreed to deliver up the mines; or if the court should be of opinion that the aforesaid lease was valid, for an account on that footing.

As the decision ultimately turned upon the question of laches, and the V.C. expressly refused to determine the points raised upon the execution of the power, it is unnecessary to set out the will. It suffices to state that fifteen years had been suffered to elapse without proceedings having been taken.

Glasse, Q.C. and *Lindley* appeared for the plt.

The Attorney-General (Sir R. Palmer), *W. M. James, Q.C.* and *Speed* for the defts. *Vivian* and *Williams*.

Martindale for the representative of Mr. Gwyn.

Charles Parke for Joseph Martin's executors, *Poole* and *Strick*.

Glasse, Q.C. in reply.

The following authorities were referred to in the course of the argument:

- Prosser v. Edmonds*, 1 Y. & Coll. 481, 498;
- Norway v. Rowe*, 19 Ves. 144;
- Prendergast v. Turton*, 1 Y. & Coll. 98;
- Clegg v. Edmondson*, 3 Jur. N. S. 299;
- Bishop of Winchester v. Knight*, 1 P. Wms. 406;
- Dean v. Thwaite*, 21 Beav. 621;
- Jones v. Jones*, 3 Mer. 161;
- Webster v. South-Eastern Railway Company*, 1 Sim. N. S. 272;
- Attorney-General v. Moses*, 2 Madd. 294;
- Long v. Long*, 5 Ves. 445;
- Macqueen v. Farguhar*, 11 Ves. 467;
- Joyce v. Demolegns*, 2 Jon. & Lat. 374;
- Williams v. Protheroe*, 3 Y. & J. 129;
- Parker v. Clark*, 30 Beav. 54;
- Whalley v. Whalley*, 2 De G. F. & J. 310.

The VICE-CHANCELLOR, after stating the facts of the case, said that the evidence clearly negated the fact alleged, that Martin agreed with the countess, on behalf of the Swansea Coal Company; he dealt entirely on his own behalf, and not being able to assign his interest in the mines without the consent of the party in possession of the estate, he covenanted that he would hold them in trust for Vivian and Williams, and he, Vivian and Williams being all dead, the bill was filed in Dec. 1860 against their representatives. The relief was founded on two distinct grounds: that the lease was *ipso facto* in itself void; and, if not, that it was obtained by fraud and ought to be set aside and made void. If the plt. was right on the two first grounds, the lease being void, his title was purely legal, being, since Aug. 1856, as to the minerals, that of owner in fee whose minerals had been wrongfully abstracted. As to the minerals prior to that time, they were purchased by Gwyn, although the legal title was not in the plt., but in the representative of Gwyn, as trustee for the plt., who might recover at law in the name of such representative, and compel him to convey by bill in equity. But that was no ground to ask equitable relief against the present defts.; therefore, if

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the plt., on the two first grounds had a right to come into equity as between him and the defts., his right was this: His remedy was originally at law; but where the subject of the right was minerals, this court would direct an account, which it could not do in ordinary cases, because a court of law did not possess the requisite machinery. If the plt. succeeded in setting the lease aside, the inquiries and account would seem to follow; but it was not his intention to express any opinion on the question, whether the will did or did not contain a power to lease for longer than the countess's life, nor on the question whether the terms of the lease were improvident, or whether it was obtained by fraud, because, whatever opinion he might entertain on any of these questions, there was one ground of defence insisted on by the defts., applicable to each and all of the questions, which appeared to him conclusive, namely, laches and delay in applying for relief. The subject-matter of this suit was the right to mines. Mining operations were of a particular character—an uncertain and speculative and hazardous adventure, applying more especially to mines unopened or recently commenced, the expense being only compensated by a long course of successful working, and it was true as to every mine that the preliminary outlay, though the heaviest, was not the only one, a large capital being requisite to meet the exigencies of the case and an expenditure of money to a serious amount. There was also a continual and increasing risk, for a mine profitable to-day might to-morrow become worthless. Similar observations had been repeatedly made by other judges. Now, if a person having a just right to mines of which he was not in possession as against those who were in possession and working them and claiming to be the rightful owner, the person in possession being perfectly aware of his rights or supposed rights, if such owner, not being prevented by fraud or concealment, stood by for a long period of time whilst those in possession were working the mines, this court would not lend him any assistance. Whatever remedy he might have had at law, he could have none here, because it was not equitable to allow him to wait till it was ascertained that the persons in possession have succeeded or been ruined, and if the project resulted in profit to ask to put that in his pocket, if in loss to repudiate the loss. It was not necessary (if possible) to prove whether he acted from premeditated design or carelessness. These observations not only applied to mines, but had a far wider range, and applied to every kind of trade, and not only so, but to every ordinary case, though not perhaps with such force. It would be waste of time to indicate, by citing cases, the reasonableness of this proposition to show how continually it was acted upon by the court. He would now state the reasons for this conclusion: first, the extent or degree of laches; and secondly, whether the plt. or Gwyn, from whom he claimed, was aware of the right sought to be established. Although the plt. did not acquire the interest till 1855, the delay for which he was responsible was not limited to the five or six years before the bill filed; when he purchased in May 1855 he purchased the right to the rents, and again in September took a conveyance of the fee, but he took Gwyn's interest with the burden of Gwyn's delay and added his own. As the plt. in the suit, he could stand in no better position than Gwyn if he had never parted with his interest. If Gwyn was disentitled to relief, so was the plt., although at that time unacquainted with the facts, but it appeared in fact that he was as well acquainted with them as Gwyn was. How must the time be computed? The countess died in Dec. 1840, and from that time Gwyn's right to insist on the invalidity of the lease commenced, but he was an infant, and so far, therefore, time could not weigh against him or the plt.;

but Gwyn came of age on the 9th Feb. 1846, when he received the accumulated income and half-a-year's rent from Martin, and from that day the time must be computed. No bill was filed till the 31st Dec. 1860—fifteen years nearly—and this court had repeatedly refused relief, on the ground of delay, for a far shorter period, and, therefore, as to the extent or degree, the case already came within the principles of this court on the subject. The next question was, how far Gwyn was cognisant of his rights, and it was material to distinguish the three grounds for relief. As to the power under the will, that was a mere question of construction of the will, no other instrument having any bearing on the question under which Gwyn derived his title, and of the contents of which he was aware; and as to the lease being void, the lease and the will were the only materials, and Gwyn and his agents were well aware of that instrument, as appeared by his acts since he came of age. The allegations in the bill that he was not cognisant of these things were in the most general terms, namely, that he was on service, and never able to discover the history of the lease, &c., admitting, in fact, that he knew its terms. As to the alleged fraud, the question was, was Gwyn informed of this? And the answer was, that on the 10th March 1848 a letter was sent to Mrs. Powell, Gwyn's mother, which contained another document conclusively showing that at that time Gwyn knew of the circumstances alleged to constitute the fraud, and it made no difference on this question who was the person sending those documents; but it was no other than the plt., who from the time Gwyn attained twenty-one was assisting to get rid of the lease, and it was clear that Gwyn was aware of the grounds on which it was alleged that the lease was void. It might be sufficient to stop here and say that the plt. was not entitled to relief, but the subsequent acts of Gwyn and his agents made the justice of that conclusion still more clear. There were communications and threats of proceedings in 1848, and from that time for full six years not only were no proceedings taken, but no communication passed on the subject, and it might have been thought that he had abandoned the claim, but that he never asked for rent. In Jan. 1854 an agent of Gwyn wrote to the solicitors of the defts. for an account of the coal under what he called the alleged lease, without prejudice to any question between the parties in any future litigation either at law or in equity, and three months after the defts. were served with a notice from Gwyn to quit, with a schedule annexed, being a verbatim copy of the parcels in the lease. Gwyn therefore treated Vivian and Williams as tenants, conscious perhaps that the receipt of rent might have created a tenancy from year to year, and recognised them as liable and rightly in possession as a yearly tenancy. Suppose the plt. got an account, how could he do so in the face of this notice antecedent to this? On the question of laches, mere notice of claim could not stand in the place of proceedings, it only made the delay more glaring; laches was not only absolutely doing nothing, but simply neglect to take proceedings, and it appeared to him that no case ever occurred in which the principles of this court with regard to laches were more peculiarly applicable than to the present. The lease alleged to be invalid was granted in 1840, the subject-matter was mines continuously worked by those claiming under the claimant's title (the plt. and Gwyn standing in the same position); Gwyn in 1846 coming of age and well knowing what his claims were, and the grounds on which they rested, all the materials in his own possession, no concealment or fraud to prevent his asserting them, and not having either the excuse of poverty or the want of experienced legal advisers. It was necessary to ask, who was the plt. and who

were the defts.? The plt. from the beginning was Gwyn's agent, and in 1855 brought up this already sufficiently stale demand, and added to its staleness by himself waiting five or six years more, and then came to this court to assert his rights, but not until Gwyn, Vivian and Williams were all dead. The defts. were not the persons alleged to have committed the fraud, but the representatives of those who purchased the lease, not being parties to or cognisant of such alleged fraud, who, during their lives, and the defts. since their deaths, had continuously worked the mines at their own risk. The matter might rest here, but one defence ought not to be passed over as to the fraud, viz., that Vivian and Williams were purchasers for valuable consideration without notice, some attempt being made to fix them with notice. This altogether failed, and the defence was sustained. It was true that Vivian and Williams did not acquire the legal estate, but it had been decided that such a plea was good as to an equitable estate. Being clearly of opinion, however, that on the ground of laches the plt. was debarred from all relief it was unnecessary to go further into this part of the case. As to the last part of the prayer that if the court should think the lease valid, there should be an account. The fact was, that an account was never refused, and always rendered whenever applied for. In fact, it was provided for by the lease. This was an anomalous mode of asking relief, though his Honour was not prepared to say that in no case would the court give it on a bill so framed. But it ought not to be given here, for two reasons: first, it proceeded on the assumption that the court should decide the lease to be valid when it had decided nothing with respect to it, except that even, if invalid, relief would be refused on the ground of laches; and, secondly, that to do so would be a great oppression on the defts., there being a great mass of pleadings and evidence, a very small portion of which had any relation to a mere account under the lease. There were forty-five printed pages of a bill, a hundred of answers, and three hundred of evidence, nine-tenths being exclusive of the question of the validity of the lease. If the plt. thought fit to file a bill for an account on the footing of the lease, he would not preclude him; but he expressed no opinion on the point, except that he could not have the account now. On the whole, the bill must be dismissed with costs, but without prejudice to any proceeding at law which the plt. might be advised to take, or any bill on the footing of the validity of the lease.

Solicitors: for the plts., *White, Barrett and White*; for the defts., *Rowland and Hacon*; for Poole and Strick, *Tampin and Tayler*.

Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Monday, Feb. 8.

(Present—The ARCHBISHOP of CANTERBURY, LORD CHANCELLOR, ARCHBISHOP of YORK, BISHOP of LONDON, Lords CRANWORTH, CHELMSFORD and KINGSDOWN.)

WILLIAMS v. BISHOP OF SALISBURY.

WILSON v. FENDALL.

Clergy—Unsound doctrine—Liberty of opinion—Inspiration of the Holy Scriptures—Eternity of final punishments.

When a clerk is charged with unsound doctrine, the court has no jurisdiction to settle matters of faith or to determine what ought in any particular to be the doctrine of the Church of England, but its province on the one hand is to ascertain the true con-

struction of those articles of religion and formularies referred to in each charge, according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to or inconsistent with the doctrine of the Church, ascertained in the same manner.

The court will not ascribe to the Church any rule or teaching which is not found expressly and distinctly stated, or which is not plainly involved in or collected from that which is written.

That only is matter of accusation which is advisedly taught or maintained by a clergyman; and he is not to be held responsible for more than the conclusions which are directly involved in the assertions made.

The assertion that the Bible was an expression of devout reason, and therefore to be read with reason in freedom, taken along with an assertion in the context, that the Holy Spirit dwelt in the sacred writers of the Bible, does not warrant the accusation that the Bible is the work of pious men and nothing more.

The proposition or assertion that every part of the Scriptures was written under the inspiration of the Holy Spirit is not to be found either in the Articles or in any of the formularies of the Church. There is not in the formularies of the Church of England any such distinct declaration upon the eternity of final punishment as to require the court to condemn as penal the expression of a hope by a clergyman that even the ultimate pardon of the wicked who are condemned on the day of judgment may be consistent with the will of Almighty God.

WILLIAMS v. BISHOP OF SALISBURY.

This was an appeal from a sentence or decree of the Dean of Arches, pronounced on the 15th Dec. 1862. A cause of office was promoted by the Right Rev. Bishop of Salisbury under 3 & 4 Vict. c. 86, in virtue of letters of request from the said bishop against the Rev. Rowland Williams, D.D., clerk, and vicar of the vicarage and parish church of Broad Chalk, with the chapel of Burr Chalk, in the county of Wilts, for having offended against the laws ecclesiastical of this realm by having written, published, and set forth in a book entitled "Essays and Reviews" a certain article, or essay, or review, with divers notes thereto, entitled "Bunsen's Biblical Researches," and by having in such article, and in the notes thereto, advisedly maintained and affirmed certain erroneous, strange and heretical doctrines, positions and opinions, contrary and repugnant to the doctrine and teaching of the said United Church of England and Ireland as by law established, and thereby contravening the statutes, constitutions and canons ecclesiastical of the realm, and against the peace and unity of the Church.

The only articles insisted on against the deft. were the 7th and 15th, as follows:—

7. That in the said article, essay, or review are contained the following passages at pages 60, 61: "As in his Egypt our author sifts the historical date of the Bible, so in his Gott in der Geschichte he expounds its directly religious element. Lamenting like Pascal the wretchedness of our feverish being when estranged from its eternal stay, he traces, as a countryman of Hegel, the Divine Thought bringing order out of confusion. Unlike the despairing school who forbid us trust in God or in conscience unless we kill our souls with literalism, he finds salvation for men and states only in becoming acquainted with the Author of our life, by whose reason the world stands fast, whose stamp we bear in our forehead and whose voice our conscience echoes. In the Bible, as an expression of devout reason, and therefore to be read with reason in freedom, he finds record of the spiritual giants whose

eloquence generated the religious atmosphere we breathe." At pages 77 and 78: "But if such a notion alarms those who think that apart from omniscience belonging to the Jews, the proper conclusion of reason is atheism; it is not inconsistent with the idea that Almighty God has been pleased to educate men and nations employing imagination no less than conscience, and suffering his lessons to play freely within the limits of humanity and its shortcomings; nor will any fair reader rise from the prophetic disquisitions without feeling that he has been under the guidance of a master's hand. The great result is to vindicate the work of the Eternal Spirit; that abiding influence which, as our Church teaches us in the Ordination Service, underlies all others, and in which converge all images of old time and means of grace now: temple, scripture, finger and hand of God; and again, preaching, sacraments, waters which comfort and flame which burns. If such a spirit did not dwell in the Church, the Bible would not be inspired, for the Bible is before all things the written voice of the congregation. Bold as such a theory of inspiration may sound, it was the earliest creed of the Church, and it is the only one to which the facts of Scripture answer. The sacred writers acknowledge themselves men of like passions with ourselves, and we are promised illumination from the Spirit which dwelt in them. Hence, when we find our Prayer-book constructed on the idea of the Church being an inspired society, instead of objecting that every one of us is fallible, we should define inspiration consistently with the facts of Scripture and of human nature. These would neither exclude the idea of fallibility among Israelites of old, nor teach us to quench the Spirit in true hearts for ever. But if any one prefers thinking the sacred writers passionless machines, and calling Luther and Milton 'uninspired,' let him co-operate in researches by which his theory if true will be triumphantly confirmed." That in the passages hereinbefore recited, being portions of the said article, essay, or review, the said Rev. Rowland Williams did advisedly maintain and affirm that the Bible or Holy Scripture is an expression of devout reason and the written voice of the congregation, not the Word of God, nor containing any special revelation of His truth or of His dealings with mankind, nor the rule of our faith, or that he did therein advisedly maintain and affirm doctrines, positions, or opinions to that or the like purport and effect, and that the said doctrine, positions, or opinions are contrary to and inconsistent with the 6th, 7th and 20th Articles of Religion and contrary to and inconsistent with that part of the Nicene Creed which declares in substance that the Holy Ghost spake by the prophets.

15. That in the said article, essay, or review, is contained the following passage at pp. 80, 81, in the words following, to wit: "For though he embraces with more than orthodox warmth New Testament terms, he explains them in such a way that he may be charged with using evangelical language in a philosophical sense; but in reply he would ask what proof is there that the reasonable sense of St. Paul's words was not the one which the Apostle intended? Why may not justification by faith have meant the peace of mind or sense of Divine approval which comes of trust in a righteous God rather than a fiction of merit by transfer? St. Paul would then be teaching moral responsibility as opposed to sacerdotalism, or that to obey is better than sacrifice. Faith would be opposed not to the good deeds which conscience requires, but to works of appeasement by ritual justification, would be neither an arbitrary ground of confidence nor a reward upon condition of our disclaiming merit, but rather a verdict of forgiveness upon our repentance and of acceptance upon the offering of our hearts." That in the passage hereinbefore recited, being portion of the said article, essay,

or review, the said Rev. Rowland Williams did advisedly maintain and affirm that justification by faith means only the peace of mind or sense of Divine approval which comes of trust in a righteous God, and that justification is a verdict of forgiveness upon our repentance and of acceptance upon the offering of our hearts; or that he did therein advisedly maintain and affirm a doctrine, position, or opinion to that or the like purport or effect, and that such doctrine, position, or opinion is contrary to or inconsistent with the 11th of the said Articles of Religion.

The Judge of the Court of Arches held the contents of these allegations was sufficiently proved, and declared the deft. to be suspended for the space of one year; whereupon the deft. appealed to Her Majesty in Council.

Dr. Williams in person contended that he did not deny the inspiration of Scripture. The freedom of opinion allowed by the formularies of the Church on this head allowed him to assert that though Scripture contained inspired writings, yet, being written by fallible men, some parts of them must of necessity be an expression of devout reason; and the expression "written voice of the congregation" did not imply a negation of inspiration. The essay did not exclude the theory of inspiration. As regarded the doctrine of justification, the main expression, "a fiction of merit by transfer," simply meant the same thing as the expression "phantasy of faith," used in the Homilies, and not as implying anything in the nature of deceit or pretence.

The *Queen's Advocate*, Coleridge, Q.C., and Dr. *Swabey* contended, on the first point, that the doctrine of plenary inspiration was part of the doctrine of the Church of England, and a miraculous and supernatural inspiration was implied. Any other hypothesis amounted to rationalism. It might be that details of the Holy Scriptures were capable of criticism on scientific or geographical grounds, but not as regards doctrine.

WILSON v. FENDALL.

This was an appeal in a similar suit charging the deft. (the now app.) for having written and published, in a book entitled "Essays and Reviews," a certain article or essay, or review, entitled "Séances Historiques de Genève—the National Church," and for having in such article, essay, or review, and in the notes thereto, advisedly maintained and affirmed certain erroneous, strange and heretical doctrines, positions and opinions contrary and repugnant to the doctrine and teaching of the said United Church of England and Ireland, as by law established, and thereby contravening the statutes, constitutions and canons ecclesiastical of the realm, and against the peace and unity of the Church.

The articles material were the 8th and 14th, as follows:—

8. And we further article and object to you, the said Rev. Henry Bristow Wilson, that in the said article, essay, or review, is the following passage at pp. 175, 6, 7: "It has been matter of great boast within the Church of England, in common with other Protestant churches, that it is founded upon the 'Word of God,' a phrase which begs many a question when applied collectively to the books of the Old and New Testament, a phrase which is never so applied to them by any of the scriptural authors, and which, according to Protestant principles, never could be applied to them by any sufficient authority from without. In that, which may be considered the first Article of the Church, this expression does not occur, but only 'Holy Scripture,' 'Canonical Books,' 'Old and New Testament.' It contains no declaration of the Bible being throughout supernaturally suggested, nor any intimation as to which portions of it were owing to a

special Divine illumination, nor the slightest attempt at defining inspiration, whether mediate or immediate, whether through or beside, or overruling the natural faculties of the subject of it, nor the least hint of the relation between the divine and human elements in the composition of the Biblical books. Even if the Fathers have usually considered 'canonical' as synonymous with 'miraculously inspired,' there is nothing to show that their sense of the word must necessarily be applied in our own sixth Article. The word itself may mean either books, ruled and determined by the Church, or regulative books, and the employment of it in the Article hesitates between these two significations. For at one time Holy Scripture and canonical books are those books of 'whose authority never was any doubt in the Church; that is, they are 'determined' books; and then the other, or uncanonical books are described as those which 'the Church doth not apply to establish any doctrine,' that is, they are not 'regulative' books. And if the other principal Churches of the Reformation have gone further in definition in this respect than our own, that is no reason we should force the silence of our Church into unison with these expressed declarations, but rather that we should rejoice in our comparative freedom. The Protestant feeling among us has satisfied itself in a blind way with the anti-Roman declaration that 'Holy Scripture containeth all things necessary to salvation, so that whatsoever is not read therein nor may be proved thereby is not to be required of any man that it should be believed as an article of the faith, &c.,' and without reflecting how very much is wisely left open in that Article. For this declaration itself is partly negative and partly positive: as to its negative part it declares that nothing—no clause of creed, no decision of council, no tradition or exposition—is to be required to be believed on peril of salvation unless it be scriptural; but it does not lay down that everything which is contained in Scripture must be believed on the same peril. Or it may be expressed thus: the Word of God is contained in Scripture, whence it does not follow that it is co-extensive with it. The Church to which we belong does not put that stumblingblock before the feet of her members; it is their own fault if they place it there for themselves, authors of their own offence." And we article and object to you the said Rev. Henry Bristow Wilson, that in the passage herebefore recited, being portion of the said article, essay, or review, you did advisedly declare and affirm in effect that the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all and certainly not in parts the Word of God, or that you did therein advisedly declare and affirm a doctrine, position, or opinion to that or the like purport and effect. And that such doctrine, position, or opinion, is contrary to or inconsistent with the 6th and 20th of the said Articles of Religion, and contrary to and inconsistent with the teaching of the said church contained in that part of the Nicene Creed which declares in substance that the Holy Ghost spake by the prophets; and as set forth in the Ordering of Priests in the said Book of Common Prayer, to wit, in the words following: "The Bishop shall deliver to every one of them the Bible into his hands, saying, Take thou authority to preach the Word of God," and we article and object as before.

14. And we further article and object to you the said Rev. H. B. Wilson, that in the said article, essay, or review is contained the following passage, at page 206: "The Christian Church can only tend on those who are committed to its cure, to the verge of that abyss which parts this world from the world unseen. Some few of those fostered by her are now ripe for entering on a higher career; the many are but rudimentary spirits, germinal souls. What shall become of them?"

If we look abroad in the world and regard the mental character of the multitude we are at a loss to apply to them either the promises or the denunciations of revelation. So the wise heathens could anticipate a reunion with the great and good of all ages; they could represent to themselves at least in a figurative manner the punishment and the purgatory of the wicked; but they would not expect the reappearance in another world for any purpose of a Thersites or Hyperbolos—social and poetical justice had been sufficiently done upon them. Yet there are such as these, and no better than these, under the Christian name—babblers, busybodies, liveries to get gain, and mere eaters and drinkers. The Roman Church has imagined a *limbus infantium*; we must rather entertain a hope that there shall be found after the great adjudication receptacles suitable for those who shall be infants, not as to years of terrestrial life, but as to spiritual development, nurseries as it were and seed grounds where the undeveloped may grow up under new conditions, the stunted may become strong and the perverted be restored. And when the Christian Church in all its branches shall have fulfilled its sublunary office, and its Founder shall have surrendered His kingdom to the Great Father—all, both small and great, shall find a refuge in the bosom of the Universal Parent to repose or be quickened into higher life in the ages to come according to His will." And we article and object to you the said Rev. H. B. Wilson, that in the passage herebefore recited, being a portion of the said article, essay, or review, you did advisedly declare and affirm in effect that after this life, and at the end of the existing order of things on this earth, there will be no judgment of God awarding to those men whom he shall then approve everlasting life or eternal happiness, and to those men whom he shall then condemn everlasting death or eternal misery; or that you did therein advisedly declare and affirm a doctrine, position, or opinion to that or to the like purport and effect, and that the said doctrine, position, or opinion is contrary to or inconsistent with the teaching of the said church, as contained in the creeds commonly called the Apostles' Creed, the Nicene Creed, and St. Athanasius' Creed; and as contained in the absolution or remission of sins which forms part of the Morning Prayer in the said Book of Common Prayer, and in which the priest says, "Wherefore let us beseech Him to grant us true repentance and his Holy Spirit, that those things may please Him which we do at this present; and that the rest of our life hereafter may be pure and holy, so that at the last we may come to his eternal joy, through Jesus Christ our Lord." And as contained in the following part of the Catechism which forms part of the said Book of Common Prayer. "Question. What desirest thou of God in this prayer? Answer. I desire my Lord God, our Heavenly Father, who is the giver of all goodness, to send His grace unto me and to all people. And I pray unto God that He will keep us from all sin and wickedness, and from our ghostly enemy, and from everlasting death." And as contained in the following portions of the Order for the Burial of the Dead, which forms part of the said Book of Common Prayer: "In sure and certain hope of the resurrection of eternal life through our Lord Jesus Christ, who shall change our vile body that it may be like unto His glorious body, according to the mighty working whereby He is able to subdue all things unto Himself." "O merciful God, the Father of our Lord Jesus Christ, who is the Resurrection and the Life, in whom whosoever believeth shall live though he die; and whosoever liveth and believeth in Him shall not die eternally; who also taught us by His holy Apostle Saint Paul not to be sorry as men without hope for them that sleep in Him; we meekly beseech Thee, O Father, to raise us from the death of sin unto the

life of righteousness; that when we shall depart this life we may rest in Him as our hope as this our brother doth; and that at the general resurrection in the last day we may be found acceptable in Thy sight and receive that blessing which Thy well-beloved Son shall then pronounce to all that love and fear Thee, saying, Come, ye blessed children of my Father, receive the kingdom prepared for you from the beginning of the world." And as contained in the following portions of the Communion Service, which form part of the said Book of Common Prayer. "The day cometh as a thief in the night." "Then shall it be too late to beseech when the door shall be shut, and too late to cry for mercy when it is the time of justice. O terrible voice of most just judgment, which shall be pronounced upon them when it shall be said unto them, Go, ye cursed, into the fire everlasting, which is prepared for the devil and his angels." "This, if we do, Christ will deliver us from the curse of the law and from the extreme malediction which shall light upon them that shall be set upon the left hand, and He will set us on His right hand, and give us the gracious benediction of His Father, commanding us to take possession of His glorious kingdom." And we article and object as before.

The Dean of the Arches pronounced the same judgment as in the former case, whereon Mr. Wilson appealed to Her Majesty in Council.

Mr. Wilson, the app. in person, contended that the rules applicable to the interpretation of the formularies of the Church were the ordinary legal rules, and it was no part of the business of the court to inquire into what ought to be the doctrine of the Church. The sole question was, what the language used in its formularies meant. This rule was laid down by the *Gorham* case, Moore, 1072. Hence it was competent to maintain distinct doctrines under the grammatical construction of the formularies. As regarded the meaning of terms, they were properly explained by a view of their history as used in controversy, as in *Shore v. Wilson*, 9 C. & F. 355. The Articles and formularies did not lay down any definite rule as to the nature of the inspiration of the Holy Scriptures. The word "inspiration" and the word "miraculous" were not used in those formularies. The charge against him founded on inspiration did not definitely define the meaning imputed to the words he had used: (*Burder v. Heath*, 8 Jur. 237, *Gorham* case.) He had never denied, in the proper sense of the term, that the Scriptures contained the Word of God; but merely, that every part of the word was inspired. As regarded the eternity of final punishment, the point was referred to in so ambiguous terms by the formularies of the Church that no accusation could be founded on that head, seeing that the offence could not be defined. Many ancient theologians totally denied the doctrine in the literal sense in vogue in modern times, and even such authorities as Tillotson, Le Clerc, Law, Horsley, Whately and Milman variously modified the doctrine.

Cur. adv. vult.

Feb. 8.—The LORD CHANCELLOR.—These appeals do not give to this tribunal the power, and therefore it is no part of its duty, to pronounce any opinion on the character, effect, or tendency of the publications known by the name of "Essays and Reviews;" nor are we at liberty to take into consideration, for the purposes of the prosecution, the whole of the essay of Dr. Williams or of the essay of Mr. Wilson. A few short extracts only are before us, and our judgment must by law be confined to the matter which is therein contained. If, therefore, the book, or these two essays, or either of them as a whole, be of a mischievous and baneful tendency, as weakening the foundations of Christian belief, and likely to cause many to offend, they will retain that character, and be liable to that condemnation, notwithstanding this our judgment. These pro-

secutions are in the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation. The articles of charge must distinctly state the opinions which the clerk has advisedly maintained, and set forth the passages in which those opinions are stated; and further, the articles must specify the doctrines of the Church which such opinions or teaching of the clerk are alleged to contravene, and the particular Articles of Religion or portions of the formularies which contain such doctrines. The accuser is, for the purpose of the charge, confined to the passages which are included and set out in the articles as the matter of the accusation; but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser. With respect to the legal tests of doctrine in the Church of England, by the application of which we are to try the soundness or unsoundness of the passages libelled, we agree with the learned judge in the court below that the judgment in the *Gorham* case is conclusive: "This court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her Articles and formularies." By the rule thus enunciated it is our duty to abide. Our province is, on the one hand, to ascertain the true construction of those Articles of Religion and formularies referred to in each charge, according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to or inconsistent with the doctrine of the Church, ascertained in the manner we have described. It is obvious that there may be matters of doctrine on which the Church has not given any definite rule or standard of faith or opinion; there may be matters of religious belief on which the requisition of the Church may be less than Scripture may seem to warrant; there may be very many matters of religious speculation and inquiry on which the Church may have refrained from pronouncing any opinion at all. On matters on which the Church has prescribed no rule, there is so far freedom of opinion that they may be discussed without penal consequences. Nor in a proceeding like the present, are we at liberty to ascribe to the Church any rule or teaching which we do not find expressly and distinctly stated, or which is not plainly involved in, or to be collected from, that which is written. With respect to the construction of the passages extracted from the essays of the accused parties, the meaning to be ascribed to them must be that which the words bear, according to the ordinary grammatical meaning of language. That only is matter of accusation which is advisedly taught or maintained by a clergyman in opposition to the doctrine of the Church. The writer cannot in a proceeding such as the present be held responsible for more than the conclusions which are directly involved in the assertion he has made. With these general remarks we proceed to consider in the first place the charges against Dr. Williams. All the charges against Dr. Williams were rejected by the learned judge in the court below, or given up at the hearing before us, except the charges contained in the 7th and 15th articles. The 7th article, as reformed, sets forth certain passages extracted from pages 60 and 61, and from pages 77 and 78, of the volume containing Dr. Williams's essay, and charges that in the passages so extracted Dr. Williams has advisedly maintained and affirmed that the Bible or Holy Scripture is an expression of devout reason, and the written voice of

the congregation—not the Word of God, nor containing any special revelation of His truth or of His dealings with mankind, nor the rule of our faith. Dr. Williams has nowhere in terms asserted that Holy Scripture is not the Word of God; and the accusation therefore must mean that by calling the Bible “an expression of devout reason, and therefore to be read with reason in freedom,” and stating that it is “the written voice of the congregation,” Dr. Williams must be taken to affirm that it is not the word of God. Before we examine the meaning of these expressions it is right to observe what Dr. Williams has said on the subject of Holy Scripture in the second of the passages included in this charge. Dr. Williams there refers to the teaching of the Church in her Ordination Service as to the abiding influence of “the Eternal Spirit,” and then uses these words, “If such a Spirit did not dwell in the Church the Bible would not be inspired;” and again, “The sacred writers acknowledge themselves men of like passions with ourselves, and we are promised illumination from the Spirit that dwelt in them.” Dr. Williams may not unreasonably contend that the just result of these passages would be thus given: “The Bible was inspired by the Holy Spirit that has ever dwelt and still dwells in the Church, which dwelt also in the sacred writers of Holy Scripture, and which will aid and illuminate the minds of those who read Holy Scripture trusting to receive the guidance and assistance of that Spirit.” The words that the Bible is an expression of devout reason, and therefore to be read with reason in freedom, are treated in the charge as equivalent to these words: “The Bible is the composition or work of devout or pious men and nothing more;” but such a meaning ought not to be ascribed to the words of a writer who, a few lines further on, has plainly affirmed that the Holy Spirit dwelt in the sacred writers of the Bible. This context enables us to say that the words “an expression of devout reason, and therefore to be read with reason in freedom,” ought not to be taken in the sense ascribed to them by the accusation. In like manner we deem it unnecessary to put any interpretation upon the words “written voice of the congregation,” inasmuch as we are satisfied that whatever may be the meaning of the passages included in this article, they do not, taken collectively, warrant the charge which has been made that Dr. Williams has maintained the Bible not to be the Word of God, nor the rule of faith. We pass on to the remaining charge against Dr. Williams, which is contained in the 15th article of charge. The words of Dr. Williams, which are included in this charge, are part of a supposed defence of Baron Bunsen against the accusation of not being a Christian. It would be a severe thing to treat language used by an imaginary advocate as advised speaking or teaching by Dr. Williams. Against such a general charge as that of not being a Christian, topics of defence may be properly urged, although not in conformity with the doctrines of the Church of England. But, even if Dr. Williams be taken to approve of the arguments which he uses for this supposed defence, it would, we think, be unjust to him to take his words as a full statement of his own belief or teaching on the subject of justification. The 11th Article of Religion, which Dr. Williams is accused of contravening, states, “We are accounted righteous before God only for the merits of our Lord and Saviour Jesus Christ, by faith, and not for our own works or deservings.” The Article is wholly silent as to the merits of Jesus Christ being transferred to us. It asserts only that we are justified for the merits of our Saviour by faith, and by faith alone. We cannot say, therefore, that it is penal in a clergyman to speak of merit by transfer as a fiction, however unseemly that word may be when used in con-

nection with such a subject. It is fair, however, to Dr. Williams to observe that in the argument at the bar he repudiated the interpretation which had been put on these words, that “the doctrine of merit by transfer is a fiction,” and he explained fiction as intended by him to describe the phantasy in the mind of an individual that he has received or enjoyed merit by transfer. Upon the whole we cannot accept the interpretation charged by the promoter as the true meaning of the passages included in this 15th article of charge, nor can we consider those passages as warranting the specific charge, which, in effect, is that Dr. Williams asserts that justification by faith means *only* the peace of mind or sense of divine approval which comes of trust in a righteous God. This is not the assertion of Dr. Williams. We are therefore of opinion that the judgment against Dr. Williams must be reversed.

We proceed to consider the charges against Mr. Wilson. These have been reduced to the 8th and 14th articles of charge. The other articles of charge were either rejected by the court below, or have been abandoned at the hearing before this tribunal. In the 8th article, an extract of some length is made from Mr. Wilson’s essay, and the accusation is, that in the passage extracted Mr. Wilson has declared and affirmed *in effect* that the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts, the Word of God; and then reference is made to the 6th and 20th Articles of Religion, to part of the Nicene Creed, and to a passage in the Ordination of Priests in the Book of Common Prayer. This charge therefore involves the proposition, “That it is a contradiction of the doctrine laid down in the 6th and 20th Articles of Religion, in the Nicene Creed and in the Ordination Service of Priests, to affirm that any part of the canonical books of the Old or New Testament, upon any subject whatever, however unconnected with religious faith or moral duty, was not written under the inspiration of the Holy Spirit.” The proposition or assertion that every part of the Scriptures was written under the inspiration of the Holy Spirit is not to be found either in the Articles or in any of the formularies of the Church. But in the 6th Article it is said that Holy Scripture containeth all things necessary to salvation, and the books of the Old and New Testament are therein termed canonical. In the 20th Article, the Scriptures are referred to as “God’s Word written;” in the Ordination Service, when the Bible is given by the Bishop to the Priest, it is put into his hands with these words, “Take thou authority to preach the Word of God;” and in the Nicene Creed are the words, “the Holy Ghost who spake by the prophets.” We are confined by the article of charge to the consideration of these materials, and the question is, whether in them the Church has affirmed that every part of every book of Scripture was written under the inspiration of the Holy Spirit, and is the Word of God. Certainly, this doctrine is not involved in the statement of the 6th Article, that Holy Scripture containeth all things necessary to salvation. But inasmuch as it doth so from the revelations of the Holy Spirit, the Bible may well be denominated “Holy,” and said to be “the Word of God,” “God’s Word written,” or “Holy Writ,” terms which cannot be affirmed to be clearly predicated of every statement and representation contained in every part of the Old and New Testament. The framers of the Articles have not used the word “inspiration” as applied to the Holy Scriptures; nor have they laid down anything as to the nature, extent, or limits of that operation of the Holy Spirit. The caution of the framers of our Articles forbids our treating their language as imply-

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ing more than is expressed; nor are we warranted in ascribing to them conclusions expressed in new forms of words involving minute and subtle matters of controversy. After an anxious consideration of the subject, we find ourselves unable to say that the passages extracted from Mr. Wilson's essay, and which form the subject of this article of charge, are contradicted by or plainly inconsistent with, the Articles or formularies to which the charge refers, and which alone we are at liberty to consider. We proceed to the remaining charge against Mr. Wilson, namely, that contained in the 14th article. The charge is, that in the portion of his essay which is set out in this article, Mr. Wilson has advisedly declared and affirmed, *in effect*, that after this life and at the end of the existing order of things on this earth, there will be no judgment of God, awarding to those men whom He shall then approve everlasting life or eternal happiness, and to those men whom He shall then condemn everlasting death or eternal misery; and this position is affirmed to be contrary to the three Creeds, the Absolution, the Catechism, and the Burial and Communion Services. In the first place we find nothing in the passages extracted which in any respect questions or denies that at the end of the world there will be a judgment of God awarding to those men whom He shall approve everlasting life or eternal happiness; but with respect to a judgment of eternal misery, a hope is encouraged by Mr. Wilson that this may not be the purpose of God. We think that it is not competent to a clergyman of the Church of England to teach or suggest that a hope may be entertained of a state of things contrary to what the Church expressly teaches or declares will be the case; but the charge is, that Mr. Wilson advisedly declares that after this life there will be no judgment of God awarding either eternal happiness or eternal misery,—an accusation which is not warranted by the passage extracted. Mr. Wilson expresses a hope that at the day of judgment those men who are not admitted to happiness may be so dealt with as that “the perverted may be restored,” and all, “both small and great, may ultimately find a refuge in the bosom of the Universal Parent.” The hope that the punishment of the wicked may not endure to all eternity is certainly not at variance with anything that is found in the Apostles' Creed, or the Nicene Creed, or in the Absolution, which forms part of the Morning and Evening Prayer, or in the Burial Service. In the Catechism the child is taught that in repeating the Lord's Prayer he prays unto God “that He will keep us from all sin and wickedness, and from our ghostly enemy, and from everlasting death;” but this exposition of the Lord's Prayer cannot be taken as necessarily declaring anything touching the eternity of punishment after the resurrection. There remain the Communion Service and the Athanasian Creed. The material passage in the Communion Service is in these words: “O terrible voice of most just judgment which shall be pronounced upon them, when it shall be said unto them, Go, ye cursed, into the fire everlasting which is prepared for the devil and his angels.” In like manner the Athanasian Creed declares that they that have done evil shall go into everlasting fire. Of the meaning of these words “everlasting fire,” no interpretation is given in the formularies which are referred to in the charge. Mr. Wilson has urged in his defence that the word “everlasting” in the English translation of the New Testament, and of the Creed of St. Athanasius, must be subject to the same limited interpretation which some learned men have given to the original words which are translated by the English word “everlasting,” and he has also appealed to the liberty of opinion which has always existed without restraint among very eminent English divines upon this subject. It is material to observe that in the Articles of King

Edward VI., framed in 1552, the Forty-second Article was in the following words:—“All men shall not be saved at the length.”—Thei also are worthie of condemnation who endeavour at this time to restore the dangerous opinion, that al menne, be thei never so ungoddie, shall at lengtht bee saved, when thei have suffered paines for their sinnes a certain time appointed by God's justice.” This Article was omitted from the Thirty-nine Articles of Religion of the year 1562, and it might be said that the effect of sustaining the judgment of the court below on this charge would be to restore the Article so withdrawn. We are not required, or at liberty, to express any opinion upon the mysterious question of the eternity of final punishment, further than to say that we do not find in the formularies, to which this article refers, any such distinct declaration of our Church upon the subject as to require us to condemn as penal the expression of hope by a clergyman, that even the ultimate pardon of the wicked, who are condemned in the day of judgment, may be consistent with the will of Almighty God. We desire to repeat that the meagre and disjointed extracts which have been allowed to remain in the reformed articles are alone the subject of our judgment. On the design and general tendency of the book called “Essays and Reviews,” and on the effect or aim of the whole essay of Dr. Williams, or the whole essay of Mr. Wilson, we neither can nor do pronounce any opinion. On the short extracts before us, our judgment is that the charges are not proved. Their Lordships, therefore, will humbly recommend to Her Majesty that the sentences be reversed, and the reformed articles rejected in like manner as the rest of the original articles were rejected in the court below, namely, without costs; but inasmuch as the apps. have been obliged to come to this court, their Lordships think it right that they should have the costs of this appeal.

His Lordship added: I am desired by the Archbishop of Canterbury and the Archbishop of York to state, that they do not concur in those parts of this opinion which relate to the 7th article of charge against Dr. Williams, and to the 8th article of charge against Mr. Wilson.

Sentence reversed.

Proctors: Brooks and Son; Toller.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON, Esqrs., Barristers-at-Law.

Jan. 29 and 30.

(Before the LORDS JUSTICES.)

COCHRANE v. WILLIS.

Demurrer—Doubtful equitable title—Agreement—Absence of consideration.

The rule that the court will not decide upon demurrer a doubtful question upon a legal title, although its inclination should be in favour of the deft., but will overrule the demurrer without prejudice to the deft.'s right to insist on the same matter by way of answer, applies with equal force to a doubtful case upon an equitable title.

The plt. was assignee, in India, of an insolvent there, who at the time of his insolvency was entitled in possession for life, without impeachment of waste, to lands in this country. On the 6th Aug. 1863 instructions from him reached his London solicitors to obtain possession of the insolvent's estate, and application was at once made to the defts., who were entitled to the estates, the one as the next tenant for life,

the other as first tenant in tail on the determination of those life-estates. Upon the property a large quantity of valuable timber was then growing. Through the delay of the debts, nothing was done until the 30th Oct., when an agreement was entered into by all parties, by which the plt. was to be, and was to be deemed to be, as fully entitled to the timber, &c., as if he had cut down and removed it on the 15th Aug.; that the debts would carry out this agreement, but that the plt. should not fell any of the timber till the 1st Dec. then next. The insolvent had died on the 24th Sept., although this was not known in England until after the agreement was executed; but upon its becoming known the debts wholly repudiated the agreement, and this bill was filed to enforce it. The debts demurred for want of equity, and the demurrer was allowed by the M. R., on the ground that there was no consideration for the agreement. The plt. appealed.

Baggallay, Q. C. and G. Lake Russell, for the plt., cited

Head v. Godlee, John. 536;

Horne v. Barton, 8 De G. M. & G. 587.

Selwyn, Q.C., Hobhouse, Q.C. and Lawrence for the debts.

G. Lake Russell in reply.

Jan. 30.—Lord Justice KNIGHT BRUCE said:—Assuming, as we are bound to do, the truth of the well-pleaded facts in the bill, I think that an equitable question of great difficulty is raised in the case, one which will require great and attentive consideration, and upon which, I repeat, or at least declare, that I have not yet formed a conclusive opinion in favour of either side. But I am satisfied (and perhaps on that very ground alone) that it is not a case for demurrer. In a note contained in the third edition of Mr. Morgan's most convenient and valuable work on the Chancery Acts and Orders, 3rd edit., p. 423, it is said (and I think accurately): "It should be mentioned, that where there is a doubtful question on a legal title, the court will not decide the question on demurrer, notwithstanding the inclination of the court be in favour of the debt, but will overrule the demurrer without prejudice to the debt's insisting on the same matter by way of answer: per Lord Hardwicke, in *Brownson v. Edwards*, 2 Ves. sen. 243, followed by Knight Bruce, V.C., in *Mortimer v. Harley*, 3 De G. & Sm. 316, and *Bowser v. Maclean*, 3 L. T. Rep. N. S. 456, and *Kirwan v. Daniell*, 5 Hare, 493." Now, the expression there used, and, as I have said, I think correctly used, is "on a legal title." The doubt here, it may be said, is not on a legal title; but I am of opinion that the reason applicable to a case of legal title applies at least as strongly to a case of the present description, and I think this is the very case for the application of that rule. Without giving any opinion upon the merits, whatever they may be, for or against either side, I am of opinion that this demurrer should be overruled, without prejudice to any such defence as the debts, or either of them, may be advised to make by answer, and that the costs at the Rolls and here should be costs in the cause.

Lord Justice TURNER said:—I agree. I think that the course which my learned brother has suggested is the right course in this case. In one view of this case, it is impossible not to see that the question may be a question entirely to be tried upon the facts. Supposing the court at the hearing of the cause should come to the conclusion that upon the face of this agreement there is a consideration, the agreement would not be wholly void. It would then come to the question, whether a court of equity will enforce the agreement or not? and the decision of that question must depend upon all the circumstances of the case. It seems to me, therefore, that the best course to adopt in this case is, to let this question be tried, as it will be, at

the hearing of the cause, upon the whole facts as they will then open before the court.

Demurrer overruled; deposit to be returned to the plt.

Solicitors for the plt., *Graham and Lyde.*

Solicitors for the debt. demurring, *Farrar, Overy and Farrar.*

Jan. 20 and Feb. 10.

(Before the LORD CHANCELLOR (Westbury).)

Ex parte MENDEL, re MOOR.

Bankruptcy—Proof for unliquidated damages—Existing demand—Sect 153 of B. A. 1861.

The 153rd section of the Act of 1861, allowing proof to be made in respect of unliquidated damages is limited to cases where there is a cause of action actually accrued, or a demand enforceable against the bankrupt, at the time of adjudication:

Hence, a claim in respect of a contract made in July to deliver a quantity of oil at a certain price in the course of the following month of January, is not one in respect of which a creditor is entitled to prove under a trust-deed dated the 30th Jan. for unliquidated damages, under the 153rd section, inasmuch as, at the date of the deed, and until the end of the month, there has been no breach of the contract.

This was an appeal against an order of Mr. Commissioner Ayrton, at Hull, whereby he disallowed the claim of the app. to rank as a creditor under a deed of arrangement executed by one John Moor, under the following circumstances:—

The app. Samuel Mendel was an oil merchant in Mincing-lane, and Moor was in business at Hull as a seed-crusher. On the 28th July 1862, Moor, through his agents, Rees and Co. of Hull, entered into a contract with Mendel as follows:

"Hull, 28th July 1862.

"Bought for account of Mr. S. Mendel, of London, of Mr. John Moor, of this place, 10 tons of linseed oil, of merchantable quality, at 36s. 6d. per cwt., good iron-bound casks included, delivered free to craft or truck during the month of Jan. 1863. Payment cash, less 2½ per cent. discount on receipt of invoice and delivery. "Ross and Co., Brokers."

On the 3rd Sept. another contract was entered into in precisely the same terms, except that 37s. 3d. was inserted instead of 36s. 6d. On the 28th July a similar contract was entered into for the purchase of 10 tons at 36s. 6d., to be delivered during Feb. 1863, and on the 3rd Sept. a similar contract to the last for the purchase of 10 tons, at 37s. 3d.

Other similar contracts were entered into by Moor with other persons, amounting altogether to 150 tons. Meanwhile oil rose in price, and the 20 tons not being delivered in January, Mendel wrote to inquire, and was informed in answer that Moor had, on the 30th Jan., executed a deed of assignment for the benefit of his creditors.

The deed was in the form prescribed by schedule D. to the Act of 1861, and was duly registered on the 26th Feb. Having contracted to sell and deliver this oil elsewhere, Mendel was in consequence obliged to buy twenty tons of oil at 43s. His loss on the contracts due in January thus amounted to 133l. 10s. 9d., and this sum formed part of the amount for which he claimed to rank as creditor.

The learned commissioner decided that, as the deed of assignment made by Moor was so made by him one day before any contract became due, there could have been no breach of contract on that day, and that the app. was not entitled to participate in the estate assigned by Moor.

Daniel, Q.C. (Sargood with him) supported the appeal.—The first question is, whether or not, under

the 153rd section of the Act of 1861, this is a debt which is proveable. The section enacts that "if any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the court to direct such damages to be assessed by a jury, and the amount of damage, when assessed, shall be proveable as a debt due at the time of the bankruptcy." The following is an instance of demand which was held not proveable as a liability under sect. 178 of the Act 1849: where a debt, in an action for injury to the plt.'s property consented to an order of reference, and the award was not made till after the debt's bankruptcy: (*Ex parte Todd*, 6 De G. M. & G. 744.) On the other hand, a covenant by sureties that the principal debtor would pay a debt by instalments was held, on the principal debtor becoming bankrupt after payment of the first and before payment of the second instalment, to be a contingent liability under the 178th section: (*Ex parte Barwis*, 1 De G. M. & G. 542.) A demand under a forward contract for the sale of oil, like the present, which was broken before the bankruptcy, was held not proveable as a debt, where the facts were not so settled as to render the intervention of a jury unnecessary: (*Green v. Bicknell*, 8 Ad. & Ell. 701.) But where the demand was in respect of a similar oil contract, which was not broken before the bankruptcy, Lord Tenterden held that the creditor could not prove under the bankruptcy: (*Boorman v. Nash*, 9 B. & C. 152.) It was to be presumed then that the 153rd clause of the Act of 1861 was meant to remedy the defects in the old law, by making a future demand a proveable debt. The words "demand in the nature of damages" must be held to include damages for breach of contract, and if so, why should "demand" be limited to a contract broken; why should it not extend to a contract existing? Secondly, this deed was dated on the 30th Jan., and it is admitted that the parties are subject to the jurisdiction of the court, as if there had been an adjudication in bankruptcy on that day. But every deed is to be registered within twenty-eight days, and in default is not to be received in evidence; and by the 199th section, if a petition for adjudication be presented against the debtor after the execution of the deed pending the interval for registration, the proceedings under the petition are to be stayed if the court shall think fit, and if the deed be duly registered the petition is to be dismissed. Supposing then a creditor files his petition in the interval, he being dissentient to the deed, and finally the registration is completed and his petition dismissed, is he to lose all remedy? The Legislature must be held have intended that he should be permitted to come in under the deed. If that be so, this contract having been broken before the 26th Feb., this creditor must by analogy be held to be entitled to come in under the deed. It may be stated generally that by the operation of sects. 177 and 178 of the Act of 1849, a method of proof was provided for every kind of claim, except claims for unliquidated damages. It was to admit also claims like this upon existing unbroken contracts, that the 153rd section was passed.

Bacon, Q.C., for the trustees of the deed, said that the argument on the other side was, that the 153rd section was passed to supply an implied defect in the law. It was too much to assume that such a defect existed. The object of the Legislature may well have been to provide that, when a contract has been broken and some damage done, the injured party may come in and prove, and have the same benefit as he would have had under the former law if the damage had been liquidated. But here no liability whatever has

been incurred until the contract is broken: (*Re Gales*, 1 De G. 100.) To extend the provisions of this enactment would be highly prejudicial. Would the court hold it applicable to every contract a debtor might enter into—a promise, for example, to marry?

De Gez (with *Bacon*, Q.C.)—As the law stood prior to Oct. 1861, only unliquidated damages were not proveable in bankruptcy. At first, only a man's present debts were proveable; then, his future debts; then, by sect. 177 of the Act of 1849, which agrees with sect. 56 of the 6 Geo. 4, c. 16, his contingent debts; and the language of that clause, "before the contingency shall have happened," rendering it doubtful whether contingent claims, as well as debts, were included therein, the 178th section, expressly relating to contingent liabilities, was passed for the first time in 1849. Upon this arose a serious question, never yet decided—whether the creditor is, or is not, absolutely barred by the certificate or the order of discharge; and if it was held that contingent debts and liabilities were not proveable without express clauses giving special machinery for the purpose, was it probable that the Legislature, in passing the 153rd section of the Act of 1861, intended to include not only unliquidated damages, but unliquidated damages for a contingent breach of contract? Was it likely that the Legislature intended to incur the same difficulties with regard to contingent debts as before, without express words? Why should the words "liable at the time of adjudication" be held to extend beyond their natural sense and meaning, to possible liabilities in the future? On the other hand, was the court to wait till the contingency happened, or became impossible to happen, and delay distribution perhaps for a period of twenty-one years? And if not for twenty-one years, why for twenty-one days, or for twenty-four hours? Secondly, the adjudication under the 197th section must date from the date of the deed, and not of the registration, and at that date the app. was not a creditor.

Daniel, Q.C. in reply.—The same argument that the app. was not a creditor at the date of the deed would apply to any contingent claim whatever. Why should the word "liable" be confined to the meaning "liable to an existing demand?" The intention of the Legislature could not have been to relieve a man from the necessity of fulfilling his contract. The same amount of inconvenience as is here spoken of was incurred by the Legislature when the 178th section of the Act of 1849 was passed to supplement the enactment of the 6 Geo. 4. He further referred to

Ex parte Harrison, *Re Gales*, 3 Mont. D. & D. 350.

His Lordship reserved judgment.

The LORD CHANCELLOR.—This is an appeal from a learned commissioner, who has refused an application to enter a proof under the 153rd section of the Bankruptcy Act of 1861. That section is a new enactment. The law as it stood in former times was, that no proof could be made for damages, unless they were such as could be ascertained by the commissioners without the intervention of a jury. The 153rd section gives a power to direct the damages to be assessed when they arise under any demand existing at the time of adjudication. The learned commissioner appears to have thought that the construction which he has put upon the section is one which is not in conformity with the intention of the Legislature. But I am not of that opinion. It was undoubtedly the intention of the framers of the Act that demands of this nature should be limited to cases where there was a cause of action complete at the time of adjudication; and I am therefore of opinion that the 153rd section of the Act of 1861 applies to such demands only, in the nature of damages, as are capable of being enforced against the bankrupt at the time of adjudication. Now, in the

present case there has been no bankruptcy; but a trust-deed has been executed in the form given by one of the schedules of the Act, and the date of the deed is by the operation of the enactment made equivalent to the time of adjudication; and the question, therefore, is whether the bankrupt was at the date of the deed liable, by reason of the contract in question, to a demand in the nature of damages? Now, the contract may be described sufficiently for the present purpose as an engagement by the bankrupt to deliver a quantity of oil in the month of January. The contract, therefore, might have been performed by the delivery of the oil at any time during the month of January. The date of the deed is the 30th Jan.; therefore at the date of the deed there was still an interval of time, a part of January, during which the bankrupt might have delivered the oil. I am unable, therefore, to say that the bankrupt was at the time of adjudication, that is, on the 30th Jan., liable by reason of the contract to a demand in the nature of damages. I quite agree in the argument, that it would not be desirable, if it were possible, by construction to extend this interpretation of the statute, for then it would be very difficult to define the limit to which it might be extended. Great confusion would be introduced into the administration of the bankrupt law by the introduction of new demands arising at indefinite periods subsequently to the adjudication. I am, therefore, of opinion that, in the construction he put upon this section of the statute, the learned commissioner was right. An argument was raised in support of a different construction by the counsel for the app., Mr. Daniel, which was founded ingeniously enough upon the 199th section of the Act of 1861. The argument was this—that, supposing the present app. to have presented his petition for adjudication in bankruptcy subsequently to the date of the deed, but before the expiration of the period allowed for complete registration, then, by the operation of the 199th section, his petition would have been dismissed in the event, supposing the trust-deed to become completely registered, and the inference was endeavoured to be derived from that, that inasmuch as registration has deprived him of his remedy, it ought to be considered therefore as an indication of an intention on the part of the Legislature that he should be permitted to prove under the bankruptcy, or under the trust-deed, which he was thus rendered unable to annul. But I do not think that any such consequence can follow. The section no doubt protects the trustee from any attempt by a creditor, who has not executed or assented to it, to upset the trust-deed by getting an adjudication of bankruptcy in the interval between the date of the deed and the final registration. But the remedies of the creditors are left in other respects wholly untouched. The remedies, therefore, of the present app., supposing he succeeded in getting the damages ascertained, will remain, subject only to this, that he is unable, by reason of this enactment, to interfere with the validity of the trust-deed. I do not think, therefore, that any inference can be derived from that section which will warrant me, if it were possible so to do, to put any other construction upon the language of the 153rd section than the construction which the commissioner has put, and which I entirely approve of. I must affirm the order and dismiss the appeal. The costs will follow in the usual course.

Solicitors: for the app., *Coleman and Bradley*; for the trustees, *Clarke, Son and Rawlins*, agents for *Wells and Smith, Hull*.

Saturday, Feb. 13.

(Before the LORD CHANCELLOR (Westbury.)

MORTIMER v. PICTON.

Settlement—Annuity by way of jointure—Variation of securities by the court under the statutory powers of investment—Arrears.

Waller mentioned this cause again to his Lordship: (see the report, *ante*, p. 591.) He stated that from the indorsement on the Attorney-General's brief it appeared that the court, after directing the investment to be made in Old East India Stock (as to which there was no question), had proceeded to order that the dividends should be paid to the plt., first in satisfaction of the arrears due to her of the annuity of 500*l.* (which the previous investment had failed to realise), and then that the annuity of 500*l.* should be paid thereout to the plt., or the dividends themselves if they did not amount to that sum. Some doubt had been entertained whether this note expressed his Lordship's intention with regard to the payment of the arrears of the annuity; and with the consent of all parties the matter was now mentioned with a view of obtaining his Lordship's opinion thereon.

The LORD CHANCELLOR observed that nothing had been said to him about the arrears. He thought that those arrears could not be regarded as a debt; there was no contract under which they could be established as a debt; and upon the whole case he should feel great difficulty in making any order as to payment of the arrears. His Lordship (giving his impression only, as he did not wish the parties to be put to the expense of appearing again on the minutes) said he feared all he could give the plt. was the income of the fund from the date of the new investment. The provision for the benefit of Mr. Rasch's client (a purchaser of part of the reversion) must be added. But the court would pause long before it made any order respecting payment of arrears of the annuity prior to the date of the order.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Dec. 16 and 21, and Jan. 14.

COATES v. COATES.

Statute of Limitations—Principal and surety—Debt—Legacy—Set-off—Release of surety as to interest on debt—Discharge of surety.

Although a debt due to a testator's estate is barred by the Statute of Limitations, his executors may set off a legacy bequeathed by him to the debtor against the debt, and retain the same accordingly.

Where a testator bequeathed the residue of his property to his widow and executrix for her life, and she released the surety for a debt due to her husband's estate from payment of all interest on the debt, such release was

Held to extend only to her life-interest in the principal moneys due in respect of the debt.

A. and B. were indebted to C. on a joint and several promissory note, A. as principal, B. as surety. A. deposited with C. a policy of assurance as a collateral security for the debt. C. died, appointing D. his executrix. A. became bankrupt; D. proved for the balance of the debt against A.'s estate, and without communicating with B., surrendered the policy to the insurance office for value:

Held, that B. was not thereby discharged from his original liability.

This suit was instituted for the administration of the estate of Benjamin Coates.

John Green and William Green were indebted—the first as a principal, the second as a surety—to Benjamin Coates, on a joint and several promissory

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note, dated the 4th March 1836, for 1000*l.* advanced to John Green, and also for interest due thereon. John Green was also indebted to Benjamin Coates on another promissory note for 1000*l.*, signed by John Green alone, and dated the 20th Aug. 1838. John Green being so indebted, viz. in the two sums of 1000*l.* secured by the two notes, deposited with Benjamin Coates, on the 31st Aug. 1839, as a collateral security for both debts, a policy on his life for 2000*l.*, effected with the Rock Life Assurance Society.

Benjamin Coates by his will bequeathed the residue of his estate to his widow for life, and appointed her and her sister Mary Coates his executrices. By a codicil dated April 16th, 1841, he bequeathed the sum of 1000*l.* to William Green, to be paid to him six months after the death of the testator's widow.

The testator died on 30th March 1845, and his two executrices duly proved his will and codicil. In 1845 John Green became bankrupt. The executrices surrendered the policy to the office for 79*l.* 10*s.* They then proved against the estate of John Green for the sum of 1560*l.* for principal and interest due on the two sums of 1000*l.* each, and they afterwards received from the bankrupt's estate two dividends of 48*l.* 15*s.* in respect of the balance so due.

William Green was in Australia at the time of John Green's bankruptcy, and was not communicated with as to the surrender of the policy.

The testator's widow died in 1859, having by her will released William Green from all his liability to payment of "interest" on the joint promissory note for 1000*l.*

Mary Coates survived her co-executrix, the testator's widow, and died, having by her will duly appointed executors thereof.

Mary Coates's executors claimed a right to retain the 1000*l.* bequeathed to William Green for so much of the principal and interest of the 1000*l.* debt, for which he was surety, as remained unpaid.

W. F. Robinson (Southgate, Q.C. with him) appeared for the plt., and contended that, although the debt was now barred by the Statute of Limitations, the executors of the surviving executrix of the testator were entitled to retain the 1000*l.* in question, on account of what was still actually due on the joint and several promissory note for 1000*l.* to Benjamin Coates's estate. They cited

Courtenay v. Williams, 3 Hare, 539;

Rose v. Gould, 15 Beav. 189.

They also insisted that the widow's release extended only to the interest on the debt, that was to say, to her life-interest in it; and that the surrender of the policy to the office did not release William Green from his suretyship:

Purdon v. Purdon, Hudson & Brooke (Irish), 229, cited vol. 1 C. P. Coop. 617;

Capel v. Butler, 2 S. & St. 457;

Mayhew v. Crickell, 2 Sw. 185;

6 Geo. 4, c. 16, s. 50;

Browne v. Carr, 2 Russ. 600; s. c. 7 Bing. 508;

Newton v. Charlton, 10 Hare, 646;

Pledge v. Buss, John. 663;

Pearl v. Deacon, 24 Beav. 186; s. c. on app. 1 De G. & J. 461.

J. Hinde Palmer, Q.C. and *Bovill* appeared for other parties in the same interest with the plts.

Selwyn, Q.C. and *Turner* appeared for William Green, and argued, that there was such laches in the case as to release the surety. They cited

Pearl v. Deacon (*ubi sup.*);

Capel v. Butler (*ubi sup.*);

Straton v. Rastall, 2 Term Rep. 366;

Watson v. Alcock, 4 De G. M. & G. 242;

Samuell v. Howarth, 3 Meriv. 272;

Rees v. Berrington, 2 Ves. jun. 540.

Baggallay, Q.C. and *Peake* for other parties.

Robinson, in reply, cited

Greedy v. Lavender, 11. Beav. 417.

Jam. 14.—The MASTER of the ROLLS.—The question in this case is, whether a legacy of 1000*l.*, left by the testator Benjamin Coates to Wm. Green, or any part of it, is now payable? The facts are as follow: The testator lent John Green a sum of 1000*l.*, and took a joint and several promissory note for that amount from John Green, and from Wm. Green, who signed the same as surety for John. The date of that note was 4th March 1836. After that the testator lent John Green a further sum of 1000*l.* on the security of a fresh promissory note signed by him alone, and dated 20th Aug. 1838. John Green, on the 31st Aug. 1839, deposited with the testator a policy of assurance on his life for 2000*l.* effected with the Rock Life Insurance office, as a further security for the two sums of 1000*l.* each. That policy had been effected by him about a year previous, viz. on the 7th Sept. 1838. On the 16th April 1841 the testator by a codicil to his will left Wm. Green a legacy of 1000*l.* payable within six calendar months after the decease of his (the testator's) widow. On the 30th March 1845 the testator died. In the early part of the year 1845 John Green became bankrupt. The two executrices thereupon surrendered the policy to the office, and received in consideration for such surrender the sum of 79*l.* 10*s.* They then proved against the estate of John Green in bankruptcy for the sum of 1560*l.* for principal and interest, due on both sums of 1000*l.* each, and they received a dividend of 48*l.* 15*s.* in respect of each debt of 1000*l.* Nothing further seems to have been done so far as Wm. Green is concerned. The widow of the testator, who was the tenant for life of the whole residue, and who was the aunt of Wm. Green, died in 1859, having by her will released Wm. Green from payment of all interest due on her death from him on the promissory note. It was admitted in the arguments, that all proceedings at law to recover anything on the promissory note are barred by the Statute of Limitations; but the executrices of the testator now seek to set off that legacy against the debt due from Wm. Green. He objects to that course: first, on the ground that the debt is barred by the Statute of Limitations; secondly, because the widow, who was one of the original executrices of the testator, released him from the debt; and, thirdly, on the ground that the sale or relinquishment of the policy to the Assurance Office discharged the surety. I think that all those points must be decided against the legatee. As to the first, it is settled by *Courtenay v. Williams*, (which was affirmed on appeal) that a legacy may properly be set off against a debt barred by the Statute of Limitations. As to the second, the release of the executrix was not a release of the debt, but only a release of the interest on the debt which was due to her personally, and which therefore only bound her life-interest in it. The third point—viz., the surrender of the policy—has more to support it; but I think it cannot be treated as any discharge of the surety. John Green, the assured, became bankrupt. It was probable, if not certain, that he would not keep up the policy, from which he could obtain no benefit. It was not incumbent on the executrices of the testator to do so, and it would in fact have been a mere speculation on their part, which, if it had turned out unfavourably, might have been complained of by the surety. The executrices did what it was their duty to do. They realised the security, by selling it for what they could get for it; and they then proved against the estate of the bankrupt for the balance due on the promissory note. That is, at least, what I assume to have been done; but there is some difficulty about the dates. If they were as mentioned

in Miss Coates' affidavit, then the proof of the debt took place on the 17th June 1845, and the surrender of the policy on the 28th July 1846—upwards of a year later. That, I think, should be inquired into, as it may affect the balance due in respect of the legacy. But whether the policy was surrendered before or after the proof, it does not in my opinion release the surety. Although the property, which forms the security, may be a reversion, or some other, which at the time cannot be sold with any probability of its realising so much as it would afterwards produce—still it is, I think, the duty of the creditor to sell it, if by so doing he can make the estate of the principal debtor available for payment of a dividend on the debt, for which the surety is liable. The benefit of that dividend is, consequently, obtained by the surety in further discharge of his debt. As I have said, the amount due in respect of the legacy will probably be different, if the surrender took place before, or if after, the proof of the debt. If the surrender of the policy preceded the proof in the bankruptcy, the proof of 1560*l.* must be taken to be the amount due for principal and 60*l.* for interest on both sums of 1000*l.* at that time, after giving credit for 97*l.* 10*s.* already received from the policy. In the absence of any evidence to show me how much was principal and how much was interest, I must, as part of the principal has been paid off, treat the matter as if the interest had been paid up to the time of the proof and hold that the 1560*l.* was the total amount due at that time for principal, after deducting the 97*l.* 10*s.* On the authority of *Pearl v. Deacon*, which was affirmed by the Lords Justices, I must hold that the 97*l.* 10*s.*, which was the produce of a collateral security for both debts, ought to be set off against the amount due on the note to which William Green was a party. The result of the account would then be, that half of 1500*l.*, or 750*l.*, would be the amount of the debt due from William as surety at the date of the bankruptcy. From that will have to be deducted 48*l.* 15*s.*, the amount of the dividend received, and in addition to that, another sum of 48*l.* 15*s.*—that is, assuming that the 97*l.* 10*s.*, received for the surrender of the policy, had been divided between the two notes equally before the proof—so that 750*l.*, after deducting 48*l.* 15*s.* in respect of the dividend, and 48*l.* 15*s.* in respect of the produce of the surrendered policy, would leave 652*l.* 10*s.* as the balance of the debt due from William Green at that time. The interest on that was released by the executrix, the widow, up to the time of her death; so that this sum of 652*l.* 10*s.* will have to be deducted from the legacy of 1000*l.* payable at that time; and the balance, with interest at 4 per cent. per annum from six months after the widow's death will be the amount payable to William Green. If, however, the debt was proved before the policy was surrendered, it will disturb that calculation, and make a distinct one necessary.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINGLOW, Esqrs., of Lincoln's-Inn, Barristers-at-Law.

Jan. 20 and 21.

COPPARD v. ALLEN.

Inspectorship deed—Liability to account as trustee—Wilful neglect and default—Parties.

By a deed of inspectorship, to which the debtor was party of the first part, three inspectors of the second part and the creditors of the third part, the creditors granted to the debtor licence to carry on his trades or businesses of a farmer and brewer, without being sued, for the period of a year (to be extended, if necessary, to two years); and

*the debtor covenanted when required by the inspectors to furnish accounts, to pay from time to time a dividend of 2*s.* 6*d.* in the pound, and the surplus into a bank, or otherwise dispose of the same, as the inspectors should direct, and that if, in the judgment of the inspectors, the trades or businesses should become embarrassed or less adequate to answer the purposes thereby intended, he, the debtor, would, at the request of the inspectors, convey and assign his property to them for the benefit of the creditors as the inspectors should require. It was also agreed that, upon any sale, the surplus moneys should be paid over to the inspectors.*

Under this deed sales of the real estate were made by a solicitor acting on behalf of the inspectors, and in exercise of the powers conferred on them. With the proceeds, mortgages were paid off, but no dividend was paid to the creditors. The inspectors did not demand that a transfer of the debtor's estate should be made to them, and none took place: Held, that the inspectors were clothed by the deed with an active trust, and were answerable for the nonperformance of the covenant for conveyance to themselves; and inasmuch as they had, with the acquiescence of the debtor, dealt with the property, they were liable to account as trustees.

A single act of neglect proved against a trustee is sufficient to render him liable to a decree on the footing of wilful neglect and default.

Of the three inspectors, one was out of the jurisdiction; another was dead. The bill (in a creditor's suit) was filed against the third inspector only, and the debtor.

Objection on the ground that the other inspector and the representatives of the deceased inspectors were not parties, overruled.

This suit was instituted by the plt. Thomas Coppard, of Henfield, Sussex, on behalf of himself and all other the unsatisfied creditors of the deft. Richard Gates, a brewer and farmer at Horsham, in Sussex, for carrying into execution the trusts of a deed of inspectorship executed by him for the benefit of his creditors, and for an account against the deft. Alfred Allen, who was one of the inspectors under that deed, charging him with wilful neglect and default in getting in and administering the estate.

By the deed, which was dated the 31st Aug. 1851, and made between Richard Gates, of the first part, Fielder King, James Rhodes, and the deft. Allen of the second part, and the several creditors of Gates who might execute the same of the third part; after reciting that at a meeting of Gates's creditors it was represented to them by him that it would be for their benefit if his stock-in-trade and effects were got in and realised from time to time, and not by a forced sale, and it was therefore agreed that a year should be given to the said R. Gates to collect, get in, and dispose of his estate under the inspection of the three persons parties thereto of the second part; it was witnessed that the parties thereto of the third part granted to Gates licence to conduct and manage the affairs of his trade and business as a brewer and farmer, and to collect, get in and dispose of his stock-in-trade, estate and effects under the inspection of the three inspectors until the 30th Aug. 1852, if he (Gates) should so long live, and observe the covenants therein; and covenanted that the parties thereto of the third part would not during the time aforesaid sue the said R. Gates, nor attach his estate.

The deed contained a covenant by Gates, with the three inspectors and with the creditors, parties of the third part, when required by the inspectors, to make out in writing a true account of his debts, property and effects, and of the several incumbrances thereon, and to use his best endeavours to collect and get in

the same for the benefit of his creditors, and from time to time when any money should have been received by him sufficient to pay 2s. 6d. in the pound upon the debts, to pay and distribute the same unto and amongst his creditors, and so from time to time until all his debts should be paid; and until such payment to deposit the moneys received by him with the London and County Bank at Horsham, to an account to be opened for the purposes of the said estate, or otherwise dispose thereof as the three inspectors should from time to time direct.

By the terms of the deed it was provided that if by reason of any unforeseen cause any delay should take place in the final settlement of the debtor's affairs, so as to prevent his creditors from receiving the full amount of their debts at or before the expiration of a year, the inspectors might prolong or extend the time for the further space of another year. The deed further contained a covenant by Gates with the parties of the third part, that if at any time during the said term or intended term, his trades or businesses should in the judgment of the inspectors become embarrassed or less adequate to answer the purposes thereby intended, he (Gates) would at the request of the inspectors convey and assign to them all the then unapplied residue of his estate and effects for the use and benefit of the said creditors, as the inspectors should require. It was further agreed that on any sale the surplus moneys to arise therefrom should be paid to the inspectors in trust to pay and divide the same among the creditors.

At the time of the execution of the indenture by Gates, he was seized of real estates of considerable value, some of which were mortgaged, and was possessed of stock-in-trade, furniture, and book and other debts to a large amount. At a meeting of Gates's creditors prior to the execution of the above deed, it was represented that his assets amounted in value to 25,000*l.* and his debts to 35,000*l.*, and the *plt.* claimed to be a creditor to the amount of 5493*l.* 16s. 11*d.*

The bill alleged that out of the moneys received by the inspectors, large sums were paid by them to the mortgagees; but no dividend had ever been declared among Gates's general creditors. The bill further alleged, that the inspectors had received sufficient property belonging to Gates to have paid a considerable dividend on all his unsecured debts; but that such property had been misapplied and wasted to a considerable extent; and that, but for their wilful neglect and default, they might have received considerable sums in respect of the outstanding debts due to Gates, and of other portions of his property, besides what they actually received, and that the *def.* Allen ought to account for the moneys which might have been so received.

In 1854 James Rhodes, one of the inspectors, left the country, and had ever since remained out of the jurisdiction of the court. About a year before the filing of the bill, Fielder King, another of the inspectors, died, and Allen had since acted as the sole inspector.

The bill, filed on the 11th Nov. 1862, against Alfred Allen and Richard Gates only, alleged that, after continued pressing, the *def.* Allen's solicitor at length, in June 1862, sent to *plt.* a report of the assets of Gates; but that the *def.* Allen had refused to render any assistance in making out the same, and that the report was consequently very inaccurate and incomplete.

The bill further alleged that the *def.* Allen had retained in his own hands a very large sum, part of the proceeds of the estate, and that he claimed to retain a sum for remuneration, and to be reconped payments to a large amount, for some of which no vouchers were produced, and others were improperly made, and ought to be disallowed.

The *def.* Allen by his answer said that Wm. King, solicitor, of Godalming, a brother of Fielder King, took upon himself the management of the affairs of the inspectorship, and, except as after mentioned, conducted the whole of the business. A portion only of the proceeds of the real and personal estate was paid to him the *def.*, and by reason of Wm. King's refusal to deliver up the accounts to him, *def.* was unable to state specifically the particulars of the estate. In the schedule he had set forth an account of the moneys received by him, showing a balance of 141*l.* 15s. 8*d.* only in his hands belonging to the general creditors. He claimed to retain certain sums in respect of a judgment-debt of 1100*l.* The report sent by Wm. King in reply to the *plt.*'s application was prepared and sent without *def.*'s instructions, and he was unable to furnish a more complete account owing to the papers and accounts being solely in the hands of Wm. King, who had refused to deliver them up.

Wm. King, by his affidavit, denied that the estate had been realised by him, save in so far as he assisted in so doing as solicitor for the inspector. He said that the schedule to the *def.* Allen's answer was, he believed, inaccurate and defective. He had received the proceeds of the sale of some furniture for which he had not accounted, and he permitted Gates to retain other furniture, for which he was to pay 179*l.* 13s. 7*d.*, which he had not done.

Mr. Bolton, an accountant employed by Mr. Wm. King, deposed that the first account furnished by Allen consisted of two items only on a slip of paper, and that upon being pressed for further accounts he sent in particulars of a claim for travelling expenses amounting to about 100*l.* When a further account was furnished the witness, in a letter to Wm. King, described it as bearing "evident marks of error, confusion and stupidity."

Malins, Q.C. and *E. E. Kay*, for the *plt.*, cited:

Springett v. Dashwood, 2 Giff. 521; 3 L. T.

Rep. N. S. 542;

Kemp v. Burn, 7 L. T. *Rep. N. S.* 666.

Bacon, Q.C. and *Rowcliffe*, for the *def.*, argued that there was no trust or duty imposed upon him by the deed; that Gates had covenanted to get in his own estate, and that the *def.* was only liable to account for the sums he had actually received. The covenant to convey to the inspectors was one which the inspectors could not have enforced, and which was never acted upon. No wilful default had been committed by the *def.* The acts proved against him were insignificant, and the furniture in the hands of Gates was not lost. They also argued that Rhodes and the personal representatives of Fielder King ought to have been made parties, and that the suit was defective.

Brooksbank, for the *def.* Gates, submitted that there had been nothing in the conduct of Gates to necessitate the present suit; that he had offered and was ready to pay into court the 150*l.* due from him for the furniture, and asked to have the bill dismissed against him with costs.

THE VICE-CHANCELLOR.—The case of the *def.* Alfred Allen is that, from the peculiar nature of the deed of 1851, it being a mere deed of inspection, there were no duties imposed upon him of the kind alleged, or else they were such that he was justified in pursuing the course he has taken. The principal part of the argument on his behalf was, that there were no duties at all upon which this court could fasten a trust; and that there being no duties to perform, there could be no decree for performance of them. If, however, there were duties to perform, and there has been no performance, there has been a neglect of duty, and upon the whole case it seems to me to be one in which there has been great neglect on his part. The question is important, because it is to be feared that in cases of this kind, where

the duties of trustees under deeds of inspection are involved; and when the trusts are for the benefit of the creditors, it too often happens that there is not that degree of diligence or that rigid performance of the duties of the trusts which the interests of the creditors require. The court is, I think, bound to treat persons acting as inspectors or as trustees with a reasonable degree of indulgence; but at the same time it will require of them a reasonable degree of diligence in the performance of their duties. There can be no doubt as to the duties which were to be performed in this case. The form of the deed left it merely in covenant, that the whole of the property should be conveyed to and vested in trustees, in order that it might be sold and realised for the benefit of the creditors. The deed contains only a covenant to that effect, but the court must hold that the trustees were liable for the nonperformance of that covenant which it was their duty to exact from the debtor. It is said that the covenant was not with them but with the creditors, but that is no excuse at all in a case of this kind. But, in fact, the trustees had, under this deed, power to require, if necessary, an assignment of the whole of the property of the debtor; but practically no conveyance of the property was necessary, because their dominion over it never was resisted by the debtor. Here there can be no doubt that the inspectors had duties to perform, and that the debt. had been an active inspector. Through the intervention of a solicitor acting for the inspectors, the property was in part received and realised; part of it was sold, and some of the outstanding debts were got in. All that was done in the execution of the powers conferred upon the trustees; and nothing seems to have been required for the actual and complete performance of the trusts, or to enable the trustees to get in the whole of the property of the debtor, who seems, from the evidence, to have interposed no obstacle whatsoever to the performance of the trusts. The question is, how has the property been disposed of which was got in? It is clearly in evidence that it was got in with the knowledge and under the inspection and control of the debt. Allen. The bare fact that the balance, though it amounted to only about 150*l.*, had been, during a period of nine years at least, in the hands of the debt. Allen, and undisposed of by him, is evidence of neglect on his part. Another part of the evidence showing his neglect is, that the price of the furniture, though a sum not very considerable, yet of an amount sufficient to have made it the duty of Allen to get it in and hold it for the benefit of the creditors, has not been got in at all from the debtor, but still remains in his hands. It has been well settled that, in the case of a bill for an account against a person in a fiduciary character, one act of neglect is sufficient to make him liable to a decree for an account, as for wilful neglect and default for what he might have received. But the neglect and misconduct of the debt. are of a much more glaring kind; for, looking at the evidence of Mr. Bolton, the accountant and solicitor formerly employed by the inspectors, it is sufficient to say that it is wholly inconsistent with the answer of the debt. Allen. There is very little in this case which recommends this trustee to the indulgence of the court, for his conduct, according to the evidence of Mr. Bolton and the solicitor, has been throughout reprehensible. He has shown great neglect in the performance of his duties, and yet he has, at the same time, charged against the trust-estate to as great an amount as the utmost diligence on his part would have enabled him to do. It is objected that the debt. is only one of three trustees, and that the plt. ought not to have an account against him without bringing the other two trustees, Rhodes and King, or their representatives, before the court; but Rhodes is out of the jurisdiction, and that is a

reason for not having him before the court; and King is dead, and I can see no reason why his representative should be made a party to the suit. It has been well settled that a *cestui que trust*, seeking an account against trustees for a breach of trust by one of the trustees alone, will be justified in bringing that one before the court without the others. There is no difficulty presented in this case by the absence of the other inspectors, both of whom seem to have acted in the character of trustees. The plt. prays for costs up to the decree, and, looking at the defence of the debt. Allen, and the attitude he has assumed, I am of opinion that the plt. is entitled to the costs of the suit up to the date of the decree, and also that he is entitled to a decree for an account as for the wilful neglect and default for what the debt. Allen might have received. As to Gates, he has submitted to pay the 150*l.*, which appears to be still on his hands, into court, and the order will be that he do pay the same within one month. In taking the accounts against the debt. Allen, there must be yearly rests, with interest at 5 per cent. upon the balances. Though it does not help the debt.'s case that he was not more diligent in getting in the money which has remained in the hands of Gates, yet I can see nothing in Gates's conduct that entitles the plt. to a decree against him for costs.

Solicitors for the plt., *Palmer, Palmer and Bull.*

Solicitors for the debt., *Gregory and Rowcliffe*, agents for *J. D. Sadler*, Horham.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, ESQ'S,
Barristers-at-Law.

Jan. 11 and 19.

WATERHOUSE v. WILKINSON.

Practice—Sale in chambers—Reopening biddings.

The sale of an estate under a decree of the court before the chief clerk, when biddings were made by sealed tenders, is so far identical with a sale by auction, that any person may, within due time, apply to have the biddings reopened.

The plt. in this suit was, under the will of a Mrs. Caiger, entitled to an option of purchasing, at a price to be fixed by valuation of a competent person, all the real and personal estate of the testatrix, which was given, in the event of the plt.'s not electing to purchase, to trustees upon trust to sell by public auction or private contract. By a decree in the suit, dated June 14, 1862, a valuation was directed, with a view to the exercise by the plt. of his option. Part of the property consisted of a moiety of the premises, No. 1, St. Paul's-churchyard, and this was valued at 8000*l.* The plt. refusing to take this part of the property at such a valuation, it was ultimately put up for sale by auction, and the highest offer made being 3000*l.*, it was bought in. On the 1st Dec. 1863, all the parties interested attended at chambers, upon the hearing of an application for carrying into effect a conditional contract for the sale of the property to J. K. Farlow for 4200*l.* Application was then made on the part of the plt. for an adjournment to give him an opportunity of making a higher offer. After this, adjournments were made from time to time, at the instance of one or the other of the competing parties, till it was agreed by them, with the approbation of the chief clerk, that a final bidding on each side should be made by sealed tenders (all parties agreeing to be bound thereby), to be delivered in chambers and opened on Dec. 15. Accordingly, the parties attended on that day, and the chief clerk after opening the tenders declared the plt. to be the purchaser at the price of 4820*l.* However, on going before the chief clerk on Dec. 19 to obtain his

order to confirm the contract, the solicitor for J. K. Farlow attended, and required the biddings to be reopened, offering, on the part of his client, the price of 5300*l*.

The matter was now adjourned into court upon motion to confirm the sale to the *plt*.

Sir *H. Cairns*, Q.C. and *C. Walker*, in support of the motion, contended that this was in the nature of a sale by private contract, and therefore, on the authority of *Millican v. Vanderplank*, 11 *Hare*, 136, a stranger could not come in to reopen the biddings.

Rolt, Q.C. and *Bagshawe*, for the parties beneficially entitled under the will, contended that this was exactly like the case of *Barlow v. Osborne*, 6 *H. of L. Cas.* 556, where it was held that the biddings might within the eight days allowed by *C. O. xxxv. 52*, be reopened.

G. Lushington for the executors.

The VICE-CHANCELLOR said that the case must stand over in order that he might examine the minute of the chief clerk of the proceedings on the 15th Dec.

Jan. 19.—The VICE-CHANCELLOR, after recapitulating the facts of the case up to the 15th Dec., said that upon the face of the chief clerk's minute, it appeared that on the latter day "the highest bidder was confirmed." That expression was clearly inaccurate, for not only had the sale not then been approved by himself, but no certificate had ever been drawn up. All that he had decided in *Millican v. Vanderplank* was, that the sale was in that case a sale by private contract, and did not, for the reasons therein given by him, come within the same rule as was applied to sales by auction. That decision had never been overruled. But the circumstances of the present case seemed to him to tally exactly with those in *Barlow v. Osborne*, by which it was decided that a sale before the chief clerk by sealed biddings had those incidents of a sale by auction that it was taken out of the rules that governed a sale by private contract. Under the old practice a sale before the master was held to be confirmed by his report; this was now altered, and it was competent to any person, unless the sale was in the strictest sense a sale by private contract, to open the biddings within eight days after the signing by the judge of the chief clerk's certificate. He must therefore direct that the sale to the purchaser be not confirmed, and Mr. Farlow, paying all the costs of the purchaser and paying the purchase-money into court by a certain day, be approved as purchaser at the increased bidding.

Solicitors: for *plt.*, *Phillips and Andrew*; for other parties, *W. W. Vallance*.

Friday, Jan. 27.

KERNICK v. KERNICK.

Practice—Evidence—Motion to take affidavit off the file—Scandal—Relevancy.

In a suit by a married woman to establish her equity to a settlement of leasehold and personal estate to which she was entitled as next of kin of her father and of her brother, a defence was set up by answer, on the part of the husband, on the ground of her intemperance and adultery, part of the evidence in support of that defence being an affidavit of a person stating a conversation with the *plt.*'s alleged paramour, in which the latter admitted acts of adultery:

Held, that after replication filed, apart from the ground of scandal, an affidavit of mere hearsay evidence ought to be removed from the file on the ground of irrelevancy.

The *plt.* in this suit, after stating her title to certain leasehold estates, and to shares in collieries as next of kin of her father and brother, and her marriage in 1854 with the *deft.* without a settlement,

and charging acts of ill-treatment against her husband, prayed a settlement of the property. The husband in his answer alleged continued acts of misconduct on the part of the wife, and adultery committed by her, at the same time denying the charges of ill-treatment. Amongst other affidavits in support of his case was one by *W. Thomas*, stating a conversation between himself and the alleged paramour, in which the latter narrated at length the circumstances under which acts of adultery had taken place.

A replication had been filed. A motion was now made to take the affidavit of *Thomas* off the file, or, in the alternative, to expunge so much as rested upon hearsay.

Rolt, Q.C. and *F. Colt*, in support of the motion, argued that the matter objected to was not only scandalous, but as being hearsay was irrelevant. [They were stopped by the VICE-CHANCELLOR, who said, that apart from the character of the statements, their being mere hearsay was sufficient objection. Such evidence would be no answer to a suit by the wife for restitution of conjugal rights.] As to the costs of the motion they cited

Ex parte Simpson, 15 *Ves.* 476.

Karslake, in opposition to the motion, argued that it was impossible until the hearing of the cause to decide whether those statements were or not relevant. The statements, if true, would be a fair answer by the husband to the *plt.*'s suit, and he was entitled to support his case by the best evidence he could get; he could not procure the direct evidence of the paramour.

The VICE-CHANCELLOR said that this was mere hearsay evidence, and however innocent it might be, he could not allow it to stand. The costs must be according to the settled practice of the court.

Solicitors for the *plt.*, *Hollings, Sharpe and Uththorne*, agents for *Simons and Plews*; for *deft.*, *Wrenmore and Son*, agents for Messrs. *James*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SANDERS, Esqrs., Barristers-at-Law.

Thursday, Feb. 11.

GANDY AND WIFE v. JUBBER.

Nuisance—Area grating—Tenancy from year to year—Liability of reversioner.

A house having an iron grating over the front area adjacent to the public footway, and so constructed as to be a nuisance, was let by *A.* to a tenant from year to year, *A.* doing repairs. *A.* died and devised to *B.* on trust, who received the rent from the same tenant for several years, and did no act to determine the tenancy:

Held, that *B.* was liable for injury to a person whose leg slipped through the grating during the tenancy.

Declaration.—That a certain messuage and an area or cellar in front of the said messuage and adjoining the same, and which area or cellar was covered and protected by an iron grating, were in the occupation of *Ann Page* as tenant thereof to the *deft.* upon the terms (amongst other things) that the *deft.* as such landlord thereof should keep the said messuage and area or cellar and the said grating in good repair, and the said messuage was then near to a certain common and public footway, and the said area or cellar was then near to and under the said footway, and it was then necessary and proper that the said iron grating should be kept in good and sufficient repair, so that persons lawfully using and passing along the said footway might not be in danger of falling or passing through the said iron grating or into the said area; yet

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the deft., well knowing the premises, wrongfully and negligently permitted the said iron grating to be and continue in such bad and insufficient repair, that whilst the plt. Susannah (then being the wife of the plt. David) was lawfully using and passing along the said footway, one of her legs passed through the said iron grating into the said area or cellar, whereby she was wounded, &c.

Third count.—That a certain message and an area or cellar in front of the said message, and adjoining the same, and which area or cellar was then covered and protected by an iron grating, were in the occupation of Ann Page, as tenant thereof to the deft. from year to year, the reversion thereof belonging to the deft., and the said tenant was not, by the terms of the said tenancy, under any contract or liability to alter or repair, or keep in repair, the said message, area, or cellar, or the said grating, and the said message was then near to a certain common and public footway, and the said area or cellar was then near to and under the said footway, and it was then necessary and proper that the said iron grating should be so constructed and kept in good and sufficient repair so that persons lawfully using and passing along the said footway might not be in danger of falling or passing through the said iron grating, or into the said area, and the said iron grating had been and was for several years of the said tenancy, before and continually up to and at the time of the happening of the grievance and injury hereafter mentioned, in a dangerous state and in a bad and insufficient state of repair, so that persons lawfully using and passing along the said footway had been and were in danger of falling or passing through the said iron grating and into the said area, and after and whilst the same was in such dangerous state and bad and insufficient repair as aforesaid, the deft. might, as such landlord and reversioner as aforesaid, have lawfully determined the said tenancy by his own sole act and deed, so that the same might and would have been determined before the happening of the grievance hereinafter mentioned, yet the deft. did not determine the said tenancy, but suffered and allowed the same to continue, and suffered and allowed the said Ann Page to remain tenant of the said message and area or cellar without being under any contract or liability by the terms of the said tenancy to alter or repair the said iron grating, and the deft. wrongfully and negligently allowed the said iron grating to be and continue in such a dangerous state and in bad and insufficient repair as aforesaid, up to and at the time of the happening of the grievance and injury hereinafter mentioned, and by reason of the premises whilst the plt. Susannah (then being the wife of the plt. David) was lawfully using and passing along the said footway, one of her legs passed through the said iron grating into the said area or cellar, whereby she was wounded, &c.

And for a fifth count the plt. repeats all the allegations in the third count contained, and in addition thereto says, that whilst the said iron grating was in such bad and insufficient repair as therein alleged, and before and whilst the deft. might have so determined the said tenancy as therein alleged, and thenceforth up to and at the time of the happening of the grievance and injury therein mentioned, the deft. had notice of the said iron grating being in such a dangerous state, and in bad and insufficient repair as aforesaid.

The other counts of the declaration are not material. Plea, not guilty. (There were several other pleas not now material.)

At the trial before Bramwell, B., at the Croydon Summer Assizes 1853, it appeared that Mrs. Gandy, the female plt., on the 21st Aug. 1862, about 6 p.m., stopped at No. 30, Leigh-street, Burton-crescent, to speak to Mrs. Page, the tenant of No. 30, who was standing at her door. On turning away from Mrs.

Page, Mrs. Gandy's leg slipped through an iron grating which was over the area of No. 30, and was much hurt. In consequence she became a patient at the University College Hospital, and the injury resulted in permanent lameness of the leg. The grating formed part of the house and was over the area and admitted light to the kitchen, and consisted of iron rails extending horizontally from the house to the public foot pavement. It was proved that the rails were too wide apart, and that children's legs had on previous occasions got through them, and the deft.'s attention had been called to the insecurity of the grating. It never was in a fit state for persons to walk over. The jury found that the grating was a nuisance to the highway. Mrs. Page's husband took the house more than ten years ago from Mr. Ward, the tenant to pay the rent quarterly and the landlord to do the repairs. Page died in 1860, and Mrs. Page had continued tenant on the same terms. Ward died in 1859, and left his house, with other property, to the deft. on trust. The landlord had always done the repairs, and the rent was paid to the deft. The learned Baron directed the jury that the deft. was the party responsible in case they should be of opinion that the grating was in an insecure and dangerous state.

The jury returned a verdict for the plt., damages, 65*l*.

A rule nisi having been obtained to enter the verdict for the deft., or a nonsuit,

G. Shaw showed cause.—The deft. is liable. The grating in itself is a nuisance, and the house was let to Mrs. Page's husband therefore with a nuisance on it. The tenancy, being a yearly one, is to be considered, as was said by Paterson, J., as recommencing every year: (*Tomkins v. Lawrence*, 8 C. & P. 729.) In *Cauley v. Arnold*, 28 L. J. 354, Ch., Wood, V.O. said: "The effect of a tenancy from year to year is that the tenant takes a new interest every year." And in *Reg. v. Padley*, 1 A. & E. 822, Littledale, J. said: "If there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable."

Todd v. Flight, 30 L. J. 21, C. P.; 3 L. T. Rep. N. S. 325;

Rosewell v. Prior, 2 Salk. 460;

Payne v. Rogers, 2 H. Bl. 350;

Russell v. Shenton, 3 Q. B. 449;

Barnes v. Ward, 9 C. B. 392;

Woodfall's L. & T. by Cole, 734.

J. Koye in support of the rule.—The deft. is not liable. There was a continuing interest in the tenancy. A yearly tenancy does not determine at the end of each year. There was no letting therefore by the deft.; he was a mere trustee. [BLACKBURN, J.—*The cestui que trust* must indemnify him.]

Reg. v. Watts, 1 Salk. 357;

Bishop v. Trustees of the Bedford Charity, 29 L. J. 53, Q. B.;

Chambliss v. Robinson, 4 Ex. 163.

CROMPTON, J.—I think that the rule should be discharged. I cannot see that the ruling of my brother Bramwell was wrong. There was strong evidence that the grating was a nuisance near the highway in the manner in which it is averred in the declaration, and I have a strong impression that the charge of negligence was made out by the evidence. The first point is whether, upon the special facts alleged in the declaration, there was the duty in the reversioner to keep the grating in good repair, and whether he was liable for allowing it to be and continue in a dangerous and bad state of repair: in other words, was the duty alleged made out by the evidence, and was the deft. guilty of negligence in keeping up this nuisance? If there was no such duty the allegation in the declaration that the deft. wrongfully and negligently allowed the

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[Q. B.]

said grating to be and continue in such a dangerous state will not help the plt. Now, I think that Mr. Shaw's argument was well founded, and that the verdict was right on the plea of not guilty. In early times it was established that the owner of freehold land was bound to keep it free from nuisance. And in *Reg. v. Watts*, 1 Salk. 357, it was held that a tenant at will was liable for suffering a house standing on the highway to be ruinous and like to fall down, which he occupied and which he was charged as liable to repair *ratione tenuræ suæ*. And the Court said, "The *ratione tenuræ suæ* is only an idle allegation: for it is not only charged but found that the deft. was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier and not to the estate which is not material in such case as to the public." No doubt if the owner lets the property and puts it out of his own power to keep it free from a nuisance, it would be hard if he was to be held liable for the acts of his tenant when he could not interfere to prevent it. In *Rosewell v. Prior*, 2 Salk. 460, "the case was a tenant for years erected a nuisance and afterwards underlet to J. S.; the question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease. By the Court: It lies, for he transferred it with the original wrong, and his demise affirms the continuance of it; he hath also a rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. Receipt of rent is upholding. The action lies against either at the plt.'s election." If a person lets property with a nuisance upon it he is liable for that nuisance. In some of the cases it has been held that notice of the nuisance is not necessary to render the party liable. Where an obstruction or erection is a nuisance in itself the party letting it is liable, but where the nuisance is occasioned by some additional act, as lighting fires, the occupier is liable. There is no great hardship in making a landlord liable who lets land with a nuisance upon it, but there may be very great hardship to the public if the tenant from year to year or week to week is the party liable, for he may be a working man, or very likely a pauper occupier. The great question in this case is, whether there was a reletting, the tenancy not having been terminated but allowed to go on as before. In many cases it has been said that a tenancy from year to year is to continue so long as the parties choose. In *Tomkins v. Lawrence*, Patteson, J. ruled that it was no variance to say that a tenancy from year to year commenced on a day subsequent to that at which it commenced originally, for it was a new tenancy. The principle seems to be, that the reversioner is not liable where he has no power to interfere to prevent the nuisance, but where he has is liable. Then, in this case, had not the deft. the power of interfering to prevent the nuisance? It is the same thing, allowing the tenant to continue on his tenancy, as reletting the house from time to time. The case is not entirely without authority. It must be a reletting with an actual nuisance on it. In *Reg. v. Pedley*, Littledale, J. said: "If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet, by purchasing the reversion, he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability. Yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the

tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it. Here the periods are short, so that there has been a reletting, and that has taken place after the user of the buildings had created the nuisance." That judgment was approved of by Crosswell, J. in giving the judgment of the court in *Rich v. Basterfield*: "If then *The King v. Pedley* is to be considered as a case in which the deft. was held liable because he had demised the buildings when the nuisance existed, or because he had relet them after the user of the buildings had created a nuisance, or because he had undertaken the cleansing and had not performed it, we think the judgment right, and that it does not militate against our present decision." This case comes within the principle of reletting with a nuisance upon it, and the authorities are in favour of the deft.'s being liable in that view of the case. On the whole, although the case is one of some doubt and difficulty, I cannot see that the direction of Bramwell, B. was wrong, and I think that the rule should be discharged.

BLACKBURN, J.—I am of the same opinion. The peculiar way in which the question arises is, whether enough of the breach of duty alleged in the declaration was proved to entitle the plt. to a verdict on the plea of not guilty. The declaration charges that the nuisance mentioned in the declaration was maintained and kept by the deft. the reversioner, he not having given notice to his tenant to quit as he might have done, and also that he wrongfully and negligently allowed it to continue, which could hardly have been proved without he had notice of it. The question comes to this, whether enough was proved to support the real substance of the breach of duty. The cases show that the reversioner is not, merely as such, liable for a nuisance which exists on the land: (*Chandler v. Robinson*.) Then comes the limitation in *Rosewell v. Prior*, that, if he lets with the nuisance on the land, he is liable; and that the action lies against either the tenant or the reversioner. That must be taken with the qualification whether it is an original demise or a renewal. If it is an original demise with the nuisance on it, he is liable for the continuance of the nuisance. In this case the facts are, the deft. is the reversioner of houses held upon a tenancy from year to year, which had continued for some years before the reversion came to the deft. The nuisance existed before he came into possession of the reversion, and when he did he failed to determine the tenancy. Is that such a reletting within *Reg. v. Pedley* as to make him liable for the continuance of the nuisance? A tenancy from year to year is determinable on either party giving six months' notice; but if no notice is given the tenancy continues on. For many purposes it may be treated as a reletting where no notice is given. And Patteson, J., in *Tomkins v. Lawrence*, so treated it. Is the not giving notice to quit a re-demise so as to make the reversioner liable for reletting land with a nuisance upon it? The only authority that I am aware of is that of Littledale, J., in *Rex v. Pedley*, a very learned and cautious lawyer. As my learned brothers Crompton and Meier have come to the conclusion that the reversioner is liable in this case, I am inclined to agree with them.

MELLOR, J.—I also think that the rule should be discharged. I agree that the liability of the owner results from the fact that he ought not to erect a nuisance on his land which is injurious to another; but where he lets the land without a nuisance on it, and the tenant creates one, then the tenant is the party so liable. Here the evidence shows that the grating was a nuisance of considerable duration, and that in its original construction it was so constructed as to be a nuisance. This is clear, that it existed during several annual periods, at which the deft. might, if he had chosen, have put an end to Mrs. Pag's

tenancy, or put an end to the nuisance by permission of the tenant. The obligation on the reversioner was, not to give his tenant notice to quit, but to prevent the continuance of the nuisance. As was said in *Reg. v. Watts*, the receipt of rent was an upholding of the nuisance. This being a tenancy from year to year, I am of opinion that we may treat this as a case of a new letting, because it is clear that the reversioner might have put an end to the tenancy if the tenant had refused to let him put an end to the nuisance.

Rule discharged.

COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.
Barristers-at-Law.

Jan. 12 and 20.

MORGAN AND ANOTHER (Assignees of G. Knight) v. KNIGHT.

Bankruptcy—Trove by assignees of a bankrupt who was an uncertificated bankrupt under a former bankruptcy—Validity of second bankruptcy.

An adjudication in bankruptcy against a person who is an uncertificated bankrupt under a former bankruptcy is not void.

Where assignees of a bankrupt brought trover for goods obtained by the deft. from the bankrupt by a fraudulent assignment made in contemplation of bankruptcy, the deft. was held not entitled to defeat the plts.' claim by setting up the title of assignees under a former bankruptcy under which the bankrupt had not obtained his certificate, those assignees not having intervened to claim the goods.

The first count of the declaration was for the conversion before the bankruptcy of G. Knight of goods belonging to him. The second count was for the conversion after the bankruptcy of G. Knight of goods belonging to the plts. as assignees. The deft. pleaded the general issue, and that the goods were not the property of G. Knight or of the plts. as assignees.

The deft. was the son of the bankrupt, and claimed the goods as having purchased them from his father, but the jury at the trial before Bramwell, B., at the last summer assizes at Lewes, found that this sale was a fraudulent assignment made in contemplation of bankruptcy. It was proved, however, that some years previously George Knight had been bankrupt, and that assignees had been appointed, and that he had never obtained his certificate, and the deft.'s counsel contended that the plts. had no title under the second bankruptcy, the proceedings under it being void. Bramwell, B. was of that opinion, and directed a verdict to be entered for the deft., the plts. having leaving to move to enter it for them for 100*l.*, the estimated value of the goods. A rule having been obtained accordingly,

M. Chambers, Q. C. and Prentiss showed cause.

Hansen and Willoughby, in support of the rule, contended, that as the assignees under the first bankruptcy had not intervened, the plts. were entitled to the goods.

The following authorities were referred to in the course of the argument:

Till v. Wilson, 7 B. & C. 684;
Herbert v. Sayer, 5 Q. B. 965;
Nelson v. Cherrell, 7 Bing. 663;
Ex parte Brown, 1 V. & B. 60;
Re Chambers, 3 Mont. & Ayr., 294;
Ex parte Proudfoot, 1 Atk. 252;
1 Chitty on Pleading, 29;
Ex parte Butler, 2 Mont. D. & De G. 731;
Drayton v. Dale, 2 B. & C. 293;
Laroche v. Wakeman, Peake, 140;
Fyson v. Chambers, 9 M. & W. 460;

Butler v. Hobson, 4 Bing. N. C. 290;

1 & 2 Will. 4, c. 56, s. 25; and

12 & 13 Vict. c. 106, s. 141. *Curr. adv. vult.*

Jan. 20.—ERLE, C. J. read the judgment of the court (Erle, C. J., Williams, Willes and Keating, JJ.)—In this case a rule had been granted for setting aside the verdict for the deft. and entering it for the plts. for 100*l.* It was an action of trover by the plts., the assignees of a bankrupt. The defence was, that the bankrupt was an uncertificated bankrupt at the time of the adjudication under which the plts. became assignees; that, therefore, the property both present and future of the bankrupt was vested in the assignees under the former bankruptcy, and the latter bankruptcy was void. It appeared that the bankrupt after the first bankruptcy had traded, and in the course of that trading had obtained the goods in respect of which the action was brought, and had made a fraudulent assignment of these goods to his son the deft., and the party who supplied the goods was the petitioning creditor in the second bankruptcy, and was seeking, by means thereof, to recover payment for the goods so fraudulently assigned, and that the assignees under the former bankruptcy had not in any manner interfered. Under these circumstances the claim of the defts. to defeat the plts. by setting up the title of the former assignees seemed inequitable and unreasonable, and we have to ascertain whether it can be maintained according to law. In support of the claim the deft. cited several authorities. In *Till v. Wilson* it appeared that an uncertificated bankrupt traded and became indebted, and a second commission had issued against him under which he had obtained a certificate, and he was taken in execution for a debt which would have been barred by the certificate if the second commission was valid; but the Court refused to discharge him out of custody because they held the second commission, under these circumstances, to be a nullity. In *Fowler v. Coster*, 10 B. & C. 431, the deft. moved to be discharged out of custody for a debt which was barred by his certificate under a commission, if that commission was valid. The motion was opposed upon the ground that he had been twice bankrupt, had obtained two certificates, and paid no dividends, and that therefore the third commission on which he relied was void for the same reason that would have made it void if he were an uncertificated bankrupt. The Court adjudged the commission to be absolutely void. In *Philips v. Hopwood*, 1 B. & Ad. 619, it appeared that the plts. were assignees under a commission issued against an uncertificated bankrupt, and were entitled to maintain trover if that commission was not void by reason of the former commission; and it was held to be void. In *Nelson v. Cherrell*, 7 Bing. 663, trespass was brought for taking goods, and the question was raised by the pleadings whether the commission against an uncertificated bankrupt was void, and the Court adjudged it to be so on demurrer. On the trial of the issues in the same case afterwards, the question was again raised in respect of the right of the assignees under the last commission to goods in the order and disposition of the bankrupt at the time of the bankruptcy, and the Court again decided that the last commission was void, and refused a rule to show cause, on the ground that the question was decided: (8 Bing. 316.) In coming to these decisions, the court relied on the *dicta* of several Chancellors; and on *Martin v. O'Hara*, Cowp. 823. These authorities have been fully discussed in the cases cited below, and it suffices to observe here that in none of the cases before the Chancellors, above referred to, was there a decision that the last commission was void; on the contrary, its validity to a limited extent was recognised. Also in *Martin v. O'Hara* Lord Mansfield assigns as one reason for refusing to discharge the deft. out of custody that the latter

commission was tainted with fraud on the part of the bankrupt. All of these decisions rest on two assumptions—first, that an uncertificated bankrupt can have no property; and, secondly, that if he has no property the commission is void by reason that there cannot be any effects to be administered under it. These are strong authorities for holding the last bankruptcy to be void; but the authorities for holding it to be valid, and the reasons on which they are founded, appear to us to be stronger. It is clear that property is not an essential to constitute bankruptcy, if there is the requisite trading, and that an act of bankruptcy is valid without any property. It is also clear that an uncertificated bankrupt may acquire property. This appears from the law which transfers his after-acquired property to his assignees. The law assumes that he may acquire property, otherwise there can be none to be transferred; and the result of the cases is not only that he may acquire property, but may hold it against all the world except his assignees, and may create rights to hold it against them if they expressly or impliedly consent to such property being in his order and disposition at the time of the subsequent bankruptcy. In *Fyson v. Chambers* the plt. was administrator of a bankrupt who had been before insolvent, and had not paid 15s. in the pound under his bankruptcy. After the death of the bankrupt, the deft., as auctioneer, had sold the goods for the next of kin, and paid over the proceeds; still he was held liable to the plt., who had taken out administration after the conversion. The effect of the decisions is, that an uncertificated bankrupt may acquire property, and as the conversion by the deft. was at the request of the parties apparently in lawful possession, and the grant of administration was not made to the plt. as creditor till long after the conversion, but still was held to relate back to the death of the bankrupt intestate, that vested in the plt. a right of action for the conversion previous to the grant. The right of the bankrupt was not possessory, and is good as against a wrong-doer as a grant of property transmissible after death. It follows that, if the right was so transmissible to the administrator, it was also a right capable of being transmitted to the assignees in bankruptcy, there being a beneficial interest in the property if he had been again made a bankrupt. In *Herbert v. Sayer* the plt. sued as the holder of a bill; the deft. pleaded that he had been twice bankrupt, and that the plt. had been twice bankrupt, and had not paid 15s. in the pound. The Court of Q. B. held the plea bad. The judgment is full of learning and sound reasoning, and decides that an uncertificated bankrupt has a right to acquire property and hold it against all the world, except his assignees, and if they choose not to interfere he is absolute owner. In *Butler v. Hobson*, 4 Bing. N. C. 290, it appeared that the bankrupt had not paid 15s. in the pound under a second commission, and was therefore in effect uncertificated, and he had traded with the consent of the plt. as assignee, and had goods in his order and disposition at the time he was made a bankrupt the third time under which the deft. was assignee. All the Court on the argument held that the property so left in the order and disposition of the bankrupt passed to the plt. as assignee under the former commission; but there was also an insolvency. Though some of the judges at first avoided deciding whether the first fiat was valid or not, and the property would be in the same situation as if the fiat was void, yet Bayley, J. decides that it was in the deft. as assignee under the last fiat, and the reasoning of all the court is clear to show that the interest that a creditor acquires in property under such circumstances can pass to the assignees under the last fiat. On the taxation of costs in this case, a further question arose, so that the court had to decide the validity of the fiat, and the whole Court gave

judgment that the third fiat was not a nullity, but the assignees under the second commission who had allowed the bankrupt to retain possession of the goods as reputed owner are not in a condition to dispute the title of the assignees under the subsequent fiat to seize and administer the goods: (5 Bing. N.C. 128.) In addition to the cases cited at length we would refer to the collection of all the authorities relevant to the point made by the counsel who argued in *Benjamin v. Belcher*, 11 A. & E. 350, and among these we would refer particularly to the very able discussion in the work on bankruptcy of Montague and Ayrton, appendix, pp. 21, *seqq.* We beg also to refer to *Ex parte Butler* in which the second assignees mentioned in the case of *Butler v. Hobson* claimed in the Bankruptcy Court as against the third assignees, and that Court held that, beyond and besides the reputed ownership clause, the second assignees were in equity precluded by their conduct from claiming either the personal or real property after acquired, as against the assignees under the third bankruptcy. We have referred to the authorities at some length because they conflict. By the review we are brought to the conclusion that a commission against an uncertificated bankrupt, was not void under the former statute, nor is an adjudication against such a bankrupt void under the statute now in force; and we consider that we have adduced sound authority for holding that the plt. are assignees under a valid bankruptcy, and our judgment is therefore for the plt. The rule therefore is absolute for entering the verdict for them for 100*l.*

Rule absolute.

Attorneys for the plt., *Linklater and Co.*
Attorney for the deft., *J. Bowen May.*

May 25 and Feb. 1.

PIGOT v. CUBLEY.

Trover—Deposit of goods—Extension of credit—Right to sell.

A. deposited goods with B. as security for the repayment of a loan in one month. At the end of the month B. entered into an agreement for an indefinite extension of the credit, A. agreeing to pay interest monthly. At the end of the second month, neither the principal or interest being paid, B. wrote to A. demanding the payment of an amount 1*l.* in excess of what was actually due, and informing him that if it was not paid he should sell the goods. The money not being paid, B. sold the goods:

Held, in an action of trover by A. against B., that B. had no right to sell till he had properly determined the extension of the credit, and that sending a letter demanding an excessive amount had not that effect, and therefore A. was entitled to recover the value of the goods:

Seem, that, on the authority of *Johnson v. Stear*, 9 L. T. Rep. N. S. 538, if there had been no extension of the credit, B. would have had a right to sell.

Trover for two pictures.

Pleas:—1. Not guilty. 2. That the goods were not the goods of the plt.

The plt. being in want of money applied to the deft. for a loan of 5*l.*, which the deft. advanced (retaining 1*l.* for one month's interest) on receiving from the plt. a promissory note payable in one month, and, as collateral security, an order on the proprietors of the Canterbury-hall for two pictures, the property of the plt., which were exhibited there. The order was in the following terms:—

"Sir,—I hereby authorise you not to allow the two pictures placed by me in your gallery to be given up to any one except Mr. John Cubley or his order."

"July 3, 1862.

"R. S. PROOT."

On the 7th Aug. 1862 the deft. wrote to the plt.

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informing him that his note was overdue, and requesting him to attend to it. The plt. then saw the deft. and verbally arranged with him for a month's further time, for which a sum of 10s. was to be paid, and the plt.'s account of this arrangement was, that the deft. said he should charge 10s. for every further month's delay in payment, while the deft.'s version was, that he gave the one month's further credit only.

On the 17th Sept. 1862 the deft. wrote the following letter to the plt. :—

"Sir,—Unless the amount of my claim, 6l. 10s., is settled by you, I shall proceed to dispose of the pictures in my charge towards liquidation of the same, and then proceed against you for whatever balance remains after they are sold,—I remain, &c.

"Mr: S. Pigot." "JOHN CUBLEY."

Six pounds ten shillings was 1l. in excess of what was actually due. The plt. being out of town did not receive this letter till November. On his return to town he found the deft. had sold one of his pictures, and the other was about to be raffled for. He called on the deft. and saw his son, and remonstrated with him, and in January he saw the deft. and informed him that he was prepared to pay his demand, and should require the pictures back. He then tendered him the money, which deft. refused to accept, but said he would try and get the pictures back; failing to do so, the plt. commenced this action.

At the trial before Williams, J., at the first sittings in Easter Term, the learned judge asked the jury to say whether the agreement was, according to the plt.'s account, indefinite; that he was to go on paying 10s. a month, or only for a single month, according to the deft.'s account. The jury found that it was indefinite, and not for one month only, and that the value of the pictures was 20l.

The learned judge then directed a verdict for the deft., with leave to the plt. to move to set it aside and enter a verdict for the plt. for 20l., on the ground that there was no power of sale.

Watkin Williams having obtained a rule accordingly,

D. D. Keane now showed cause.—Here there is a loan of money, a deposit of goods as security, and a time fixed for payment, and it is laid down by Gibbs, C.J., in *Potholier v. Dowson*, Holt N. P. C. 383, that this constituted more than a lien, and gives a right to sell if the money is not repaid :

Kemp v. Westbrook, 1 Ves. sen. 278;

Story's Equity Jurisprudence, ss. 1031, 1033 ; and the cases collected there.

Martin v. Reid, 11 C. B., N. S., 730, is the last case on the subject ;

Coggs v. Bernard, 1 Smith L. C. 147.

On the morning of Aug. 7 the deft. had a right to sell; what has the plt. done to defeat that right? He comes and says, "Give me more time, and I will pay you 10s. a month." That does not defeat the right to sell, and if the deft. has done wrong in selling the plt. can sue for breach of contract, but not in trover. If I covenant not to sue, that does not defeat my right to sue, but only gives a right of action for breach of contract in suing. The money claimed by the deft. in his letter of Sept. 17 exceeded what was actually due, but that makes no difference :

Stockman v. Parr, 11 M. & W. 809;

Bromage v. Vaughan, 9 Q. B. 608.

It is enough that he gave notice that he was about to proceed for the money due, without stating the exact amount. It is not like the case of an assignee of the pawnor, who might not know what was due.—[*Byles, J.*—Is there any case to show that on the nonpayment of interest to be paid on a day prefixed, when the principal is not due, there may be a sale?] There is no such case; but it seems preposterous to say that he may refuse to pay his interest for an inde-

finite time. The money not being paid at the end of the month, the rights of the plt. were at an end, and the right of the deft. to sell was complete; he gave notice of his intention to sell, and an action of trover, therefore, will not lie.

Watkin Williams in support.—There is no such doctrine in the English law as that a right of action cannot be suspended for a good consideration. There is a distinction between the day for payment and the day which the parties have fixed for the redemption of the pledge. The case in *Holt's Nisi Prius Cases*, cited by my friend, is the only case in which it has been laid down that a power of sale can be exercised without giving notice; and Gibbs, C.J. lays it down, as an inference of fact, that the day for payment is the day for sale: (*Kent's Commentaries*, 10th edit. vol. 2, p. 804.) Here there is a loan for a definite time, viz. one month; and if nothing more had been done, and notice had been given at the end of that month, there would doubtless have been a power of sale; but then there was an entirely different arrangement: there was to be an extension, from month to month, till it was determined in a proper manner. It is possible that he might have acquired a power of sale if he had determined the extension in a proper manner:

Addison on Contracts, 4th edit. 325.

The COURT reserved their judgment until the case of *Johnson v. Stear*, in which they had just granted a rule, was decided.

Cwr. adv. vult.

Feb. 1.—*ERLE, C. J.* now delivered the judgment of himself, Williams, Byles and Keating, JJ.—In this case the plt. sued the deft. in trover for the wrongful sale of two pictures. They had been placed in the deft.'s hands by the plt. on the occasion of a loan for 5l., for which the plt. gave the deft. a promissory note at a month, 1l. having been deducted for interest in advance. When the note became due on the 3rd Aug. 1862 the deft. applied to the plt. for the amount, but he requested further time for payment, which the deft. allowed on the terms of 10s. a month being paid for interest. According to the deft.'s evidence a single month's time was given. For the plt. swore, and the jury believed him, that the extension of time on those terms was indefinite. After the first month's extended time had expired, viz. on Sept. 19, the deft. wrote to the plt. to the effect, that unless the amount of his claim was paid he should proceed to sell the pictures in liquidation of it. By mistake, however, he claimed 1l. too much by this letter, and it did not reach the plt. till he returned to London in November. At that time the pictures were unsold. No further communication took place between him and the deft. till after the deft. had sold them. The plt. then tendered the deft. the debt with the stipulated monthly interest, and demanded back the pictures. But the deft. declined to accept the money, on the ground that he had already sold them. On these facts the questions arose whether such sale was unauthorised, inasmuch as the jury found that it was not expressly made a part of the original agreement that the deft. should have a power to sell in default of due payment of the note. The judge at the trial thought that the deft. had authority to sell, inasmuch as the deposit was made as a security for the payment of the debt on a future day certain; and the verdict was accordingly entered for the deft. We think that the judgment was right as to this point, on the authority of the cases collected in *Coggs v. Bernard*, and the recent decision of this court in *Johnson v. Stear* (*ubi supra*). But it is unnecessary for the court to determine that question, because leave was also given to move to enter a verdict for the plt. on another point, viz., that before the power to sell, supposing it to have been conferred, was exercised, the parties had substituted a new agreement under which the time for payment, and consequently the power of sale, was indefinitely

[Ex.]

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[Ex.]

extended. And on this latter point our opinion is in favour of the plt.; for, although it was certainly competent to either party, by taking proper steps, to terminate the new arrangement, yet we think the mere sending of the letter demanding an excessive amount had not that effect. The verdict must therefore be entered for the plt. for 20*l*. *Rule absolute.*

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, Jan. 25.

THE IPSTONE PARK IRON ORE COMPANY (LIMITED)
v. PATTINSON.

B. A. 1861—Composition-deed under sect. 192—Plea of, in defence to action—Release of debts—Debtor's remedy under sects. 197, 198.

*Deft., a trader, by a composition deed under sect. 192, made between himself and a trustee on behalf of and with the assent of undersigned creditors, conveyed to such trustee all his estate absolutely to be applied for the benefit of his creditors in like manner as if he had been at the date thereof duly adjudged bankrupt, and the creditors assenting thereto thereby agreed to accept the sum of 5*s*. in the pound in discharge of their respective debts, to be paid within twelve months from the date of the deed. The deed was signed by the requisite number of creditors and all the other statutory requisites were complied with. In an action by plt., a non-assenting creditor, it was*

Held, that the deed, though valid under the Act as a composition-deed, and available for all purposes in bankruptcy, yet, as it contained no release in terms of the debtor from his debts, was not pleadable in bar to the action, and did not operate as a statutable release in answer to plt.' claim.

The debtor's remedy under the provisions of the statute with respect to deeds of arrangement is to apply to the Court of Bankruptcy (sect. 197); and under sect. 198 the deed would afford ground for a stay of execution at law.

Quære, whether a deed could be framed which should be valid as against non-assenting creditors, and yet be pleadable in bar?

Declaration on a promissory note, dated 10th Feb. 1862, at one month, for 49*6l*. 8*s*. 6*d*., with counts for goods sold and delivered, and on account stated.

Plea.—That after the accruing of the alleged cause of action, and after the B. A. 1861 commenced and took effect, an indenture was made in the words and figures following, i.e.: "This deed made 27th Feb. 1862, between Geo. Clarke Pattinson (deft.), of &c., of the one part, and Samuel Pattinson, of &c., on behalf of and with the assent of the undersigned creditors of the said deft. of the other part, witnesseth that the said deft. hereby conveys all his estate and effects to the said S. Pattinson absolutely, to be applied and administered for the benefit of the creditors of the said deft. in like manner as if the said deft. had been at the date hereof duly adjudged bankrupt, and the creditors of the said deft. assenting thereto, being fully satisfied that his estate will not realise more than 5*s*. in the pound, hereby agree to accept the sum of 5*s*. in the pound in discharge of their respective debts, to be paid within twelve months from the date hereof; and the said deft. doth hereby expressly declare that the whole of the debts owing by him, and upon which the said composition will be payable, do not exceed 2100*l*. In witness, &c." Executed by the deft. and the said S. Pattinson, and signed and sealed by or on behalf of the other creditors of the deft., and a memorandum of registry on

the 25th March 1862, pursuant to the B. A. 1861, indorsed.

Averment, that the said deed became and was as valid, effectual and binding on all the creditors of deft., including plt., as if they had been parties to and had actually executed the same; that all conditions of the B. A. 1861 had been observed, and that a majority in number representing three-fourths in value of the creditors had in reality approved of and assented to the said deed. That deft. and the trustee had duly executed the same, and the execution thereof was duly attested, &c., and that the said deed, duly stamped, was within twenty-eight days from the date of its execution delivered to the chief registrar with the affidavit required by the Act, and that immediately on execution of the deed by deft., possession of all the property comprised therein, of which the deft. could give or order possession, was given to the said trustee; and that the said deed was within twenty-eight days, &c., duly registered in the Court of Bankruptcy, and a memorandum thereof written on the face thereof; and a certificate of the filing and registration under the hand of the chief registrar and seal of the Court of Bankruptcy had been duly granted to deft. That plt., before and when the said deed was made, were creditors of deft. in respect of the cause of action in the declaration mentioned, and had had due notice of the said deed and been requested to execute the same, and might and could have executed the same had they been so minded, and still might execute the same. And that the said deed was then in full force and effect, and that all things on deft.'s part had been done and happened to render the said deed as binding on plt. as if they had actually executed the same, and to release the deft. from the plt.' action by force of the said deed and of the statute in such case made; and deft. has been and is by means of the premises released and discharged from this action.

Demurrer and joinder in demurrer.

There were also replications and rejoinders and demurrers to the same respectively, which were not alluded to in the argument or the judgment, and therefore it is unnecessary to set them out here.

Plts.' points:—1. The deed set out in the plea is not pleadable in bar to an action, but merely ground for an application to the Court of Bankruptcy. 2. It is not binding on non-executing creditors, not being for the benefit of all deft.'s creditors. 3. It is binding only on the assenting creditors. 4. It contains no release, but a mere agreement to accept payment at a future day in satisfaction, and such agreement is merely ground for a cross-action, and is not pleadable in bar. 5. Till payment the deed furnishes no bar.

Deft.'s points:—1. The deed is for the benefit of all deft.'s creditors. 2. It is a release and satisfaction or merger of the debt and cause of action of plt., and their remedy is under the deed, and not by virtue of their debt.

Sir G. Honyman (with A. Stavelly Hill), for plt., in support of the demurrer, cited

Legg v. Cheesborough, 5 C.B., N.S., 741; 26

L. J. 200, C.P.;

Dell v. King, 9 L. T. Rep. N.S. 576;

Waller v. Adcock, 6 L. T. Rep. N.S. 583; 7

H. & N. 541;

Tabor v. Edwards, 4 C.B., N.S., 1;

Spitzer v. Chaffers, 8 L. T. Rep. N.S. 665; 33

L. J., N.S., 7, C.P.

Harley v. Greenwood, 5 B. & Ald. 95;

M. Lloyd, for deft., in support of the plea, cited

Lewis v. Jones, 4 B. & C. 506;

Flockton v. Hall, 14 Q. B. 380; 19 L. J. N.S.

1, Q.B.;

Ex parte Morgan, re Woodhouse, 7 L. T. Rep. N.S. 729; 32 L. J. 15, Bank.;

[Ex.]

THE IPSTONE PARK IRON ORE COMPANY v. PATTINSON.

[Ex.]

Ex parte Godden, 7 L. T. Rep. N. S. 608 ; 32

L. J. 37, Bank ;

Ex parte Cockburn, 9 L. T. Rep. N. S. 464.

POLLOCK, C.B.—In my opinion the judgment of the court should be in favour of the plts. The deed now before the court contains no release, but it is contended by Mr. Lloyd in his argument that it ought to be considered as if it did contain a release, or as if the admitted state of the proceedings in the plea would amount in some way to a bar to the action. Now if the deed had contained a release, and all the requisites mentioned in the statute to give effect to it had been gone through, so that there was no objection to its validity by reason of its form or its want of any of the statutory requisites to make it binding on non-executing and non-assenting creditors, no doubt it would then be pleadable as a release in bar to the action. All that the statute required, I apprehend, is this, namely, to place a debtor proposing to make a voluntary composition with the requisite proportion of his creditors, in the same position as a bankrupt was under the old bankruptcy laws, and to protect him from the harassment of suits and actions; and supposing this to be under the old bankruptcy law, this would have been effected by the Court of Bankruptcy interfering, or by the court giving effect to the certificate to be obtained by the bankrupt in the Court of Bankruptcy. I apprehend, therefore, the only remedy of the trader, under the provisions of the present statute with respect to deeds of arrangement, is to apply to the Court of Bankruptcy. Mr. Lloyd says that so to construe the statute will be to deprive it of its intended effect, and he seems to think that unless a debtor obtains a release, or a certificate of discharge—a something which he can put his hand on, showing that he is not bound to anybody—he is not at all benefited by the deed. I think, however, if he is put by the deed in a position in which the Court of Bankruptcy will interfere to stay proceedings in execution against him, that he gets all that is requisite, and that there is not the slightest occasion for a release, so as to be an answer to a judgment in a court of law. Practically under the Insolvent Acts (and the present Bankruptcy Act is an amalgamation for many purposes of the law of insolvency and bankruptcy) an insolvent might never get his final discharge; and although, by means of the deed and the Court of Bankruptcy, the creditor is finally to get what substantially amounts to a discharge, namely, protection from execution, it appears to me, looking at both the object and words of the statute, and bearing in mind the cases on the old bankruptcy law, that this deed is not legally a bar to the action, and cannot be so pleaded; and that our judgment must therefore be for the plts.

MARTIN, B.—I am of the same opinion. Looking at the statute, it seems to me that its effect and meaning is this: if a man owes another a debt, he may be sued, and his creditor is entitled to sue him, in a court of law for it; if the debt be paid, that is a bar to the action, if it be released, that also is a bar; and the statute enacts that if certain things happen, that shall be a bar. This deed contains no release, and the statute has nowhere said that such a deed shall be a bar to an action. Had it so enacted, we should be bound to give effect to it. If it be a release, it must be by positive enactment. A discharge must be by operation of the statute, or, to follow the words of Bayley, J. in his judgment in *Harley v. Greenwood*, "If it be a bar at law, it must become so by the positive enactment of the statute." This Act, I find, carefully avoids saying that such a deed shall be a bar, whilst by sect. 198 it protects the debtor from execution. What right, then, have we to say that the Legislature has enacted that this deed shall be a bar to an action and an extinguishment of the debt? Were we so to decide,

the extreme inconveniences which, as pointed out by Bayley and Holroyd, JJ. in *Harley v. Greenwood*, would have arisen in that case from their holding that the mere proving of a debt should operate as a perpetual bar, might follow here. Suppose, for instance, this matter were *in fieri*, and the bankruptcy were not followed out and were never concluded, then the Statute of Limitations would come in and bar the debt for ever, and so it would be entirely lost, and the creditors be barred of all remedy. It seems to me that the real answer is, that the Legislature has not enacted that this deed shall be a bar at all. As to the deed itself, it strikes me to be a valid deed, and the best of the kind that I have ever seen, and although it has in my judgment no such operation as that contended for by Mr. Lloyd, it has all the operation which the Legislature intended that it should have, which certainly is not that of being a bar to this action.

CHANNELL, B.—I agree in opinion with my Lord and my brother Martin. The question for our decision as to this deed is, whether it operates as a bar, and is pleadable as such to the action; that is, whether it is a statutable release. I think clearly it is not. The deed, which is made between the debtor and a trustee on behalf of and with the assent of the creditors who sign it, is a conveyance by the debtor to his trustee of all his estate and effects absolutely, to be applied for the benefit of the creditors of the debtor, in like manner as if he had been at that moment duly adjudged a bankrupt; but that does not make the deed a statutable release or pleadable in bar. The deed provides also for the payment of a composition, which the assenting creditors agree to accept in discharge of their respective debts, but that is no answer to an action. Under this deed the trustee is in the position of a creditors' assignee in bankruptcy where a debt has been proved. Proceedings under these deeds are assimilated by the Act to proceedings in bankruptcy, but the fiat and appointment of assignees are no bar to an action; although no doubt they might warrant an application to this court to stay proceedings in the action, or to the Court of Bankruptcy to expunge the debt unless the creditor suing stays his action. So here, upon the certificate of registration being obtained, this deed would be available for all purposes in bankruptcy, and would afford ground in a court of law for a stay of execution on a judgment, which is quite the effect the Legislature contemplated the deed should have. So far from such a deed having no effect, as has been urged by Mr. Lloyd, I think, on the contrary, that it is quite operative, and that it has a very large and most beneficial operation. The object of a creditor in suing his debtor is not only to obtain judgment, but to reap the fruits of it by execution. He will not therefore follow up such a suit when he knows that if the deed be fairly made, and every thing has been done in accordance with the requisitions of the statute, he will be prevented by the joint operation of the deed and the statute from getting such fruits. It has been said in the course of the argument that there is some doubt whether, if this deed be not pleadable in bar, there could be any deed which should be valid as against non-assenting creditors, and be so pleadable. I do not wish to express any opinion upon that point. It is immaterial here, because the present case is entirely different, and so it is not necessary to decide that point.

PIGOTT, B.—I am of the same opinion, although I own I have entertained some doubt upon the question of the release. The 192nd section of the Act points out what deeds are to be valid and upon what conditions, and although it makes no mention of a release I should have thought that that section contemplated a deed which contained a release; but the form given in schedule D. to the Act contains none, nor does this

CR. CAS. R.]

REG. V. MATTHEW KNIGHT.

[CR. CAS. R.]

deed. In the recent case of *Spitzer v. Chaffers*, in the C. P., it was held that a deed under sect. 224 of the old B. A. 1849, containing a release by the scheduled creditors who signed the deed, may be binding upon non-assenting creditors, and a plea setting up such deed was held good. The decision, however, in *Harley v. Greenwood* is good law, and I feel bound thereby to come to the conclusion that this deed is not pleadable, and that if the Legislature had intended that it should be, it would have said so. I agree, therefore, with the rest of the court, although I own that I feel some little difficulty as to leaving a man, who has made over all his property for the benefit of his creditors, open to an action.

Judgment for the plts.

Attorneys for the plts., Austen and De Gex, 4 Raymond's-buildings, Gray's-inn.

Attorneys for deft., Lewis and Sons, 7 Wilmington-square.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 23.

(Before COCKBURN, C.J., GROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. V. MATTHEW KNIGHT.

Autrefois acquit—Evidence of larceny—Recent possession.

Prisoner, a servant, was committed to take his trial at the April sessions on a charge of stealing copper from his masters. He was tried and acquitted. Two days before his trial the prosecutors laid an information and obtained a warrant under which the prisoner was apprehended, immediately after the acquittal, for stealing other things (five shovels and a riddle) from them previous to his apprehension on the first charge. He was committed for trial on the second charge.

On the second trial the prisoner pleaded autrefois acquit, and his advocate contended that the prisoner was entitled to succeed on that plea on the ground that both charges might have been included in the indictment on the first trial. The jury gave their verdict that the prisoner was not acquitted of the second charge on the first trial.

The riddle was not proved to have been in the prosecutors' possession for eighteen months before the trial, and the shovels for eight months, and the evidence was, that the prisoner was first seen about January with the things in his possession, the second trial being in June. The jury convicted the prisoner:

Held, that the conviction was right, and that there was no ground for the verdict being entered for the prisoner on the plea of autrefois acquit; or for an acquittal on the ground that there was no recent possession traced to the prisoner.

Case stated for the opinion of the court.

Lincolnshire, Kesteven.—At the General Quarter Sessions of the Peace of our Sovereign Lady the Queen holden at Bourn in and for the said parts and county, on Monday, 29th June 1863, before the Right Hon. Sir John Trollope, Bart., chairman, William Parker, Esq., and other justices of the peace of our said Lady the Queen:

The prisoner Matthew Knight was tried before me at the Easter Quarter Sessions for the parts of Kesteven aforesaid, held at Bourn aforesaid, on the 6th April 1863, upon an indictment charging him with having on the 22nd Jan. 1863, at Spittlegate, in the said parts, feloniously stolen twenty-five pounds weight of copper, of the value of 1*l.* 3*s.*, of the goods and chattels of one Richard Hornaby the younger and others.

From the evidence produced by the prosecution in support of this indictment, it appeared that the prosecutors' foreman first became acquainted with the loss of the copper on the 12th Jan. 1863, and that on the 17th of the same month of January the prisoner was apprehended on a warrant charging him with having committed the larceny on the 6th Dec. 1862; he was then remanded until the 22nd Jan., and on that day further remanded until the 6th Feb., when he was fully committed for trial at the then ensuing sessions to be held on the 6th April.

At the trial the attorney for the prisoner took exception to evidence being given of certain admissions made by the prisoner concerning the copper prior to the day named in the indictment, and the objection being allowed, the attorney for the prosecution thereupon withdrew from the case and the prisoner was acquitted.

Immediately after his acquittal on the 6th April the prisoner was again apprehended on a warrant granted upon an information preferred by the same prosecutors on the 4th April, charging him with having on the 22nd Jan. 1863, at Spittlegate aforesaid, in the parts and county aforesaid, feloniously stolen five shovels and one riddle of the value in the whole of 10*s.*, of the goods and chattels of the said Richard Hornaby the younger and others.

In the depositions taken previous to the second commitment on the 18th April 1863 the prisoner is therein charged with having feloniously stolen the shovels and riddle on the 22nd Jan. 1863.

At the present Midsummer Quarter Sessions for the said parts and county aforesaid, held at Bourn aforesaid on the 29th June 1863, the prisoner was indicted before me with having at Spittlegate aforesaid stolen the said riddle on the 20th Sept. 1832, and in a second count he was charged with having, at Spittlegate aforesaid, stolen the said five shovels on the 16th Jan. 1863.

From the evidence adduced at this second trial it appeared that one of the prosecutors' witnesses saw a riddle branded R. H. and X. (similar to the one produced) on the prisoner's premises in the summer time of 1862, and that both the riddle and shovels were found by a police constable in the prisoner's possession on the 21st Jan. 1863. There was no evidence in either case to show on what particular day or month either the copper, riddle, or shovels were stolen.

For several years and up to the time of his apprehension the prisoner had been in the employ of the prosecutors, Mesars. Hornaby, of Grantham, who are machine makers in a large way of business, employing about four hundred hands. The evidence against the prisoner in the first case was chiefly the prisoner's own admission in producing the stolen copper on an implied promise from prosecutors' foreman, which evidence was rejected. In the second case there was no admission or confession. The stolen property was found on the prisoner's premises by the police whilst in custody on remand upon the first charge.

The grand jury having found a true bill, the prisoner pleaded in due form *autrefois acquit*, and in support of such plea his attorney raised the following point of law, viz., that the first indictment ought to have included all the articles which the prosecutors on or previous to the 6th Feb. (the day of first commitment) or the 6th April (the day of trial) knew to have been stolen by the prisoner from them; and that they (the prosecutors) could not by an alteration of dates prefer different indictments against the prisoner for offences of the same sort committed at the same place and against the same person. And that therefore an acquittal of the offence charged in the first indictment was an acquittal of the offence or offences charged in the second.

In support of this argument prisoner's attorney raised

[PROB.] In the Goods of FRANCIS MORTON—In the Goods of NATH. DAVID SCOTT WALLICH. [PROB.]

upon the law of including any number of articles in one indictment; and also further cited sect. 16 of 14 & 15 Vict. c. 100, to show that the prosecutors could have inserted any number of cases not exceeding three, provided they were committed within six months; and the *dictum* of Parke, B., as reported in the case of *Reg. v. Bird*, 20 L. J. 94, M. C.

The jury gave their verdict that the prisoner was not acquitted of the second offence.

The prisoner then pleaded not guilty to the felony.

The riddle and shovels were clearly identified to be the property of the prosecutors, and were found in the possession of the prisoner—the riddle in his back yard, one shovel in his coal-house, another shovel in his garden covered over with ashes, and three other shovels locked up in a distant pigsty in prisoner's occupation, and one of the prosecutors' witnesses stated that in the beginning of January, about half-past seven o'clock in the morning, the prisoner brought some tools in a barrow into his (the witness's) yard where the pigsty was, and stated "he had brought them to put at the top of the pigsty to be out of the way." The brand mark had been erased from some of the shovels, and the letters M. K. (the prisoner's initials) had been substituted. In cross-examination the foreman stated it was impossible to say when the articles were taken.

The attorney for the prisoner then asked the court to direct an acquittal on the ground that the riddle not being proved to have been in their possession for the period of upwards of eighteen months and the shovels for not less than eight months, there was no recent possession by the prisoner as contemplated by the law, and that therefore the prisoner was not bound to account how he came by the property stolen.

I left the whole question to the jury, who returned a verdict of guilty.

The Court sentenced the prisoner to be imprisoned for one calendar month to hard labour, subject to the opinion of the Court of Criminal Appeal upon the following points, taking bail for his rendering himself in execution if the decision of the court should be against him.

1. Whether an acquittal of the offence charged in the first indictment was an acquittal of that charged in the second; and if so, ought the prisoner to have been acquitted on the plea of *autrefois acquit*?

2. Whether the court ought to have directed an acquittal upon the law of recent possession or otherwise, as requested, and upon the grounds stated by the prisoner's advocate. JOHN TROLLOPE, Chairman.

O'Brien, Serjt., for the prisoner, admitted that he could not sustain the objections made for the prisoner, and reserved for this Court.

By the COURT, Conviction affirmed.

COURT OF PROBATE.

Reported by Dr. SWABBY, of Doctors'-commons.

Saturday, Jan. 16.

In the Goods of FRANCIS MORTON.

Appointment of guardian—Probate—12 Car. 2, c. 24, s. 8—Practice.

A paper purporting to be a last will and testament duly executed, but containing simply an appointment of a guardian of his children by a father, and not disposing of personal property, nor appointing an executor, is not entitled to probate.

Francis Morton, the deceased in this case, made and duly executed a will commencing, "This is the last will and testament of me, Francis Morton, of Liverpool, &c., which I make this 5th day of Feb. 1857. I constitute and appoint my dear wife sole guardian of all my infant children during their respective

minorities." The will did not contain any disposition of property, or the appointment of an executor. The deceased left no other testamentary instrument.

Kemplay moved the court to decree letters of administration of the personal estate of the deceased, with said will annexed, to be granted to Mrs. Morton as his widow. It must be admitted that the decisions are against the motion; in *Lady Chester's* case, 1 Ven. 207; s. c. 3 Keble 30, the Ecclesiastical Court was prohibited by the K. B. from proving a will simply appointing a guardian. There was a later case (*Gilliat v. Gilliat and Hatfield*, 3 Phill. 222), where the court said that it was not necessary that such a will should be proved.

Sir J. P. WILDE.—The case in *Ventris* is conclusive. The principle on which it depends is also clear. The jurisdiction of this court to grant probate of an instrument is founded on the fact that it affects personal property. This paper does not affect personal property, and therefore is not entitled to probate.

Motion rejected.

Solicitors, Walker and Son.

Tuesday, Feb. 2.

In the Goods of NATH. DAVID SCOTT WALLICH (deceased).

Will—Executors—Codicil—Executors in India.

W. made a will in England in 1861 and appointed B. and C. executors thereof. In May 1862, being in India, he made a codicil, and on the 9th June executed a paper whereby he appointed E. and F. "my executors in this country."

The Court held, that the context of the paper giving testator's reasons for the appointment of E. and F. showed that he did not mean them to have any power over his property in England, and granted probate to B. and C., without reserving power to E. and F.

In this case the deceased, an army surgeon in India, died at Dughshai, in India, in June 1863. When in England in 1861 he duly made and executed a will whereof he appointed his brother G. C. Wallich and his sister S. M. Wallich executor and executrix. On the 26th May 1863 he executed a codicil at Dughshai, and on the 9th June 1863 he executed a paper in the following words: "And I further desire that my affairs may not be placed in the hands of the Administrator-General, as is the usual custom in this country, but that they may be managed entirely by my friend Col. C. T. Chamberlain, 1st Bengal Cavalry, and F. Cooper, Esq., C. B., Deputy Commissioner of Delhi, whom I hereby appoint my executors in this country, and who are to be responsible only to my executors at home."

The codicil and this latter paper had been sent to England, and

Dr. Swabey now moved on behalf of the executors named in the will for probate of all the papers to be granted to them without reserving power to the executors appointed by the last paper: (see *Pulman*, dec., 347, ante.) The court will probably be able to decide this case without determining whether the appointment of executors in a country is equivalent to their appointment for a country.

Sir J. P. WILDE.—I think, from the context of the paper in which the executors in India are appointed, it is clear that the deceased did not intend them to have any power over his property in England, and the probate may go to the executors named in the will, without reserving power to the others.

Attorney, G. Blake.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWANNY, of Doctors'-commons.

Jan. 29 and Feb. 2.
(Before WILDE, J. O.)

HALL v. HALL.

Wife's petition—Cruelty—Evidence suggesting resp.'s insanity.

Where the evidence on behalf of the petitioner discloses facts from which the resp.'s insanity may be inferred, the court will require to be satisfied that such facts admit of a different explanation before it will make a decree in favour of the petitioner.

This was the wife's petition for dissolution of marriage by reason of cruelty and adultery. The husband's answer traversed these charges, and pleaded condonation of the cruelty. The case now came on for hearing before the court itself.

The *Queen's Advocate* (Sir R. Phillimore) and *Hansons* for the petitioner.

Dr. Spinks for the resp.

The petitioner was examined as to cruelty. It appeared, among other facts, that during the latter part of the cohabitation the husband had been more or less under the restraint of some persons in the house acting as keepers.

On cross-examination, no questions were put to the petitioner as to acts of violence which she had deposed to; but she was asked whether she had not known before marriage that her husband was of violent temper and given to drink.

By the COURT.—After the cross-examination, it does not seem necessary to call other witnesses as to acts of violence; but the question arises, whether the court can proceed to make a decree in this case where there is strong evidence before it that the husband is irresponsible for his actions?

The *Queen's Advocate*.—The question does not arise on the pleadings; such a fact or defence must be before the court in a known legal manner; by the husband's next friend, if he is now insane, or by himself, if now sane, but insane during the time spoken to. In *White v. White*, 1 Swab. & Tris. 592, the court decreed a judicial separation by reason of the wife's violence towards the husband, though it appeared that she had been from time to time in confinement as insane.

Cur. adv. vult.

Feb. 2.—WILDE, J. O.—In this case the court desires further evidence, some serious questions having been raised. The sanity or insanity of the resp. is a question of which the court must satisfy itself, and this, although it has come to light on the evidence, without being raised in the pleadings, for society has an interest in the maintenance of marriage ties, which the collusion or negligence of the parties cannot impair. It was faintly, and with great care not to be too explicit, argued that madness would be no answer, even if pleaded, and cases were cited to which I have since referred. With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are for the most part immaterial. Thus I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from "violent and disorderly affections" as said in one case, or from "violence of disposition, want of moral control, or eccentricity," as said in another, or "from a liability to become excited in controversy," in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter. An insane man is likely enough to be dangerous to his wife's personal safety, but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of this court's interference is safety

for the future, its sentence carries with it some retribution for the past. In either aspect it would be equally unjust to act on the excesses of a disordered brain: in the latter, for the insane are not responsible; in the former, for insanity may be cured and the danger at an end. These positions appear to me, as at present advised, to be reasonable, and should the facts eventually bring this case within reach of them, may be safely acted upon. The case of *White v. White*, before the late Judge Ordinary, is, I think, in strong accordance with them. Now it has transpired in evidence that the resp., for many months before his wife was obliged to leave him, had constantly a keeper in the house to restrain him; that he was kept without means and followed by the keeper when he went out alone; finally, that he fled from the house suddenly and secretly with his keeper to York, taking his child with him. The presumption that he was out of his mind flows very naturally from such facts. For aught the court knows, he may be now actually in confinement or under medical control, for there is no account of his subsequent history. But it is said that all this may be explained by the fact that he was given to drinking and of violent temper. It may be so, but those who advised and arranged this treatment should be brought before the court to elucidate that which they alone can explain away. The court may then appreciate the resp.'s condition and its causes. The case stands adjudicated that they may do so.

Attorneys for petitioner, *Shum and Co.*; for resp., *Hicks and Son.*

DIGEST OF MARITIME LAW CASES (ACCEPTING SALVAGE AWARDS.)

FROM 1837 TO 1860.

(Continued from p. 459.)

[N.B.—The *LAW TIMES REPORTS*, N.B., will give all the Maritime Law Cases decided from Michaelmas Term 1859. This Digest will contain all (except the Salvage Awards) decided from 1837 to Nov. 1860. A Digest of the Salvage Cases during the same period is appearing in the *LAW TIMES*.]

STAYSAIL.

2185. Ship in tow of a steamer held liable for damage by collision with another vessel, as not having been under proper control from a foretopmast staysail not being set: (*The Countess of Lonsdale and the Agnes Blake; General Steam Navigation Company v. Jorjerson, C. S. C., Jan. 1855, Shipping Gazette.*)

STEAMER.

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I. IMPROPER SPEED (RELATIVE TO COLLISION CLAIMS).

2186. A steamer going at the rate of ten knots per hour, condemned in damages on account of a punt, moored alongside of a collier at Deptford, being sunk by the swell breaking over her gunwale: (*Smith v. Jones*, C. E., June 27, 1839, *Shipping Gazette*.)

2187. Steamer going at the rate of eight or ten miles an hour, instead of five, as restricted in the Thames off Rotherhithe, condemned in damages for the expense of raising a barge sunk by swell, for the value of the barge, which was irreparable, and for damage to coals on board: (*Pope v. Craig*, C. E., Dec. 20, 1839, *Shipping Gazette*.)

2188. Liability of owners of steamer for damage to goods on board. Care as to stowage. Notice to consignees of detention by bad weather, when goods could be forwarded by land: (*Muddle v. Stride*, 9 Car. & P. 380; *Harrison's Digested Index*, year 1840.)

2188 a. Obstructing navigation of steamer: (*Johnston v. Knowles*, 5 Jur. 845; *Harrison's Digested Index*, year 1841.)

2188 b. On dark nights, steamers must not proceed at an improper speed. "The fulfilment of a contract, or the convenience of the public, is no excuse for endangering life:" (*The Rose*, A. C., Jan. 24, 1843; 2 W. Rob. 2; *Pritchard's Digest*, 136; *MacLachlan on the Law of Merchant Shipping*, 281; *The Iron Duke*, A. C., May 13, 1845; 9 Jur. 476; 4 *Notes of Cases*, 94; *Pritchard's Digest*, 136.)

2189. If great care be used in keeping a good look-out, a steamer may even go at the rate of twelve knots per hour at night, provided it can be adopted without danger to other ships: (*The Iron Duke*, J. C. P. C., June 11, 1846, *Shipping Gazette*.)

2190. Those in charge of a steamer going at an improper speed through anchorage ground, where many vessels were at anchor, and causing loss of life, would be guilty of manslaughter: (*Dictum of Dr. Lushington in The Charles Bartlett v. The Europa*, A. C., June 15, 1850; 14 Jur. 627.)

2191. A steamer ought not to proceed through a crowd of vessels when she cannot do so without endangering them: (*The Primrose v. The Diana*, A. C., May 20, 1853.)

2192. A steamer is bound to stop altogether if anything be seen in her way which she is likely to destroy. Case relative to violation of the provisions of the Act 7 & 8 Vict. c. 174, s. 51, as to speed of steamboats, &c. in the Thames: (*The Ann v. The Balavier*, A. C., May 30, 1854; *The Balavier and The Ann*; *Netherlands Steam Boat Company v. Styles*, J. C. P. C., July 13, 1854; *Harrison's Digest*, 200; 9 Moo. P. C. C. 286.)

2193. Owners of a steamer having a pilot on board, held liable for damage caused by her going at an improper speed up a river during the night. Duty of master in this respect. The fact of a steamer carrying mulls is no excuse for endangering other ships: (*The Cornishian v. The Pacific*, a. a., A. C., May 25, 1855, *Shipping Gazette*.)

II. COLLISION (CARRYING LIGHTS), &c.

2194. Verdict against a steamer for damage to another steamer by collision in the Thames, but nothing allowed by the jury for loss of time when in dock for repairs: (*Dodson v. Denny*, &c., Home Circuit, Nisi Prius Court, *Shipping Gazette*, Aug. 11, 1837. See Nos. 528 and 2195.)

2195. Duty of steamers, being much under command, to adopt every possible precaution to avoid collision with other ships: (*The Perth v. The Ariel*, before Sir John Nichol, A. C., Jan. 12, 1838; 3 Hagg. 415; *Pritchard's Digest*, 133.)

2196. Steamer held liable for running down a collier anchored in fairway of the Thames without a light on board. Lord Denman said it was desirable that vessels lying in the navigable track of the river "should have lights on board, although that did not seem to be the usual practice: (*Ritson v. Craig*, &c., Q. B., Feb. 21, 1838, *Shipping Gazette*.)

N. B. The carrying of lights has since become the subject of legislative enactment.

2197. Steamer found liable for damage done by collision; she should have stopped her engine at once: (*The Perth v. The Ariel*, before Sir John Nichol, A. C., Jan. 12, 1838; 3 Hagg. 414; *Pritchard's Digest*, 136. See also *Copeland v. Brownfield*, C. P., Feb. 27, 1839, *Shipping Gazette*.)

2198. Steamer held liable for damage by collision caused by not keeping a good look-out: (*The Iberia*, A. C., July 16, 1839, *Shipping Gazette*.)

2199. Verdict against a steamer for damage to another steamer by collision, and for loss of services of steamer while under repair: (*Dodson*, &c. v. *Dunn*, Home Circuit, Croydon, Aug. 14, 1839, *Shipping Gazette*. See No. 2194.)

2200. Steamers a class of vessels especially capable of rendering efficient assistance in salvage cases, and entitled to the more liberal reward: (*The Sophia*, A. C., Jan. 14, 1840; *The General Palmer*, A. C., July 5, 1844, *Shipping Gazette*.)

2201. Held, that two steamers on different courses, if there be risk of collision, should both port helm, notwithstanding any rules hitherto observed in the navigation of the river Thames: (*The Friends*, A. C., Jan. 13 and 24, 1813; 4 Moore, 314; *Pritchard's Digest*, 136; affirmed on appeal.)

2202. Held, that steamers, in doubtful cases of collision, should put their helms to port under the rule then recently

established: (*The Ann and Mary*, A. C., Nov. 3, 1843, *Shipping Gazette*.)

2203. Steamer considered in the light of a sailing vessel with a fair wind in cases of collision: (*The Iron Duke*, J. C. P. C., June 18, 1846, *Shipping Gazette*.)

2204. A steamer is always considered as a vessel going free, although the wind and tide may be against her: (*The Isaac Allerton*, A. C., April 18, 1848, *Shipping Gazette*; *The Lord Saumarez*, A. C., Dec. 21, 1848; *The Kingston-by-Sea*, A. C., Feb. 1, 1849; *The Vivid*, A. C., July 12, 1849; *The London Merchant*, A. C., Nov. 16, 1849, *Shipping Gazette*.) But not necessarily so if she has a merchant vessel in tow: (*The Kingston-by-Sea*, A. C., Feb. 1, 1849, *Shipping Gazette*.)

III. MISCELLANEOUS CASES.

2205. Plaintiffs consulted in jury trial against underwriters for loss of a passenger steamer on a voyage between London and Dublin, carrying only one boat instead of two, as directed by the Steam Navigation Act, 9 & 10 Vict. c. 100, ss. 3 and 16: (*The Tribune*; *Senator Screw Steam Company v. Astle*, Q. B., Dublin, Feb. 16 and May 5, 1848; report of trial printed by C. F. Goodwin, Dublin.)

2206. Penalty for breach of statutory regulation regarding overcrowding of steamers enforced against owners of a steam-vessel: (*Reg. v. Collis*, Liverpool Sessions, Nov. 9, 1852, *Shipping Gazette*.)

2207. The fact that a steamer has performed a salvage service in a short time does not detract from its merit. Comparison of services rendered by sailing ships and steamers. The power of the latter accelerates the service: (*The Gipsy*, A. C., June 7, 1853, *Shipping Gazette*.)

2208. The reward to a steamer for salvage assistance is enhanced by her being able to perform the service in a shorter time than a sailing vessel could render it: (*The Leda*, A. C., June 20, 1855, *Shipping Gazette*.)

2209. Under the Act 3 & 4 Vict. c. 65, the Admiralty Court had jurisdiction in claims for steam towage, but not for a steam-tug bringing off passengers from the shore: (*The Wallace v. The Jane*, A. C., July 27, 1853, *Shipping Gazette*.)

2210. Steam-ship company held liable for passengers' travelling expenses in consequence of the ship being disabled from proceeding on her voyage through the main shaft of the engine breaking: (*The Rhine*, a. a.; *Probyn v. General Steam Navigation Company*, C. B. C., Dec. 26, 1855, *Shipping Gazette*.)

2210 a. Leading case on the subject of seaworthiness of a river steamer insured for a voyage by sea. Numerous cases cited by counsel. The law regarding seaworthiness largely discussed, and the following cases commented upon by the court: *Sadler v. Dixon*, 5 M. & W. 405; *Christie v. Secretan*, 8 T. R. 198; *Small v. Gibson*, 4 H. of L. Cas. 384, 388, 404; *Carter v. Boehm*, 3 Burr. 1915; *Tidmarsh v. Washington Insurance Company* (American case), 4 Mason, 429; and *Payne v. Haine*, 6 M. & W. 541; (*Burgess v. Wickham*, Q. B., Feb. 24, 1863; 1 *Maritime Law Cases*, 303.)

(To be continued.)

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and J. MORGAN, Esqrs.,
Barristers-at-Law.

Jan. 28 and Feb. 1.

(Before Mr. Commissioner GOULBURN.)

Ex parte THE OFFICIAL MANAGER OF THE PROFESSIONAL LIFE ASSURANCE COMPANY, REGISTERED, &c., re A PETITION FOR ADJUDICATION.

*Petition for adjudication—Petitioning creditor's debt—Call by official manager—*24 & 25 Vict. c. 134, s. 90.

A. having subscribed for shares in a public company prior to the passing of the B. A. 1861, in respect of which he was placed upon the list of contributories under an order to wind-up the company in Chancery:

Held, that a call made by the official manager upon him did not constitute a good petitioning creditor's debt to support an adjudication of bankruptcy against A., inasmuch as it was not a debt contracted after the passing of the Act within the meaning of the Act of 1861.

This was the petition of Robert Palmer Harding, the official manager of the Professional Life Assurance Company, who claimed to be a creditor of Thomas George Williams, a shareholder and contributory in the sum of 1921l. 13s. 8d., as the balance due from him in respect of calls made under the order of the M. R.

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to wind-up the company, and in respect of which it was now sought to make him a bankrupt under the 70th section of the B. A. 1861.

It was stated in the petition that Thomas George Williams, late of No. 3, Northampton-place, Hackney-road, Middlesex, and now of Boulogne-sur-Mer, in the Empire of France, gentleman, not being a trader, and having for six calendar months next immediately preceding the date of this petition resided beyond the jurisdiction of this honourable court, that is to say, at Boulogne-sur-Mer aforesaid, was indebted to the petitioner, as the official manager of the Professional Life Assurance Company, Registered, in the sum of 1921*l*. 13*s*. 8*d*., and that the petitioner had been informed and believed that the said Thomas George Williams did lately commit an act of bankruptcy within the true intent and meaning of the law of bankruptcy.

The account furnished by the official manager, after giving the debtor credit for 210*l*. 4*s*. owing to him as a creditor of the company, brought him in a debtor in the sum above mentioned.

The only question in dispute was, whether the debt claimed constituted a good petitioning creditor's debt within the 90th section of the Act of 1861, which is as follows:—

"The debt of the petitioning creditor of any debtor not being a trader, and not being at the time a prisoner against whom such creditor would have been entitled to obtain a vesting order in insolvency if this Act had not passed, must be a debt contracted after the passing of this Act:" [6th August 1861.]

The company was being wound-up in Chancery under the Winding-up Acts of 1848 and 1849, under an order dated the 11th May 1861. T. G. Williams having been settled upon the list of contributories in respect of 500 shares which he took in the company on the 24th July 1849, a call of 3*l*. 15*s*. per share was made on the 14th June 1863, to be paid on or before the 6th July following.

On the 23rd July 1863 an order peremptory was made by the M. R. for him to pay the sum of 1921*l*. 13*s*. 8*d*., the balance due from him on his account with the company, within fourteen days after service thereof.

Rozburgh appeared for the official manager in support of the petition. He contended that the order of the court being made for the debtor to pay an ascertained sum on the 23rd July 1863, it was not competent for this court to inquire into the purposes for which the debt was incurred prior to the date of that order, by which, in fact, the court was concluded, and beyond which it had no jurisdiction to inquire. By the 33rd section of the Winding-up Act 1849 the Court of Ch. could not inquire into the regularity or terms of any order after the expiration of three weeks, the time limited for appeal; and the Court of Bankruptcy could not exercise any greater authority than that exercised by the Court of Ch. The order to pay, therefore, being made on the 23rd July 1863, no possible doubt could exist as to the time when the debt was contracted, viz. after the 6th Aug. 1861. He also referred to the Winding-up Act 1849, s. 99.

Lewis (solicitor), on behalf of Williams, contended that the company of which the debtor was a member was dissolved in May 1861, three months before the passing of the B. A. 1861. By the 3rd section, which was the interpretation clause, of the Winding-up Act 1848, the call was nothing more than an assessment of the liability of each partner or shareholder to contribute towards the debts incurred by the company. The balance order of the 23rd July 1863, by and upon which it was alleged that the debt was first created, was equivalent only to a judgment of a court of law in an action instituted for the recovery

of a debt. The date of the judgment or order to pay formed no sort of criterion as to the date when the debt was contracted under the 90th section of the Act of 1861. Moreover, all the debts of the company were contracted, or each shareholder became liable for them only when the contracts were made, the money lent, or the goods supplied, and as regards the company were due to the several creditors when contracted. At that time also the liability of each contributory to his co-contributories was created. He cited

Robinson's Executors' case, 6 De G. M. & G. 572 ;

Parbury's case, 7 De G. F. & J. 80 ; a. c. 4 L.

T. Rep. N. S. 62 ; 30 L. J. 514, Ch. ;

Ex parte Nicholas, 2 De G. M. & G. 271 ;

s. c. 21 L. J. 64, Bank. ;

B. A. 1861, ss. 69, 70.

Rozburgh in reply.

Feb. 1.—Mr. Commissioner GOULBURN.—This is a case of some importance, being one in which an adjudication of bankruptcy is sought against a non-trader resident abroad under the provisions of the B. A. 1861, and it depends upon the 69th and 70th sections of that Act. The 69th section enacts that, "All debtors, whether traders or not, shall be subject to the provisions of this Act ; but no debtor who is not a trader shall be adjudged bankrupt except in respect of some one of the acts of bankruptcy hereinafter described as applicable to a non-trader." Then come the acts of bankruptcy, and one of them is, "if any person not being a trader shall with intent to defeat or delay his creditors depart this realm, or, being out of this realm, shall with such intent remain abroad," he shall be deemed to have committed an act of bankruptcy. Upon that point we may dismiss the case very shortly. There can be no doubt whatever, that everything stated in the 70th section as to a debtor departing the realm with intent to defeat or delay his creditors, and remaining abroad with the same intent, is applicable to this case, because the debtor himself has admitted this somewhat ostentatiously, so much so as to induce the belief that his wish is rather to seek than to avoid a bankruptcy. This is quite clear upon his own admission, for he says, almost in the words of the section, "I did go away for the purpose of avoiding my creditors, and I remain abroad for that purpose." There can be no doubt that he has so far committed an act of bankruptcy within the section. The only important point of the case, and which was so much discussed the other day, remains, and that is, whether the petitioning creditor's debt is so contracted as to satisfy the provisions of the 90th section of this Act. The only question here is, whether there was a debt contracted after the passing of this Act. On behalf of the official manager, who asks for the adjudication, it is said that the debt was clearly contracted after the passing of the Act, because it was contracted when the M. R. ordered the debtor to pay the call made upon him as a contributory of this company. A stand is taken upon this debt, and it is contended that no one is entitled to look behind it. Now the order of the M. R. is very short and clear. It says, "Upon the application of the official manager of the said company, and upon reading the affidavit of the said official manager, sworn on the 23rd July 1863, and filed with the proceedings in this matter, it is ordered that Thomas George Williams, now of Boulogne-sur-Mer in the empire of France, one of the contributories of this company, do within fourteen days hereinafter from the date of the notice hereof, pay to Robert Palmer Harding, the official manager of the said company, at his office in Bank-buildings, the sum of 1921*l*. 13*s*. 8*d*., this being the balance now appearing to be due from the said Thomas George Williams on his account with the said company." It is said that this is a contract to

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pay the debt, and that we cannot go beyond it, outside it, or behind it; that it stands by itself, and the debt must be held to be contracted at the date of that order. Now I do not agree in that at all. It is quite clear that the law always implies a contract on the part of the debtor to pay that which he ought to pay. That is the ordinary practice in *assumpsit*. We always alleged that in pleading. Having shown that it was the duty of a man to pay, we used to go on and raise an *assumpsit* that he undertook and promised to pay what he ought to pay. But it is only an inference, and that inference cannot arise but in the absence of an actual or existing contract, which contract there is here. The contract in this case was to pay, and the time when the debt accrued was when he signed or executed an indenture or deed of partnership as one of the shareholders of this company. On the 24th Feb. 1849 he executed the deed of settlement of the company for 500 shares. In that deed there are various provisions, one of which is that the directors may make calls for further instalments of capital to be paid up. It is in pursuance of that power, the shareholders having agreed to it, that Mr. Williams was held to be a contributory, and being a contributory an order was made upon him to pay the amount due. The question is, whether the order of the M. R. does not relate back to the time when the deed was executed. I think it does relate back. I think that this was an inchoate debt when this gentleman signed the deed. He thereby undertook, agreed and promised to pay any sum that should be found due, and when that sum was found due, and the amount ascertained, that has, in my opinion, relation back to the time when the contract was entered into. I think we cannot travel out of an express contract, or exclude an express contract, and rest simply upon the implied one to pay, which arises by operation of law upon the order of the M. R. Now the authorities most relied upon by those seeking adjudication is the case of *Robinson's Executors, re The Royal Bank of Australia*. That case is, I think, entirely distinguishable from this, and depends upon totally different circumstances. That is not my own opinion alone, but it is so stated in *Parbury's* case. I allude to that case now for the sake of showing that in a case like this, which turns upon the time of contracting the debt, the case of *Robinson's Executors* does not, according to the remarks of Turner, L.J., in *Parbury's* case, apply. The L.J. says: "The case of *Robinson's Executors* does not seem to me to have any bearing upon this case, for the question there was, not as to the time when the debt was contracted, but whether the call was a specialty or a simple contract debt. That was the sole question; Robinson's executors had paid simple contract debts when they ought not to have done so, if there were any specialty debts outstanding, and it was contended that under these circumstances there was a specialty debt outstanding against them of 12,000*l*. It was said that, having executed the company's deed, a specialty debt arose in consequence of the deed, and that therefore the executors ought not to have paid the simple contract debts. Master Richards held that it was a specialty debt, and it was referred to Stuart, V. C., who called in the aid of a common law judge, the present C.J. of the C. P. It also went before the L. C. (Cranworth) and the two L. JJs., who called to their help the late Mr. Justice Cresswell and Mr. Baron Martin. Cresswell, J., gave the opinion of himself and Martin, B., and it appeared that the L. C. and the two common law judges were strongly of opinion (though they had doubts) that this was not a specialty debt in respect to calls, but a simple contract debt only. The L.JJ., however, dissented from this view, and Knight Bruce, L.J., said: "Such is my deference to the weight of authority here, when I find a vice-chancellor, a lord chancellor, and three common

law judges all one way, I decline to act upon my own opinion, and therefore withdraw and give none." Turner, L. J. takes the same course. Without going into the questions, I think, for the reasons expressed by Turner, L. J., in *Parbury's* case, that the case of *Robinson's Executors* has no bearing upon this case. Before adverting again to *Parbury's* case, let me read the definition of what a call is from 11 & 12 Vict. c. 45, s. 3 (the Winding-up Act 1848): "The word 'call' shall mean every demand or requisition upon the contributories of a company, made or to be made, for a contributory payment towards the funds or assets thereof, or for or towards the payment or discharge of any of the debts, liabilities, or losses of such company." This looks as if the call was for the payment of an antecedent debt. In *Parbury's* case he was a shareholder in the Warwick and Worcester Railway Company, in respect of which a winding-up order was made. Parbury had applied for his discharge in India, under the Indian Insolvent Act, but had not inserted the company in his schedule. We may dismiss all question whether such omission made his discharge bad. The only question here is, at what time the debt was contracted. After Parbury had obtained his discharge, his name was placed upon the list of contributories, and a call was made upon him in that character. Kindersley, V.C. held that his name must be removed from the list of contributories, and that he was not liable to the call. That immediately raises the question as to when the debt was contracted, and it shows that it was not contracted only when the call was made. Campbell, L. C. agreed in that case with the Lords Justices. It is there laid down that "the whole scope of the Act seems to be to place a discharged debtor upon the same footing as a certificated bankrupt. Then the point will be, when was the debt contracted? If the debt was contracted after the certificate, of course it would not be a bar to it, and if contracted before, it would be." So here the question immediately raised is, when was the debt contracted? Turner, L. J., says: "The decision in *Robinson's* case had no bearing, because the question there was, whether it was a specialty or a simple contract debt. Here the question is when the debt accrued, and whether it is bound by the discharge." The same inference is deducible from the case of *Ex parte Nicholas*. The judgment there proceeded upon the principle that the debt was contracted anterior to the bankruptcy. But in addition to all that can be gathered from these cases, it appears to me as if the Legislature had this difficulty in view in framing the 25 & 26 Vict. c. 89 (the Companies Act 1862), the 75th section of which meets this question, and settles the law: "The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound-up, shall be deemed to create a debt in England and Ireland of the nature of a specialty accruing due from such person at the time when the liability commenced, but payable at the time or respective times when the calls were made as hereinafter mentioned for enforcing such liabilities." There is the very point: *debitum in presenti solvendum in futuro*. Having given this case my best attention, I am of opinion that there was no debt contracted after the passing of the B. A. 1861, and therefore that I ought not to proceed to adjudication.

Ordered accordingly.

EXCHEQUER CHAMBER.

Reported by T. W. SAUNDERS, W. MAYD and LUMLEY SMITH,
Esqrs., Barristers-at-Law.

ERROR FROM THE QUEEN'S BENCH.

Wednesday, Feb. 3.

(Before ERLE, C.J., WILLIAMS and WILLES, JJ.
and CHANNELL, B.)

GRIFFIN v. DRIGHTON AND ANOTHER.

*Church—Right of incumbent to access to all parts of
the church—Lay rector—Chancel.*

The possession of the parish church is in the incumbent and churchwardens, who have a right to access to every part of it. Where, therefore, there was a door leading from without into the chancel upon which the lay rector had placed a lock which he kept locked except during divine service:

Held, that the incumbent (the vicar) had a right to access to the chancel through the door at all times.

This was a writ of error from the Q. B. (see 8 L. T. Rep. N. S. 500), where the facts are fully stated.

Bridge (Lush, Q.C. with him) appeared for the plt.

Manisty, Q.C. appeared for the defts.

The following cases were cited:

Clifford v. Wicks, 1 B. & Ald. 498;

Burton's Comp. 466;

Jones v. Ellis, 2 Y. & Jer. 265;

Godbolt's Rep. 200;

Spooner v. Brewster, 3 Bing. 136;

Jarrett v. Steele, 3 Phill. 170;

Lee v. Matthews, 3 Hag. 173;

Rich v. Bushnell, 4 Hag. 164;

Gibson's Codex, 224;

Morgan v. Curtis, 3 M. & Sel.

ERLE, C.J.—This was an action of trespass by the lay rector against the vicar for taking off a lock of a door leading into the chancel, and the substance of the plea is, that the vicar claimed a right to go through all parts of the church and through all the doors, and that the lay rector put a lock upon the door leading into the chancel to prevent him from doing so, and that he took it off to secure his ingress and egress, and this defence on the part of the vicar was held to be a good defence, and I am of opinion that the judgment of the court below should be affirmed. I do not mean to go into the question of the rights of the lay rector to the freehold, for no such right as that appears to be in question in the consideration of the case before us, which involves a claim of right on the part of the incumbent who has duties to perform in the church, and I do not think that I can express the right better than in the words of Sir John Nicholl, in his judgment in *Jarrett v. Steele*, 3 Phill. 167, where he says, "all persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in this country; that the possession of the church is in the minister and churchwardens, and that no person has a right to enter it when it is not open for divine service, except with their permission and under their authority." I feel that is a perfectly sound interpretation of the law. The words in this plea are not to be torn from their natural meaning, which clearly say that the churchwardens and vicar claim possession of the entire church. It is not necessary to say what are the rights of the lay rector in the church, for my judgment proceeds upon the principle laid down by Sir John Nicholl. It seems to me to be peculiarly necessary that the vicar should have access to the church from any part, and more particularly to the chancel, where at times he has special duties to perform.

WILLIAMS and WILLES, JJ., and CHANNELL, B. concurred. Judgment of the court below affirmed.

APPEALS FROM THE COMMON BENCH.

Thursday, Feb. 4.

BAXENDALE v. THE GREAT WESTERN RAILWAY COMPANY.

Carriers—Packed parcels—Unequal charges—Railways.

The defts., being a railway company, had formerly been in the habit of making a deduction in their charge for parcels to those who delivered and received them at their stations; but prior to the present action they made a change, and charged the same sum for the carriage, whether the goods were delivered to, or taken away, from the stations by the customers or not:

Held (affirming the decision of the Court of C. P.), that they had no right to make such change.

This was an appeal from the decision of the Court of C. B. upon a special case. The facts of the case and the decision of the court are reported ante, 8 L. T. Rep. N. S. 833. It will be sufficient to say that the defts. had charged the plt. the same rates for the carriage of goods from station to station as they charged to other persons for whom they collected goods conveyed them to the station of departure, carried them to the station at the end of the journey, and conveyed them thence to the consignees. The plt. claimed to recover back from the defts. the sums which they contended had been overcharged to them. The Court of C. B. decided in favour of the plt., but Erle, C. J. dissented from that decision in an elaborate judgment.

M. Smith, Q.C. (Field with him), for the defts. the railway company, referred to

17 & 18 Vict. c. 31, s. 6;

Baxendale v. The Eastern Counties Railway Company, 4 C. B., N. S., 63;

Stevens v. Jeacocke, 11 Q. B. 731;

7 & 8 Vict. c. 9, s. 50;

8 & 9 Vict. c. 20, s. 90;

10 & 11 Vict. c. 226, ss. 52, 53;

Pickford v. The Grand Junction Company, 10 M. & W. 399;

Branley v. The South-Eastern Railway Company, 12 C. B., N. S., 63; 6 L. T. Rep. N. S. 458;

Parker v. Great Western Railway Company, 6 E. & B. 77.

Bovill, Q.C. (Ollivant with him), for the plt., was not called on.

COCKBURN, C.J.—We are all of opinion that the judgment of the Court of C. P. ought to be affirmed. The 7 & 8 Vict. c. 3, s. 50, contains an equality clause which is again renewed in the Railway Clauses Consolidation Act. These clauses enact that equal charges shall be made to all persons. The construction put upon these charges in the Court of C. P. applies to the present case. It is not competent to the railway company to superadd to the tolls which they are by Act of Parliament entitled to charge, a charge for collecting made on those who do not require their services, a charge which might be reasonable for those who do require them, but is unreasonable for those who do not. This, therefore, is an unequal charge. Mr. Smith argued that, by 10 & 11 Vict. c. 226, s. 53, the company is entitled to charge, at their discretion, for articles under 500lbs. in weight; but all that appears to follow from that section is, not that the equality clause is repealed, but that the enactment limiting the maximum of tolls is, as to certain articles, repealed. If the company proceed to establish a tariff for articles under 500lbs. in weight, the tariff must be subject to the equality clauses, and the same for all persons. As to the question whether an action for money had and received will lie, which seems to have been one of the numerous points discussed in *Parker v. The Great Western Railway*, if the judgment of that court went

so far as to say that it would not, I think that it was erroneous, and that a court of error ought not to be bound by it. Tolls had not then undergone the discussion which subsequently took place in the Court of C. P., or the doctrine of Coleridge, J. would not have been laid down. Upon the whole case, I think that the matter is extremely clear, and I hope that it will be considered as settled, and that the case will not be taken up to the H. of L.

The rest of the Court (MARTIN, CHANNELL, and FIGOTT, BB., and CROMPTON, BLACKBURN and MELLOR, JJ.) concurred. *Judgment affirmed.*

Thursday, Feb. 4.

HORTON v. MABON.

Patent—Infringement—Application of known instrument to new purpose.

A. obtained letters patent for an alleged invention for the improvement of telescopic gasholders. The improvement consisted, among other things, in the application of a double angle iron cup or trough, filled with water to the points of contact between the respective cylinders of the gasometer, by which the escape of gas was prevented. Such a user of the double angle cup was new as regards gasometers, but was well known, and had been commonly used for other purposes. In an action for infringement in making gasometers with the said cup, Held (affirming the decision below), that this was merely the application of a well-known instrument to an analogous purpose, that it was not a new invention, and therefore not the subject of a valid patent.

This action was brought to recover damages for the infringement of the plt.'s patent for improvements in the construction of gasholders. The Court of C. P. decided that the plt. had merely applied known scientific knowledge to new purposes, and that his invention was not the subject of a patent. The case is reported, and the facts stated *ante*, 6 L. T. Rep. N. S. 289. The plt. having appealed from this decision,

Webster (Bovill, Q.C. with him) repeated the arguments urged in the court below, and referred to

Harwood v. The Great Northern Railway Company, 2 B. & S. 194; 6 L. T. Rep. N. S. 190; *Meeson v. Harcourt*, 6 M. & G. 734; *Muntz v. Foster*, 2 Webster's Patent Cases, 92; *Newton v. Vaucher*, 6 Ex. 859; *Crane v. Price*, 4 M. & G. 580; *Morgan v. Seaward*, 2 M. & W. 544; *Lewis v. Davis*, 3 C. & P. 503; *Brunton v. Hawks*, 4 B. & Ald. 541.

Hindmarch, Q.C., for the deft., was not called on. COCKBURN, C.J. delivered the judgment of the court (Crompton, Blackburn and Mellor, JJ., Channell and Pigott, BB.).—We are all of opinion that the judgment of the Court of C. P. ought to be affirmed. It is established in point of fact that whereas the plt. claims as part of his invention the substitution of double-angle irons for single-angle irons, which had been previously used, it was a thing well known that for two single-angle irons one double-angle iron could be used. It was a matter of general knowledge. It is impossible that a patent could be upheld appropriating to a patentee the application of a thing perfectly well known as a matter of existing scientific knowledge. *Judgment affirmed.*

Friday, Feb. 5.

ILDEBERTON V. JEWELL AND ANOTHER.

Composition-deed—B. A. 1861 (24 & 25 Vict. c. 134), ss. 192 and 198—Non-executing creditors—Plea to and action against bail.

A composition-deed which does not purport, on the face of it, to be for the benefit of all the creditors, is not binding under sect. 192 of the B. A. 1861, on the creditors who have not executed it; and a certificate under sect. 198 of the filing of such a deed affords no answer to an action against bail who have undertaken to render the debtor.

This was an action which was removed from the Lord Mayor's Court to the Court of C. P. The declaration was on a recognisance of bail in the usual form. The deft. Jewell pleaded "that after the making and coming into operation of the B. A. 1861, and at the time of the execution of the deed by the said Louis Castrique hereinafter mentioned, the said Louis Castrique (not being a bankrupt) was indebted to the plt. on the judgments recovered against the deft. as in the declaration mentioned, and to divers other persons, in divers large sums of money, and that while the said Louis Castrique was so indebted as aforesaid, and after the making and coming into operation of the said Act, to wit, on the 17th Jan. 1862, and before the commencement of this suit, and before the issuing of the *capias* hereinafter mentioned, a certain deed was made and entered into between the said Louis Castrique and certain persons then being and therein respectively described as his creditors, and then executed by the said Louis Castrique, which said deed was made and entered into for the benefit of all the creditors of the said Louis Castrique, and related to the debts and liabilities of the said Louis Castrique, and his release therefrom, and which said deed, together with a schedule thereunder written, and a certain attestation thereon, were in the words and figures following:—"

The plea then set out the composition-deed, which was in the usual form, except that it did not purport, upon the face of it, to be for the benefit of all his creditors. And the plea then averred the execution of this deed by three-fourths in value of the creditors of the said Louis Castrique, and the registration and other proceedings requisite to give it validity, and concluded thus:

"And the said deft. says that although afterwards, to wit on the 31st March 1862, a writ of *capias* was issued and prosecuted out of the said Lord Mayor's Court by the plt. against the said Louis Castrique upon the said judgment, as, according to law and the custom and practice of the said Lord Mayor's Court, there ought to have been, the same was sued and prosecuted out of the said Lord Mayor's Court after the notice of filing and registration of the said deed had been given as aforesaid, and after the issuing of the said certificate, and without leave of the Court of Bankruptcy. And the said deft. says that, by reason of the premises, the said *capias ad satisfaciendum* was not and is not available to the plt., and the said deft. avers that, save as aforesaid, the plt. has not sued or prosecuted out of the said court any *capias ad satisfaciendum* against the said Louis Castrique upon the said judgment."

The other deft. pleaded a similar plea.

To these pleas the plt. demurred, the grounds of demurrer being "that the deed affords no answer to the action, as the deed is not binding on creditors who are not parties to it." Joinder.

The plt.'s points were as follows:—1. That the deed set out in the pleas affords no answer to the action, as the deed is not binding on the creditors who are not parties to it. 2. When there is no *cessio bonorum* on the part of a bankrupt or insolvent, the majority

of a body of creditors cannot bind the minority to a composition. 3. That the pleas do not show that the requisite majority executed the deed; for the defts. by their pleas may intend a majority of the unsecured creditors. 4. That non-executing creditors are excluded from the benefit of the deed. 5. That the deed is unreasonable in its provisions. 6. That although the deed may be binding under the bankrupt law as between the parties thereto, it cannot affect strangers.

The defts.'s points were:—1. That the defts. are sued as sureties, and the deed for the benefit of the creditors of the principal debtor Castrique set out in the plea, is binding on the plt. under the B. A. 1861, s. 192. 2. That this plea shows that the said Castrique has duly performed all the conditions required by the said deed so as to entitle himself to the benefit thereof. 3. That after notice of the filing and registration of the said deed under the B. A. 1861, no writ of execution could be executed against Castrique without leave of the Court of Bankruptcy, and that no leave was obtained, and that, before the deft. could be fixed as bail, the plt. was bound to have issued an available writ of execution against the said Castrique. 4. That the certificate and the filing and registration of such deed given to the said Castrique under the B. A. 1861, s. 198, was thereby available to the said Castrique for all purposes as to protection in bankruptcy, and could only be set aside by a superior tribunal. 5. That in granting the said certificate the said registrar of the Court of Bankruptcy acted judicially, and the deft. could not be compelled to incur the risk of arresting and rendering the said Castrique in defiance of the protection accorded to him by the said certificate.

By sect. 192 of the B. A. 1861 (24 & 25 Vict. c. 134) it is enacted that, "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts and liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any such matters, shall be valid and effectual and binding on all the creditors of such debtor, as if they were parties to and had duly executed the same, provided the following conditions be observed, &c."

In the case of *Ilberton v. Castrique*, 8 L. T. Rep. N. S. 537; 32 L. J. 206, C. P., the Court of C. B. held that the same deed was not binding on the plt. who had not executed it, and in the present case they decided that on the authority of *Ilberton v. Castrique*, the deed was void as against non-executing creditors, and therefore afforded no answer to an action by the plt. against bail who had undertaken to render the debtor Castrique in the Mayor's Court. The case now came up to the court of error on appeal from this decision.

Mellish, Q.C. (Hodson with him) for the defts.—There are two questions: first, whether this deed is good under the 192nd section of the Bankruptcy Act; and, secondly, supposing it is good, whether it is an answer to an action on a recognisance of bail. The second question was not entered into in the court below. The first question was argued in the case of *Ilberton v. Castrique*, 14 C. B. N. S., 99; 8 L. T. Rep. N. S. 537, where the same deed was in question, and the Court of C. P. held it to be bad, principally on the judgment of Turner, L. J., in the case of *Ex parte Rawlings*, 7 L. T. Rep. N. S. 238, 582; 32 L. J. 27, Bank. This is the first occasion on which this question has come before a court of error. I admit that this must be a deed for the benefit of all the creditors. By sect. 192 and the following sections of the Act, if the deed is capable of being executed by all the creditors, and there is nothing on the face of it to show that all the creditors shall not execute it, then, when it has been executed by the appointed

number, it is binding on all as if they had executed it, and it is not necessary that the covenants should be with the debtor and all the creditors, but with the debtor and the appointed number, and the court must construe the deed as if all were parties to it, and all had executed it. There is an express provision in the deed that the composition shall be tendered within a month. [CROMPTON, J.—But to "the creditors parties hereto."] I contend that if the deed is such a one that all might have executed it, when the appointed number have executed you are to construe it as if all had done so. [MARTIN, B.—Are the non-executing creditors to have no remedy for recovering the composition?] Yes, if it is not tendered to them within a month the deed is absolutely void. [CROMPTON, J.—How is the creditor to know that the three-fourths have executed, and that he is bound?] The deed is to be published by the Court of Bankruptcy, and it cannot be so published till three-fourths have signed. [CROMPTON, J. referred to the case of *Larpent v. Bibby*, 5 H. of L. Cas. 431.] The deed may be binding on all the creditors, though not one of them has executed it; the debtor must execute it, but it is only necessary that three-fourths of the creditors should assent in writing. [BLACKBURN, J.—You agree that if there is anything on the face of the deed which would exclude any of the creditors, it would be bad?] Yes. [MARTIN, B.—This deed does not relate to all the debts and liabilities of the debtor.] You must read the deed as if all had executed, and then it would. There is a case of *Ellis v. Ollave*, 3 Salk. 60, which I cite to show what was the opinion of the judges as to the words "to, for, or with the creditors who had executed the composition-deed."

Ex parte Morgan, re Woodhouse, 32 L. J. 15, Bank.; 8 L. T. Rep. N. S. 778;

Ex parte Rawlings, 32 L. J. 27, Bank.; 7 L. T. Rep. N. S. 288.

There the decision was not on this point at all, but that the proper number had not signed. There the composition was to be secured by promissory notes, and the deed recited that the notes had actually been given to the creditors who had signed. There is another case of *Ex parte Godden, re Skettle*, 32 L. J. 37, Bank. There the composition was to be paid on the creditors executing the deed, so that the non-executing creditors would only have the bare right to it. These are not decisions on the point, but only opinions. There is no decision which can be considered binding on the court.

Harry v. Wall, 1 B. & A. 103;

Daniel v. Saunders, 2 Chitty, 564,

are decisions as to the debts being placed opposite the names of the creditors in the schedule. The L. C. gives his opinion of the 192nd section in *Ex parte Spyer, re Josephs*, 8 L. T. Rep. N. S. 743. [MARTIN, B.—I think that the 197th section cannot possibly apply to such a case as this. CROMPTON, J.—If the composition is good, the original debt is gone.] No; he must tender the composition. I now come to the second point, whether, if the deed is good, it is an answer to an action on a recognisance of bail. In *Donelly v. Dunn*, 2 B. & Pul. 45, it is laid down that "bail cannot plead the bankruptcy and certificate of their principal in their own discharge," though I cannot see the reason for the decision: (Comm. Dig. tit. "Bail," Q. 6 and 7.) Bail is only security that the debtor shall pay the debt or deliver up his body: (*Newington v. Keys*, 4 B. & A. 493.) [CROMPTON, J.—I always understood that bail was discharged because there was no ca. ss. against the principal.] That is what I am going to contend:

Brandon's Prac. Lord Mayor's Court, 110;

Devered v. Ratcliffe, Cro. Eliz. 185;

Masters v. Lewis, 5 Mod. 95;

Dudlow v. Watchorn, 16 East, 39.

If this deed is good, by sect. 198 of the Act there could be no valid *ca. sa.* against Castrique without leave of the Court of Bankruptcy, and I cite these cases to show that there must be a valid *ca. sa.*

Manisty, Q.C. (Joyce with him) for the plt.—There is no authority in favour of my friend's argument, but that dictum of Lord Holt in *Feltham v. Cudworth*. There are many authorities for saying that this deed is only binding on those who execute it: (*Legg v. Cheeseborough*, 5 C. B., N. S., 741.) [CROMPTON, J.—I do not think it is a question who should be the parties to the deed, as the deed may be made with a trustee, but whether there is a provision in the deed for all the creditors.] Just so. I will not dwell on *Walter v. Adcock*. It is so unreasonable that persons who are not parties to the deed should be bound by it and yet not able to sue on it, that I submit this must be a bad deed:

Ex parte Cockburn, re Smith, 9 L. T. Rep. N. S. 464.

[*Mellish*.—The L. C. has ordered that case to be argued before him again.] No deed which says that if you have your debt once tendered it shall operate as a release, can be a reasonable deed:

Copeman v. Hart, 14 C. B., N. S., 91;

Dewhurst v. Kershaw, 1 H. & Colt. 726.

You have no right to say that if I don't execute within the month I have no right to the composition.

Mellish in reply.

MARTIN, B.—Five of us are of opinion that the judgment of the court below should be affirmed, and I am not prepared to say that the rest of the court is of a different opinion. In my opinion it ought to be affirmed on the ground stated by my brother Crompton, that the deed is for the benefit of those creditors only who executed it. With respect to the Act, we have no difference of opinion. It says, that when a deed has been entered into "between a debtor and his creditors" (and that would mean all his creditors; but the Act goes on to say), "or any of them, or a trustee on their behalf" (and that must be on behalf of all), "relating to the debts and liabilities" (that must mean that it must relate to all the debts and all the liabilities), "then it shall be effectual and binding on all the creditors as if they were parties thereto, and had duly executed it." Then I look at this deed and ask, does it apply to all the debts and all the liabilities of all the creditors? In my judgment it does not. I think it only applies to those who executed it, and whose debts are set out in the schedule, and that those who have not executed it are thrown overboard. This deed is confined to the creditors, parties of the second part, who have executed it, and to the amount of the debts in the schedule, and it excludes those who have not executed, and it seems to me that a deed in this form does not satisfy the requirements of the Act of Parliament. That is the judgment of five of us, and of four of the judges of the Court of C. P. Probably this deed was taken from an old book of forms, which was intended for another purpose, and it is very likely that this Act of Parliament was never thought of by the persons who framed the deed. And here I wish to protest, in the strongest manner, that I have the greatest desire to give effect to this Act of Parliament, and to place no impediments in the way of those seeking relief under it, and I think that a person of ordinary ability, with the Act of Parliament before him, would find no difficulty in drawing a good deed.

CROMPTON, J.—I am quite of the same opinion. I have always been very anxious to see full effect given to honest deeds, and my wish has always been that some general form of deed under this Act should be sanctioned by the Legislature. On this point of law we have had several decisions, and I think we all

agree in the proposition of Mr. Mellish, that the deed must be for the benefit of all the creditors, and it is not necessary that it should be made between the debtor and all his creditors, but between the debtor and some of his creditors, or a trustee on behalf of all. I do not put my judgment on the ground that the deed must be *inter partes*, between the debtor and all the creditors, but it must relate to the debts of all. The Act of Parliament says there shall be a provision for all, and it seems to me to make no difference whether you expressly exclude a part or only leave them out. It seems to be decided that there need be no *cassio bonorum*, but that these deeds should be regulated in the same manner as the trust property in the *cassio bonorum*. There is in this deed no provision made for the non-executing creditors: it is a deed between the debtor and all who have put down their debts in the schedule, and the words "the said creditors, parties hereto of the second part," are used throughout. There is not a word in the deed to show that any but the creditors signing are to take the composition, and I find no provision for those not signing. By a late case (a) it is, I think, decided that there must not only be a provision for all, but also a release by all; and in the case in the C. P. (*Spitzer v. Chaffers*) that as the provision must be for all, so all the creditors must release, but there certainly must be a provision for all. The only matter that I would mention with reference to Mr. Mellish's very able argument, that the non-executing creditors are in the same position as those who have executed, is that those who executed could object to anything in the deed, but the others could not. The clause says that the deed "shall be as valid, effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same." I do not think that puts all in the same position, unless the deed is made for the benefit of all, and the non-executing creditors do not appear to me to be in every point of view in the same situation as if they had signed the deed. Assuming that they are to be in the same situation, and granted that they are to be taken as if they had signed the deed, then it makes no provision for them. The deed on the face of it does not make any provision for the non-executing creditors, and therefore I think it is bad, and that the judgment of the court below should be affirmed.

CHANNELL, B.—I agree that the judgment of the court below should be affirmed, and on this short ground—that the deed must be a deed which provides for all the creditors, and all the debts and liabilities of the debtor, and there is nothing to satisfy me that that is the case in this deed.

BLACKBURN, J.—I should not venture to reverse the decision of the Court of C. B. without further consideration, but I cannot at present assent to it, and if I had to decide the case, I should take time to consider my judgment; at present I am of opinion that this is a good deed. I agree that a deed to be good under the Act must be a deed relating to all the creditors, and if it excluded any, or did not provide the same benefit for all, it would not be binding on those who had not executed; but I think, as at present advised, that the effect of the 192nd section, which says that a deed between a debtor and any of his creditors "shall be as valid, effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same," is, as Mr. Mellish has argued, to say that though the deed has only been executed by a part, yet it shall be binding on all; and that the true construction of the statute is, that if there is a deed providing for all the debts and liabilities, and all the creditors, as soon as three-fourths

(a) The learned judge probably refers to the case o *The Ipatones Park Iron Company v. Pattinson*, in the Ex. argued this term. See *ante*, p. 806.

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have executed it, it shall be as binding and effectual as if Mr. Ilderton had executed it, and for that it was necessary to show that this is for the benefit of all. I have, at present, great doubt whether you can show by parol that the deed is for the benefit of all, when it appears on the face of it that it is for "the parties hereto of the second part," i. e. those who have signed their names in the schedule. I am inclined to think that this deed was intended to be for the benefit of the whole, but I have some doubt; if it had stated that it was a deed under the Bankruptcy Act, or that it was for the benefit of all the creditors, or some such expression, I should have assented to Mr. Mellish's argument. It seems to me that most of the minor considerations have been answered, and especially that with respect to all the creditors, both executing and non-executing, having the same remedy to recover the composition; but it is not necessary that I should enter into those points. I will not say at present that I dissent from the rest of the court, but I say that I do not assent.

MELLOR, J.—I agree with the majority of the court that the judgment of the court below should be affirmed. The deed must be a deed between the debtor and all his creditors, or between the debtor and a part of his creditors, or between the debtor and a trustee, but in the two latter cases it must be for the benefit of all. This deed carefully excludes the non-executing creditors, and when I come to look at the reservation of securities, it is "without prejudice to any security which the said creditors, parties hereto, may hold for their said debts," that is, as set out in the schedule; this seems very strongly to show that the deed was intended to refer to those only who signed it, and the tender was also to be made to them. I agree with my brother Crompton that it must appear on the face of the deed that the other creditors, who have not executed, are provided for. I do not go into the minor matters, but I agree with my brother Blackburn that most of them were answered.

PIGOTT, B.—I am of the same opinion; and for myself I may say that I am desirous of giving the fullest effect to this Act of Parliament and to these deeds; but when I look at this deed I find nothing to bind Mr. Ilderton, and then, looking at the Act of Parliament, I find that when three-fourths of a man's creditors have entered into a composition-deed, and certain requisites have been complied with, the other fourth is to be bound. Then it is necessary to see whether this is such a deed as is contemplated by the statute. I asked Mr. Mellish whether we were to leave out the words "relating to the debts or liabilities of the debtor." That does not mean part of the debts, but all; and looking at the present deed, I see clearly that it only provides for a part of the creditors who have executed the deed, and for that reason I think that the judgment of the Court of C. P. should be affirmed.

Judgment affirmed.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON,
Esqrs., Barristers-at-Law.

Saturday, Jan. 30.

(Before the LORDS JUSTICES.)

RAVENSCROFT v. JONES.

Legacy—Gift to legatee—Ademption.

*The testator made his will in 1849, and gave to his daughter, the female plt., unmarried at that time, a legacy of 700*l.* Upon her becoming engaged to be married, her mother, by the testator's directions, gave her bank-notes for 100*l.* Soon after*

*her marriage she and her husband went to the house of the testator, who then gave to the husband 400*l.* He subsequently made a codicil confirming his will: Held (agreeing with the M.R.), that neither of the presents was an ademption of the legacy. But Turner, L. J. doubted as to the gift of the 400*l.**

This was an appeal by the executors of Joseph Jones, the testator in the cause, against a decision of Romilly, M.R., who, upon the hearing of the cause for further consideration, had decided that Martha Ravenscroft, one of the plts., was entitled to the whole amount of a legacy of 700*l.* given her by the will. The circumstances were these:—

The testator's will bore date the 6th Nov. 1849, and thereby, after mentioning several sums of money given by him to his children for their advancement in life, he gave to them or some of them legacies varying in amount, and gave to Mrs. Ravenscroft, his daughter, who was at that time Martha Jones, a legacy of 700*l.*, and he divided the residue of his estate between his four sons, and the children of another daughter who was then dead.

At the date of this will (and for five years previously) Mrs. Ravenscroft was living alone with her father and mother, who were both advanced in life, and her father was also in a very infirm state of health. Mrs. Ravenscroft had the sole care of them, as her brothers and sisters were either married or had left home. Mrs. Ravenscroft continued to live with her parents until her own marriage, hereafter mentioned.

The testator made two codicils to his will, bearing date respectively the 24th Jan. 1851 and the 10th June 1852. Neither of these referred in any manner to the legacy given to his daughter Martha.

In March 1855 Miss Martha Jones became engaged to her present husband, and it was arranged that the marriage should shortly afterwards take place. Soon after the engagement became known, Mrs. Jones, the mother, gave to her daughter bank-notes amounting to 100*l.*, telling her that she did so by the direction of the testator, but no reference whatever was made to the will by the testator or by his wife. Miss Jones considered that it was a wedding present from her father, and she expended the greater part of it upon her wedding outfit.

The marriage was solemnised in the following June, and about three weeks after Mr. and Mrs. Ravenscroft went together to see the testator, who was at that time ill and confined to his bed. Mrs. Jones, upon that occasion, gave to Mr. Ravenscroft a bundle of bank-notes, which amounted to 400*l.*, and in doing so said, "Mr. Jones told me to give you this." Mr. Ravenscroft then went into the testator's bed-chamber for the purpose of thanking him, and upon his doing so, the testator said that he hoped it would do him good, or expressed himself to that effect. It did not appear that any reference was made to the will on this occasion.

On the 13th June 1856 another codicil was executed by Mr. Jones, which did not alter the bequest to his daughter Martha, but expressly confirmed his will.

The testator did not die until the 15th Feb. 1859, and his will and codicils were duly proved by the executors named, who were defts. in the present suit.

Disputes arose between the members of the family as to the division of the testator's property, and this bill was filed by Mr. and Mrs. Ravenscroft against the executors for a general administration of the estate, and at the hearing the usual accounts and inquiries were directed. The chief clerk was of opinion that the two gifts mentioned were adoptions *pro tanto* of the legacy of 700*l.* given to Mrs. Ravenscroft, and he certified that only 200*l.* with interest was payable to her out of the estate.

The M. R. came to a contrary conclusion, and or-

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Re THE WESTMINSTER ESTATE OF THE PARISH OF ST. SEPULCHRE, &C.

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dered payment to Mrs. Ravenscroft of the whole of the legacy, from which order the executors appealed.

Hobhouse, Q.C. and H. Fox Bristowe supported the appeal.

Southgate, Q.C. and J. H. Taylor appeared for the plts.

The following were the authorities referred to:

Ex parte Pye, 18 Ves. 140;

Pym v. Lockyer, 5 Myl. & Cr. 29;

Montefiore v. Guedalla, 1 De G. F. & Jon. 93;

1 L. T. Rep. N. S. 251;

Powys v. Mansfield, 3 Myl. & Cr. 359;

Ferris v. Goodburn, 4 Jur. N. S. 847; 32 L. T. Rep. 18;

Montague v. Montague, 14 Beav. 565;

Kirk v. Eddowes, 3 Hare, 509;

Debeze v. Mann, 2 Bro. Ch. Cas. 165, 519;

Robinson v. Whitley, 9 Ves. 577;

McClure v. Evans, 29 Beav. 422; 3 L. T. Rep. N. S. 870;

Snipe v. Lord Lowther, 2 Hare, 424.

Hobhouse, Q.C. having been heard in reply,

Lord Justice KNIGHT BRUCE said, that, assuming the burden of proof in the case before the court to be as to both of the sums in dispute upon Mr. and Mrs. Ravenscroft, he was of opinion that they had entirely discharged themselves of that burden. With respect to the smaller sum given, the 100*l.*, it would seem to have been paid over to the testator's daughter simply as some provision for her outfit, and so as to enable her to marry with a little ready money in her pocket; and he did not think, upon the assumption that the burden of proof of intention was on the lady and her husband, that a jury could be reasonably directed or asked to answer the question, whether that gift was intended as a satisfaction of the legacy, in any other than one way. With regard to the second and larger gift, he would rather prefer not to give an opinion as to the ground upon which, to a great extent at least, the M. R. appeared to have proceeded—namely, that the daughter herself was the legatee, but that the payment was made, not to her but to her husband. He did not rely upon that ground, nor did he express any dissent from it; but he considered that the time, circumstances and manner of the gift showed that it was intended as a simple gift, and not as a substitution, total or partial, for the legacy of 700*l.* which the testator had given to his daughter by his will, which will or legacy the testator had not, in his opinion, in his mind at the time. He should have been of that view independently of the last codicil to the will, and he felt that he was not departing from the case of *Powys v. Mansfield* (*ubi ante*), nor from any other of the authorities, in saying that such a codicil, even though not decisive of the question, was one which could not be left out of consideration. From the whole of the facts in evidence, then, he felt satisfied that no ademption, partial or total, had been intended, and therefore the conclusion of his Honour in favour of Mr. and Mrs. Ravenscroft's title to the whole of the legacy of 700*l.*, with interest, undiminished by either the 100*l.* or the 400*l.*, was the correct one. In his opinion the appeal was substantially groundless.

Lord Justice TURNER said that he was in entire agreement with his learned brother and the M. R. upon the question raised as to the 100*l.* These questions as to advancement and ademption always opened up the consideration of what an advancement really was. In the present case, however, he was clearly of opinion that the 100*l.* was a gift, and not an advancement, and that it ought not to be taken into account as part of the legacy given by the testator to his daughter. But he was obliged to confess that he was not satisfied that the same conclusion could be come to with respect to the 400*l.*; it appeared to him that this sum stood

upon a different footing. Although he was not then disposed to acquiesce in the conclusion of his learned brother and the M. R. upon that point, the doubt he felt would not affect the decision, for, of course, as the L. J. agreed with his Honour, the decision at the Rolls would be affirmed.

Appeal dismissed; by consent, costs on both sides to be costs in the cause, and the deposit to be returned.

Solicitors for the plts., *Fox, Wilson and Meadows.*

Solicitor for the executors appealing, *H. H. Lawrence.*

May 29 and Feb. 17.

(Before the LORD CHANCELLOR (Westbury).)

Re THE WESTMINSTER ESTATE OF THE PARISH OF ST. SEPULCHRE, LONDON, AND Re THE WESTMINSTER BRIDGE ACTS 1859 AND 1863, AND THE 9 & 10 VICT. C. 39, *ex parte* THE VICAR OF ST. SEPULCHRE AND OTHERS.

Statutory jurisdiction—Costs of sale of lands and reinvestment of purchase-moneys—Lands Clauses Act, sects. 1, 72 and 80—Special Acts.

If the special Act, being subsequent in date to the Lands Clauses Consolidation Act, under which companies and trustees of public undertakings are authorised to take land, itself gives a complete rule on the subject of the payment of costs, not only of purchases of land, but of the reinvestment of the purchase-moneys, the operation of the rule contained in the 1st section of the Lands Clauses Act (which provides that the provisions of that Act shall, without the necessity of any further enactment, be incorporated in the special Act) is excluded.

But if the special Act, as above stated, gives only a partial rule, as, for example, if it provides only for the costs of the reinvestment of purchase-moneys paid into court, omitting all provision as to the costs of the original purchase of the land, the provisions of the Lands Clauses Act, with regard to the omitted portion of the subject, will be held to apply.

The case of Re Cherry's Settled Estates, 6 L. T. Rep. N. S. 31, observed upon.

This was an appeal by the Commissioners of Her Majesty's Works and Public Buildings from a decision of Kindersley, V. C., on a petition presented by the vicar, churchwardens and trustees of the parish of St. Sepulchre, in the city of London, under these circumstances:

By the Westminster-bridge Act 1859 (22 & 23 Vict. c. 58) the Commissioners of Works are authorised to purchase out of such moneys as Parliament might provide and place at their disposal the hereditaments specified in the schedule thereto. By sect. 3 of the same Act all the powers by the Westminster-bridge Act 1853 (16 & 17 Vict. c. 46) "either expressly or by reference to the Acts therein cited" given to the commissioners in reference to the hereditaments comprised in the Act of 1853, are given to and vested in the commissioners with regard to the hereditaments specified in the schedule to the Act of 1859.

By sect. 13 of the Act of 1853 certain sections (amongst others the 44th and 49th sections) of the Chelsea-bridge Act 1846 (9 & 10 Vict. c. 39) are incorporated in and made applicable to the Act of 1853.

By sect. 44 of the Chelsea-bridge Act, it is enacted that any purchase-money agreed to be paid for any hereditaments purchased by virtue of that Act, "which shall belong to any body politic, corporate, or collegiate, *feme covert*, infant, idiotic, or other person or persons under any disability or incapacity, or not legally entitled absolutely to dispose of the premises by the sale of which such money shall be produced," should, in case the same should exceed 200*l.*, be paid

into the Bank of England in the name of the Accountant-General of the Court of Ch. to an account entitled, &c., to the intent that such money should be applied under the direction of the court in the purchase or redemption of the land tax, or towards the discharge of any debt or such other incumbrance as this court should authorise to be paid, affecting the same hereditaments or other hereditaments, standing settled therewith to the same or the like uses; and where such money should not be so applied, the same should be laid out and invested, under the like direction, in the purchase of other hereditaments, to be conveyed and settled to such and the like uses, and in the same manner as the hereditaments so purchased stood settled or limited; and in the meantime and until such purchase should be made, the said money should be invested in the purchase of Consols or Reduced Bank Annuities.

By sect. 49 of the same Act, it is enacted that when by reason of any disability or incapacity of the body or bodies, trustee or trustees, corporation, or other person or persons entitled to any hereditaments to be purchased under that Act, the purchase-money for the same should be required to be paid into the bank in the name of the Accountant-General of the Court of Ch., and be applied in the purchase of other hereditaments to be settled to the like uses in pursuance of that Act, "it should be lawful for the court to order the expenses of all purchases from time to time to be made in pursuance of that Act, or so much of such expenses as the said court should deem reasonable, to be paid by the said commissioners, who should from time to time pay such sums of money out of the moneys applicable to the purposes of that Act as the said court should direct."

Amongst the hereditaments comprised in the schedule to the Westminster-bridge Act 1859, was a house, No. 7, New Palace-yard, belonging to the charity estate of the parish of St. Sepulchre. The solicitor to the trustees, on the 14th Sept. 1859, sent in a claim for compensation for this and an adjoining house, "including everything," the sum claimed for No. 7 being 3300*l*. The negotiations respecting the adjoining house were carried through, and in Oct. 1860 the commissioners gave notice to the trustees to send in their claim for No. 7. On the 28th Nov. the trustees sent in a claim for 3300*l*. "in satisfaction and recompence for the value of their estate and interest in the premises." To this demand the commissioners ultimately agreed, and on the 22nd March 1862 the money was paid into court.

In July 1862 the trustees presented a petition, setting forth a contract which had been entered into by them for the purchase for 3000*l*. of certain freeholds in Thames-street, and praying that the contract might be approved, &c., and that the costs of the sale of No. 7, from the trustees to the commissioners, and also the costs of the purchase to be made by the trustees under the above contract, might be paid by the commissioners.

On the 14th Jan. 1863 (the title and purchase having been approved of) Kindersley, V.C. granted an order, and directed "costs and expenses according to the Act" to be paid by the commissioners. On going before the magistrate to settle the draft order, a question arose, the trustees' solicitors contending that they were entitled to the costs of both the sale and repurchase. The commissioners contended that the trustees were entitled to the costs of the reinvestment only; and the registrar being of that opinion, the case came before the court on minutes, and the V.C., after hearing the case argued, on the 19th Feb. gave judgment, and directed the commissioners to pay the expenses of the purchase from the trustees, as well as the expenses of any future purchase which might be incurred by reinvesting the money in other lands.

In delivering judgment, his Honour said: "I think I ought to put a *prima facie* interpretation on the words, that is, such an interpretation as the words naturally bear, unless there is something to lead to a different construction. . . . It does not appear to me that it would be reasonable to put that limited construction which is contended for—to say, because the clause only applies to cases where the money does come into court, that, therefore, it only applies to purchases made after the money comes into court. Then, I look at what may be called the abstract justice of the case. It does appear to me that where persons are liable to have their property taken away for public purpose, it must be presumed that the public should pay all the expenses which the taking of those lands entails upon the landowner."

The *Attorney-General* (Sir W. Atherton, Q.C.), the *Solicitor-General* (Sir R. Palmer, Q.C.) and *Alfred Hanson* supported the appeal.—It was contended that the words "all purchases" in the 49th section of the above Act were clearly limited to purchases of stock or land made in pursuance of the Act with the moneys already paid into court, and not to the original purchases by the commissioners from the landowners. In the case of *Re Strachan's Estate*, 9 Harr. 185, in which the same words "all purchases" occur, Turner, L. J. (then V.C.) held that the purchases mentioned must be confined to purchases made with the moneys already in court. The case of *Re Cherry's Settled Estates*, 6 L. T. Rep. N. S. 31, before his Lordship in March 1862, was also cited.

Pontifex, for the trustees, the *resp.*, pointed out the distinction between the case of *Cherry's Estates* and the present. There the Special Act, the *Spitalfields Improvement Act*, was an extension only of a former Act, which had been passed before 1845, when the *Lands Clauses Act* (8 Vict. c. 18) came into operation. Here the *Chelsea-bridge Act* was passed subsequently to the *Lands Clauses Act*, by the 1st section of which it was enacted that that Act should apply to every undertaking of a public nature authorised by any Act which should thereafter be passed, which should authorise the purchase or taking of lands for such undertaking, and that that Act should be incorporated with such Act. Hence the 72nd and 80th sections of the *Lands Clauses Act*, under which the trustees would clearly be entitled to the costs, both of the sale and of the repurchase, became applicable to the present case. He also referred to the remarks of Lord Truro in the case of

Re Eton College, 15 Jur. 45; 20 L. J. 1, Ch. The *Solicitor-General*, in reply, contended that sects. 23 to 56 of the *Chelsea Act* having been incorporated into the Westminster-bridge Act were intended to provide, and did provide, a new machinery in substitution for, and supersession of, the provisions of the *Lands Clauses Act*.

His Lordship reserved judgment.

The LORD CHANCELLOR.—The question in this case is one of some nicety, and I have to determine between two conflicting decisions of Turner, L. J. when V. C., and Kindersley, V.C. The question arises on the construction of a clause contained in an Act of Parliament directing certain costs to be paid by the commissioners for carrying the Act into effect. The Act under which the sale was made was the Westminster-bridge Improvement Act of 1859, and by a very mischievous practice in the construction of these Acts of Parliament, that Act, instead of containing the rule within itself, refers to an antecedent Act of 1853, for the purpose of incorporating the rule as to costs given in that Act, and when we have arrived at that Act we find that we have still another stage to go, for the Act of 1853 does no more than refer to the statute of the 9 & 10 Vict. c. 39. Whether these references are at all available for the purpose of

incorporating the rule given by the 9 & 10 Vict. c. 39 into the Act of 1859, so as to make it an intelligible rule, is not the point which has been argued; both sides being willing to take the rule as given in the sections of the Act of the 9 & 10 Vict. c. 39. Now the material sections in that Act of the 9 & 10 Vict. c. 39, are the 44th and 49th sections. The 44th section is material in this way only, that it absolutely directs that all the purchase-money of lands belonging to persons who are under disability to contract to sell, either by reason of infancy, coverture, or fiduciary position, when paid into court, shall be applied in the repurchase of other lands to the same uses, and in the meantime may be applied in temporary investments in the funds. The section is material for the purpose of showing that persons under disability are not given by these Acts of Parliament the ordinary powers of trustees, of being able to deduct their reasonable expenses out of the capital of the trust-funds which they are entitled to receive. Then sect. 49 provides, reading it concisely, that "when, by reason of disability, the money has been paid into court to be applied in the purchase of other lands to be settled to the like uses," that (in a shorter form of expression) is, "wherever purchase-money has been paid into court under the 44th section, it shall be lawful for the court to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the court shall deem reasonable to be paid by the said commissioners." The V.C. has taken the words "purchases from time to time to be made in pursuance of this Act" apart from the context. In his judgment he says that he puts upon those words, taken separately, their natural interpretation. That natural interpretation is, that purchases made in pursuance of the Act are all purchases of every description, including therefore purchases made by the commissioners, as well as purchases made by persons out of the money they have received from sales to the commissioners. The V.C. is of opinion that what he denominates the abstract justice of the case requires this interpretation. I cannot concur in that reasoning. I think it is impossible to take these words apart from the context; and I cannot admit the principle that, in a matter of positive law, abstract justice requires or justifies any departure from the established rules of interpretation. Those established rules no doubt admit of your putting a secondary meaning upon words where the ordinary and primary signification would lead to some absurdity or some impossibility. But where the conclusion is merely that there is a *casus omissus*, for which the Legislature has not provided, to alter the ordinary rules of interpretation upon the principle of a duty due to abstract justice, is simply to legislate and not to interpret. I cannot, therefore, concur in the reasoning by which the V.C. has been led to this construction, or in the grounds of his judgment. It does not appear that the V.C.'s attention was—I will not say directed—but was fixed upon that part of the decision which was properly cited to him, made by the present Lord Justice Turner, when V.C., in the case of *Ex parte Strachan*. That was a similar application to the present, arising upon another Act of Parliament, the words of which are identical with these words contained in the 9 & 10 Vict. c. 39. Turner, V.C. was of opinion that the words did not enable him in that case to give to the applicant those costs which the applicant in the present case desires. Now that decision was come to by Turner, V.C., in the year 1851. No doubt that has been followed in a variety of determinations since, and I think, therefore, that so far as the interpretation of these words is concerned, if the V.C. had happened to notice the earlier part of that case (that he does advert to the subsequent part of it) he would not have arrived at a

different conclusion as to the construction of these words from that which was arrived at by Turner, V.C. But I am still enabled, I am happy to say, to come to the conclusion that the order of the V.C. is right, although I dissent from the grounds on which he has based his order. No doubt every one must feel that it is extremely important that there should be means of reimbursing to parties under disability the costs properly incurred in transactions of this nature. And the reason is obvious, for if the trustee, the guardian, the corporation, could not recover the costs, incurred in prudent management, attending these sales, they would be delivered over bound hand and foot into the power of the commissioners of undertakings of this description. No doubt, on many occasions, it is necessary to resort to a jury, and great expense may attend the getting up the case before the jury, so as to ensure the charity or trust, or the infant, or the *feme covert*, receiving the proper price of the land, and if their costs cannot either be deducted out of the money received, or cannot be obtained from the promoters of the undertaking, of course the person whose duty it is to protect the interests of those under disability would be compelled of necessity to abstain from the proper performance of that duty. Now, it was from considerations of this kind that, I think, the Legislature shaped the Lands Clauses Consolidation Act. In the argument of this case before me it has been urged with very great ability by Mr. Pontifex, who appeared for the applicant, that the rule given by the Lands Clauses Act on the subject of costs must be considered as still incorporated as to a part of that rule into the statute of the 9 & 10 Vict. c. 39, and of course into the Act of 1859. Now, the Legislature, in passing the Lands Clauses Act, laid down this principle in the 1st section: that its general provisions should, without the necessity of any enactment for that purpose, be treated as a part of every subsequent Act of a like nature passed for a public undertaking. The language is express: "All the clauses and provisions of this Act," that is, the Lands Clauses Act, "save so far as they shall be expressly varied or excepted by any such Act," that is, the particular Act, "shall apply to the undertaking authorized thereby, so far as they are applicable, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith." Therefore the general provisions on the subject of costs are to be taken as an integral part of this Act of the 9 & 10 Vict., unless they are expressly varied or excepted by such Act. If the particular Act gives itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the Lands Clauses Act. But suppose that the rule given by the particular Act applies only to a portion of the subject, does that interfere with the rule of the Lands Clauses Act remaining incorporated as to the other and separate part of the same subject? Now the costs in matters of this kind are divisible into two separate parts. There are the costs incurred by the persons whose lands are taken anterior to the money coming into court; and then there are the costs of the reinvestment of that money. The Lands Clauses Act lays down a distinct rule with regard to both, and the provisions with respect to the costs attending the sale and conveyances are given by the 72nd section of the Lands Clauses Act. They are distinct and separate, and they require the promoters to pay those costs to the persons whose lands are taken. According to the construction, therefore, which I have arrived at of the 9 & 10 Vict., I find a distinct rule, not only with regard to the costs from and after the time when the purchase-money has been paid into court, but I find the whole subject of the costs incurred anterior to that

CHAN.]

VICKERY v. EVANS.

[ROLLS.]

time untouched by any provision. How, then, can I refuse to recognise the rule given by this section, to which I have just referred, of the Lands Clauses Act, on the subject of the costs of the sale and conveyances? How can I refuse to recognise that as being part of the 9 & 10 Vict., seeing that I am required to take it as part of the 9 & 10 Vict., unless I find something upon the subject in the 9 & 10 Vict. which is inconsistent with the section of the Lands Clauses Act being regarded as a part of the 9 & 10 Vict.? The answer to this argument that was furnished by the Attorney-General was a reference to a decision that I pronounced some time ago in a matter that has been reported in 6 L. T. Rep. N. S. 31 (*Re Cherry's Estate*). But that decision is perfectly consistent with the conclusion at which I have arrived. The matter, unfortunately, by these references, and the absurd manner in which they are worded, becomes intricate; but I trust I shall be able in a few words to make the distinction plain. In the case cited by the Attorney-General of *Re Cherry's Estate*, the Act of Parliament directing the sale to be made and the land to be taken referred to an antecedent Act of the 3 & 4 Vict. It will be observed that the Act of the 3 & 4 Vict. is anterior to the Lands Clauses Act. The reference, therefore, in the Act in *Re Cherry's Estate* passed over the Lands Clauses Act, and took the rule given by a statute anterior in point of time to the Lands Clauses Act. But that was not all. The rule given by the Act in *Re Cherry's Estate* had these remarkable words, that the lands taken under that Act should in all respects be treated and considered as if they had been taken under the 3 & 4 Vict., and that all the provisions applicable to transactions under that Act, which was also the 9 & 10 Vict., should in all respects be construed as if they had been transactions under the Act of the 3 & 4 Vict. Now the peculiarity of that reference, the carrying back all the purchases and all the dealings with the money under the 9 & 10 Vict. c. 34, to the 3 & 4 Vict., and the rules and directions contained in the 3 & 4 Vict., compelled me to pretermitt the Lands Clauses Act, and of course to decide that the provisions of the Lands Clauses Act had nothing to do with transactions that were expressly directed to be, in all respects, regulated and determined by the rule given by an Act of Parliament that preceded by several years the enactment of the Lands Clauses Act. But precisely the reasons that compelled me, in that case, to dissent from the V. C., and to refuse to apply the Lands Clauses Act, compel me in the present case to apply the provisions of that statute. For here I am carried back by the Act of 1859 to the 9 & 10 Vict.; and when I take up the 9 & 10 Vict. I am obliged also to take up as an integral part of that statute the clauses on this subject which are contained in the Lands Clauses Act, and which the Legislature compels me to look at as being a part of the 9 & 10 Vict., save so far as they are expressly excepted or varied. I must, therefore, adopt the argument of Mr. Pontifex. I regret that was not also presented to the V. C. I think the V. C. would have found in that confirmation of the conclusion at which he has arrived. I am, therefore, of opinion that, so far as the particular section in the 9 & 10 Vict. is concerned, the interpretation of that section is the one that was given by Turner, V. C., and ought not to be that which it has received from Kindersley, V. C. But, accepting that limited interpretation, I find the whole of the anterior costs covered by an express clause in the Lands Clauses Act, which is a part of the 9 & 10 Vict., for there is nothing in the 9 & 10 Vict. which excludes or negatives the enactment that it is to be read as a part of that statute. I must, therefore, direct the costs to be paid to the applicant in conformity with the V. C.'s order. But as these orders

are drawn up not in a very convenient form by giving the costs "according to the Act," which, in truth, is to give the costs according to a labyrinth of words, it is necessary to define that the costs are given, so far as they are directed to be given, by that section of the Lands Clauses Act which is to be treated as if it were a part of the Act of 1859. These, like most other matters which one has to determine, are questions that the law itself gives birth to. The greater part of our judicial time is really occupied in deciding questions of which the law is the parent; and I am sorry to say that a great number of them have their birth and their parentage in the negligent and careless manner in which Acts of Parliament are composed. I must give the costs against the apps.

Solicitors: for the apps, *John Gardiner*, Solicitor to the Board of Works; for the resps., *Pontifex and West*.

ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Tuesday, Dec. 22.

VICKERY v. EVANS.

Tenant for life and remainderman—Trustees and residuary legatees—Discretionary trusts for investment—Security.

Where the question as to the propriety of an investment by a tenant for life and remainderman arises between the two latter parties, while the court will not, on the one hand, sanction a collusive and fraudulent investment that would have the effect of diminishing the capital sum to which the remainderman will be entitled on the death of the tenant for life; yet, on the other hand, it is not in the power of the remainderman to require the investment to be made at the lowest rate of interest, in order that the capital sum may be increased.

Where, however, the trustees are also residuary legatees, and where there is a large discretion reposed in them, and no fraud in the case, it would seem that there is no rule prohibiting an investment of the trust-funds at 4l. 5s. per cent. on sufficient security.

Trustees who were also residuary devisees and legatees of the trust property, with the fullest trust reposed in them for investment thereof, invested a portion of it on a mortgage at 5 per cent. interest of freehold ground-rents, producing 176l. per annum, to meet an annuity of 150l. bequeathed to A. for life, with remainder to B. absolutely. The mortgage-deed provided that, if the interest on the mortgage was paid punctually, it should be only 4l. 5s. per cent., and that the principal should not be called in before 1867:

Held, that the security was sufficient:

Held, also, that at the death of A., B. would be entitled either to take a transfer of the mortgage; or to have it realised, and if there should then be a deficiency, to have it made good by the trustees.

Miss Caroline Vickery, the testatrix in this suit, by her will devised and bequeathed her real and personal estate to the trustees therein named, upon trust, out of such her estate, to invest "such a sum of money in or upon the public stocks, or the funds or securities of the United Kingdom, or upon the security of freehold or copyhold hereditaments in England in the names of her said trustees, as, when so invested, would produce by and from the dividends or interest to arise from such investment the annual sum of 150l. and to pay the same to Francis William Johnstone Vickery for life;" and after his death the testatrix directed that "her trustees should stand possessed of the stocks, funds and securities in or upon which the

investment thereinbefore directed to be made for the purpose of producing the said annual sum of 150*l.*, should have been made upon trust for her nephew Francis Vickery for his own use and benefit." The testatrix by her will also declared that notwithstanding the directions thereinbefore contained for investing sufficient portions of her trust-estate to produce the annual sum of 150*l.*, it should not be obligatory on the trustees to make such investment specifically, unless they were able to do so without selling freehold or leasehold property, shares in companies, or other investments, but that they should retain such hereditaments, shares and investments unconverted, so long as they in their uncontrolled discretion should think proper, and that in the meantime the rents, dividends and proceeds of such hereditaments, shares and investments should with the proceeds of other parts of her trust-estate be applicable to the payment of such annuity; and that her trustees should not be answerable either for any depreciation in the value of such shares or investments, or for any loss which might arise from the sale thereof by reason of their not having sold the same at any particular time;" and the testatrix gave her trustees the fullest discretionary power she was able to confer upon them, either to sell the shares and investments or not, and to retain them as long as they might think it expedient so to do.

The testatrix then appointed the defts. the executors of her will, and made them the residuary devisees and legatees thereunder. The testatrix died in Dec. 1861. The estate was more than sufficient to satisfy the claims upon it. The defts. set apart 3530*l.* to meet the annual sum of 150*l.*, and they invested the same on mortgage of freehold ground-rents, amounting in the whole to the annual sum of 176*l.* The property in respect of which those ground-rents were reserved consisted of ten newly-erected houses in Colville-square and Colville-terrace west, Notting-hill. The mortgage-deed contained a provision that, if the interest (which was reserved at the rate of 5*l.* per cent., reducible upon punctual payment to 4*l.* 5*s.* per cent.) was duly paid, the principal should not be called in till Oct. 1867.

The plt. in this suit was Francis Vickery, and he filed the bill in it against the trustees of his aunt's will, praying a declaration that the mortgage security was not a proper investment, and for a decree for the due administration of the trusts of the will.

The two questions to be determined were, first, whether the trustees had, under the circumstances of the case, a discretionary power to make the investment in dispute; and secondly, whether, if they had such a discretionary power, the investment was a proper one?

The answer to the first question depended, of course, upon the construction to be placed by the court upon the terms of the will above stated. The answer to the second, upon the consideration whether the mortgage property was in itself a sufficient security to answer the trusts of the will?

The plt. contended that the security was insufficient, and in support of that adduced the evidence of a Mr. Marsh, surveyor, who swore that the ten houses in question were in a new neighbourhood, and recently built; that when he surveyed them six of them were untenanted; and that, in his opinion, the market fee-simple value of the whole ten houses, subject to the leases, did not exceed 4000*l.* A Mr. Debenham also stated that the present market value was from 3950*l.* to 4150*l.*

On the other hand, Mr. Norton, an auctioneer, swore that the present value was 4576*l.* (taking it at twenty-six years' purchase), and that when the other houses in the neighbourhood should be completed, a higher price would be realised. A Mr. Foster, an auctioneer, taking the value at twenty-seven years'

purchase, which he swore was a fair calculation, valued the property at 4752*l.*

Selwyn, Q.C. and Druce appeared for the plt. and contended that, by the trusts reposed in the trustees, they could not fix the amount to be set apart to meet the annuity; they could only determine upon the mode in which the due amount when set apart was to be invested, and that even then they were bound by the strict rules of the court:

Stickney v. Sewell, 1 M. & Cr. 8;

Norris v. Wright, 14 Beav. 291;

Stretton v. Ashmall, 3 Dr. 12.

By those rules the investment should have been made at 4 per cent., so as to give the plt. a larger capital sum when he came into possession of it. They also insisted that the security was insufficient, relying upon the evidence so adduced for the plt. as aforesaid, and urged that the security ought to have been one that was realisable immediately, or before 1867.

Southgate, Q.C. and Whitehouse, for the defts., denied the accuracy of the construction put by the plt. on the trusts reposed in the trustees. They said that the trusts were in all respects absolute, and had been exercised with perfect *bona fides*. They commented on the case of *Stickney v. Sewell*, and insisted that the security was ample; for if the rents were unpaid the landlord could enter and determine the leases. They cited

Jones v. Lewis, 3 De G. & Sm. 471;

Aspland v. Watts, 25 L. J., N. S., 53, Ch.

The MASTER of the ROLLS, addressing himself to the second question first, said:—I am of opinion that the freehold ground-rents are a sufficient security. In truth, it is not merely the ground-rents, but the houses themselves, which form the security, for the ground landlord may enter and take possession if the ground-rents are not paid. Upon the other question, however, I have felt more difficulty; and I have not, so far as I am aware, any authority to guide me. The trusts for investments in the will are very large and clear. The plt. here is a remainderman. I think that, while on the one hand this court will not sanction a collusive and fraudulent investment that would have the effect of diminishing the capital sum to which the remainderman is entitled on the death of the tenant for life; yet, on the other hand, it is not in the power of the remainderman to require that the investment shall be made at the lowest rate of interest in order that the capital sum may be increased. It occurred to me during the argument, whether a line might not be drawn by the court by analogy to the rate of interest charged against accounting parties, and whether the court might not then say that the money should be invested at the rate of 4 per cent. Where, however, there is no fraud, and there is a large discretion vested in the trustees, I do not know of any rule which prohibits an investment at $\frac{1}{4}$ per cent.—the security being ample, and the trustees entitled, as residuary legatees, to any benefit that may accrue thereby. It was pointed out in the course of the argument, that the principal money in this case cannot be called in for three years; so that, if the tenant for life dies before 1867, the remainderman may be prejudiced. I am of opinion that, at the death of the tenant for life, the remainderman will be entitled, either to take a transfer of the mortgage, or to have it realised; and if there should then be a deficiency, to have that made good by the trustees. Although I am of opinion that the security is a good and sufficient one, yet I think it will not be right to dismiss the bill, for the plt. was clearly entitled to come here to have the fund properly secured. There must therefore be a declaration that the security is sufficient, and that all further proceedings be stayed, and with liberty to apply. I shall not make any order as to costs.

Solicitors for the plt., *Dawes and Son*.

Solicitors for the defts., *Stileman and Neute*.

V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WINSLOW,
Esqrs., of Lincoln's-inn, Barristers-at-Law.

Saturday, Jan. 23.

WILLIAMS v. HEADLAND.

Indemnity of executors—Shares in mines—Order of the court a sufficient indemnity against any liability arising therefrom.

Where in an administration suit executors claimed to be allowed to retain part of the residuary estate as an indemnity against any personal liability that might arise in respect of mining shares, part of the testator's estate at the time of his death, but since sold, though not registered in the name of the purchaser :

It was held, that the executors were sufficiently indemnified by the order of the court, and that it was only necessary that the residuary legatees should undertake to be answerable for any claim that might arise.

This was an administration suit.

The testator Wm. Headland bequeathed to the defts. Francis John Headland and Edward Headland and the survivor of them, all his personal estate upon trust, as to one-third thereof, to convey, assign, pay and deliver the same to the separate use of the plt. Isabella Ann Williams, and as to the remaining two-third parts, at their and his absolute discretion to sell such parts thereof as should not consist of money or securities for money, mining, railway, or other shares or description of property not bearing interest, dividends, or annual produce, and to invest the same as therein mentioned, and stand possessed of the interest, dividends and annual produce thereof, upon trust to pay the same to A. M. Headland for life, and after her decease to pay, transfer and assign, assure and convey the said two-third parts or shares of his said personal estate, and the stocks, funds and other securities upon which the same might be then invested, unto E. M. Headland and C. Headland absolutely :

Testator died on the 3rd April 1860. At the time of his death he was possessed of shares in certain mines, and the only question now was, whether the executors were entitled to have a fund set apart for their protection out of the residuary estate, to answer any liability that might hereafter arise in respect of ten shares in the Wheel Ellen Mine, and five shares in the East Buller Mine, both in Cornwall.

The shares had been sold for 2s. 6d. per share, but had not been registered in the name of the purchaser ; and the executors said that they were informed and believed that the testator's estate might be made liable for future calls.

Malins, Q. C. and W. H. Melvill, for the plt., contended that the executors were not authorised to retain any portion of the testator's estate by way of indemnity, and asked that they might be ordered to pay over the balance. They cited

Waller v. Barrett, 24 Beav. 413 ;

Bennett v. Lytton, 2 J. & H. 155 ;

Davies v. Nicolson, 2 De G. & J. ; 31 L. T. Rep. 374.

Bacon, Q. C. and Toulmin, for the defts., contended that it was the established custom of the court to permit executors to retain a sufficient sum in their hands to secure them from any risk ; that until the passing of Lord St. Leonard's Act (22 & 23 Vict. c. 35), executors were entitled to an indemnity against liability arising under covenants in leases. The present was an analogous case, though unprovided for by the statutes ; and they asked that 200*l.* Three per Cent. Consols might be set apart to answer any claims that might be made against them in respect of the shares.

The VICE-CHANCELLOR.—I observe that Wood, V.C. in the case of *Bennett v. Lytton*, which has been referred to, took care to put his order upon the broadest ground. I cannot imagine anything more dangerous than to throw the least doubt upon the extent to which a decree of this court is an indemnity to executors. If this court orders a sum to be paid to an executor, or orders an executor to pay a sum, or takes it out of his hands, that order is, generally speaking, an indemnity to the executor. But the court is always careful of the case of those who may have demands against the estate not at present made, or not at present appearing, and for this reason, as Lord Cottenham long ago pointed out, the old practice of the court was, that every legatee, before he got payment of his legacy through a decree of the court, was obliged to enter into a recognisance to refund, in case demands should be made against the estate which did not then appear. That practice gradually got into disuse, but that course of the court clearly shows that what the court had in view was, not merely the indemnity of the executor, but care with reference to the rights of those who might have demands against the estate not then appearing, so as to preserve those demands against the assets in the hands of those who were to receive them from the court. The M.R., in *Waller v. Barrett*, had a case before him of a demand for an indemnity, in the shape of setting apart a specific fund to answer an apprehended breach of covenant in a lease. In that case the chief clerk certified, upon a reference for providing a proper indemnity, the case being one in which an indemnity was necessary, that recognisances by the legatees who were to receive the money out of court would be a sufficient indemnity, and so the M.R. held. In that case he reviewed the whole of the authorities, and showed very clearly the principle upon which the court acts. I notice that case because it was one in which there was no decree for general administration, a case in which, therefore, the executors had not been indemnified by the order of the court in the administration of the estate. It follows, from what he pointed out, that when the court too implicitly follows the decisions, a great deal of injustice is done, and more is done than is necessary with reference to the rights of those who may be entitled to demands against the estate, or than the proper indemnity of the executors require ; The general rule is, that what the court orders to be done as to an estate is an indemnity to the executors ; as the M. R. stated in the case of *Waller v. Barrett*. I do not mean to say that, where an executor is ordered to pay a sum in a suit which is not for the administration of the estate, it will protect him from creditors. But I apprehend in a suit for the administration of an estate, if the court orders him to pay money, that is a perfect security to him ; for, unless that were so, it would paralyse the functions of this court. Now, what I have to look to is, what is asked on the part of the executors, and what on the part of the legatee, and what it is proper for the court to do. The case is one in which the apprehended liability is in respect of shares sold but not registered to the purchaser. It is impossible to say in such a case that there may not be some demand against the estate ; and the liability of the executors is thus brought nearer and in a more instant way than under other circumstances it might be. But to set apart a sum to answer the liability would seem to be a great injustice to the residuary legatee, and more than the executors upon any principle are entitled to ask. If, in this case, the residuary legatee undertakes to make good any liability, or to answer any demand that may be made in respect of these sold, unregistered shares, that is enough, in my opinion, to enable him to receive the money out of the court. Unquestionably, the

order of the court, so far as the liability of the executors is concerned, is a complete indemnity, and I would not have it supposed that I entertain a moment's doubt about it.

Bacon, Q.C. said he understood that the residuary legatees, the plt. and the two others, were to undertake to be answerable.

The VICE-CHANCELLOR.—Upon their undertaking, the payment will be made.

Solicitors: for the plt., *C. J. Hampton*; for the defts., *Walker and Twyford*.

V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,
Barristers-at-Law.

Saturday, Jan. 30.

BLAND v. PLUMMER.

Construction—Marriage-settlement—Power of appointment.

A power of appointment in a marriage-settlement was to be exercised in favour of "all and every or any child or children."

Held, that those words conferred a right of appointing the whole fund to one or more, in exclusion of the others of such children.

The main question on this petition arose upon the construction of a power of appointment over a sum of 4000*l.*, contained in the marriage-settlement of Mr. and Mrs. Bland, dated the 15th Nov. 1802. The sum mentioned was assigned to the trustees of the settlement on trust, after the death of the survivor of the intended husband and wife, "to transfer the stocks, funds and securities" whereon the trust-moneys were invested "to and between or amongst all and every or any child or children" of the marriage "in such part and proportions, at such age or respective ages, days or times, and subject to such provisos, conditions and limitations, over for the benefit of some or one of the said children" as the husband and wife by deed, or the survivor by deed or will should appoint; and in default of appointment, "upon trust to transfer and assign the same, or so much and such part thereof concerning which no such direction or appointment as aforesaid should be made to and between or amongst all and every such child or children" in equal shares. There were five children of the marriage who all survived their parents—William Handley, Emma Sheppard, Jane, Rivett Henry, and Thomas.

Dr. and Mrs. Bland by a deed-poll under their hands and seals, dated the 4th Feb. 1833, appointed one-fifth, 800*l.*, subject to their life-interest, to their son Thomas.

By a deed-poll in similar form, dated the 21st May 1834, Dr. and Mrs. Bland jointly appointed, subject to their interest, 200*l.*, a further part of the 4000*l.*, to their son Thomas, and 3000*l.* the remainder of the sum to their daughter Jane.

After the death of Dr. Bland, doubts arose as to the validity of the latter deed of appointment, and thereupon Mrs. Bland, by a deed of the 14th April 1859, appointed all the trust-funds over which she had a power of appointment by virtue of the settlement, except the sum of 5*l.*, to Jane Bland. The petition was presented by incumbrancers on the one-fifth of Thomas Bland.

J. Pearson, for the petitioners, stated the facts of the case.

Phear, for Jane Bland, contended that the words "for all and every or any child or children" were not intended to confer an exclusive power of appointment, that therefore the deed-poll of May 1834 was invalid, and that of 1859 must stand; the words "or any"

were intended to apply to the case of there being only one child of the marriage.

Rogers, for Thomas Bland, argued that these words were expressly intended to give such an exclusive power as in the case of a covenant for further assurance of "all and every or any the premises" conveyed; it was not "or any the child," which would have been the proper form on Mr. Phear's contention; in the gift over on default of appointment the words "or any" were omitted.

Phear in reply.

The VICE-CHANCELLOR said, that it appeared to him that the power was intended to give a right of exclusive appointment; he thought that the words were such as conveyancers generally used for the purpose of distinguishing between a whole or a part. It might be said also that, if there were only one child, the necessity for making any appointment could hardly arise, so that the words "or any," upon the contention of Mr. Phear, would hardly be of any effect; by following the other construction full force would be given to these words. He should, therefore, hold that, under the words of this power, Dr. and Mrs. Bland might appoint the whole fund to one or more exclusively of the others or other of their children.

Solicitors, *Cres and Last*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS,
Esqrs., Barristers-at-Law.

Wednesday, Jan. 20.

REG. v. CARRUTHERS.

Metropolitan Building Act—Public building—Church—Construction of walls.

A district surveyor required the builder of a new church to make the footings double the width of the proposed walls, according to No. 8 of the preliminary rules in schedule 1, and for omitting to do so laid an information against him, and a magistrate made an order under sect. 46 requiring the builder to comply with the requisition:

Held, that the order was bad, as a church was a public building and exempted by sect. 30 from the operation of the rules of construction in schedule 1.

Rule nisi to quash an order made Aug. 29, 1863, by one of the metropolitan police magistrates, under the Metropolitan Building Act (18 & 19 Vict. c. 122), s. 46, on the deft. Wm. Carruthers, directing him within fourteen days to comply with a notice served on him by Mr. Legg, the district surveyor, and to pay 2*l.* 4*s.* for costs.

The deft., a builder, was engaged in building a church in Lamb-lane, Hackney, Middlesex, and was charged in an information by Mr. Legg with omitting to make the footings double the width of the proposed walls of the church, as he had given him notice to do.

The information and complaint were heard on the 29th Aug. last, before John Leigh, Esq., one of the magistrates of the police courts of the metropolis, and it was then proved that the building referred to in the said information and complaint was a public building, namely, a church, and the magistrate's attention was drawn to sect. 30 of the Metropolitan Building Act, 18 & 19 Vict. c. 122, which enacts "that notwithstanding anything contained in that Act, every public building, including the walls, roofs, floors, galleries and staircases, shall be constructed in such manner as may be approved of by the district surveyor, and in the event of disagreement in such manner as may be determined by the Metropolitan Board of Works." It was contended that the rules of construction contained in

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the Act were expressly confined to private buildings and buildings of the warehouse class, and were not applicable to public buildings at all, and that the Act gave the magistrate no jurisdiction over and no power to interfere with the construction of any public building, but that all public buildings were to be constructed under the supervision and responsibility of the district surveyor, subject in the event of disagreement between him and the architect to an appeal to the Metropolitan Board of Works.

The magistrate overruled the objection and adjudged William Carruthers, within fourteen days from the date of the said order, to comply with the requisitions of the said notice, and to make the said footings double the width of the walls of the said building.

The following is a copy of the notice referred to in the said order and in the said notice.

"Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), s. 45.

"District Surveyor's Office.

"To Mr. William Carruthers, of Reigate,

"Surrey, builder.

"With reference to the works at the building under mentioned, and now in progress under your superintendence as the builder engaged in executing the same, I hereby give you notice that they are not conformable to the rules of the Building Act in the particulars hereunder stated, and I require you, within forty-eight hours from the date hereof, to render the same conformable to the rules of the said Act in such particulars. Building referred to, Church. Situation of building, Parish of Hackney. Street, Lamb-lane. Number in street (if any). Description of the locality (if the site be vacant ground).

"Particulars of work done contrary to the Act and to be amended:

"The footings not being double the width of the intended walls of the said building.

"Particulars of work required to be done by the Act, but omitted, but now to be done:

"The footings to be made double the width of the proposed wall.

"Particulars of work to be cut into, laid open, or pulled down to ascertain the nature of the works executed.

"Dated this 5th day of Aug. 1863.

(Signed)

"GEORGE LEGG,

"District Surveyor of West Hackney."

Lush (Phear with him).—It is contended that the rules for the construction of buildings and walls in the first schedule to the Act apply to all public as well as private buildings. A church is a public building within the interpretation clause, sect. 3; but in the buildings specified in sect. 6 as those which are to be exempted from the operation of part I. of the Act, a church is not mentioned; a church therefore remains subject to the provisions of part I. of the Act: (sect. 7.) Then sect. 12 enacts that walls shall be constructed of such substances and of such thickness and in such manner as are mentioned in the first schedule of the Act. And therefore the walls of a new church are to be constructed according thereto. Sect. 30 only gives discretion to the district surveyor, subject to appeal to the Metropolitan Board in case of disagreement in matters which are not provided for by the Act; but the present is a case which is provided for by the first schedule to the Act. Then, if that be so, the district surveyor having given the notice required by sect. 45, calling on the builder to construct the walls in conformity to the Act, the magistrate had power, under sect. 46, to make the order in question.

C. G. Addison contra.—The buildings specified in sect. 6 are buildings which are to be wholly exempt from the control of the Act. It is not contended that a church is wholly exempt, but that it is a public

building within sect. 30, and to be erected in such manner as may be approved of by the district surveyor, subject to appeal to the Metropolitan Board in case of disagreement. Here the builder contends that it is unnecessary to have the walls of the thickness required by the district surveyor. The surveyor's judgment is not to be arbitrary, but to be subject to appeal to the Metropolitan Board. If so, the magistrate had no jurisdiction to make the order.

COCKBURN, C. J.—I am of opinion that the order of the magistrate must be quashed. The question turns upon the 30th section of the Metropolitan Building Act, 18 & 19 Vict. c. 122. That section, in effect, enacts that the Metropolitan Building Act shall apply to all buildings not included in the term "public building;" but that in the case of a public building, instead of being within the general provisions of the Act, the questions which may arise as to the manner in which such building shall be constructed shall be determined by the district surveyor, subject to appeal, in the case of disagreement, to the Metropolitan Board of Works. In the Act there are various enactments upon the subject of the construction of buildings; and with reference to walls, the rules applicable to the construction of that part of every building, the first schedule relates to the construction of the walls of dwelling-houses and houses of the warehouse class. In addition to these general rules, there are special rules applicable to each of these classes respectively. The subject of walls is treated in the Act as a matter of construction, and rules are laid down with reference to such construction. As a wall is necessarily part of a building, it seems to me that the matters relating to walls form part of the rules of construction, and are to be determined by the general rules of the Act when the building is not a public building; but to be excluded from them when we are dealing with a public building. Mr. Lush argued that sect. 30 is merely a cumulative provision, and that you must start with the assumption that whatever the Act says with reference to the walls of private buildings must apply also to the case of public buildings, with this addition, that the district surveyor may impose any condition which he thinks fit. That, I think, is straining the language of the section. We should have expected it to have assumed a very different form if such had been the intention of the Legislature, and that then it would have said that public buildings shall be subject to the general rules of construction provided for other classes of buildings; and in addition, the district surveyor may impose such terms and conditions as he may think proper. But that is not the language of the Act. It begins by saying that the construction of public buildings shall be according to the requirements of the district surveyor, and that the other requirements of the Act, independently of the construction of public buildings, shall be subject to the provisions of this Act. Mr. Lush argued that there were no other provisions in the Act which could apply to public buildings. Upon a closer inspection of the Act, that turns out to be erroneous. Whether any addition to or alteration of a building would make it a new building within the conditions of the Act is one question; the provision as to the removal of dangerous structures would be another. Another argument urged by Mr. Lush is, that whereas, with reference to private buildings in case of any violation of the provisions of the Act there is a summary remedy pointed out by invoking the jurisdiction of a magistrate, that does not apply to the case which we are now considering, in which there has been, on the part of the builder of a public building, a contravention of the requirements of the district surveyor. It has been suggested that the 46th section would apply to such a case. I do not desire to be understood to give any opinion upon that one way or the other.

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It may be a matter of doubt. After having looked carefully at the words of the section, I can come to no other conclusion than that, whereas all buildings of a private character must be constructed according to the provisions contained in the Act, as regards public buildings, the construction is independent of those provisions, and is controlled by the discretion of the district surveyor, subject to the correction of the Metropolitan Board. Taking that view of the 30th section, I am clearly of opinion that the proceeding in this case before the magistrate was wrong, and that the order must be quashed.

BLACKBURN, J.—I am of the same opinion. The order proceeds upon the supposition that the party complained against has omitted to do certain things, viz., to make the footings of the church double the width of the wall. I think that the conviction is wrong, upon the ground that no such duty is imposed in the case of a public building. In the case of an ordinary building it is imposed by the 12th section. The 30th section applies to public buildings. The effect of that section is that, as to public buildings, the only rule of construction is that they shall be constructed in the manner approved by the district surveyor, and in the event of disagreement, by the Metropolitan Board. And though I listened with great attention to Mr. Lush's argument, I cannot construe the words "rules of construction of the building" in such a sense as not to include within it a rule providing in what manner, and of what size and materials, the walls of a building shall be constructed. I am sorry to be obliged to do this, because I see great difficulty about the subsequent proceedings in such a case. I do not see any provision in this Act as to the manner in which the district surveyor, or the Metropolitan Board, are to determine how the building is to be constructed, nor when this determination is to be made, nor, in the event of its being made, how it is to be enforced. But it is plain that the magistrate could not convict unless the Act in words directed that, in the case of a public building, the footings of the walls are to be made double the thickness of the upper wall, and that I think it does not do.

MELLOR, J.—I am of the same opinion. The construction suggested by Mr. Lush is *prima facie* a reasonable one, and one which I should have been glad to have been able to uphold; because it is possible that the effect of the construction which we are giving to the Act may give very extensive power to the district surveyor, subject only to the Metropolitan Board, and that the powers might well have been limited by subjecting public buildings to the authority of the district surveyor *plus* the rules of the Metropolitan Building Act. But the section carefully includes in the words "public buildings," not only the building itself in the aggregate, but "the walls, roofs, floors, galleries and staircases," and words are inserted for the purpose of preventing the surveyor's discretion from being bound or limited by the rules of construction which are to be found in the Act. I cannot impose any limitation upon those provisions. The preliminary rules contained in the first schedule are rules of construction, and the general words at the commencement of that schedule are satisfied by saying that they are general rules of construction, applicable to the two classes of buildings which follow, viz., dwelling-houses and houses of the warehouse class.

Conviction quashed.

Attorneys for the complainant, *Hawks, Wilmott and Stokes.*

Attorneys for the deft., *C. and J. Allen and Sons.*

Wednesday, Jan. 27.

REG. v. HANDLEY.

Mines and Collieries Act—Employment of girls at mine-shaft—Contractor—Evidence—Appeal.

The 5 & 6 Vict. c. 99, s. 21, which gives an appeal against convictions under the Act to the quarter sessions, makes the judgments and determinations of the quarter sessions final:

Held, that this court had power to entertain a special case sent by the quarter sessions for their opinion, they having confirmed a conviction appealed against, subject to the opinion of this court:

To make a contractor for working a mine liable to a conviction for allowing females to have charge of the machinery or tackle by means of which persons are brought up or passed down a vertical shaft of a mine, contrary to the 5 & 6 Vict. c. 99, ss. 8 and 13, knowledge of or acquiescence in their being so employed must be brought home to him.

Evidence of females being found in charge of such machinery and tackle on one occasion only is not sufficient.

Case from the Court of Quarter Sessions for Staffordshire, for the opinion of this court, on an appeal from a conviction under the 5 & 6 Vict. c. 99, "An Act to prohibit the employment of women and girls in mines and collieries," sects. 8 and 13.

The following is a copy of the conviction:—

"County of Stafford, to wit.

"Whereas, on the 29th Nov. 1862, an information and complaint was laid and made by Abraham Roper, of Bilston, in the said county, miner, before, &c., for that John Handley, at Wolverhampton, in the said county, charter-master, being the contractor for working a certain mine in a colliery called the Snow-heath Colliery, situated, &c., the entrance to which mine was by a vertical shaft, did, on the 13th Nov. in the year aforesaid, allow two persons, neither of whom was a male of the age of fifteen years or upwards, to wit, two female persons, to have charge of part of the machinery or tackle of the engine by means whereof persons were brought up and passed down the said vertical shaft, contrary to the form of the statute in such case made and provided. And whereas, it being made to appear to the satisfaction of the said justice that the said offence was committed by or under the authority of the said John Handley as such contractor as aforesaid, without a personal consent, concurrence, or knowledge of the owner of the said mine, the said justice thereupon issued his summons to the said J. Handley, requiring him to be and appear at the police-court in Wolverhampton aforesaid on this day, before such of Her Majesty's justices of the peace in and for the said county as might be then and there present, to answer for such offence. Now, be it remembered that, on this 3rd Dec. 1862, at the said police-court, &c., the said J. Handley duly appeared, in pursuance of the said summons, before us, the undersigned, &c.; and it being proved to our satisfaction that he is guilty of the offence charged against him in and by the said information and complaint, and that such offence was committed by or under his authority as such contractor as aforesaid, without the personal consent, concurrence, or knowledge of the owner of the said mine, we, the said justices, do hereby convict the said J. Handley of such offence, and do adjudge the said J. Handley for his said offence to forfeit and pay the sum of 50*l.*, to be paid and applied according to law; and also to pay the said Abraham Roper the sum of 1*l.* 3*s.* for his costs in this behalf. And if the said several sums be not paid immediately, we order that the same be levied by distress and sale of the goods and chattels of the said J. Handley, and in default of sufficient distress we

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adjudge the said J. Handley to be imprisoned in the house of correction at Stafford, in and for the said county, and there kept to hard labour for the space of two calendar months, unless the said penalty and costs shall be sooner paid.

On the trial of the appeal it was proved that J. Handley, the app., was the charter-master and contractor for working a coal-mine called the Snow Heath Colliery, of which mine William Hanbury Sparrow was the owner, he being the immediate proprietor within the meaning of the statute 5 & 6 Vict. c. 99, s. 14.

The relation in which a charter-master stands to the owner of a colliery is this. The charter-master gets and raises the coal. He is paid by the owner a certain sum per ton, called a royalty, for the coal gotten and raised to the pit bank. The owner is the proprietor of the steam-engines, and machinery and tackle, and provides the steam power and engine-man. The charter-master employs the workmen or miners, and also all persons at the surface of the colliery necessary for conveying the miners to and from the mine, and for removing the coal brought to the surface into waggons.

The entrance to the mine in question was by means of a vertical shaft. Two women, Sarah Banks and Emma Wade, on the 13th Nov. 1862 were found in charge of part of the machinery and tackle of an engine worked by steam power, by means of which engine, machinery and tackle, persons were brought up and passed down the vertical shaft. Sarah Banks and Emma Wade were so in charge without the personal consent, concurrence, or knowledge of W. H. Sparrow, the owner of the mine. They were the servants of and employed by Handley as bank girls on the surface of the colliery, and their duty was to load the coal brought up the shaft in ships, and to transfer it from the ships to waggons. It was no part of their duty to interfere with the machinery or tackle or engine by means of which persons were brought up and passed down the shaft. Handley employed a deputy or doggy, and also a banksman. Part of the duty of a banksman is to see the workmen employed in the mine pass up and down the shaft.

At the time Sarah Banks and Emma Wade were found in charge as above mentioned, no other person was within fifteen yards of them. A man was seen at that distance, but no evidence was given who that person was, and there was no reason for supposing, nor was it suggested, that the app. was such person.

Rules, a copy of which is annexed to the case, and may be referred to, were produced by the banksman, and stated to be in force in the colliery. No evidence was given of the personal consent, concurrence, or knowledge on the part either of Handley or of his deputy, or of the banksman, of Sarah Banks and Emma Wade having charge of part of the machinery and tackle as above mentioned, or of any authority to them to take such charge, otherwise than as such consent, concurrence, knowledge, or authority is capable of being inferred from the above facts.

The Quarter Sessions confirmed the conviction, subject to a case for the opinion of the Court of Q. B. as to whether there was evidence before the Court of Quarter Sessions on which that court could and ought to have acted, of an offence under the 5 & 6 Vict. c. 99, s. 8, having been committed by or under the authority of the app., as alleged in the conviction.

G. Brown and Gibbons for the resp.—There is a preliminary objection. Sect. 21 enacts that the determination of the quarter sessions shall be final and not subject to review; and by sect. 22 the writ of *certiorari* is taken away in such case. By the 12 & 13 Vict. c. 45, s. 11, parties may by consent agree to a special case

after notice of appeal; but here the appeal has been heard, and the sessions have confirmed the conviction.—[CROMPTON, J.—In this case they have not come to a decision; they have decided subject to our opinion.] The 9 & 10 Vict. c. 99 is to prohibit the employment of women and girls in mines and collieries; and sect. 8 enacts that where the entrance to a mine shall be by means of a vertical shaft, it shall not be lawful to allow any persons other than males of the age of fifteen to have charge of any part of the machinery or tackle by which persons are brought up or passed down such vertical shaft. Sect. 13 makes agents, servants, workmen, and contractors by whose authority any offence against the Act is committed, responsible. [COCKBURN, C. J.—It is not found that these women were employed with the knowledge of the contractor, or that they were usually so employed, or even so employed on any previous occasion. Is the fact of their having been simply found on this occasion so employed sufficient to lead to the inference that they were acting under the authority of the contractor?] The app. offered no evidence to negative knowledge on his part. These two women were lowering persons into the pit, and it did not appear that any one else was employed to do the work. The words of sect. 8 are “not to allow,” and it is submitted that the contractor is responsible for allowing it to be done. [BLACKBURN, J.—He is not to be responsible if he has no knowledge of what was going on. COCKBURN, C. J.—When the act is done by the contractor without the knowledge of the owner, then the contractor is liable; but if it is done by the contractor and as the servant of the owner, and acting under his orders, then the owner is liable. Sect. 13 only makes the contractor responsible when otherwise he would not be so.] There was clearly some evidence on which the sessions could act.

Matthews, contra, was not called upon.

COCKBURN, C. J.—If evidence had been adduced and admitted, as I think it ought to have been, of these girls having been frequently seen performing this work, so that the inference would arise that the contractor must have known of the proceeding, the case would have been within the Act. He is prohibited by the Act from so employing girls, but the employment must be with his knowledge or by his tacit acquiescence. As the evidence stands it is more consistent with probability, that it was the act of the man whose business it was to do this particular work, than that they were employed by or with the knowledge of the contractor. There is not sufficient evidence that it was done with the concurrence or knowledge of the contractor for us to say that it had been allowed by him contrary to sect. 8. The conviction will therefore be quashed.

CROMPTON, J.—I am of the same opinion. The contractor must have allowed these girls so to act in order to render himself liable to a conviction. The only evidence is, that the girls were found so acting on one occasion. That is no evidence that he allowed them so to act.

BLACKBURN, J.—A very little additional evidence might have done, but merely showing that on one occasion the girls were found so engaged is not sufficient.

MELLOR, J. concurred.

Conviction quashed.

COURT OF COMMON BENCH.

Reported by W. MATD and LUMLEY SMITH, Esqrs.,
Barristers-at-Law.

Jan. 18 and 20.

BARBER AND OTHERS v. NOTTINGHAM AND
GRANTHAM CANAL COMPANY.

*Pleading — Compensation jury — Right to assess
damage—No power to decide as to the existence of
a cause of action.*

*To an action brought to recover a sum of money
awarded by a compensation jury under a private
Act of Parliament for damage to the p'ts.' mine by
the water that oozed from a reservoir made for the
canal, the defts. pleaded by their third plea that
the damage sustained was not sustained by the
making or maintaining of the reservoir, or by the
flowing, leaking, or oozing of the water of the
reservoir over or through the banks of the same
within the meaning of the 35th section of 32 Geo. 3,
c. 100, (a) whereby the said commissioners had not
jurisdiction under the first Act to assess the
damage or settle the expenses, and by their fourth
plea that the damage was not found at the inquisition
to have been caused by the default of the defts.
but by the water oozing through the strata which
formed the natural banks and bottom of the
reservoir:*

*Held, that the third plea was good, as the Act only
gave the jury power to assess the damages, and not
to decide whether there was any cause of action;
and that the fourth plea was bad, as it was no
answer to the action to say that the water oozed
through the natural banks of the reservoir.*

The declaration stated that the p'ts. were the owners
and occupiers of and interested in certain lands, coal
mines and hereditaments in the parish of Greasley, in
the county of Nottingham, known as High Park
Colliery, and near to a reservoir in the said parish,
which had been made and maintained under the provisions
of an Act of 32 Geo. 3, entitled "An Act for
making and maintaining a navigable canal from the
Cromford Canal, in the county of Nottingham, to or
near to the town of Nottingham, and to the river Trent,
near Nottingham Trent-bridge, and also certain colla-
teral cuts therein described from the said intended
canal." And that the p'ts., on the 20th Dec. 1862,
recovered against defts. by virtue of the said Act, and
of "The Ambergate, Nottingham and Boston and
Eastern Junction Railway Act 1846," and of "The Not-
tingham and Grantham Railway and Canal Act 1860,"
the sum of 4992l. 3s. 10d., the amount of recompense
assessed and ascertained to be made to the p'ts. by the
defts. for damage sustained by making and maintaining
their reservoir, and by the flowing, leaking and oozing
of the water of the said reservoir over and through the
banks of the same into and upon the said lands, mines
and hereditaments; and that although the verdict of
the jury and the said judgment thereupon was duly
pronounced, the defts. had not paid the damages or any
part thereof to the p'ts.

The second count charged that after the said verdict
and judgment the commissioners, in accordance with
the provisions of the Act, settled the expenses by them

(a) That the commissioners are authorised, with the
consent of the parties concerned, to determine and adjust
what sum of money by the company for any damage
which shall be sustained by the flowing, leaking, or oozing
of the water over and through the banks of the said in-
tended canal, reservoirs, &c. And in the event of the
company and commissioners not being able to agree,
then that a jury shall be summoned to appear before the
commissioners to inquire and assess the sum of money to
be paid as recompense for the damages sustained, which
verdict and judgment thereon signed by the com-
missioners shall be binding and conclusive to all intents
and purposes.

at 372l. 1s. 8d. to be defrayed by the defts., but which
they had not paid, and the p'ts. claimed 6000l. as
damages.

Third plea.—And for a further plea the defts., as to
the whole of the declaration, say, that the said damage
in the first count mentioned to have been sustained,
was not sustained by the making or maintaining of
said reservoir, or by the flowing, leaking, or oozing of
the water of the said reservoir over or through the
banks of the same, or by reason of the execution by
the defts. of the powers in the said first-mentioned
Act contained within the meaning of the 35th section
of the said statute, whereby the said commissioners had
not jurisdiction under the said Act to assess the said
damage, or to settle the said expenses.

Fourth plea.—And for a further plea the defts.,
as to the whole of the declaration, say, that the
said alleged damages were caused by the flowing,
leaking and oozing of the said water of the said
reservoir through the banks of the same, and not
in any other manner whatsoever, except as afore-
said, by the making or maintaining of the said
reservoir, or by reason of the execution by the defts.
of the powers in the said first-mentioned Act con-
tained. And the defts. further say that it was not
proved, at the holding of the inquisition, or found
by the jury, that the said flowing, leaking and oozing
of the said water arose or happened by or through the
act or default of the defts., or of the canal company
mentioned in the said first-mentioned Act; and that
the fact was and is, that the same arose and happened
without any such act or default, and was caused by
the acts of the p'ts. themselves in sinking certain
shafts and pits in their said lands and coal mines,
and so causing large quantities of water which
naturally lay and were contained in the underground
soil and strata in which the said shafts and pits were
sunk, and which were situate between the said shafts
and pits and the said reservoir, and formed the banks
and support thereof, to flow, leak and ooze without the
default or knowledge of the defts. of the said canal
company, from and out of the said reservoir through
the banks thereof, and to percolate into and through
the said soil and strata, and into the said shafts, pits
and mines.

Demurrer and joinder in demurrer to third and
fourth pleas.

Replication.—And for a further replication to the
3rd and 4th pleas, the p'ts. say that the defts. ought
not to be admitted or received against the said record
in the first count mentioned, and to plead the said
pleas, because the p'ts. say that a jury duly
summoned and empanelled according to the provi-
sions of the said 35th section did duly and according
to the said provisions, inquire of, assess and ascertain
the said recompense; and that the commissioners,
being the commissioners for settling, determining and
adjusting all questions, matters and differences arising
between the defts. and p'ts. as such proprietors of
and interested in the said lands in the first count men-
tioned, as in and by the said Act of Parliament, provided
duly and according to the provisions of the said Act,
gave the said judgment for the said recompense in
the first count mentioned, as therein mentioned, and
that the matters and things in the third and fourth
pleas alleged to be before and at the time of the said
application and proceedings, verdict and judgment,
questions and matters in difference between the p'ts. as
such owners of and interested in these lands and the
defts. within the meaning of the said Act.

Demurrer and joinder in demurrer.

Field (Hayes, Serjt. with him) for the p'ts.—The
questions in this case are—first, whether the finding
of the jury and the judgment of the commissioners
is binding and conclusive; and secondly, whether the
fourth plea is bad, inasmuch as it is no answer to

the claim of the plts. I contend that the finding of the jury is binding and conclusive to all intents and purposes; and as to the fourth plea, that if the defts. choose to use the natural banks of the reservoir instead of making artificial ones, they are liable for any damage caused by reason of the water flowing and oozing through and over these natural banks.

Mellish, Q. C. (Horace Lloyd with him), for the defts., contended that the finding of the jury was only conclusive as to the assessment of the damages, and that they had no power to decide the question of law as to the liability of the defts., and that the fourth plea was a good answer to the plts.' claim.

The following cases were referred to in the course of the argument:

Reed v. The Victoria Station and Pimlico Railway Company, 1 H. & C. 827;

Reg. v. London and North-Western Railway Company, 3 E. & Bl. 483;

Reg. v. Bolton, 1 Q. B. 66;

Cane v. Mountain, 1 M. & Gr. 257;

Radnor v. Re-ve, 2 Bos. & Pul. 39 1;

Mould v. Williams, 5 Q. B. 469;

Thompson v. Ingham, 14 Q. B. 711;

Allen v. Sharps, 2 Ex. 352;

Reg. v. Inhabitants of Hickling, 7 Q. B. 880;

Williams v. Adams, 2 Best & Smith, 312;

Reg. v. Dayman, 7 El. & Bl. 672;

Tenant v. Goldwin, 2 Salk. 360;

Hodkinson v. Ennor, 32 L. J. 230, Q. B.; 8 L. T. Rep. N. S. 451;

Johnson v. The New River Company, 29 L. J. 93, M. C.;

Reg. v. The Metropolitan Board of Works, 32 L. J. 105, Q. B.; 8 L. T. Rep. N. S. 238.

ERLE, C. J.—I am of opinion that the judgment should be for the defts., upon the demurrer to the third plea, and for the plts. upon the demurrer to the fourth plea. The action is brought to recover a sum of money awarded by a compensation jury under a private Act for making the Nottingham Canal; and the declaration sets out the verdict of the jury, and the judgment of the commissioners. In sect. 35 of the statute, it is enacted that the verdict and judgment so pronounced shall be binding and conclusive to all intents and purposes. The verdict is for the amount of damage done to the pits. mine by the water that oozed from a reservoir made for the canal by virtue of this statute. The third plea is that the reservoir had done no damage at all to the plts.' mine, and that therefore neither the commissioners nor the jury had jurisdiction to assess the amount of damages; and I am of opinion upon the common law, and the construction of the Lands Clauses Act, that it is a good plea. In *Reg. v. London and North-Western Railway*, it was decided that a compensation jury and a sheriff's jury under the statute was to fix the amount to be paid if the party was entitled to compensation. I am aware the question was raised first of all by the sheriff's jury, on a claim raised in respect of a right of way, finding there was no such right of way, and the court said they could not do that. In *Reed v. The Victoria Station Company*, the parties came to the conclusion that the plea may raise the question whether the claimant had any cause of action. If the party chooses to deny there was either *injuria* or *damnum*, the plea is a good plea, and the question must be tried in an action, and if upon the trial of the issue the complainant can make out that he is damaged to the extent of 1*l.* it seems to follow from the decisions that plts. would be entitled to the amount the compensation jury has given. The cases decided seem to have settled that, with respect to the Lands Clauses Act, the jury fix the amount, and the party may raise the question whether there was any damage in the case at all; if there was any, the judgment must

be for the whole amount the compensation jury give, and you cannot go into the question of how much arose from the act of the company, or how much from other causes; 4900*l.* damage by reason of water coming into the mine is what the jury have assessed in the present case. If that turns out to be the result of the inquiry, the company must pay the 4900*l.*, as I understand the law. The plea, therefore, seems to be a good plea within the cases decided. As to the Lands Clauses Act, is there any distinction between that and the present Act? I have listened attentively to Mr. Field's argument, and I cannot find any substantial distinction that I can rely on. The commissioners, by sect. 26 of the Act before us, are appointed to determine all differences which shall arise between the canal company and persons interested in any lands which shall be prejudiced by the execution of the powers hereby granted; then, by sect. 35, the commissioners are to adjust all claims arising by reason of the execution of the powers of this Act, and if the parties are not satisfied, then they shall settle it by going to a compensation jury, who are to assess the damages; though, where there is a difference between the canal company and the proprietors of land injuriously affected or prejudiced by the works, it seems that throughout there is a condition for the impeachment of the jurisdiction of the inferior tribunal, not merely that they must be proprietors of land, but proprietors of land pre-judiced by the works; the inferior tribunal do not conclusively settle it, and their jurisdiction is over that only which is left to them, namely, the amount. Whether the land of the claimants was injuriously affected at all, so that there was any cause of action, is a matter that is to be tried. Then the fourth plea appears to me to be a bad plea. I take the substance of the plea to be that the water oozed from the reservoir into the plts.' mine by reason of the porous nature of the strata upon one side of the reservoir; but it did not ooze from works made by the canal company, but as the water was penned up to a considerable height and rested upon strata formed by the hand of nature, when the shaft became sunk in the mine from the porous nature of the strata and the act of sinking the shaft, the water ran out of the canal, and greatly to the annoyance of the canal company did the damage, which was partly from the act of the mine-owner, and partly from the porous nature of the soil. But I think the plea is a bad plea, because it appears to me that the statute here has created a great many rights and given a great many powers, authorising the canal company to collect all manner of springs and sources of water, and to heap up, if I may so say, the water in this reservoir, and has then specifically enacted, that the company shall be answerable to the proprietors of land for all damage, *inter alia*, damage caused by flowing, leaking and oozing of water through the banks of the reservoir. I think those are general words; if you take the privilege, or if you go on collecting the water, you must take it with the liability, and if any water oozes through the banks, you are to compensate for the damage arising therefrom. It is the same as if you make an artificial bank, or pen it up on the lower side of the gorge, and make the water rest on the strata nature has formed; those strata of nature are the banks of the reservoir within the meaning of the statute, and the party is liable for the oozing of the water through those strata, those being, in my judgment, the banks of the reservoir.

WILLIAMS, J.—I am of the same opinion.

WILLES, J.—With respect to the first question, it appears to me, as the authorities at present stand, the judgment of the Court of Ex. in *Reed v. The Victoria Station Company*, is quite a consistent judgment. It is a very good illustration of the state of the author-

rities. The judgment, upon the first plea, proceeded upon the expression in the early part of the 68th section: "If any party shall be entitled to any compensation in respect of any lands." It was upon that the judgment proceeded with respect to the first of the pleas, and the court held in accordance with what has been now laid down in so many cases. But the right to compensation is made by that enactment a condition precedent to the jurisdiction of the jury. "If any party shall be entitled to compensation, condition precedent that he shall be entitled to some compensation in respect of a cause of action consisting of injury and *damnum*." With respect to the second plea in that case, namely, that the damage did not amount to 50*l.*, the court held that to be a bad plea, and if you look at the section you will see in a moment why the court have so founded their judgment on one plea not consistent with the judgment upon the other, because part of the language of the section in reference to the 50*l.* is "if the compensation claimed in such case shall exceed the sum of 50*l.*" Therefore, the condition precedent to the jurisdiction as to the existence of the damage is that it shall exist, because, if it does not exist, there is no cause of action. The condition precedent with respect to the damage being over 50*l.* is that more than 50*l.* shall not be claimed, nor shall be proved to have existed. I own I think Mr. Field has quite failed to show that the Court of Ex. in deciding that case had not its attention very distinctly drawn to the point, and did not intend to decide and did not decide contrary to the authorities, but consistently with the section read by the light of those authorities. Upon the other point I do not think it necessary to say any thing.

Judgment for the defts. on the demurrer to the third plea, and for the plts. on the demurrer to the fourth plea.

Attorneys for plts., Johnson and Wetherall.

Attorneys for defts., Johnston, Farquhar and Leech.

Thursday, Feb. 4.

CLARKE v. FULLER.

Statute of Frauds—Evidence—Authorised agent.

The deft. being in want of a house, applied to E., the plt.'s agent, respecting one which he had to let, and having seen it, made an offer to take it, provided the plt. did certain repairs. E. proposed to write to the plt. on the subject, to which deft. replied, "Do so."

At the trial the plt. proposed to put in the letter which E. had written to him, the material part of which was as follows:—

*"I have at length let Town Walls House, subject to certain alterations and repairs, at 40*l.* per annum; a list of the said repairs I herewith send you. I think they are so absolutely necessary and reasonable that I have at once set Mr. B. upon the work, so as to bind the person who has taken it, &c. When the repairs are done I will draw up a lease of possession and take a full list of particulars."*

Held, that there was nothing to show that E. was the agent of the plt., and that this was not a memorandum of an agreement within the Statute of Frauds, and consequently was not admissible as evidence for the plt.

This was an action brought in the County Court of Shropshire, for a refusal by the deft. to take a house at a yearly hiring according to agreement, and the following are the material facts of the case as stated for the opinion of this court by the judge of the County Court.

At the hearing Samuel Fletcher Williams was called in support of the plt.'s case, and stated that he was a clerk in the employ of one Edwards, an

auctioneer in practice at Shrewsbury, and that in August last the deft. called at Edwards's office, accompanied by Mr. Perring, and stated that he had seen an advertisement inserted by Mr. Edwards in the local papers relative to the letting of a house belonging to the plt., and asked for the keys to look at the premises. Williams thereupon gave deft. the keys, and he and Mr. Perring went over the house. On their return the deft. said he liked the house very much, and he would take it if certain repairs were done. Williams said he would tell Mr. Edwards, and he would write to Mr. Clarke, and that he (Williams) would communicate the result to Mr. Perring. Deft. said, "Very well."

About a fortnight afterwards Williams met Mr. Perring in Shrewsbury and told him the repairs should be done. Perring promised to inform deft. Afterwards on the 27th Aug. deft. again called at Edwards's office, asked for the keys, and had them for the purpose of going over the house. When he came back he said the house suited him very well and he would take it then and there. Edwards was also present. Deft. said there were certain repairs he should require done, which he would then specify, and he accordingly wrote in pencil and signed a list of them.

Deft. also said he should like to have the repairs done a week before Michaelmas. Edwards promised they should be done at once. Edwards said he would write to Mr. Clarke, and he had no doubt Mr. Clarke would accede to the proposition, and accept deft. as tenant. Deft. said, "Do so."

The plt.'s counsel then tendered in evidence the following letter:—

"St. John's-hill, Shrewsbury, Aug. 27, 1862.

"I have at length let Town Walls House, subject to certain alterations and repairs, at 40*l.* per annum. A list of the said repairs I herewith send you. I think they are so absolutely necessary and reasonable, that I have at once set Mr. Bowyer, the painter, upon the work, so as to bind the person who has taken it. Our respected friend Mr. Perring introduced the gentleman, and speaks of him in the highest terms. The name of the gentleman who will take (subject to all the repairs being done, and which I have promised him shall be done) is G. A. Trullar, Esq., surveyor to the post-offices. His appointment is permanent, and he will make you a first-class tenant. When the repairs are done, I will draw up a lease of possession, and take a full list of particulars, &c.—(Signed) THOMAS EDWARDS.

"John Clarke, Esq."

This letter was objected to by the deft.'s counsel, and the judge decided that it was not admissible in evidence, on the ground that the evidence did not show that Edwards was the properly constituted agent to make the contract, but merely to make inquiries, and in consequence of such decision the plt. elected to be nonsuited.

The question for the opinion of the court is, whether the judge was right in rejecting this letter.

J. J. Powell, Q. C. for the app.—The letter is sufficient to bind the deft., as it is a note in writing relating to land; it contains all the elements of a contract, as it says, "I have let the house at 40*l.* per annum." If a person says "I will take a house," it means, in the absence of special terms, from the present time, and the term need not be specified in writing. Edwards says in his letter "I have let it;" that means from the present time. The question has also been raised as to Edwards being the authorised agent of the deft. Surely, if deft. asked him to write the letter, that is making him his agent, and he is therefore bound by his acts. He referred to

Fitzmaurice v. Bailey, 26 L. J. 114, Q. B.; and *Durrell v. Evans*, 31 L. J. 337, Ex. Ch.; 4 L. T. Rep. N. S. 254.

[Ex.]

THE ATTORNEY-GENERAL v. RUSHTON.

[Ex.]

Matthews contra.—This case coming within sect. 4 of the Statute of Frauds, it is necessary that that statute should have been complied with. The court therefore has to consider whether Edwards had authority to make a contract binding under the statute; and if he had, then whether this letter was a sufficient memorandum of such contract. I contend that it was not. (He was stopped.)

ERLE, C. J.—I am of opinion that the learned judge was right. It does not appear to me that Edwards was the authorised agent of Fuller to make this contract. What passed between them was in the nature of a treaty to take the premises. In my mind the letter was nothing more than an intimation to his employer, Clarke, that he had a proposal for the house, and recommending that the repairs should be done. It seems to me that it never was intended that Edwards was to make a contract binding on Fuller, and that this letter was not a memorandum in writing within the meaning of the Act. Then there is nothing to show when the term of hiring was to begin, and it is clear that in taking premises from year to year it is very important to show when the term is to commence, for the purpose of determining when the six months' notice to quit is to be given, &c. I am of opinion, therefore, that this letter was nothing more than a proposal for letting the house, and is not binding on the deft.

WILLIAMS, J.—I am of the same opinion. The statute says, that the memorandum must be "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised," and I see nothing in this case to show that Edwards was lawfully authorised.

WILLES, J. concurred.

Judgment for resp.

COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Saturday, Jan. 16.

THE ATTORNEY-GENERAL v. RUSHTON.

Revenue—*Succession Duty Act* (16 & 17 Vict. c. 51), ss. 2 and 15—*Derivative title under sect. 15*—*Amount of duty payable*—*Object of sect. 2.*

A testator devised property to his wife E. C. for life, with remainder to her son R. W. R. in fee, and died in 1832. R. W. R. died intestate in 1844, in the lifetime of E. C., the tenant for life, and before the passing of the Succession Duty Act (16 & 17 Vict. c. 51), whereupon his reversionary interest in the said property, expectant on the death of the tenant for life, became vested in the deft., his son and heir-at-law, who, upon the death of E. C., the tenant for life, in 1859, after the time appointed for the commencement of the said Act, became beneficially entitled thereto in possession:

Held, that, under the provisions contained in the first part of the 15th section of the Act, the deft. was liable to pay duty at the same rate as his father, if living, would have paid—namely, 10 per cent.

Per Martin, B.: The real and sole object of the 2nd section of the Succession Duty Act was to give a convenient definition of the terms "succession," "successor" and "predecessor," and it effects that object in tolerably clear terms.

This was an information to obtain payment of duty in respect of the succession of the deft. in the real property devised by the will of one Joseph Claridge, deceased, as hereinafter stated, and the question for the decision of the court was as to the proper rate of duty payable by the deft.

The information stated that the said Joseph Cla-

ridge by his will, dated the 29th July 1828, duly executed and attested as was then by law required for the devise of estates of freehold and inheritance, disposed of his real property in the following terms:—"Also all those my several closes or inclosed grounds which I lately bought and purchased of and from John Walker and Thomas Main, and all and singular other my messuages, cottages, closes, lands and real estate whatsoever, situate and being at East Hadden aforesaid, or elsewhere, with their and every of their appurtenances, I give and devise unto my loving wife Elizabeth Claridge and her assigns for and during the term of her natural life, and from and immediately after her decease I give and devise all and singular my said real estates with their and every of their appurtenances, unto and to the use of Richard Willock Rushton (otherwise Richard Willock Claridge), the son of my said wife Elizabeth Claridge, and to his heirs and assigns for ever;" and that the said testator died in 1832 without altering his will, leaving his widow and her son R. W. Rushton surviving.

R. W. Rushton died intestate in 1844, in the lifetime of his mother, the tenant for life of the testator's real property, leaving the deft. J. P. Rushton, his eldest son and heir-at-law, surviving, in whom the reversionary interest in the testator's real property thereupon became vested.

The testator's widow, the tenant for life of the real property, died in 1859, after the time appointed for the commencement of the Succession Duty Act 1853, and by reason of the disposition in the said will the deft. upon her death became beneficially entitled in possession to the testator's real property, as a succession derived from the testator. And it was charged that, inasmuch as both he and his father were strangers in blood to the testator, the deft. became chargeable with duty at the rate of 10 per cent. upon the value of such succession.

The deft., by his answer, admitted all the statements in the information to be true, except that he said that upon the death of the testator's widow, the tenant for life, he, the deft., became beneficially entitled in possession to the testator's real property, as a succession derived from his father, and that he was not chargeable with duty at the rate of 10 per cent. inasmuch as his succession was derived by immediate descent from his father, who at the time of his death was seised in fee of the said property, but that he was only chargeable at the rate of 1 per cent.

The Attorney-General, the Solicitor-General, Locke, Q.C., and A. Hanson (of the Chancery bar) for the Crown.—A taxable succession under the Act liable to duty is admitted, and the question is, who is to be regarded as deft.'s predecessor—the testator, or deft.'s father? It comes under sects. 2 and 15 of the Act. By the 2nd section, two classes of taxable successions were created: first, a succession by a *disposition*, made at any time, which takes effect in possession on the death of any person dying after the Act; and, secondly, a *devolution* takes place by descent after the passing of the Act; but there is no succession by *devolution* unless the death on which the descent takes place occurs after the passing of the Act. A *disposition* confers a succession, whether it be a past or future disposition, provided the person taking under it becomes beneficially entitled to the property on the death of a person dying after the commencement of the Act. A *devolution* only confers a succession provided it be on the death of a person dying after the commencement of the Act; and then the 2nd section defines the terms "successor," "predecessor," &c., and it is clear that the word "ancestor" there mentioned, applies to a "*devolution*." Any person taking under a disposition, an interest reversionary at the time of the Act, and

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[Ex.]

which became vested in possession by the death after the Act, would be chargeable when the interest so became vested. Then comes in sect. 15, and says that in all those cases where the Act finds the succession in the hands of a person claiming a *derivative* title, it is to be taxed as if it remained in the hands of the original taker. The Crown's claim is grounded on that clause. At the commencement of the Act this property was reversionary expectant on a death, viz., that of the widow, tenant for life. It was not vested by alienation, not having been then alienated, but it was vested by "other derivative title in a person other than the person originally entitled." Deft.'s father was the person originally entitled under the will, but at the time of the Act the property was no longer vested in him, but it was vested in his son the deft. by "any other derivative title," viz., a title by descent. *Devolution* means a passing from a dead to a living person. The second part of sect. 15 throws light on the construction. The succession must be created at the time of the devolution or disposition. It is only by supposing a succession between deft. and his father that 1 per cent. can be payable; but a devolution to create a succession must be on a death after the Act, and the father died before it. The succession here, if at all, was between testator and deft.'s father, and had the latter lived to come into beneficial possession he would, as a stranger in blood, have paid 10 per cent., and deft. succeeding on a devolution creating *no new succession* must pay the same duty under sect. 15, or nothing at all.

Lush, Q. C. and A. P. Henman for deft.—*Prima facie* this case is within sect. 2. The principle of the Act is to tax persons in proportion to the degree of relationship between the parties. Deft. derived all his interest from his father. The Crown's argument is derived from the 15th section only, and but for that section and the doubt thrown on it no question would arise here. In *The Attorney-General v. Gardner*, 7 L. T. Rep. N. S. 682; 1 H. & C. 639, that section was discussed, and Bramwell B. was clearly of opinion that a title by devise or descent was not within the words "other derivative title" in the section. There are expressions in other cases also bearing out that view:

Lord Saltoun v. The Advocate-General, 3 Maq.

H. of L. Cas. 660;

Lord Braybrooke v. The Attorney-General, 4

L. T. Rep. N. S. 218; 9 H. of L. Cas. 178.

[*MARTIN, B.*—Naturally one would call the son the successor of the father; but how do you get out of the words of the 15th section? It may be right or wrong, but here is a case as directly within that section as a case can be.] The words "other derivative title" mean a title in some way other than by direct succession from father to son. Here he succeeds in right of his father. [*POLLOCK, C. B.*—No; certainly not, he succeeds in right of the will.] The case stands under sect. 2 alone, unaffected by sect. 15. Sect. 2 distinguishes between successions by disposition and by devolution. In *Saltoun v. The Advocate-General* the L. C. in giving judgment says: "Where the succession is by *disposition*, the *settlor* is the 'predecessor,' and when by *devolution*, the *last possessor* is the 'predecessor.'" Practically the case is decided by *Gardner's* case, in which the language of Bramwell, B. would apply here with a slight alteration of facts. [*MARTIN, B.*—Here the deft. takes by virtue of the limitations in the testator's will; but in *Gardner's* case it was as though the estate created by the settlement had been wiped out and extinguished, and Miss Gardner's father became entitled and was in as of his own fee under the old title, and any disposition by him was carved out of the old estate.] The words "alienation or other derivative title" in the 15th section do not apply to this case. "Other derivative title"

are *ejusdem generis*, and do not refer to *devolution*. Deft. was not named in the will. If the father here is to be passed over, suppose it passed from father to son for twenty generations, what would there be to prevent the last taker from tracing back to the original settlor? The father by dying intestate created a *new succession*, and deft. took a beneficial interest in fee in the reversion.

The *Attorney-General*, in reply, was stopped by the Court.

POLLOCK, C. B.—We are all of opinion that the Crown is entitled to 10 per cent. duty. Upon reading the 2nd and 15th sections of the Succession Duty Act, the case is so plain that I think no argument can make it plainer. There was an estate for life with a reversion, and the person entitled to the reversion died before the statute came into operation; but the person having the life-estate lived until the statute came into full operation. Dying as she did, if the deft.'s father had been alive, he would have undoubtedly paid the 10 per cent. duty. The son takes his place, and he clearly has to pay the same duty as the father would have paid. Looking at it in that view, I cannot see how any argument arises, or how there is the slightest doubt in the world. It seems to me that the construction of the Act of Parliament is really as plain as if the framers had put in the names of the parties, and had said that the gentleman who disputes the claim of the Crown in this case should pay 10 per cent.

MARTIN, B.—I also think this a very clear case. It seems to me that a good deal of the argument (and it is not an unpalatable one) is founded upon an endeavour to divert the 2nd section of the Act from its real object. The real purpose of that section was to give a convenient definition of three terms, that is to say, of "succession," "successor," and "predecessor." That was its sole object, and it effects that object in tolerably clear terms. Then comes the 15th section, and it is to be seen whether this case does not fall within the terms of this 15th section as plainly as can be. The testator, before this Act of Parliament was passed, devised an estate to A. for life, with remainder to B. in fee. B. died before the Act came into operation, but A. did not; she survived. The state of things was, that by virtue of this will the heir of B. became entitled to this property in consequence of his father's death. Was he, at the time appointed for the commencement of this Act, in this condition, that a "reversionary property expectant on a death" was vested in him "by alienation or other derivative title?" How was he possessed of this property except as reversionary property by virtue of a derivative title; that is to say, which he derived from his ancestor? Was he a "person other than the person originally entitled thereto?" He was. His father was the person originally entitled thereto, and he is another person than his father. Then the Act expressly enacts that "the person in whom such property shall be so vested shall be chargeable with duty at the same time and at the same rate as the person originally entitled would have been chargeable." I think it is very clever to raise any argument about it. I think that the words express, as clearly as anything can express, what has occurred in this case. It seems to me that this case is as clearly within the 15th section as words can make it.

CHANNELL, B.—I think this case comes within the 15th section of the Act of Parliament. If I read that section apart from the 2nd section, I do not think that there can be any reasonable doubt upon the subject. I agree with my brother Martin in thinking that the 2nd section has been introduced into the argument for the purpose of diverting it from its proper object.

PIGOTT, B.—I think that there might have been some foundation for Mr. Lush's argument if the last two lines of the 2nd section had stood alone; but when I read the 15th section it is impossible

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to escape from the conclusion that this is the very case pointed at by that section. I think that the word "derivative" is a most apt word to express the state of this succession.

Judgment for the Crown for 10 per cent. duty, with costs.

Attorney for the Crown, *Solicitor of Inland Revenue*, Somerset-house.

Attorneys for the defts., *Hensman and Nicholson*, 25, College-hill, Cannon-street west, agents for Messrs. *Hensman*, Northampton.

Friday, Jan. 22.

SLEEMAN AND OTHERS v. BARRETT AND OTHERS
(Executors of Bennett).

Truck Act (1 & 2 Will. 4, c. 37)—Butty colliers' labour—Paid for partly by goods.

The plts. were butty colliers or contractors, and by a verbal agreement only with the mine-owner worked for him many years as butty colliers to get coal, either by the day, by the yard, or by the ton. The plts. were not to underlet; but they employed others to assist them in the work taken; they were paid partly in money and partly by goods, deductions being made from their wages for the goods supplied. In an action afterwards for their full wages on the ground that they were within the Truck Act (1 & 2 Will. 4, c. 37) and should not have been paid any part of their due by goods, defts. pleaded a set-off for the goods supplied:

Held, that as the plts., employed other persons under them to assist them in their work, as they lawfully might, it was not their own personal labour only that was required, but work to be done which was the result of labour, they did not come within the construction of the Truck Act (1 & 2 Will. 4, c. 37); therefore they were not entitled to recover in money that for which they had before been paid by goods.

Declaration against defts., as executors of T. Bennett, deceased, for money payable by Bennett, deceased, to plts. for work done and materials provided by them for the said deceased, and for money found to be due from the said T. Bennett to plts. on an account stated.

Pleas:—1. Never indebted. 2. Payment by Bennett. 3. Delivery by Bennett of goods in satisfaction. 4. Payment of money by Bennett at plts.' request. 5. Set-off to defts. as executors for goods sold, &c., by Bennett to plts., and the usual other money claims.

Issue joined thereon.

The plt. Sleeman, a collier, in the Forest of Dean, entered into partnership with the three other plts., and dissolved the partnership in 1859; but before dissolution they had worked for Mr. Bennett as butty colliers for many years, at the Nelson colliery, in the Forest, either by the day, or by the yard, or by the ton. Agreements, but not in writing, were made between the parties, and the plts. employed men to assist them in their work, and each month the plts. were furnished with one pay-bill. It was agreed that the plts. should not underlet the work, but do it as they best thought fit. Bennett was also a miller and cornfactor; he allowed the plts. coals to burn at their own houses, for which he made no charge. The plts. were in the habit also sometimes of receiving coals and of giving farmers coals for cider, potatoes and other goods, instead of paying cash. The men were also supplied by Bennett with flour and other goods. When the plt.'s pay-day came round they agreed with Bennett's bailiff as to the amount that was due to them, accounts being furnished by both sides. Bennett found oil and gunpowder for the plts. to be used by them in their work, for which they had to pay, and they alleged that they could and did ultimately

procure both at a cheaper rate than Bennett used to charge for them. Bennett about July 1855 sold the mill, &c. to his foreman, Wintle and after that Wintle supplied them with flour, &c. in the same way. No order in writing was ever given by the plts. for any of the articles which constituted the deductions. Bennett paid Wintle in cash the amount which he had supplied in goods to those men at their request.

When plts. commenced working for Bennett as butty colliers or contractors, it did not appear that there was any agreement in writing, or that any arrangement was made as to whether they were bound to work personally; but they did work generally and employ other men to work with them and for them, to get coals by the ton, and to make the cut out and headings by the yard, and to whom they paid daily wages during part of the time, from Aug. 1856 to March 1860, over which their account was claimed. Plts. had two places in different parts of the colliery where they were getting coal by the ton, at times some of them stayed away from the pit for days, and the others, with their men, assisted in the raising of coal, and at the same time others of the plts., with men employed by them, drove the cut out, or other contract work; they worked not only in getting coal by the ton, but in making a cut out and headings in the colliery by the yard, employing several men under them, and occasionally did repairs in the colliery besides, for which they charged and were allowed so much per day. During the time plts. worked for the deceased, certain deductions were made from their wages for goods supplied to them by Bennett and Wintle. Upon the pay-day the plts. would receive from deft.'s pay-clerk an invoice of the goods which the plts. had received from Wintle, and would make deductions to the amount of that invoice, and of the deductions and claim, and would receive the balance due to them. The question was, whether such deductions were not illegal under the Truck Act, 1 & 2 Will. 4, c. 37.

The action was tried at Gloucester before Channell, B., when a verdict was entered for the defts., by consent, in order that the opinion of the court should be taken upon the facts and evidence, as stated in the notes of the learned judge at the trial. The plts.' counsel to have leave to move the court for a rule to enter the verdict for plts. for such sum as the court may direct, the court to be at liberty to draw such inference of fact as a jury might draw, and a rule nisi was subsequently obtained accordingly on the ground that upon the evidence given and the admissions made, the plts. were entitled to recover 1232*l.* 7*s.* 5*d.* The action had been originally brought for 1408*l.* 14*s.* 1*d.* The defts. admitted that work had been done to that amount, but claimed certain deductions that reduced it to 1232*l.* 7*s.* 5*d.*

Gray, Q.C. (Gough with him) showed cause.—Butty colliers do not come within the construction of the Truck Act. Although the plts. were to give their personal labour, yet, as they employed other persons under them, they were exempt from the provisions of the Truck Act. The plts. worked themselves, no doubt; but they also hired other men to do the work for them, and, according to the contract, it would have been competent for them, if they performed the work properly, to do it by any hands they pleased. They are therefore not artificers within the meaning of the Act. The owner contracted with plts. to get the coal at so much per ton, the plts. finding all things necessary for the purpose, hiring men to do the work, superintending them and agreeing to pay them. With these hired men the defts. as owners have nothing to do, there was no privity between them. These butty colliers are entitled to agree to be paid in goods if they so pleased. The action here should have been by the men against the plts., for as between plts. and the owner it is a contract not within the Truck Act, or

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the mischief against which the Act is pointed. Plts. are not "labourers" or "artificers," "paid by wages," within the meaning of the Act. Sects. 1, 2, 3, 4, 5, 19 and 25 of the Act bear on the case. There are five cases on the point:

Riley v. Warden and another, 2 Ex. 59

Sharman v. Sanders and others, 13 C. B. 166;

Weaver v. Floyd, 21 L. J., N. S., 151, Q. B.;

Bowers and another v. Lovekin and another, 6 E. & B. 584;

Ingram v. Barnes, 7 E. & B. 115; on appeal to the Ex. Ch. Ib. 132.

Huddleston, Q.C. (*H. James* with him), in support of the rule, argued, that as there was a contract for personal labour, the employment of men under them was immaterial. This case is within the provisions of the Truck Act. Throughout Lancashire, Yorkshire, Staffordshire and Gloucestershire butty colliers have always been treated as servants, and have expiated the leaving their service by imprisonment under the Masters and Servants Act, 4 Geo. 4, c. 34. If, then, butty colliers are within that Act, they are within the Truck Act. *Collier's* and *Bailey's* case, 3 E. & B. 607, shows that they are bound to work or be imprisoned under 4 Geo. 4, c. 34. They invariably work themselves, forming gangs of ten, twenty, thirty, or forty—a sort of partnership. The jury, had it been left to them, must have found that a butty collier was a man bound to work personally. [POLLOCK, C. B.—I do not see the importance you attach to the personal service of these men. The question is, are they persons working for wages, or persons contracting to do certain work for a certain large solid payment? BRAMWELL, B.—Do you dispute the authority of *Ingram v. Barnes* in the Ex. Ch., or do you propose to distinguish it?] I say it has nothing to do with this case. See what the Act contemplated and how large are its terms: (sects. 1, 3, 4, 19, 25.) Throughout the Act it speaks of "any labour" in connection with certain trades, and the most extended definition is given to the term "wages." Would not a jury have found plts. to be "artificers," or other persons "employed" in getting coal, &c.? [BRAMWELL, B.—I think not.] He cited also

Lowther v. Lord Radnor, 8 East, 118;

Ex parte Gordon, 25 L. J., N. S., 12, M. C. (Bail Court);

Blake v. Lanyon, 6 T. R. 221;

Ex parte Ormerod, 1 Dowl. & L. P. C. 825;

Lawrence v. Todd, 32 L. J. 238, M. C.

POLLOCK, C. B.—I am of opinion this rule should be discharged. I have already intimated my opinion during the course of the argument, that if an agreement is made with one or more to do certain work, and be paid for the labour so that the contract is substantially for their particular labour, whatever may be the form of the agreement, and it can be clearly seen that is its object, paying such persons by goods instead of their regular and proper wages would be within the operation of the Truck Act. Where the subject of the engagement is not for the actual labour of the contracting person, but the mere result of any labour that may be employed—as, for instance, where a contract was not for labour, but for the removal of a certain quantity of clay—then the case is not, in my opinion, within the Truck Act, and I take that to be the true distinction. I agree with *Riley v. Warden*, adopted, as it has been, by the court of error in *Ingram v. Barnes*, and I consider the law to be now settled by those cases. If there be any case differing from them (I do not believe there is since the decision of *Ingram v. Barnes*), I think it is not law so far as it does differ. I do not agree in the opinion expressed by Erle, C. J. in *Ingram v. Barnes*; the real test, in my opinion, is upon the substance of the contract, whether it is for

labour or the result of labour. Where some one agrees for a large number of men to perform certain work, meaning by "work," not labour, but the result of labour, the sum to be paid to the person so contracting is not "wages earned by, or payable to, an artificer in respect of labour by him done" within the meaning of the Act. I come to this conclusion, not only upon principle, but upon the decided cases, which I think have now settled the law.

MARTIN, B.—I am of the same opinion. Mr. James has not the materials here for the argument he has addressed to us, for the facts of the case will not support it. I entirely agree with *Riley v. Warden* and *Ingram v. Barnes*, adopting especially the opinion of Parke and Rolfe, BB., in the case of *Riley v. Warden*, and if there are any cases at variance with these decisions I dissent from them.

BRAMWELL, B.—I think the rule should be discharged, as it seems to me impossible to read this Act, apply it to the facts of this case, and give any other judgment, keeping in view the authorities on the subject, I might be content to say, that I abide by the authorities mentioned by the Lord C. B. and my brother Martin. The 1st section of this Act enacts that in contracts for the hiring of any artificer in the trades thereafter enumerated, or for the performance by any artificer of any labour in any of the said trades, "the wages of such artificer" should be payable in money; so in the 3rd section the expression is "wages payable to the artificer in respect of labour by him done," and in the 5th section "money due to such artificer as the wages of his labour." It cannot be contended that what the plt. in this case had to receive was "wages of his labour." It is manifest to my mind, that unless there be an artificer, labour, and wages of that labour, the case is not within the Act.

CHANNELL, B.—I am of the same opinion, and that the case, upon the facts and evidence as stated in the notes taken at the trial, is not, for the reasons already given, within the operation of the Truck Act. I also think that *Riley v. Warden* and *Ingram v. Barnes* disposed of this case. Rule discharged.

Attorneys for plt., *Rogerson* and *Ford*, agents for *Carter* and *Goold*, Newnham.

Attorneys for defts., *Richards* and *Walker*, agents for *Borlase* and *Robinson*, Mitcheldean.

[Note.—There is to be an appeal from this decision.]

EXCHEQUER CHAMBER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Feb. 6 and 8.

(Before COCKBURN, C. J., ERLE, C. J., WILLIAMS, CROMPTON, WILLES, BLACKBURN and MELLOR, JJ.)

THE ATTORNEY-GENERAL *v.* SILLEM AND OTHERS (claiming the *Alexandra*). (a)

Appeal in Revenues cases—Queen's Remembrancer's Act (22 & 23 Vict. c. 21), s. 26—*C. L. P. Acts* 1852 and 1854—*Rules of the Court of Ex. of 4th Nov. 1863*—"Process, practice and mode of pleading"—*Jurisdiction—Crown's right of general reply. The Queen's Remembrancer's Act* (22 & 23 Vict. c. 21), by sect. 26, enacts that "it shall be lawful for the Lord Chief Baron, and two or more Barons of the Exchequer, from time to time to make all

(a) As there is to be an appeal from this decision to the H. of L., we consider it unnecessary to occupy so many pages as would be required for a full report of the seven judgments, especially as the point is certain never to recur, and is of no moment to the practitioner; we therefore present only the opposing judgments of the chiefs, which we give *verbatim*.

such rules and orders as to the process, practice and mode of pleading on the Revenue side of the court, &c. as may seem to them necessary and proper, and also from time to time, by any such rule or order, to extend, apply, or adapt any of the provisions of the C. L. P. A. 1852, and the C. L. P. A. 1854, and any of the rules of pleading and practice on the Plea side of the said court, as may seem to them expedient for making the process, practice and mode of pleading on the Revenue side of the said court as nearly as may be uniform with the process, practice and mode of pleading on the Plea side of such court."

In intended pursuance of the power given them in that section, the Court of Ex., on 4th Nov. 1863, made and issued new rules, applying the 34th, 35th, 36th and other sections of the C. L. P. A. 1854 to cases on the Revenue side of the court, and giving a right of appeal to the Court of Error, the Ex. Ch., and the H. of L. in certain cases of rules refused, or discharged, or made absolute on the Revenue side of the Ex.:

Held (per Cockburn, C.J., Crompton, Blackburn and Mellor, JJ.) that by the 26th section of the Queen's Remembrancer's Act, power was not given to the Court of Ex. to establish proceedings by appeal on motions for new trial in revenue cases, and to give an appellate jurisdiction to the Court of Ex. Ch., and that consequently the rules of 4th Nov. 1863 were invalid, and the Ex. Ch. had no jurisdiction to hear an appeal under them in a case from the Revenue side of the Ex.

Aliter (per Erle, C. J., Williams and Willes, JJ.), that the rules were authorised by the 26th section of the Queen's Remembrancer's Act, and the Court of Ex. Ch. had jurisdiction to hear the appeal.

By the Court.—It is not a necessary incident to cases in which the Crown is deft. in error, that the counsel for the Crown is to have the last word.

An information was filed in the Ex., in Trinity Term last, for the forfeiture of the vessel *Alexandra*, seized at Liverpool for a breach of sect. 7 of 59 Geo. 3, c. 59 (Foreign Enlistment Act), and the case was tried at the sittings after Trinity Term, before the Lord Chief Baron and a special jury, on the 22nd June and three following days, when, a verdict being found for the claimants, a bill of exceptions to the ruling of the Lord Chief Baron was tendered by the then Attorney-General, the late Sir W. Atherton.

The parties failing to agree upon such a bill of exceptions as the Lord Chief Baron would sign, the Attorney-General (Sir R. Palmer) applied to the Court of Ex. in Michaelmas Term (Nov. 3) for leave to move for a new trial after the first four days of the term, in case the bill of exceptions should not be agreed to within that time. The consideration of the question involved in this application was adjourned to the following day (Nov. 4), when the Attorney-General elected to abandon the bill of exceptions, and to move for a rule nisi for a new trial; but before doing so, he moved the court to apply the C. L. P. Acts of 1852 and 1854, and the rules of pleading and practice, to the Revenue side of the court, so that an appeal would be competent, under sect. 26 of the Queen's Remembrancer's Act, 22 & 23 Vict. c. 21. That section enacted as follows:

It shall be lawful for the Lord Chief Baron, and two or more Barons of the Court of Exchequer, from time to time, to make all such rules and orders as to the process, practice and mode of pleading on the Revenue side of the court, and as to the allowance of costs, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper; and also from time to time, by any such rule or order, to extend, apply, or adapt any of the provisions of the C. L. P. A. 1852, and of the C. L. P. A. 1854, and any of the rules of pleading and practice on the Plea side of the said court, to the Revenue side of the said court, as may seem to them expedient for

making the process, practice, and mode of pleading on the Revenue side of the said court as nearly as may be uniform with the process, practice and mode of pleading on the Plea side of such court."

After some consideration the Court on the following day (Nov. 4) issued new rules, of which the following only are material to the present case:

Court of Exchequer—Revenue Side.

In pursuance of the provisions contained in the 26th section of the 22 & 23 Vict. c. 21, entitled "An Act to regulate the office of Queen's Remembrancer, and to amend the practice and procedure on the Revenue side of the Court of Ex.":

It is ordered that the following provisions of the C. L. P. A. 1854 be extended, applied and adapted to the Revenue side of the Court of Ex.; and also that the following rules as to giving bail in cases of appeal shall be in force on the Revenue side of the Court of Ex.:

1. In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused, or granted and then discharged, or made absolute, the party decided against may appeal.

2. In all cases of motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or when granted being discharged or made absolute, as the case may be, or provided the court in its discretion think fit that an appeal should be allowed, provided that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed.

3. The Court of Error, the Ex. Ch., and the H. of L. shall be courts of appeal for this purpose.

4. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney and to the Queen's Remembrancer within four days after the decision complained of, or such further time as may be allowed by the court or a judge.

5. The appeal hereinafore mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the court or a judge of the court appealed from), in which case shall be set forth so much of the pleading, evidence, and the ruling or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal.

6. When the appeal is from the refusal of the court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal.

7. The Court of Appeal shall give such judgments as ought to have been given in the court below, and all such further proceedings may be taken thereupon as if the judgment had been given by the court in which the record originated.

8. The Court of Appeal shall have power to adjudge payment of costs and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process, and otherwise.

The foregoing rules shall come into operation and take effect forthwith, and apply to every cause, matter and proceeding now pending.

(See report of the case *Attorney-General v. Sillen and others*, ante, 9 L. T. Rep. N. S. 261.)

On the following day (Nov. 5) the Attorney-General moved for and obtained a rule nisi for a new trial on the ground of misdirection, and of the verdict being against evidence and the weight of evidence, it being then understood that the Crown abandoned the bill of exceptions entirely. This rule was argued by counsel on both sides on the 17th Nov. and five following days, when the Court took time to consider their judgment.

On the first day of Hilary Term last their Lordships, differing in opinion, delivered their judgments *seriatim* at great length. Pollock, C.B. and Bramwell, B. giving judgment in favour of the claimants and discharging the rule for a new trial; whilst Channell and Pigott, BB. were of opinion that judgment should be for the Crown and a new trial be had. Thereupon Pigott, B., as the junior baron, withdrew his judgment and the rule for a new trial was discharged. The Crown, availing themselves of the above new rules, gave notice of appeal, and a case was accordingly prepared on their behalf, which, the claimants declining to agree to, or to make any alterations in it, was ultimately, in pursuance of a judge's order,

settled by the Lord C. B. on the 31st Jan. last, and now came on for argument before the Ex. Ch., when a preliminary objection to the jurisdiction of the court to hear the appeal was taken on the part of the respas., the owners and claimants of the vessel, on the ground that the above new rules of November last were invalid, and no right of appeal was created or given by them.

Sections 9, 10 and 19 of the Queen's Remembrancer's Act, which were also much referred to in the argument and by the court, are as follows :

Section 9. Sect. 272 of the C. L. P. A. 1852, for the amendment of defects and errors in any proceedings in civil cases, and concerning the costs and terms of such amendment, shall extend to all suits and proceedings on the Revenue side of the Court of Ex.

Section 10. In any suit or proceeding on the Revenue side of the Court of Ex. the parties may at any time before judgment, by consent and order of a judge, state any question or questions of law in a special case for the opinion of the court, without pleadings, and upon judgment thereon error may be brought as on a judgment in a special verdict, unless the parties agree to the contrary, and the proceedings for bringing a special case before the Court of Error shall, as nearly as may be, be the same as in the case of a special verdict, and the Court of Error shall either affirm the judgment or give the same judgment as ought to have been given in the court in which it was originally decided, the said Court of Error being required to draw any inferences of fact from the facts stated in such special case which the court below ought to have drawn.

Section 19. A writ of error shall not be necessary or used in any suit or proceeding in error on the Revenue side of the Court of Ex., and the proceeding to error shall be a step in the cause, and shall be taken in manner and subject as to such terms and conditions as to giving bail, &c.

Sir H. Cairns (with whom were *Karslake*, Q. C., *Mellish*, Q. C. and *Kemplay*) for the respas., the owners of the vessel.—This court has no jurisdiction to hear the appeal. Before the C. L. P. Acts there could have been no appeal, and under them there is none, for they apply only to actions commenced by writ of summons. It is said that these new rules give the right of appeal and consequent jurisdiction; but their validity and the power of the court below to create an appeal are denied. Obviously the meaning of the term "Court of Error" in the C. L. P. A. has been entirely overlooked. Sect. 36 of C. L. P. A. 1854, on which rule 3 is supposed to be founded, says, "The Court of Error, the Ex. Ch. and the H. of L. shall be Courts of Appeal for the purposes of this Act." But rule 3 says they shall be "Courts of Appeal for this purpose," namely, for this particular case, which, so applied, is utterly unmeaning. In the C. L. P. A. the "Court of Error" had a meaning distinct from the term "Ex. Ch.," and a necessary and intelligible one, for that Act applied not only to the Superior Courts, but to the Courts of Lancaster and Durham and other inferior courts, from which the Court of Q. B. was the Court of Error, and therefore the C. L. P. A. said "the Court of Error, the Ex. Ch. and the H. of L.," as the case might be, shall "for the purposes of this Act," be the Court of Appeal for those courts. But in this new rule it was for the Appeal mentioned in the preceding clause. By no authority less than that of an Act of Parliament could the Court of Ex. create a new Court of Appeal. (He here refers to and reads the title and preamble of the Queen's Remembrancer's Act.) In the absence of provisions going beyond the preamble, the latter is a guide in construction, and here the preamble states the object to be "to amend the *procedure* on the Revenue side of the court," and the subsequent provisions do not go beyond this. Sect. 9 is the first material section, incorporating sect. 222 of C. L. P. A. 1852. Then sect. 10 virtually incorporates sect. 42 of C. L. P. A. 1852 and sect. 32 of C. L. P. A. 1854. Parliament treats the Court of Ex. as one court, and the Court of Ap. or Court of Error as another, and gives to suitors the right of bringing error on a special case, pointing out what the Court of Error is to do with reference to

it. (He then refers to and reads sects. 11, 12, 15, 18, 19 and 20 of the Queen's Remembrancer's Act.) The provisions of the C. L. P. A. of 1852 were then adopted by Parliament and applied by its authority to the Revenue side of the Ex., and Parliament thus dealt with all the proceedings by way of appeal and error except one, viz., an appeal in the event of a rule for a new trial being refused, made absolute or discharged. Then comes sect. 26, under which these rules purport to be made. By the first part of that section power is given to the Chief Baron, and two or more of the Barons of the Ex. to make rules for regulating the "*process, practice and mode of pleading*" on the Revenue side of this court. It did not require the whole court, and the part could not be greater than the whole. Their jurisdiction was, so to speak, *territorial*; they were absolute masters at home and within the four corners of their court, but from home, and beyond their court, they were powerless. They were absolute as to the rules and practice of the Ex., but could not create new courts, or give suitors new rights outside their court.

The *Attorney-General* (with him the *Solicitor-General*, the *Queen's Advocate*, *Locke*, Q. C. and *T. Jones*) for the Crown.—If Parliament has given this power to the Court of Ex., then there is nothing extraordinary in the exercise of it by the rules recently made, which were not legislative, but an extension and adaptation, under the second part of sect. 26 of the Queen's Remembrancer's Act, of the provisions of the C. L. P. Acts to the Revenue side of the court. The argument contra was based on the assumption that proceeding by error was no part of the process, &c. of the Revenue side of the Ex., which was a fallacy. A review of the C. L. P. Acts would show that it was so. (He here referred to the title and preamble of the C. L. P. A. 1852, and particularly to clauses 154 to 167, relating to error.) It was plain from this that a procedure before the Court of Error in Parliament, where the record was brought from one of the inferior courts at Westminster, was regarded, within the meaning of the C. L. P. Acts, as part of "the process, practice and pleadings of the Superior Court." [ERLE, C. J.—Heretofore a writ of error was a new action in law. Sect. 148 of the C. L. P. A. 1852 has a bearing upon this, where it says, "A writ of error shall not be necessary, or used in any cause, and the proceeding to error shall be a step in the cause."] That furthers the view I am presenting, and is a clue to the whole matter. Although, for the purpose of correcting errors and getting justice done, the record below was brought up before the superior tribunal, it was still the same cause as it was below, and when the error was corrected the amended record would be returned to the court from whence it came—from first to last it was and remained the record of the Court of Ex. Sect. 19 of the Queen's Remembrancer's Act was fatal to the argument of the other side; for it was not, as had been contended, an application of sect. 148 of the C. L. P. A. of 1852, but an independent substantive enactment that proceedings in error on the Revenue side shall be a distinct "step in the cause;" and then sect. 26 provides for extending the provisions of the C. L. P. A. to Revenue cases by means of the rules which have been made. The Court of Ex. have previously made rules with regard to "error" under this 26th section, extending the provisions of sects. 154, 155, 156 and 157 of C. L. P. A. 1852 to revenue cases, and relating to the mode of carrying error through the Ex. Ch. and the H. of L. (He referred to rules of the Court of Ex., 97 to 103 of 20th June 1860.) Not a word of the matter in sects. 155, 156 and 157 of the C. L. P. A. is contained in the Queen's Remembrancer's Act, and it will be *casus omnisus* if these new rules are not within the power granted to the court by sect. 26, and if these rules are *ultra vires* so also must be the

rules of June 1860, and it must be taken as established that the old process of error must apply in every case. On examining the clauses of the C. L. P. A. it is impossible to separate these matters from the procedure of the Court of Ex. itself: (sects. 34 to 42 of C. L. P. A. 1852 and sects. 34 and 35 of the Act of 1854.) Every single condition there mentioned is a condition to be fulfilled in the Court of Ex., and everything giving a *locus standi* to the app. arises out of that which is "process and practice" of that court in the most exact and literal sense of those words.

Sir H. Cairns in reply.

The *Attorney-General*, as representing the Crown, claimed the right of general reply.

The *Queen's Remembrancer* said (in answer to an application from the Court) that, on an argument in error in the Ex. Ch., the *Attorney-General* usually had the right to reply.

COCKBURN, C. J. (after consulting with the rest of the Court).—The court will hear you, Mr. *Attorney-General*; but we wish to add, in order that this may not be considered as establishing a practice, that it is laid down in the case of *O'Connell and others v. The Queen*, in the H. of L., that it is not a necessary incident to cases in which the Crown is deft. in error, that the counsel for the Crown is to have the last word. But we think it fully open to us, in the exercise of our discretion, to hear you, and therefore we will hear you in reply.

The *Attorney-General* then replied.

Cur. adv. vult.

ERLE, C. J.—Upon this motion to dismiss the appeal, the question has been, whether the Barons of the Exchequer had jurisdiction to order that the following provisions of the C. L. P. A. 1854 should be applied to the Revenue side of the Court of Ex.; namely, that an appeal, with its ordinary incidents, should lie to the Ex. Ch. and the H. of L., where a rule for a new trial on the ground of misdirection by a judge has been discharged. In my opinion the answer to this question should be in the affirmative—that there was jurisdiction on the ground that the *Queen's Remembrancer's Act* (22 & 23 Vict. c. 21), s. 26, gave to them the power to make that order. In support of this opinion, I proceed to consider that statute, together with the state of the law which led to its passing. And first I would premise that procedure in a suit includes the whole course of practice, from the issuing of the first process by which the suitors are brought before the court to the execution of the last process on the final judgment; and throughout the C. L. P. Acts and this Act "procedure" is used as equivalent to "process, practice and mode of pleading." Procedure in civil suits in the Superior Courts of Common Law received memorable improvement by the C. L. P. Acts 1852 and 1854. Those Acts are declared, in the preamble of the first and the title of the second, to be for "the amendment of process, practice and mode of pleading in the Superior Courts." Those Acts provide that each suit, from the issuing of the first to the execution of the last process, should be taken to be one entirety. They contain provisions for the practice to be followed in obtaining redress for erroneous judgments by appeal to the Ex. Ch. and the H. of L., the writ of error being abolished, and proceedings in error being declared to be steps in the cause by the C. L. P. A. 1852, s. 148. Appeal is very essential for maintaining the right administration of law, and careful provisions are made to give the use and prevent the abuse of the right of appeal. According to those provisions the appeal is effected by the act of the suitor, in the court of first instance, delivering a memorandum to the officer of the court without writ or other authority, and the right to deliver that memorandum is vested in him in

his capacity of suitor, derived from the first process in the suit. That memorandum, so delivered, if the rules of practice are complied with, compels the officer of the court below to bring the record into this court and into the H. of L., and may compel each of these higher courts to hear his appeal against the judgment entered on the roll of the court below, so brought by that officer into the higher courts; and he is to record thereon the judgment of those higher courts, and then to take back that judgment to the court below, as the judgment in that suit to be executed by that court, according to the practice thereof. The provisions are ample for the practical guidance of the suitor in carrying his appeal through each court, and they are clear to show that each Court of Appeal has no other functions than to fix the time for hearing the case; neither court can interfere with the record, or do any effective act but hear and determine on the judgment to be pronounced. The whole of these provisions in the C. L. P. A. are constantly described as relating to "process, practice and mode of pleading," and they extended to the Plea side of the Court of Ex., but not to the Revenue side of that court. And this brings me to the passing of the statute above mentioned, the 22 & 23 Vict. c. 21, under which the Barons claimed to make this order. I assume that the procedure on the Revenue side of the Ex. was adapted to usages now obsolete, and so was in need of being amended; also that the Legislature intended to adopt this amended procedure of the C. L. P. Acts, as being consonant to the interests of truth and justice, reserving no privileges to the Crown as a suitor against a subject inconsistent with those interests. I would also refer to the rule that the rights of the Crown cannot be taken away without clear words of enactment, as explaining the insertion of some of the sections in this Act. But to come to the statute itself. The preamble recites the expediency of making provision in relation to the procedure on the Revenue side of the court; then several sections, adapting the spirit of the C. L. P. Acts to matters of revenue, contain provisions suited to the intended change of procedure. Those which seem to me relevant to the matter now in hand are as follows: Sect. 9 gives full power to amend all defects of form. Sect. 10, to state a special case, and bring error thereon. Sects. 12 and 13, in case of appeal to the Ex. from the assessment of the commissioners relating to succession duty, give power to appeal from the Ex. to the two higher courts. Sect. 15, in case of a suit for succession duty, enables the court to refer the matter to a master, and to take his report as a special case, and error to be brought thereon. Sect. 17 empowers the judges of assize to try issues on the Revenue side as on the Plea side. Sect. 19 makes proceedings in error to be a step in the cause, without writ of error, to be taken in manner as may be directed by any order made by the Barons under this or any other Act. Sect. 20 gives power to tender a bill of exceptions on trial of issues from the Revenue side; and sect. 21 to give costs for and against the Crown. We then come to sect. 26, which gives large powers for making orders. It contains two distinct clauses; by the first clause the Barons are empowered from time to time to make all such orders as to "process, practice, and mode of proceeding on the Revenue side, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and proper;" and by the second clause, "also from time to time by such order to extend, apply, or adapt any of the provisions of the C. L. P. A. 1852, and of the C. L. P. A. 1854, and any of the rules of pleading and practice on the Plea side of the court, to the Revenue side, as may seem expedient for making the process, practice and mode of pleading on the Revenue side as nearly as may be uniform with the process, practice and mode of pleading

on the Plea side of the court." I have referred to several sections creating specific appeals. For all of these appeals, both to the Ex. Ch. and to the H. of L., the Barons must make order under sect. 26, when making orders as to process, practice and mode of pleading on the Revenue side; for if they did not do so, the effectual execution of the Act would be prevented. Sect. 19, relating to proceedings in error, seems to me to refer expressly for the practice in those proceedings to the orders to be made by the Barons under sect. 26. It refers to orders to be made under this Act; and sect. 26 is the section which empowers them to make the required orders. If this view of the effect of the statute be correct, it is certain that the power of the Barons to make orders as to the process, practice and mode of pleading on the Revenue side was not confined to the Court of Ex., but extended to the courts of error, into which suits should be brought from the Revenue side of the Court of Ex. It may also be worth noting, that under sect. 26 the Barons must make orders for the practice on the appeals under sects. 10 and 12 above referred to, as the appeal is created by the name "appeal," and no specific procedure is created. The first clause of sect. 26 gives very ample powers; but the second clause is that which is more immediately applicable to the order in question. It empowers the Barons, *inter alia*, to apply any of the provisions of the C. L. P. A. 1854 to the Revenue side, as may seem expedient for making the procedure on the Revenue side as nearly as may be uniform with the procedure on the Plea side. The order in question applies sect. 35, which is one of the provisions of the C. L. P. A. of 1854, to the procedure on the Revenue side. The Barons are directed to make that procedure uniform with the procedure on the Plea side. Sect. 35 is part of the procedure which is in use on the Plea side; and the Barons, therefore, are not only empowered, but required, to make an order for applying it, if they are to make the procedure on the two sides uniform, and if they think it expedient. The order of the Barons seems to me, therefore, to be supported by the words of sect. 26, and to accord with the intention to be collected from the context. The objections, on which Sir Hugh Cairns relied to prove want of jurisdiction, depend on the construction of sect. 26; and if the construction above stated is right, it follows that his objections fail. Against that construction he pressed two principal arguments, as I understood him: first, that the order which the Barons were empowered to make was intended to operate only on proceedings while in their own court, and had no effect upon the courts above; and secondly, that the said order, if valid, subjected suits to a ground of appeal which did not exist before. As to the first ground, I have already given my reasons for saying that procedure on the Revenue side includes not only proceedings in the court of first instance, but also those in the sequel of courts through which the same suit may be carried by the suitor, and that power was given to the Barons over the whole of the procedure. The statute, in my opinion, delegated to them an authority to make orders; and all orders made within that authority have the same effect as the statute. It may well be that the Legislature thought that the Barons of the Ex. were best qualified to decide how far the collection of the revenue could be reconciled with new rights proposed to be granted,—rights which might be subject to abuse by dishonest debtors sued by the Crown. But my reasons for dissenting from this argument have been sufficiently explained. With regard to the second objection, that the order, if valid, would subject suits to a ground of appeal which did not exist before, my answer is a denial of the fact. In my opinion, the order of the Barons did not create any new ground of appeal; the order applies sect. 35 of the Act of 1854 to the

Revenue side; and thereby, when a motion is made for a new trial on the ground that the judge had not ruled according to law, that is, has misdirected, a party may have the decision on that motion reviewed in a court of appeal. Before 1854, in case of misdirection by a judge, a party aggrieved might seek redress either by tendering a bill of exceptions, or by moving in banco for a new trial. Each remedy had its defects. The bill of exceptions, though a most salutary check against mistakes by judges, was subject in practice to much expense, delay, complication and other defects. The motion for a new trial had the defect of being final without appeal; and as the court, according to usage, accepted the statement made by the judge of the course he had taken at the trial, the suitor was often dissatisfied with the result. Sect. 35 introduced a salutary amendment of the practice, which was to be at the suitor's option in case of misdirection, by enabling him to appeal from the decision of the court of first instance upon a motion for misdirection. By this amendment a bill of exceptions can only be needed when the suitor has a distrust of the judge or of his court. If there is mutual confidence, the point can be reserved subject to appeal, and the suitor has facility for obtaining the judgment of the three courts in their order. But on a bill of exceptions, the opinion of the court in which the action is brought is not taken, and the proceeding is encumbered with the difficulties before referred to. The 22 & 23 Vict. enabled the party to tender a bill of exceptions in suits on the Revenue side; it thereby enabled him to bring any complaint of misdirection before a Court of Appeal—the ground of appeal being misdirection, but the practice to be followed being bill of exceptions. The order in question left the ground of appeal precisely the same as it would have been under a bill of exceptions, but altered the practice to be followed in seeking redress. If the party, instead of tendering a bill of exceptions, moves for a new trial, he may bring the question of misdirection before the Court of Appeal under the order of the Barons. But it is still the same misdirection which might have been the subject of exception. The course for redress under a bill of exceptions would have been more circuitous, but still misdirection, and nothing but the misdirection, which might have been an exception, can be the ground of appeal under the order in question. Thus it seems to me to be true that the order relates only to the practice to be followed in appealing on account of misdirection, and leaves the rights of the parties under the law in respect of misdirection as they were before, and in this sense did not create a new ground of appeal. For these reasons, I am of opinion that the order in question is valid, and that this court has jurisdiction to hear and determine this appeal.

WILLES and WILLIAMS, JJ., severally delivered judgments concurring in the opinion of Erle, C. J.

COCKBURN, C. J.—After the best consideration I can give to this case, the only conclusion at which I can arrive is that we have no jurisdiction to entertain this appeal. The question depends upon whether by the 26th section of the 22 & 23 Vict. c. 21, "An Act to regulate the office of Queen's Remembrancer, and to amend the practice and procedure on the Revenue side of the Court of Ex.," power is given to the latter court to establish the proceeding by appeal on motions for new trial in revenue causes, and to give an appellate jurisdiction to the Court of Ex. Ch. The section first provides that "it shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Ex. from time to time to make all such rules and orders as to the process, practice and mode of pleading on the Revenue side of the court, and as to the allowance of costs, and for the effectual execution of the Act, and the intention and objects thereof, as may seem.

to them necessary and proper." It is admitted that this part of the section relates only to the procedure in revenue causes so long as a cause is pending in the Court of Ex. itself. But the section goes on to give power to the Barons "from time to time by any rule or order to extend, apply, or adapt any of the provisions of the C. L. P. A. 1852, and the C. L. P. A. 1854, and any of the rules of pleading and practice on the Plea side of the said court to the Revenue side of the said court, as may seem to them expedient for making the process, practice and mode of pleading on the Revenue side of the said court as nearly as may be uniform with the process, practice and mode of pleading on the Plea side of the said court." The question is, whether the power of adapting the provisions of the C. L. P. A. for the purpose of assimilating the procedure on the Revenue side to that on the Plea side of the court, enables the Court of Ex. to create, for the first time, an appellate jurisdiction in this court in causes relating to the revenue? It is, no doubt, true that the proceeding by appeal on motions for new trial is one of the provisions of the C. L. P. A. of 1854. But I cannot bring myself to think that, when the language of the 26th section of the 22 & 23 Vict. c. 21, is looked to, the application of this provision is within the scope of the authority conferred on the Barons of the Ex. Still less, when the other enactments of this statute are taken into account, does it seem to me possible to adopt that view. It is admitted that the words "process, practice and mode of pleading on the Revenue side of the court," occurring in the first branch of the 26th section, apply only to the procedure of the court itself, properly so called. It is not contended, in support of the jurisdiction, that under the power conferred by the first branch of the section, the court would have had power to create a proceeding by appeal. Why, then, should the words be read differently when occurring in the second branch of the section? Besides which, independently of this argument, it appears to me that the term "process, practice and mode of pleading on the Revenue side of the court" must be taken to have reference to the procedure of the court while the cause is still pending within it, and cannot be taken, without a very forced construction of the language, to apply to the creating of an appellate jurisdiction, or to the procedure to be adopted when the cause has quitted the sphere and precincts of the inferior court, and has passed into the jurisdiction of the appellate tribunal. It is true the process out of which the appeal emanates and springs is that of the court below, as also that the record, after the appeal has been disposed of, returns to the court out of which it came, in order that effect may there be given to the judgment. It is also true that in Acts of Parliament relating to procedure of the Superior Courts of common law, the term "process, practice and mode of proceeding" is applied to the procedure of courts of error and appeal. But who, on an appeal in a civil suit, ever thought of speaking of the practice of the Court of Ex. Ch. as the practice of either of the three courts from which, to its superior jurisdiction, an appeal lies? In the Court of Ex., on a rule for a new trial, a plurality of counsel may be heard on the same side. In the Court of Appeal we hear but one on each side. This is because our proceedings are here regulated by the practice of this court, and not by that of the Court of Ex. Again, the time within which, according to the C. L. P. A., the appeal must be brought, the form in which it shall be brought before the court, the awarding of process (as to which power is expressly given to the Court of Appeal), all these are matters of practice, as to which, if special statutory enactments had not been made, the Court of Appeal must have made rules to regulate its own proceedings. How can these matters be said to appertain to the procedure on the Revenue side of the Court of

Ex.? Yet these provisions as to the jurisdiction and procedure of this court, the Court of Ex. has taken upon itself to prescribe and settle as though it formed part of its own. The fundamental fallacy of the whole proceeding appears to me to consist in supposing that, because a cause commences on the Revenue side of the Court of Ex., and in a certain sense may be said to be a cause in that court, the practice and procedure of this court is therefore to be a part of the practice and procedure of the Court of Ex. The Revenue side of the Court of Ex. is a separate and distinct court; this Court of Ex. Ch. is another. The practice and procedure of the one is not that of the other; and a power to amend the practice and procedure of the one is not, as it seems to me, a power to amend that of the other. But can it be supposed, in the absence of clear legislative enactment, that Parliament intended to confer on the Court of Ex. the power of creating or withholding an appeal in matters of revenue at its pleasure and discretion? When, in the history of juridical legislation, was such a thing ever heard of as the Legislature leaving it to a tribunal to decide whether its authority should be subject to revision and correction on appeal? No doubt, in order to prevent vexatious and frivolous appeals, the right to appeal may be made conditional on the permission of the court; but no one ever heard of its being left to a court to decide whether its authority should be generally subject to an appellate jurisdiction or not. Statutory power has been given to courts to make rules and regulations as to procedure, but never to determine whether there should be a superior appellate court. Is it conceivable that Parliament would, in a matter of so much importance, and so eminently fitted for the determination of the Legislature, have delegated its functions to a court of law? It does not appear to me enough to say that by this Act the proceeding by bill of exceptions is allowed in revenue cases, and therefore the Legislature might well intend to give power to the Court of Ex. to superadd the proceeding by way of appeal. The obvious answer to such an argument is that, had such been the case, nothing would have been more easy than for Parliament so to enact. A few short lines, and the matter would have been set at rest. But besides this there are material distinctions between the proceeding by bill of exceptions and that by appeal. The proceeding by appeal, consisting, as it does, of three stages instead of two, is more likely to be resorted to for the purpose of delay. The case on which the appeal is to be brought must be stated between the parties, or, in case of disagreement, must be settled by the court or a judge. It may not have been deemed advisable to place the Crown in this position. I am warranted in thinking that the adoption of this mode of proceeding in revenue cases was deemed of doubtful expediency, from the fact that, though the Act of 22 & 23 Vict. c. 21, passed as far back as 1859, it was not till November last, that is, after an interval of four years, that the Court of Ex., in consequence of the difficulty which arose as to settling the bill of exceptions in this case, had recourse to this 26th section, and made the rule of the 4th Nov. 1863, in order to get rid of the embarrassment in which it found itself placed. It may be that, from a doubt of the propriety of extending the right of appeal to revenue causes, the Legislature may purposely have stopped short of introducing an appeal clause into the Act of 1859, and may have contented itself with affording a remedy by bill of exceptions, as being of a more formal character, and less likely to be resorted to, except on very substantial grounds, and as avoiding the inconvenience of making the Crown a party to the special case to be stated in the case of appeal. This view of the case becomes materially confirmed when it is observed how much of the provisions of the

C. L. P. Acts in relation to proceedings on error has been introduced by specific enactment into the statute in question. In the 9th, 10th, 18th and 19th sections we have the provisions of those Acts relating to error applied to revenue causes. It follows that either Parliament did not consider the adoption of these provisions as within the competency of the Court of Ex. within the 26th section, or did not think proper to leave legislation on such a matter to the court instead of providing it by Act of Parliament. Why then should a different course have been pursued in the perfectly analogous case of proceeding by appeal? Again, in the 20th section we have a provision for the right to a bill of exceptions. If the Legislature had intended to give the proceeding by appeal as well, why should it have stopped short of saying so? Still more striking are the provisions of the 12th and 13th sections, by which, in cases of appeal from the assessments of the Commissioners of Inland Revenue to the Court of Ex. under the Succession Duty Act (proceedings clearly on the Revenue side of the court), an appeal is given, in the very terms of the C. L. P. A., to the Court of Error in the Ex. Ch., and from this court to the H. of L. Can it be supposed that if the Legislature had intended to extend the right to appeal further, it would have confined its specific application to this particular instance? According to the well-known rule of construction, must not the express enactment in the particular case be taken to negative the intention to extend the provision generally? If, indeed, there were no provisions of the C. L. P. Acts which were applicable to assimilating the procedure of the two sides of the Court of Ex., except the provision as to appeal, I should feel greater difficulty as to the construction of the 26th section. But there are several most valuable provisions which would fall plainly within the procedure of the court in my sense of the term. Among these may be enumerated the provisions as to evidence, as to discovery and inspection, and as to trial,—provisions which have had the effect of improving the administration of justice in the courts of law in a very eminent degree. To the adoption of these and similar provisions of the C. L. P. Acts, the power of the Court of Ex., in my opinion, alone extends. To push it further would be, I think, to make Parliament say what it has not said, and do what it has not done—to legislate, in short, instead of expounding the statute, which alone is within our province. I regret to be obliged to come to this conclusion, partly because the proceeding by bill of exception appears to have been given up on the belief that this proceeding could be adopted; still more because, if the view I have taken be correct, the opportunity will be lost of settling the law on the very important question of the construction of the Act 59 Geo. 3, c. 69, as to the equipment of ships for the service of belligerents. We should, however, be altogether departing from the principles on which, in the discharge of our judicial functions, it is our solemn duty to act, if we allowed ourselves to be influenced by considerations such as these. We must interpret the Act of Parliament, on which alone the present question depends, as we would do any other statute, and as though the discussion and decision of a great question of national importance were not depending on our judgment on this preliminary objection. I cannot, however, but observe, in conclusion, that in all probability we shall neither prejudice the parties, nor delay the ultimate decision of this great question, by dismissing this appeal. Whatever might have been our decision on the main question, had we proceeded to hear this appeal, this case would no doubt have been taken to the H. of L. Doubtless such will be the case now; and if the highest appellate tribunal should hold the decision of this court on the question of jurisdiction to be erroneous, the

case will be heard there upon its merits, just as no doubt it would have been had we heard this appeal-out, and decided the main question involved in it. It is satisfactory, therefore, to think that no injury or delay will be occasioned by dismissing this appeal in the present stage, even should we be wrong. I concur with those members of the court who think that, according to the true construction of the 26th section, we have no jurisdiction to entertain this appeal, and that our only course is to dismiss it.

MELLOR, BLACKBURN and CROMPTON, JJ. severally delivered judgments concurring in the opinion of Cockburn, C.J. *Appeal dismissed.*

Attorney for the Crown, The Solicitor of Inland Revenue, Somerset-house.

Attorneys for the resps., Gregory and Rowcliffes, 1, Bedford-row.

Monday, Feb. 8.

(Before COCKBURN and ERLE, C.JJ., CROMPTON, WILLES, BLACKBURN and MELLOR, JJ.)

GEO. PRATT AND JAS. CORDREY (defts. below),
apps., v. CHARLES JAS. EASTON AND MARY ELIZ.
BILTON (plts. below) resps.

Repairing lease—Due execution of power—Construction of covenant to repair.

A testator devised his house, sheds, tan-yards and premises to his daughter for life, with power to grant leases thereof for a term not exceeding twenty-one years, at rack-rent, on building or repairing leases for the term of sixty years; remainder to testator's sons as tenants in common in fee. The tenant for life, by a lease of the premises (the dwelling-house and other buildings at that time, though habitable, being so old and decayed as to be likely at any time to become ruinous and unfit for the purposes for which they had theretofore been used by time and ordinary wear and tear) demised the same for a term of forty years at a rent less than rack-rent. The lease recited the will of the testator and the power given by it to lease, and it purported and was expressed to be made pursuant to and in execution of that power; the lessee covenanted therein that he would when and as often as need should require well and sufficiently repair, uphold, support, paint, maintain, mend and keep the premises and also all buildings thereon/er erected thereon, &c. Proviso to the lessor, her stewards, surveyors and workmen, to enter and view the state and condition thereof, and to give notice for the amendment of all defects and wants of reparation, and upon the lessee's default or breach of any of the covenants there was a power of re-entry by the lessor.

On the death of the tenant for life the remaindermen brought ejectment against the lessee (during the forty years' lease) on the ground that such lease was not either a building or repairing lease within the power contained in the testator's will:

Held (reversing the judgment of the Court of Ex.), that, considering the state of repair the premises were in and rent at the time the lease was granted, it was a "repairing lease" in due execution of the power (Cockburn, C. J. dubitante).

This was an appeal by the defts., under the provisions of the C. L. P. A. 1854, against the decision of the Court of Ex. of Pleas in discharging a rule of that court obtained by the defts. to show cause why a verdict should not be entered for the defts. upon a point reserved at the trial of this case at the Croydon summer assizes 1860. The facts will be found fully stated in the report of the court below, 9 L. T. Rep. N. S. 342, ante.

Notice of appeal against the decision of the said court was duly given. The question for the decision

of the court of appeal is, whether or not, on the facts stated, the defts. are entitled to have the said verdict set aside and to have a nonsuit entered.

If the court shall be of opinion in the negative, then the verdict for the plts. to stand, and judgment to be entered for them with costs of suit. If the court shall be of opinion in the affirmative, then the verdict entered for the plts. to be set aside and a nonsuit entered accordingly.

Mellish, Q. C. (A. Wills with him) for the apps.—The only question for the court to determine in this case is, whether the lease for forty years, by Mary Easton to Hunt, is in conformity with the power given by the lessor's father, Charles Easton, in his will, to grant building or repairing leases for sixty years. The court below say this is not a repairing lease, that it is nothing more than an ordinary lease to a tenant at rack-rent for such a term, and any lease of buildings for forty years to a tenant at rack-rent would contain similar covenants, and that this was not a repairing lease within the terms of the power and meaning of the will of the testator. But it is submitted that the lease is upon the face of it a repairing lease, and therefore valid, within the power given by the will of Charles Easton; at any rate it is so when taken in connection with the facts found by the arbitrator. There appears to be no clear definition by any case or in any of the text-books as to what is a repairing lease, and certainly there is no authority showing that such a lease as this is not a repairing lease. In order to determine that, it should be seen what the premises devised were, and in what state or condition they were at the time the lease was made. It was a large tan-yard with numerous buildings. The arbitrator found that when the lease was granted the dwelling-house and other buildings comprised in it (except the building marked H. on the plan, which was in good repair) were so old and decayed as to be likely at any time to become ruinous, and unfit for the purposes for which they had been used. The lessee then takes a lease of the premises for forty years, and enters into this covenant to repair and keep them in repair during the term, and yield them up in that state at its expiration. There is also a proviso of re-entry on default, and power granted to the lessor to enter and view the condition of the premises during such term. The term "repairing lease" does not appear to have received any defined meaning by any decision or text-writer:

Sugden on Powers, 829, 830, 8th edit.;

Jones v. Verney, Willes, 169;

Doe v. Withers, 2 B. & Adol. 896;

Isherwood v. Oldknow, 3 M. & Sel. 382; and

Payne v. Haine, 16 M. & W. 541,

were cited, and the arguments used in the court below (reported ante, 343) repeated.

Murphy (Lush, Q.C., with him) for the resp.—The intention of the testator is to be collected from his will, and as this was a large space of ground, he no doubt contemplated that it would all be available for building purposes, and he meant to give the tenant for life, his heirs and administrators, the power either to lease it for twenty-one years at rack-rent, so that it might be used for its accustomed business purposes of a tan-yard, or to let it out on building leases for such a term as would induce persons to build on it. Reading this lease with such a key to the testator's intention as expressed in his will, it is clear that this was not a lease at rack-rent, nor was it for twenty-one years' term, nor could it be a building lease or a repairing lease. There was no covenant to build or to repair otherwise than that stated, which is to be found in any ordinary farming lease of premises let at rack-rent. There is no direct authority upon the point, but in *Gutteridge v. Manyard*, 1 Moo. & R. 334, Tindal, C.J. said: "Where a very old building is

demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement He is bound to keep the house as nearly as possible in the same condition as when it was demised. [Cockburn, C.J.—What do you say would be a covenant to repair within the power in the testator's will in this case?] A much more ample and express covenant than this, as this does not impose upon the lessee any greater obligation than that which is usual in covenants in leases of premises at rack-rent. [CROMPTON, J.—It lies on you to show us what the covenant should be, does it not, if you say the present one is insufficient?] It should be a more extensive covenant than this one is. WILLIAMS, J.—In *Chance on Powers*, No. 2393, he says there is not much in the books with reference to powers to grant building or repairing leases. BLACKBURN, J.—Neither Sugden nor Chance say what the covenants in repairing leases ought to be, but they leave us to infer that the powers and covenants are understood.] It is necessary to look at the state the ground was in when the will was made; then it was open ground, very desirable for building. The court would, to carry out the intention of the testator, read the word "or" as "and" if that could be collected as clearly his wish, that is to say, "building and repairing lease" for "building or repairing lease." It should be a lease compelling the lessee to build, and having built to repair, otherwise there would be nothing to repair. (The former argument in the court below was in substance repeated, and the cases there mentioned referred to.)

Mellish in reply.—*Payne v. Haine* decides that on a contract to keep the premises in good repair, the tenant was bound to put them in that condition, and that the tenant was not justified in keeping them in bad repair because he found them in that condition; but the extent of repair was to be measured by their age and class. In this lease the testator's will and the power are recited, and the lease is made and purports to be made in pursuance of that power. If the lease is clearly insufficient, that perhaps would not be enough to make it good; but if it should be ambiguous, then it helps to show what both parties to it meant, and that it should be so construed according to their expressed intention. The arbitrator found the buildings so dilapidated that before the end of the term it would or might become necessary to rebuild. The reversioner does get a consideration, and no one would have taken such premises in their then state for two or three years only on such terms.

After the learned Judges had retired for about a quarter of an hour to consider their judgment,

ERLE, C.J. said: In this action the question which we have to determine is, whether the lease of Sept. 1829, by Mary Easton to Henry Wm. Hunt, of the premises therein mentioned, for forty years, is a valid lease within the power given to the lessor by the will of the testator, as already referred to, to grant building or repairing leases for the term of sixty years. "Repairing lease" does not appear to have a very definite signification; but this lease, it is admitted, is valid if it is a repairing lease within the meaning of the power given by the will to grant repairing leases. That the parties to it themselves intended it to be so is evident from the recitals. It recites the will of the testator, and the power to grant repairing leases contained in it, and the lease purports to be made pursuant to and in execution of that power. The covenant by the lessee is, that he will, as often as need shall require, well and sufficiently repair, uphold, support, paint, maintain, amend and keep the premises thereby demised, and also all buildings thereafter erected by him on the premises; and it is also further stipulated therein that the landlady or her assigns,

&c., and her stewards, surveyors and workmen, may at all reasonable times thereafter, enter thereon and view the state and condition thereof, and give or leave notice of all defects and wants of reparation then or there found; that the tenant is to repair within a limited time therein mentioned, or upon default the lessor has power of re-entry. That, I think, is an extremely ample covenant to repair. I think its meaning, from all the circumstances, and from the finding of the arbitrator as to the condition of the buildings, and the ruinous state of the premises at the time the lease was made, is that this is a repairing lease within the power contained in the will. A repairing lease has no definite or arbitrary meaning, and there is no authority to be found so as to enable the court to act upon it as a precedent in deciding this case. The court cannot read this covenant to repair in the lease without seeing it has some important meaning, especially when noticing the other parts of the lease, and the facts found by the arbitrator. I look at it, and want to know what more could be required to make it a repairing lease. All the premises, as well those that are built as any others to be erected, are therefore to be well and sufficiently repaired, and surrendered up in that state at the end of the term. *Payne v. Haine* shows what a tenant or lessee is bound to do when he takes premises that are old and in bad repair if he agrees to keep them in good repair. I am greatly at a loss to know what stronger words could be put or what more was expected; to satisfy the terms of that covenant it would not be sufficient to merely prevent the buildings from falling down. I look at the judgment of the court below, but I cannot find that the learned judges have there said what would be required of the parties to make this a valid repairing lease under the power in the will, if this is not a good repairing lease; they only say that it is not a repairing lease in compliance with the power in the will given to the lessor to grant a repairing lease. But if this is not a repairing lease valid under the power, what should be put or required to make it? I think it is a repairing lease in execution of the power. I have, however, to add on behalf of Cockburn, C.J. (who is not now present), that he is not satisfied that it is not a repairing lease; he is in doubt about it: he does not dissent from our judgment, but he does not concur in it. It seems to me that this is a repairing lease, good as such under the power, and that the verdict found for the plt. should be set aside and a nonsuit entered.

The rest of the Court concurred.

Judgment of the court below reversed. (a)

App.'s attorneys, *Digby and Son*, 90, Chancery-lane.

Resp.'s attorneys, Messrs. *Hilleary*, 5, Fenchurch-buildings, Fenchurch-street.

(a) COURT OF EXCHEQUER.

Thursday, Nov. 5.

EASTON AND ANOTHER v. LONDON AND LANE
(Trustees of, &c.)

This was an action of detinue for the title-deeds. The testator (Chas. Easton) held the property given by his will by virtue of a conveyance to him thereof, dated 6th May 1797, from the Marquis of Salisbury. After the above-mentioned lease had been granted by Mary Easton to Hunt, she deposited the original conveyance, and Hunt assigned his lease to the defts. as security for 575*l.*, money advanced by them to the said Mary Easton and H. W. Hunt. She died in 1862, and the plt., who then claimed the reversion, brought this action to recover the original conveyance from the defts., who claimed to hold it as mortgagees for the money they had lent and interest.

The cause came on for trial at Croydon summer assizes 1863, before Bramwell, B. when he directed a verdict for the plt., with leave reserved to the defts. to move to set it aside, and enter the verdict for them if the court should think it ought to be so entered.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 23.

(Before COCKBURN, C. J., CROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. v. KERRIGAN.

False pretences—Evidence of acts of accomplice not included in the charge.

An indictment charged K. and W. with falsely pretending to B. that they had a quantity of tobacco, which they proposed to sell, and did sell to him, and thereby obtained money from him. The evidence was, that K. and another person P. acting together, were the chief parties by whom the false pretences had been made:

Held, that the acts of P. were the acts of K., and admissible against him upon the indictment.

Case reserved at the Quarter Sessions of the county of Derby for the opinion of this Court.

On the 17th Sept. 1863 John Kerrigan was committed by E. Wilmot, Esq. and L. E. Mann, Esq., magistrates for the county of Derby, to take his trial at the Michelmas Quarter Sessions. The commitment charged him with one William Wilson, "for that they the said John Kerrigan and William Wilson, on the 7th Sept. inst., at Belper, in the said county, did unlawfully, knowingly and falsely pretend to sell to Daniel Barlow two bales of tobacco, containing three hundred pounds weight, at and for the sum of 49*l.*, whereas, in truth and in fact, the said bales contained about half-a-pound of tobacco only, by which said false pretence the said John Kerrigan and William Wilson did unlawfully obtain from the said Daniel Barlow the sum of 31*l.*, with intent then and there to cheat and defraud him, the said Daniel Barlow, of the same, contrary to the statute in such case made and provided."

The first count of the indictment charged that Kerrigan and Wilson, "on the 7th Sept. 1863, unlawfully, knowingly and designedly did falsely pretend to Daniel Barlow that they, the said John Kerrigan and William Wilson, were possessed of a large quantity of good tobacco, to wit, two bales of tobacco, containing 3 cwt., of the value of 2*l.* per stone weight, and which they the said John Kerrigan and William Wilson proposed to sell, and did sell and deliver to the said Daniel Barlow, by means of which said false pretence the said John Kerrigan and William Wilson did then unlawfully obtain from the said Daniel Barlow the sum of 31*l.* of the moneys of him the said Daniel Barlow, with intent thereby then to defraud, whereas, in truth and in fact, the said John Kerrigan and William Wilson were not possessed, and had not in their possession a large quantity of good tobacco, to wit, two bales of tobacco containing 3 cwt., of the value of 2*l.* per stone weight, as they,

Montague Chambers, Q.C. moved accordingly.—The forty years' lease was a valid lease under the power: Hunt had a right to assign it, and Mary Easton to pledge the original conveyance as security for the money advanced. The plt. have no right at law to this deed until the expiration of the lease. The plt. should have gone into equity and equity possibly would have directed a deposit of the deeds for the benefit of all parties. The rule on this point is laid down in 1 Mad. Ch. Pr. (edit. 1837), 306. But in general the title-deeds remain with the tenant for life, who is by law entitled to detain them:

Banbury v. Briscoe, 2 Ch. Cas. 42;

Webb v. Lord Lynton, 1 Eden Rep. 4;

Lempster v. Pomfret, Amb. 154.

POLLOCK, C.B.—The tenant in fee-simple is entitled to the title-deeds and may maintain detinue for them against any person having possession of them who cannot show a right to hold them. The observations of Mr. Maddock are right, perhaps, supposing the tenant for life to be living. The defts. can go into equity.

BRAMWELL, CHANNELL and FIGOTT, BB. concurred.

Rules refused.

C. CAS. R.]

REG. V. KERRIGAN.

[C. CAS. R.]

the said John Kerrigan and Wm. Wilson, did then so falsely pretend, but only two bales which contained half-a-pound weight of tobacco, together with a large quantity of stones, bricks and sawdust, as they the said John Kerrigan and William Wilson, at the time they so falsely pretended as aforesaid, well knew against the form of the statute in such case made and provided.

Second count.—That Kerrigan and Wilson, “being evil-disposed persons and wickedly devising and intending to defraud, on the 7th Sept. 1863, did, amongst themselves and divers other persons, to the jurors unknown, conspire, contrive, confederate and agree together falsely and fraudulently to cheat and defraud one Daniel Barlow of a large sum of money. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Kerrigan and William Wilson, and other persons as aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy and agreement, did, on the day and year aforesaid, represent to the said Daniel Barlow that they, the said John Kerrigan and William Wilson, had in their possession a large quantity of tobacco of good and valuable quality, to wit, of the value of 2*l*. per stone, and would sell and deliver to the said Daniel Barlow two bales of the said tobacco, containing 3 cwt., for the sum of 49*l*., and that they, the said John Kerrigan and William Wilson, did deliver to the said Daniel Barlow two bales which they represented and alleged to contain three cwt. of good tobacco, of such value as aforesaid, but which said bales contained half-a-pound weight of tobacco only, together with a large quantity of stones, bricks and sawdust, with intent to cheat and defraud the said Daniel Barlow of a large sum of money, to wit, of the sum of 31*l*., against the peace of our Lady the Queen, her crown and dignity.

Wilson was acquitted, Kerrigan was found guilty on both counts.

All the counts referred to the same transaction.

The prisoner pleaded not guilty, and his counsel (Mr. Stephen) then moved the court to quash the count charging a conspiracy, on the ground that the prisoner had not been committed nor the prosecutor bound over to prosecute on that charge, nor had the leave of a judge or of the Attorney or Solicitor-General been obtained to prefer it, as required by 22 & 23 Vict. c. 17 s. 1. After hearing the counsel for the prosecution (Mr. Huish) the Court determined to retain the count, and left it to the jury, because they were of opinion that such leave was not necessary when a count for conspiracy was merely a variation of the same charge as that laid in the first count, but only in cases in which conspiracy was an original and distinct offence. The counsel for the prisoner admitted that there was evidence of a conspiracy for the jury, if they had power to try the prisoner on the count in question. The jury convicted the prisoner.

The evidence was as follows:—

Daniel Barlow sworn: I live in Derby. On Aug. 21 a man called Philip came to my house; he said something about some tobacco. On Aug. 24 J. Kerrigan called and wanted to sell me some silk. I said, “One of your men has been the Friday before.” He said “Yes, it is one of our men; we have forty men in this country getting orders.” He talked in a foreign accent. He said they had a large firm in Liverpool, and dealt in tobacco, tea and other things; they could sell tobacco cheaper than any other firm, because they imported it all from abroad; they could sell it for 2*l*. a stone. I said I had a friend in the wholesale trade, and I would see him about it. I had asked Philip for a sample. On Friday Aug. 28 some one left a sample of two ounces of superior tobacco at my house. Ker-

rigan did not say where they were staying. I afterwards went to a chophouse next door to the York Hotel, Derby. I found Philip next door, and he took me to Kerrigan to the chophouse. I told them I had seen my friend, and he would take 3 cwt. a week if it was as good as the sample. They said they could supply him with a ton. I agreed for 3 cwt., at 2*l*. a stone, 48*l*. in all. Kerrigan said it was in bales; there might be a stone over or under, but it could be rectified when we settled. He said it was about two miles out of Derby. He said I should have it in two or three days. On Sept. 2 I went again to the eating-house, the tobacco had not been delivered. I found Kerrigan alone; and asked why it had not been delivered; he said Philip had hurt his foot. He (Kerrigan) was going to Liverpool. I must pay Philip for the tobacco; it would be just the same as paying himself; he had left his address with Philip. On the 7th Sept. Philip came and gave me a piece of paper. (This was not produced in court.) I went with him to Belper in a trap to the Angel Inn. He showed me the way. I paid him there 31*l*. on account of 49*l*. I refused to pay him the whole price until I had weighed the tobacco. He gave me no receipt. He went out of the door, I followed; one bale was in the trap; two men, of whom Wilson was one, were lifting in another. I drove to Mr. Mayers, at Derby, and we opened both bales. The first contained half-a-pound of tobacco spread out at the top, brown paper, stones, bricks, old hay, and sawdust; the other contained no tobacco at all; the bales were wrapped up in canvas and tied with tarred cord. I paid Philip in consequence of what Kerrigan said to me. I did not then know Kerrigan's name.

John Barber sworn: I keep the Angel Inn at Belper. On Thursday, 3rd Sept., Kerrigan came, some other men were there. All used to go out with packs on their backs. Kerrigan went on Friday. On Saturday Philip came; he asked leave to put two bales in an outhouse, this was done; they were canvas bales tied with tarred cord. On Sunday Kerrigan came. Philip and some other men came with him. Kerrigan and Philip went away. On Monday, 7th Sept., Mr. Barlow and Philip came about dusk in a trap. Philip asked for the key of the outhouse, and I gave it him. Kerrigan employs and supplies hawkers; there were four at my house; he said his men had gone off with his goods.

Rebecca Kirkland sworn: I keep a shop at Belper, and sell cord, next door but one to Mrs. Cooper's. On 4th Sept. three men brought some tarred cord. Kerrigan was one of them; he paid for it; the cord produced is similar to it.

Hannah Cooper sworn: I let lodgings in Belper. On 5th Sept. Kerrigan came. Two men called Philip and Bill were in the house. On the morning of that day I went out. Philip and Bill were in bed. I returned about nine, and found the door locked; they said I could not come in, they were packing china and glass. I went away for an hour and returned; the men were gone; two bales, wrapped in sack and tied with tarred cord, were in the house; the packages had been recently tarred; some tar was in a pot on the hob of the fireplace; I found some hay and sawdust at the back door. Between three and four p.m. two men took the packages away in a wheelbarrow. On Monday, 7th Sept., Kerrigan came in drunk. Next morning he went out about six and soon came in again; he said, “Has any policeman been?” I said “Why?” He said, “Because I have been fighting.” He left some things in my charge and went away, and I saw him no more. He said he was going to Chesterfield.

George Carter sworn: I apprehended both the prisoners on 8th Sept., at Chesterfield station. Kerrigan got out of the carriage first, and I took him and

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charged him with obtaining money by false pretences from Doctor Barlow. Kerrigan said, "I don't know any one of that name." I searched him and found a pill-box with Dr. Barlow's name on it. Next morning Barlow came and identified him. He said to Kerrigan, "Good morning, Monsieur Antonio de Monti." Kerrigan said, "I don't know you."

At the conclusion of the case for the Crown the prisoner's counsel objected that there was no evidence to go to the jury that the prosecutor had obtained any money by false pretences, as the only false pretence within the meaning of the statute was the pretence by the man Philip that the parcel contained tobacco. The counsel for the prosecution argued that the false pretence was, that the prisoner pretended to be possessed of 3 cwt. of tobacco, worth 2*l.* per stone, that this was so laid in the indictment, and that there was evidence for the consideration of the jury, not only that he made such false pretence and obtained the money of the prosecutor by it, but that he (the prisoner) knew it to be false when he made it. The Court held that there was evidence to go to the jury on both counts of the indictment. The jury convicted the prisoner on both counts. The court sentenced him to twelve calendar months' imprisonment upon each count, the sentences to run together.

The questions for the Court of Criminal Appeal are, 1st. Whether the count charging a conspiracy ought to have been left to the jury. 2nd. Whether there was evidence to go to the jury in support of the count charging a false pretence.

F. Stephen for the prisoner.—First, with regard to the count for obtaining money from the prosecutor by false pretences, the only false pretence proved was that the specific bales at the Angel, Belper, contained tobacco. [CROMPTON, J.—That they were tobacco.] It was not proved that the prisoner Kerrigan took any part in that false pretence. The statement that the prosecutor paid Philip in consequence of what Kerrigan said to him may apply to the conversation between Philip and Kerrigan and the prosecutor at Derby, when they said, they could supply a ton; or it may apply to the transaction at the Angel, Belper; if it applies to the former, that was not the false pretence by which the money was obtained. There was no case if the prosecutor was induced by a false statement to enter into the contract, and by a subsequent independent fraud of Philip he was defrauded. The original lie was not the false pretence by which the money was obtained. The money was not obtained by what passed at Derby, but by the representations made at the Angel, Belper. [CROMPTON, J.—As soon as a connection was shown between Philip and Kerrigan, the act of one was the act of the other in misdemeanor. Philip and Kerrigan are the same for this purpose.] If that is so the objection is untenable, and it becomes unnecessary to argue the first question. (a)

Buzzard, for the prosecution, was not called upon.

By the COURT: Conviction affirmed.

COURT OF PROBATE.

Reported by Dr. SWABEY, of Doctors'-commons.

Tuesday, Feb. 2.

In the Goods of JAMES FRASER (deceased).

Administration de bonis non—Amount of bond—
82nd section of Probate Act.

*On administration, will annexed, de bonis non to a contingent annuitant and legatees with the consent of minor children beneficially interested, the property about 8000*l.*, the Court allowed two sureties to justify to the amount of 1000*l.* each.*

(a) As to this objection, see *Reg. v. Fudge* and *Reg. v. Hoare*, *supra*, pp. 777, 719.

The deceased, in this case, died on the 1st Jan. 1863, having made his will with two codicils and thereof appointed George Shaw, Henry Duckworth and Frederick Firmin executors and residuary legatees in trust, and his children living at his death contingent residuary legatees. The said executors renounced the probate and execution of the said will. The deceased was a licensed victualler and had carried on business at the "Globe" and "Crown" taverns.

The only children of the said deceased, living at his death, were Simon William Fraser, Mary Ford Fraser (spinster), Margaret Farquarson Fraser (spinster), Jane Helen Fraser (spinster), Jessie Ford Fraser (spinster) and James White Fraser, who were minors; and Henry Wright Fraser, who was an infant.

The said executors were, by the second codicil, also appointed guardians of such minors and infant, and they also renounced the letters of administration, with the said will and codicil annexed, of the personal estate and effects of the said deceased on behalf of the said minors and infant; and thereupon, on the 3rd Feb. 1863, letters of administration, with the said will and codicils annexed of all and singular the personal estate and effects of the said deceased, were granted to Christiana Fraser, the lawful widow and relict of the said deceased, who had since died leaving part thereof unadministered.

The only next of kin of the said minors and infant was Mrs. Fraser, their grandmother, but who left England for Texas about twelve years previously, and had not since been heard of.

The only unadministered property consists of the "Globe" Tavern, about 500*l.* New Three per Cents., about 660*l.* cash in hand and at the bankers, and about 600*l.* book-debts and money lent by the testator.

The testator by his will directed his executors and trustees to manage and carry on his business of a tavern and hotel keeper at the "Globe" and "Crown" taverns until all his children should attain the age of twenty-one years, or in the case of daughters should have previously married, and in the first codicil he declared it to be his earnest wish that his executors and trustees should, after his death, continue in their services his very good and faithful servant Maria Robinson, as an able assistant in his business of a licensed victualler, and as an inducement for her continuing in the employment of his said executors and trustees, bequeathed to her, in addition to her then salary, the annual sum of 10*l.* whilst in their service, and also, if his business should be sold by his trustees, or if at any time they should no longer require the services of the said Maria Robinson, or if she should be rendered unfit for her duties by ill-health, or physical or mental incapacity, bequeathed to her the sum of 100*l.*

The "Crown" Tavern had been sold, but the "Globe" Tavern was being carried on for the benefit of the testator's family.

The said Maria Robinson continued in the service of the testator's widow until her death, and had the sole management of the said tavern, and the said testator's widow having during her life never interfered in any manner with such management, or in the management of the testator's affairs, and for the more readily carrying on the said business, by receiving and paying all moneys connected with such business, the account at the bankers was, during the widow's lifetime and afterwards in the sole name of the said Maria Robinson.

It was stated to be of great importance to the interests of the testator's estate that a representative to him should be immediately appointed, and it is the anxious wish of the testator's family that the said Maria Robinson should be such representative.

The guardians of the children had had written notice of the intended application; one of them had signed a consent to the administration passing to Maria

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Robinson; the other two, without objecting to the grant, declined to interfere in the matter.

On the affidavits of Mark Jameson, attorney, and of Maria Robinson, verifying the above facts,

Dr. Twiss now moved the court to grant administration with the will and codicil annexed of the unadministered goods of the deceased to Maria Robinson as contingent annuitant and legatee named in the first codicil. The difficulty has been as to the amount in which the sureties to this bond should be required to justify, as the value of the property is about 8000*l.* subject to a mortgage of 3900*l.*, for which for the present purpose no deduction can be allowed. There would be great difficulty in finding securities to justify in double that amount; but by the 82nd section of the Probate Act the court has power to reduce the amount or to take more bonds than one, so as to limit the liability of any surety. In the present case, perhaps, the court would be satisfied with two sureties justifying to the amount of 1000*l.* each, the grant being made with the full consent of persons parties beneficially interested.

Sir J. P. WILDER.—I think that may be so. The administration may be as prayed, on two sureties justifying to the amount of 1000*l.* each.

King, proctor.

DIVORCE AND MATRIMONIAL CAUSES COURT.

Reported by Dr. SWABBY, of Doctors'-commons.

March 1861, July and Nov. 1863, and Jan. 1864.

ROWLEY v. ROWLEY.

Petition for dissolution—Compromise—Subsequent misconduct—Subsequent suit.

On a wife's petition for dissolution of marriage, certain issues of cruelty and adultery came on for trial on 12th March 1861, when an agreement was signed by the respective counsel of the parties, by which, *inter alia*, a separation-deed was to be executed, and the petitioner agreed not to take further proceedings in this court. The petitioner moved the court to set down the case again for trial on the ground that the agreement was not signed by counsel with her consent; the full court, on appeal, confirmed the Judge Ordinary's rejection of this motion. In 1863 the petitioner filed a fresh petition alleging the same acts of adultery as in the former petition, certain other acts previous to March 1861 which she alleged had only come to her knowledge in the early part of 1863, certain other acts of adultery since March 1861, and various acts of cruelty, some alleged to be different from those contained in the former petition. In the result, the Court held that the petitioner was bound by the agreement of March 1861 not to take any proceedings in respect of any matter before that date; and as the subsequent acts of adultery, to which the Court held the agreement not to extend, would not of themselves support the wife's petition for dissolution, it refused to give any directions as to the mode of trial.

In this case the wife, by her petition dated 9th May 1863, asked for a dissolution of her marriage by reason of her husband's adultery and cruelty. The petition stated the marriage to have taken place in 1844, and that the cohabitation of the parties finally ceased in Nov. 1854.

The charges of cruelty and adultery alleged in the petition may, for the present purpose, be classed as follows:—1. Acts of adultery before 12th March 1861, of which certain specified acts were alleged not to have come to the knowledge of the petitioner till early in the year 1863. 2. Acts of adultery since the 12th

March 1861. 3. Acts of cruelty during cohabitation, *i.e.*, before Nov. 1854.

The resp.'s answer, filed 5th June 1863, set forth

1. An agreement for a deed of separation made between their respective counsel.

2. That the petitioner has not taken any step to have the said petition removed from the file.

3. That this petition was filed by the petitioner in breach of her undertaking not to institute other proceedings in this court.

4. That the acts of adultery alleged are the same acts of adultery as were alleged by the petitioner in the petition of the 25th Feb. 1860.

5. That the acts of cruelty in the present petition alleged, other than those there alleged, were known to the deft. on the 25th Feb. 1860.

6. General traverse of adultery alleged.

7. General traverse of cruelty alleged.

8. That petitioner is in receipt of the yearly income of not less than 700*l.* secured to her separate use.

To this the petitioner, on the 16th June 1863, filed a replication, 1st, denying the alleged agreement; 2nd, denying that this petition was in breach of the undertaking, and traversing the adultery and cruelty.

The court was moved on behalf of the petitioner in 1863 to order the issues raised to be tried before itself by a special jury, and Cresswell, J.O. refused to make any order as to the mode of trial till the allegations of adultery and cruelty which had been contained in the petition of 1860 had been struck out.

After much contention as to the form of the pleadings, the substance of which so far as it affects the present case appear in the judgment, the court was moved on the 19th Jan. 1864, by

Dr. Tristram, on behalf of the petitioner, to give directions as to the mode of trial.—Adverting to the opinion expressed by the court on a former occasion, he submitted that acts of cruelty which might have been within the knowledge of the petitioner before the 12th March 1861, would be revived by the proof of the subsequent adultery, and that therefore she had a right to go to a jury on the issues of cruelty now alleged in the petition, and the subsequent adultery.

Dr. Swabey, contra.—The doctrine of revival cannot apply. This was an agreement to settle certain matters in dispute, and live separate. Conciliation brings the parties together again after a wrong done; and for the protection of the party injured the law annexes the condition of revival in case of any subsequent marital offence of which the Matrimonial Court can take cognisance. If the court should be of opinion that the subsequent acts of adultery are the only ones which the petitioner has a right to go upon, there is no use in submitting that issue to a jury in the present form of the petition, which is for dissolution alone.

Cur. adv. vult.

Jan. 26.—WILDER, J.O. gave the following judgment:—In this case the court was applied to for directions as to the mode of trial. The case is a remarkable one in its circumstances, and illustrates in a forcible manner the oppression which may be worked by the misapplication of the salutary powers of this court. The petitioner is the wife of Mr. John Rowley. She was married to him on the 2nd July 1844. In Oct. 1848 she left his house, alleging cruelty on his part, this statement appears on her own petition. In Jan. 1849 she returned to him. In Sept. 1849 she appears to have left him again, and refused to return. Mr. Rowley then took steps to enforce her return. He commenced a suit for restitution of conjugal rights in the Consistory Court of York. This was in Oct. 1852. To this Mrs. Rowley set up by way of defence that he had been guilty of adultery and cruelty, and she prayed that a decree of divorce *a mensa et thoro* should be pronounced in her favour on these grounds. The cause was carried by appeal to Her Majesty in

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council, where it was ultimately decided, and the result was, that on the 29th Dec. 1853 an order of council was made on the recommendation of the Judicial Committee to the effect that Mrs. Rowley had failed in proving the cruelty and adultery pleaded, and that she must return to her husband. In Jan. 1854 she did so, but she left him again in November of that year, and has never cohabited with him since. On the 25th Feb. 1860, Mrs. Rowley filed her petition in this court, and prayed for a divorce on the ground of cruelty and adultery. In this petition she did not confine her charges of cruelty or adultery to occasions subsequent to the above suit, but adduced several charges dated in 1848 and 1849, which either were or might have been adduced in the former suit, which had been decided against her. The resp. having pleaded to this petition, the cause came on for trial before the late Judge Ordinary and a special jury, on the 12th March 1861, when the cause was withdrawn from the jury with the consent of both parties, and the following memorandum drawn up and signed by their respective council. Mrs. Rowley has contended that it was not binding upon her, but the full Court of Divorce, after hearing the parties, has decided that it was. [The learned Judge here read the agreement as set out above.] It is sworn in the affidavit of Mr. Duncan, and not denied by Mrs. Rowley, that Mr. Rowley has faithfully observed this agreement on his part. But Mrs. Rowley is not content. On the 9th May 1863 she filed another petition in this court, notwithstanding her undertaking "not to institute other proceedings." The prayer was for divorce, and the grounds adultery and cruelty. In this petition she repeated in a number of paragraphs the identical charges she had made in the suit, which was compromised as above stated, and added a variety of others. The late Judge Ordinary, when applied to for directions as to the mode of trial, perceived this, and refused to make any order till these old charges were struck out. They have been so, but a variety of charges of cruelty remain in the petition, which, though not brought forward in the former suit, bear date long before that suit was instituted. And it could not be otherwise, for Mrs. Rowley has never cohabited with her husband since Nov. 1854. The same remark applies to most of the acts of adultery charged, though there are some as late as June 1861 and April 1863. To these charges the resp. has pleaded the agreement of March 1861. Now, what is the effect of that agreement, and to what extent is the course which Mrs. Rowley has taken consistent with good faith and an honest adherence to that arrangement? I cannot construe the agreement to mean anything else but that, in respect to her husband's past conduct at any rate, Mrs. Rowley consented to surrender, and that irrevocably, any legal right she might have to relief in this court. I say any right she might have, for her case remained to be proved, and she might perchance have been as little successful on that occasion as she was in the previous suit. It is, therefore, in gross breach of good faith, and in violation of express agreement, that Mrs. Rowley has filed her present petition. The foundation of her prayer for divorce is the cruelty she alleges to have been committed by her husband during the cohabitation antecedent to the suit which resulted in that agreement. It is not in the nature of cruelty not to be within the knowledge of the party aggrieved. She has not even, therefore, the excuse that she did not then know the full extent of her then existing grievances. Upon what ground, then, is it contended that this court ought to permit Mrs. Rowley thus to withdraw herself from her own engagements? It has been ingeniously argued, that the adultery charged to have been committed in 1862 revived the previous cruelty, as it would do in an ordinary case of condonation.

Now, condonation is that species of forgiveness or reconciliation which, in furtherance of the marriage bond, the court has erected into a bar to legal proceedings for a separation, but which, in the interest of justice, the law has also declared to be only conditional on future good conduct. This has nothing in common with a direct and positive bargain not to resort to the powers of this court, made between the husband and wife, and reduced into writing. The conditions, if any, to which such an agreement is subject, must be found expressed or collected as implied in the language itself. But there is no such condition to be found. The agreement has been violated. Why should not the court give it effect? There is a class of suits in which restitution of conjugal rights and the aid of the court to enforce the obligations of marriage is sought, and to such a voluntary agreement to live separate is no answer. But in cases like the present, where the court is asked to derogate from, not to enforce, the marriage bond, it is far otherwise. If cohabitation is to be no longer continued, and choice is to be made between the legal and public remedy and the voluntary and private arrangement, who can doubt between them? Expense, exposure, uncertainty, the exhibition in open court of vows broken and duties neglected, to the great scandal of the public upon whom it is forced, as well as the parties to whom it is the sole legal resort,—such is the price that must be paid for a remedy which begins by bringing the marriage into disrepute and ends by impairing or dissolving it. In contrast with this, a voluntary agreement to live apart almost ceases to be an evil, and should find no lack of favour from the court when it is designed to replace the greater evil of a public judicial separation. The result is, that the court declines to further Mrs. Rowley's suit by giving any directions for the mode of trial, and on proper application will entertain the question whether the husband is not entitled to be dismissed from this suit.

A. Carr, attorney for petitioner; *A. Duncan* for resp.

COURT OF BANKRUPTCY.

Reported by *A. A. DORIA* and *J. MORGAN*, Esqrs.,
Barristers-at-Law.

Jan. 7 and Feb. 5.

(Before Mr. Commissioner FANE.)

Ex parte HARRIS AND OTHERS, *re* BIANCONI.

Annulling petition—Residence.

A native of Ireland coming over to England confessedly for the purpose of being discharged from his debts by proceedings in bankruptcy, and staying at hotels in Sussex and London for a period of about sixteen weeks next preceding the filing of his petition, his wife and family residing in Ireland, where also the great bulk of his creditors reside, is not a resident, within the jurisdiction of the court in London as required by the 88th section of the B. A. 1861, entitled to present such petition.

Petition to annul. The bankrupt was adjudicated on the 6th Aug. 1863 upon his own petition, in which he described himself as "formerly of Longfield, Tipperary, then of Lower Leeson-street, Dublin, then of Wooden-bridge Hotel, Wicklow, all in Ireland; then of the British Hotel, Cockspur-street, Charing-cross, London; then of Ostend, then of Antwerp, then of Brussels, all in Belgium; then of Boulogne; then of Blancpignon, Commune de St. Martin, near Boulogne; then again of Boulogne, all in France; then of Mons-craw, Belgium; then of Aix-la-Chapelle, Prussia; then of the Bridge-house Hotel, London-bridge, London; and next and now of the New Inn Hotel, Seaford, Sussex, gentleman, of no profession or employ."

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In the statement of debts and liabilities filed by him in pursuance of the 93rd section of the B. A. 1861, his debts were stated to amount to 9333*l.* 11*s.* 9*d.*, of which sum 8133*l.* 11*s.* 9*d.* were due to unsecured creditors, and 1200*l.* to creditors holding security.

The first meeting took place on the 30th Oct. 1863, and the bankrupt admitted upon examination that he came to England on the 18th April previously, and remained in England until the 8th Aug. following; and that whilst in England he lived at the New Inn Hotel, Seaford, until the 6th Aug., when he came to London and stayed at an hotel there until after the filing of his petition, when he returned to Ireland and resided with his father in Tipperary; and that his object in coming to England was to endeavour to relieve himself from his difficulties and to be discharged therefrom.

Under these circumstances an objection was taken by certain creditors that there had not been sufficient residence in England to entitle the bankrupt to present his petition here.

A petition presented by Lewis Harris and two other creditors stated that the bankrupt had eighty-four unsecured creditors, of whom

47 resided in Ireland, representing about...	£6833
30 in France	693
5 in England.....	593
1 in Brussels.....	42

Total £8161

It was further stated, that the bankrupt was an Irishman by birth, and had with his wife always resided in Ireland with his father, and that he had never abandoned or left his residence there except for the temporary purpose of travelling or residing abroad in order to avoid and delay his creditors.

Reed and *Wrenfordsley* appeared in support of the petition, and contended that the bankrupt never had a residence in England within the meaning of the 88th section of the B. A. 1861. They cited

Munro v. Munro, 7 Cl. & Fin. 371;

Story's Conflict of Laws, p. 44;

Nias v. Davies, 9 L. T. Rep. 150. And

Ex parte Bean, 1 De G. M. & G. 486, upon the point of notice of the adjudication not having been given to the creditors.

Sargood appeared for the bankrupt.—The only question was that of jurisdiction, and the court could not, upon the present application, go into the merits. He referred to the 86th and 88th sections of the Act, and submitted that the words "any debtor" in the former section must be construed, irrespective of country, or residence, whether transitory or permanent.

Aldridge (solicitor) appeared for the official liquidator.

Mr. Commissioner FANE.—I have no hesitation in acceding to the prayer of this petition, and order that this adjudication be annulled and the petition dismissed.

Ordered accordingly.

